

# Washington Law Review

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Volume 90  
Number 2 *Symposium: Campbell at 21*

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6-1-2015

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### Recommended Citation

Ross Tanaka, Notes and Comments, *Washington's Reproductive Privacy Act: An Interpretation and Constitutional Analysis*, 90 Wash. L. Rev. 993 (2015).

Available at: <https://digitalcommons.law.uw.edu/wlr/vol90/iss2/13>

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# WASHINGTON'S REPRODUCTIVE PRIVACY ACT: AN INTERPRETATION AND CONSTITUTIONAL ANALYSIS

Ross Tanaka

*Abstract:* In *Roe v. Wade*, the Supreme Court declared that the “zone of privacy” inherent in the liberty component of the Due Process Clauses protected a woman’s right to choose when to terminate her pregnancy. Nevertheless, in the years following *Roe*, the Court held that the right of choice did not include a right to state assistance in obtaining an abortion. After decisions such as *Webster v. Reproductive Services* and *Maher v. Roe*, the state may express its preference for childbirth by denying the use of its funds, facilities, and personnel for abortion. Although a majority of the Court held that such selective funding did not violate the Constitution, certain Justices argued the state’s funding decision would have a coercive impact on a woman’s choice. In response to the Court’s decisions, Washington enacted the Reproductive Privacy Act, which requires that if the State directly or indirectly provides maternity care, it must also provide substantially equivalent abortion care. The Act also prevents the State from discriminating against the fundamental right of choice. No court, however, has interpreted the Act. Accordingly, this Comment analyzes the Privacy Act and suggests an interpretive framework for courts when determining whether the State has complied with the Act’s requirements. In addition, this Comment explores the tension between the Privacy Act and religious healthcare providers that may object to abortion, ultimately arguing that this Comment’s interpretation of the Privacy Act passes strict scrutiny under Article 1, section 11 of the Washington Constitution.

## INTRODUCTION

Although Washington is a relatively secular state, it could soon have the highest concentration of Catholic-affiliated healthcare in the country.<sup>1</sup> Catholic healthcare providers are some of the largest in the country. In 2011 “10 of the 25 largest health systems in the nation were Catholic” and two of those systems were in the top five largest non-profit healthcare systems in the nation.<sup>2</sup> Given its size, resources, and expertise, many Washington providers have turned to Catholic healthcare for support, either through a merger or an affiliation

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1. Kirk Johnson, *Hospital Mergers Rest Abortion-Access Battle*, N.Y. TIMES (May 12, 2013), <http://www.nytimes.com/2013/05/13/us/hospital-mergers-in-northwest-raise-issue-of-abortion-barriers.html>.

2. LOIS UTLEY ET AL., MISCARRIAGE OF MEDICINE: THE GROWTH OF CATHOLIC HOSPITALS AND THE THREAT TO REPRODUCTIVE HEALTHCARE 5 (2013), available at <https://www.aclu.org/files/assets/growth-of-catholic-hospitals-2013.pdf>.

agreement.<sup>3</sup> If all of the pending deals go through, the number of Catholic-affiliated acute care beds in Washington may be as high as forty-four percent.<sup>4</sup>

The growth of Catholic healthcare in Washington creates a conflict between religious exercise and certain fundamental reproductive rights. Catholic healthcare providers must abide by the Catholic Health Directives, which forbid health services like abortion, birth control, and end-of-life choices.<sup>5</sup> As a result of agreements with Catholic providers, secular facilities may alter their services to comply with the Catholic Directives. For example, in Seattle, Swedish Health Services offered elective abortions for decades.<sup>6</sup> But the hospital agreed to stop when it joined with Providence Health & Services, one of the largest Catholic systems in the country.<sup>7</sup>

Nevertheless, when it comes to reproductive rights, Washington is one of the most protective in the country. Washington's Reproductive Privacy Act (the "Act" or "Privacy Act") declares that every woman has a fundamental right to choose or refuse an abortion and forbids the state from discriminating against the exercise of the fundamental right of choice.<sup>8</sup> The Act also requires that the State provide substantially equivalent abortion care whenever the State provides maternity care.<sup>9</sup> Given the entanglement of state and private funds, which can occur through affiliation agreements between public and private providers, the State's obligation to provide substantially equivalent abortion care could create a conflict for Catholic healthcare.<sup>10</sup>

This Comment suggests a framework to interpret the Privacy Act and explores the tension it creates with free exercise interests.<sup>11</sup> Part I of this

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3. *See id.* at 16.

4. *Id.*

5. *See* UTTLEY ET AL., *supra* note 2, at 2; U.S. CONFERENCE OF CATHOLIC BISHOPS, ETHICAL AND RELIGIOUS DIRECTIVES FOR CATHOLIC HEALTH CARE SERVICES 26 (2009), available at <http://www.usccb.org/issues-and-action/human-life-and-dignity/health-care/upload/Ethical-Religious-Directives-Catholic-Health-Care-Services-fifth-edition-2009.pdf>.

6. Reed Abelson, *Catholic Hospitals Expand, Religious Strings Attached*, N.Y. TIMES (Feb. 20, 2012), [http://www.nytimes.com/2012/02/21/health/policy/growth-of-catholic-hospitals-may-limit-access-to-reproductive-care.html?\\_r=1&hpw](http://www.nytimes.com/2012/02/21/health/policy/growth-of-catholic-hospitals-may-limit-access-to-reproductive-care.html?_r=1&hpw).

7. *Id.*

8. WASH. REV. CODE § 9.02.100 (2), (4) (2014).

9. *Id.* § 9.02.160.

10. *See infra* Part II.

11. Although this Comment examines the Privacy Act in light of the growth of Catholic healthcare in Washington, it is important to note that the Reproductive Privacy Act applies outside of that context. For example, shortly before this Comment went to print, the ACLU filed suit against Skagit Regional Health over a failure to provide substantially equivalent care under the Act. Amy

Comment provides background on federal substantive due process jurisprudence in some detail. Although the Act is a state law, its purpose and substance is integrally tied to the federal abortion jurisprudence. Detailing the evolution of substantive due process helps illustrate both the scope of the constitutional right of choice and the unique concerns underlying Washington's choice to enact greater protection for abortion than currently exists at the federal level. Part II suggests an interpretation of the Act. Part III examines the potential conflict the Act creates for Catholic healthcare and explains why a potential free exercise challenge would probably be brought under the Washington, rather than the federal, Constitution. Finally, Part IV argues that the Act passes strict scrutiny under the Washington Constitution.

## I. FEDERAL SUBSTANTIVE DUE PROCESS AND ABORTION JURISPRUDENCE

In 1973, the Supreme Court extended substantive due process protection to a woman's right to choose when to terminate her pregnancy.<sup>12</sup> Although the Constitution does not explicitly mention privacy, the Court recognized that a woman's decision to terminate her pregnancy lies within a zone of privacy protected by the "liberty" component of the Fifth<sup>13</sup> and Fourteenth<sup>14</sup> Amendments' Due Process Clause.<sup>15</sup> This Part traces the doctrinal shifts in the Supreme Court's substantive due process and abortion jurisprudence, focusing on the origins of *Roe v. Wade*<sup>16</sup> and the constitutional limits of a woman's right of choice.

### A. *The Rise and Fall of Lochner and Economic Liberty*

Substantive due process doctrine recognizes that the Fifth and Fourteenth Amendment's guarantee that the state shall not deprive any

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Radil, *Skagit Hospital Creates Illegal Barriers for Abortion, ACLU Says*, KUOW.ORG (Feb. 19, 2015), <http://kuow.org/post/skagit-hospital-creates-illegal-barriers-abortion-aclu-says>. It does not appear that the alleged failure to provide substantially equivalent care was the result of an agreement between the hospital and a Catholic provider.

12. *Roe v. Wade*, 410 U.S. 113 (1973).

13. U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law.").

14. U.S. CONST. amend. XIV, § 1 ("No state shall . . . deprive any person of life, liberty, or property, without due process of law.").

15. *Roe*, 410 U.S. at 152–53.

16. *See generally id.*

person of “life, liberty, or property, without due process of law”<sup>17</sup> goes beyond freedom from bodily restraint, encompassing other substantive limits on the government’s ability to act not specifically enumerated in the Constitution.<sup>18</sup> Although the exact substance of those boundaries have changed over time, the general principle the Court adheres to in identifying due process rights has not. The doctrine is built on the assumption that although the government has the power to enact laws for the preservation of the public good, there are certain uses of the state’s authority that are antithetical to democratic governance.<sup>19</sup> Thus, due process seeks to balance the state’s police power with the private sphere’s liberty. During the rise of laissez-faire economics in the early twentieth century, that liberty was defined in terms of economic freedom.<sup>20</sup> Throughout this era, the Court consistently determined that the private ability to enter economic contracts was not an area of public interest, making it impervious to legislative action.<sup>21</sup>

*Lochner v. New York*<sup>22</sup> exemplified the Court’s libertarian approach to economic legislation. In that case, the Court struck down a law preventing bakers from working more than sixty hours in a week.<sup>23</sup> The issue before the Court was whether the New York law was a valid exercise of the state’s police power or “an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty.”<sup>24</sup> The Court determined that the law fell into the latter category.<sup>25</sup> Because the amount of time a baker spent working had no relation to the quality of the bread, the New York law did not further the state’s legitimate interest in public health.<sup>26</sup> Both the baker and the employer, as “grown and intelligent men,” were deemed capable of contracting for their own wellbeing without interference from the state.<sup>27</sup>

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17. See U.S. CONST. amends. V, XIV, § 1 (emphasis added).

18. See *Allgeyer v. Louisiana*, 165 U.S. 578, 588 (1897).

19. See *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 387–88 (1798) (“There are acts which the Federal, or State, Legislature cannot do, without exceeding their authority. There are certain vital principles in our free Republican governments, which will determine and over-rule an apparent and flagrant abuse of legislative power . . .”).

20. See *United States v. Lopez*, 514 U.S. 549, 606 (1995).

21. See, e.g., *Lochner v. New York*, 198 U.S. 45, 61 (1905).

22. See generally *id.*

23. See *id.* at 52, 57, 64–65.

24. *Id.* at 56.

25. See *id.* at 57.

26. *Id.*

27. *Id.* at 61.

The Court repudiated *Lochner* in *West Coast Hotel v. Parrish*,<sup>28</sup> in part to facilitate the passage of remedial New Deal legislation.<sup>29</sup> Since *West Coast Hotel*, the Court's approach to economic legislation largely reflects the legal positivist<sup>30</sup> approach espoused by Justice Holmes in his *Lochner* dissent.<sup>31</sup> Though courts and commentators routinely reject *Lochner* and its reasoning,<sup>32</sup> the case is nevertheless instructive. The foundation of the Court's zone of privacy and abortion jurisprudence has roots in *Lochner*'s balancing of personal liberty and the state's police powers.<sup>33</sup> Implicit in the *Lochner* Court's reasoning is an understanding of personal liberty as incorporating a degree of privacy in decision-making.<sup>34</sup> The Court did not dispute the potential harm to bakers, but

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28. 300 U.S. 379, 398–99 (1937).

29. KATHLEEN SULLIVAN & NOAH FELDMAN, CONSTITUTIONAL LAW 377 (16th ed. 2007).

30. Generally, the legal positivist theory holds that the legal system depends on certain structures of government, not whether the law satisfies normative ideals. *Legal Positivism*, STANFORD ENCYCLOPEDIA OF PHIL., <http://plato.stanford.edu/entries/legal-positivism/> (last visited Apr. 28, 2014). What laws are in force depends on the social standards that society recognizes as authoritative. *Id.*

31. See *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting) (“This case is decided upon an economic theory which a large part of the country does not entertain. . . . But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law.”). This view is reflected in the highly deferential approach the Court gave to economic legislation in the years following *West Coast Hotel*. See 300 U.S. at 398–99 (reasoning that the legislature was entitled to determine that women were the ready victims of those who would take advantage of them and to adopt measures to reduce that evil); *Williamson v. Lee Optical*, 348 U.S. 483, 488 (1955) (establishing a highly deferential standard of judicial review: “[i]t is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it”). But see *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (arguing for a heightened standard of judicial review when the legislation implicates the rights of discrete and insular minorities who might be disadvantaged in the political process).

32. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 861–62 (1992) (plurality) (discussing the flaws in *Lochner*'s reasoning); *Griswold v. Connecticut*, 381 U.S. 479, 481–82 (1965) (declining to apply *Lochner*); *Amunrud v. Bd. of Appeals*, 158 Wash. 2d 208, 228, 143 P.3d 571, 580 (2006) (noting that the *Lochner* jurisprudence has been soundly rejected by the Washington and United States Supreme Courts).

33. See *Poe v. Ullman*, 367 U.S. 497, 542 (Harlan, J., dissenting) (“Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society.”); *Lochner*, 198 U.S. at 53 (Peckham, J., majority) (“The right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right. There are, however, certain powers, existing in the sovereignty of each state in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts.”).

34. See *Lochner*, 198 U.S. at 57–58 (“The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to

recognized that the legislature could not substitute its judgment for either the baker or the employer unless the state acted through a valid use of its power to further the public good.<sup>35</sup> *Lochner's* flaw lay in the Court's determination that the New York law had no relation to public health.<sup>36</sup> However, the idea that certain decisions are immune from state action continues today.<sup>37</sup> Though the following line of cases concerning personal autonomy leading to *Roe* represent a paradigm shift in the Court's understanding of what constitutes the private sphere, the Court, as in *Lochner*, still looks to whether the state action exceeded its boundaries by intruding into an area of solely private concern.

### B. *The Right to Autonomy in Personal Decision-Making*

Decided squarely within the *Lochner* era, the Court in *Meyer v. Nebraska*<sup>38</sup> and *Pierce v. Society of Sisters*<sup>39</sup> extended the concept of liberty in economic decision-making to autonomy in choices related to childrearing. In *Meyer*, the Court reversed the conviction of a teacher who violated state law by teaching German to his young students.<sup>40</sup> The Court cast its protection as a right of the parents "to control the education of their own."<sup>41</sup> Similarly, in *Pierce*, the Court struck down an Oregon law requiring children between the ages of eight and sixteen to attend public school.<sup>42</sup> Like *Meyer*, the Court in *Pierce* held that the law unreasonably interfered with the "liberty of parents and guardians to direct the upbringing and education of children."<sup>43</sup> The Court rejected the State's argument that it needed to "use its power to achieve a very connective and communitarian goal of breaking down the barriers of

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contract in relation to his own labor.").

35. *Id.* at 57.

36. See *Washington v. Glucksberg*, 521 U.S. 702, 761 (1997) (Souter, J., concurring) ("[W]hile the cases in the *Lochner* line routinely invoked a correct standard of constitutional arbitrariness review, they harbored the spirit of *Dred Scott* in their absolutist implementation of the standard they espoused."); John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 941 (1973) ("Thus the test *Lochner* and its progeny purported to apply is that which would theoretically control the same question today: whether a plausible argument can be made that the legislative action furthers some permissible governmental goal. The trouble, of course, is they misapplied it.").

37. See *Lawrence v. Texas*, 539 U.S. 558, 573–74 (2003).

38. 262 U.S. 390 (1923).

39. 268 U.S. 510 (1925).

40. *Meyer*, 262 U.S. at 400, 403.

41. *Id.* at 401.

42. 268 U.S. at 530–31, 534–35.

43. *Id.* at 534–35.

race, sect, class and ethnicity by educating children all together”<sup>44</sup> as “a threat to ‘standardize . . . the child [as] a mere creature of the state.’”<sup>45</sup> Here, the Court’s reference to standardization marks the critical point in the balancing between individual liberty and state control.<sup>46</sup> The Court did not question the government’s power to “compel attendance at some school” or to “prescribe a curriculum.”<sup>47</sup> These legitimate pedagogical concerns, however, gave way to individual liberty when the state exceeded its bounds by standardizing children.<sup>48</sup>

The *Meyer* and *Pierce* decisions created an early due process formulation inextricably linked with the Court’s conception of personhood.<sup>49</sup> Instead of following *Lochner*’s economic focus, the Court shifted its understanding of the private sphere to decisions that, as *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>50</sup> later articulated, “define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”<sup>51</sup> The Court’s rhetoric suggests that children were viewed as extensions of their parents.<sup>52</sup> As such, childrearing and education lay within a personal private sphere; state intrusion into those bounds was illicit “standardization.” In this way, these two decisions function as a bridge between the economic *Lochner* line of cases and the later privacy strand of due process. Like *Lochner*, *Pierce* and *Meyer* focus on autonomy in decision-making. The difference being that instead of privacy in economic decision-making, *Pierce* and *Meyer* recognize a sphere of autonomy in decisions relating to personhood and the ability to shape that which is directly under one’s

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44. Elizabeth A. Reilly, *The Rhetoric of Disrespect: Uncovering the Faulty Premises Infecting Reproductive Rights*, 5 AM. U. J. GENDER & L. 147, 190 (1996).

45. *Id.* (quoting *Pierce*, 268 U.S. at 535).

46. *See Pierce*, 268 U.S. at 535 (“The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only.”).

47. *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923).

48. *See Reilly*, *supra* note 44, at 191.

49. *See* Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 752 (1989) (“Whatever its genesis, ‘personhood’ has so invaded privacy doctrine that it now regularly is seen either as the value underlying the right or as a synonym for the right itself.”). But, as Professor Rubenfeld notes, “[d]espite its ubiquity, ‘personhood’ remains rather ill-defined. The word is meant, it seems, to capture some essence of our being—‘those attributes . . . irreducible in [one’s] selfhood’—with which the state must not be allowed to tamper. Yet the concept has a certain opacity, greater perhaps than that of analogous but no less abstract terms such as ‘dignity’ or ‘liberty.’” *Id.* at 753.

50. 505 U.S. 833, 851 (1992) (plurality).

51. *Id.* at 851.

52. *Meyer*, 262 U.S. at 401 (remarking that the liberty guarantee included “the power of parents to control the education of *their own*” (emphasis added)).



control.<sup>53</sup> As the *Pierce* and *Meyer* line progresses, the Court shifts its focus inward, finding a sphere of autonomy in decisions relating to one's body.

*Griswold v. Connecticut*<sup>54</sup> announced the right to privacy used in the later abortion cases.<sup>55</sup> In *Griswold*, the Court struck down Connecticut statutes prohibiting the use and distribution of contraceptive devices.<sup>56</sup> The plaintiffs were the directors of a Planned Parenthood clinic who were arrested and charged with dispensing birth control to married women.<sup>57</sup> The majority found that "the specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."<sup>58</sup> Those various guarantees create a "zone of privacy."<sup>59</sup> The Constitution protects that zone of privacy.<sup>60</sup> Importantly, the *Griswold* decision did not enshrine a right to contraception in the Constitution.<sup>61</sup> Rather, the zone of privacy only forbade the government from entering that sphere.<sup>62</sup> This is consistent with the general principle that the Due Process Clauses do not require the state to affirmatively act to protect liberty.<sup>63</sup> Rather, they are merely a limitation on the state's power that prevents it from asserting its authority within the private sphere.

Seven years later, the Court realized the "generative potential" of the decision in *Eisenstadt v. Baird*,<sup>64</sup> extending *Griswold* to unmarried

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53. *See id.*

54. 381 U.S. 479 (1965).

55. Rubinfeld, *supra* note 49, at 744.

56. *Id.* at 744–45.

57. David B. Cruz, "The Sexual Freedom Cases"? Contraception, Abortion, Abstinence, and the Constitution, 35 HARV. C.R.-C.L. L. REV. 299, 307 (2000).

58. *Griswold*, 381 U.S. at 484.

59. *Id.*

60. *Id.*

61. Ely, *supra* note 36, at 930.

62. *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989). In *DeShaney*, the Court dismissed an action brought by the mother of Joshua DeShaney, who was beaten and permanently injured by his father. *Id.* at 191. The mother sued social workers who failed to recognize the abuse and take action, claiming that the inaction deprived the boy of "liberty" guaranteed by the Due Process Clause. *Id.* at 193. Writing for the Court, Chief Justice Rehnquist observed that "[t]he Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means." *Id.* at 196; *see also Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (no obligation to provide adequate housing); *Youngberg v. Romero*, 457 U.S. 307, 317 (1982).

63. *Id.*

64. 405 U.S. 438 (1972); RICHARD A. POSNER, *SEX AND REASON* 329 (1992).

persons.<sup>65</sup> “While in *Griswold* ‘the right of privacy in question inhered in the marital relationship,’” the *Eisenstadt* Court “treated the presence of a marital relationship as an inessential feature of the *Griswold* decision.”<sup>66</sup> The result was an “aggressively individualistic view of constitutional rights.”<sup>67</sup> While never abandoning *Griswold*’s concern for bringing the full force of criminal law into the bedroom, *Eisenstadt* confirmed that the right of privacy and the associational right central to sexuality inhered on an individual basis.<sup>68</sup> The *Griswold* line of cases provides a vague picture of what rights fall within the “zone of privacy.” The cases leading up to *Roe v. Wade* define a due process right to marriage,<sup>69</sup> procreation,<sup>70</sup> contraception,<sup>71</sup> and childrearing and education.<sup>72</sup> While repudiating *Lochner*, the Court nevertheless invoked the same notion of the private sphere, recast as a zone of privacy. Thus, while the privacy strand of cases looks very different from, and expressly repudiates, the *Lochner* line, the methodology in the Court’s decision-making is strikingly similar.

### C. *Modern Abortion Jurisprudence: Casey and the Government Funding Decisions*

*Roe v. Wade* announced that the “right of privacy” recognized in *Griswold* was broad enough to cover a woman’s decision to terminate her pregnancy. The opinion did not rely on the “obvious contraception-abortion comparison and indeed [gave] no sign that it [found] *Griswold* stronger precedent than a number of other cases.”<sup>73</sup> Rather, the Court found a privacy interest in a woman’s suffering in carrying a baby to

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65. *Eisenstadt*, 405 U.S. at 453–55.

66. Cruz, *supra* note 57, at 309.

67. *Id.*

68. See *Eisenstadt*, 405 U.S. at 453 (“Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup.”).

69. *Loving v. Virginia*, 388 U.S. 1, 12 (1967). The decision primarily relied on the Equal Protection Clause but also found a substantive due process right to marriage. *Id.*

70. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

71. *Eisenstadt*, 405 U.S. at 453.

72. *Pierce v. Soc’y of Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534–35 (1925).

73. Ely, *supra* note 36, at 929 n.68; Richard A. Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159, 169 (1973) (remarking that “the Supreme Court appeared to go out of its way to distinguish *Griswold* from the abortion cases, treating it as just one of many cases that recognized the right of privacy”).

term.<sup>74</sup> *Planned Parenthood v. Casey* later explained that the unique burden a woman must bear in carrying a child is “too intimate and personal for the State to insist, without more, upon its own vision of the woman’s role” in the pregnancy.<sup>75</sup> The Court tied its perception of personhood and a woman’s right to define her “own concept of . . . the universe”<sup>76</sup> to the intimate bond, formed by suffering, between the mother and her child.<sup>77</sup>

Although *Roe v. Wade* created a trimester framework for analyzing how the state could regulate a woman’s right to abort,<sup>78</sup> *Casey* abandoned that method of analysis. *Casey* affirmed *Roe*’s central holding that a woman has a fundamental right to terminate her pregnancy.<sup>79</sup> However, it identified two countervailing interests: the state’s interest in the fetus’s potential for human life<sup>80</sup> and the health of the mother.<sup>81</sup> Prior to fetal viability, the woman’s privacy interest outweighs the state’s interest in protecting the potential for human life.<sup>82</sup> Accordingly, prior to viability, the state can neither proscribe nor place an “undue burden” on a woman’s right to obtain an abortion.<sup>83</sup> Courts will consider a law an “undue burden” if “its purpose or effect is to place substantial obstacles in the path of a woman seeking an abortion before the fetus attains viability.”<sup>84</sup> Subsequent to viability, the scales tip in favor of the state. The strength of the potential for human life permits the state to “regulate, and even proscribe abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.”<sup>85</sup>

Even though *Casey* affirmed *Roe*’s holding that a woman has a fundamental right of choice in terminating her pregnancy, the Court’s

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

75. 505 U.S. 833, 852 (1992).

76. *Id.* at 851.

77. *Id.* at 852.

78. *Roe*, 410 U.S. at 164–65.

79. *Casey*, 505 U.S. at 834.

80. *Id.* at 870. The Court recognized that a fetus is not a “person” for the purposes of the Constitution. *Roe*, 410 U.S. at 157–58. The opposite conclusion would demand prohibition of abortion in all circumstances, regardless of whether the woman was raped or if the life of the mother is in danger. *See id.* at 157 n.54. Even the Texas statute in *Roe* did not countenance this result. *Id.*

81. *See* Jared H. Jones, *Women’s Reproductive Rights Concerning Abortion, and Governmental Regulation Thereof—Supreme Court Cases*, 20 A.L.R. FED. 2D 1 (2007).

82. *Casey*, 505 U.S. at 837.

83. *Id.*

84. *Id.*

85. *Id.*

decisions since *Roe* placed a number of caveats on a woman's right of choice. For example, the Court made clear that the state may allocate its resources in such a way that expresses its preference for childbirth over abortion.<sup>86</sup> The Court has upheld both state and federal regulations that either provide funding for childbirth but not abortion<sup>87</sup> or deny government funding for abortion outright.<sup>88</sup> In *Harris v. McRae*<sup>89</sup> the Court upheld the constitutionality of the Hyde Amendments, which barred Medicaid funding even for most medically necessary abortions.<sup>90</sup> The Court noted that nothing in *Roe* or its progeny forbade the state from realizing its preference for childbirth over abortion through the allocation of public funds.<sup>91</sup> The Court drew a distinction between "direct state interference with a protected activity and state encouragement of an alternative activity," saving the Amendments from constitutional infirmity.<sup>92</sup> Further, by denying the use of government money for abortions, the state placed no obstacle in a woman's path. Rather, the woman's indigency, which the state was under no obligation to cure, prevented her from obtaining an abortion.<sup>93</sup> This reasoning follows from the well-established principle that the Due Process Clauses generally confer no affirmative right to governmental aid, "even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual."<sup>94</sup>

The Court extended this logic to state laws barring state employees from performing abortions and from the use of state facilities for abortion procedures.<sup>95</sup> In *Webster v. Reproductive Health Services*,<sup>96</sup> the Court upheld a Missouri law that barred state employees from performing abortions and the use of state facilities for abortions.<sup>97</sup> In

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86. See *Maier v. Roe*, 432 U.S. 464, 470 (1977).

87. See, e.g., *id.* (upholding against Equal Protection challenge the constitutionality of Connecticut regulations granting Medicaid benefits for childbirth but not medically unnecessary abortions); *Poelker v. Doe*, 432 U.S. 519, 521 (1977) ("[W]e find no constitutional violation by the city of St. Louis in electing, as a policy choice, to provide publicly financed hospital services for childbirth without providing corresponding services for nontherapeutic abortions.").

88. *Harris v. McRae*, 448 U.S. 297, 302, 326 (1980).

89. 448 U.S. 297 (1980).

90. *Id.* at 302, 326.

91. *Id.* at 314.

92. *Id.* at 315 (quoting *Maier*, 432 U.S. at 475).

93. *Id.* at 317.

94. *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989).

95. *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 509 (1989).

96. 492 U.S. 490 (1989).

97. *Id.* at 509.

upholding the statute, the Court placed the restriction in the same category as the previously affirmed funding limitations in *Harris* and progeny, stating that “[n]othing in the Constitution requires States to enter or remain in the business of performing abortions.”<sup>98</sup> Just as the Court’s decision in *Harris* left women with the same array of choices as if the government had never sponsored healthcare,<sup>99</sup> Missouri’s refusal to make its medical employees or facilities available for abortion procedures placed women in the same position as if the state had never built hospitals in the first place.<sup>100</sup>

Thus, while women retain a fundamental right to terminate their pregnancy, crippling limitations severely limit that right’s efficacy. Although the government may not place an obstacle that unduly burdens a woman’s right of choice,<sup>101</sup> it may withhold the funds, facilities, or personnel necessary to perform an abortion. For the millions of women who cannot afford private healthcare or live in rural areas with access to fewer hospitals, such government limitations could have a drastic impact on their choice between abortion and childbirth. In response to these limited constitutional protections, Washington voters adopted more protective measures for women seeking an abortion.

## II. WASHINGTON’S REPRODUCTIVE PRIVACY ACT

Washington adopted its Reproductive Privacy Act as a part of Initiative 120 in 1991.<sup>102</sup> The driving force behind the Act’s enactment was a growing concern that the Supreme Court would overturn *Roe v. Wade*.<sup>103</sup> The Privacy Act sought to provide an alternate basis for the right of choice outlined in *Roe*, and enshrined, through statutory means, a fundamental right for women to choose or refuse an abortion.<sup>104</sup> The Act, however, goes beyond merely declaring the existence of a fundamental right of choice. It takes affirmative measures to prevent the State from skewing the decision-making process in favor of childbirth

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98. *Id.* at 510.

99. *Harris v. McRae*, 448 U.S. 297, 317 (1980).

100. *Webster*, 492 U.S. at 509.

101. *See, e.g.*, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 893 (1992).

102. Whether a Public Hospital District Violates RCW 9.02 If It Contracts with a Provider of Health Services that Declines to Provide Certain Services, 2013 Op. Wash. Att’y Gen. 3, 4 (Aug. 21, 2013), available at <http://www.atg.wa.gov/ago-opinions/whether-public-hospital-district-violates-rcw-902-if-it-contracts-provider-health-care> [hereinafter 2013 Attorney General Opinion].

103. WASH. SEC’Y OF STATE, OFFICIAL VOTERS PAMPHLET (GENERAL ELECTION, NOVEMBER 5, 1991) 14 (1991).

104. *Id.*

over abortion.

The Privacy Act addresses the concerns espoused by dissenting Justices in the *Harris-Webster* line of cases. In his *Harris* dissent, Justice Brennan disagreed with the majority's holding that selective funding had no influence on a woman's choice.<sup>105</sup> Justice Brennan did not dispute the majority's argument that, in the abstract, the government did not place an affirmative obstacle in a woman's path when it chose to fund childbirth over abortion.<sup>106</sup> As a practical matter, however, "funding all of the expenses associated with childbirth and none of the expenses incurred in terminating pregnancy" coerced women into choosing childbirth by making them an offer they could not refuse.<sup>107</sup> "[M]any poverty-stricken women [would] choose to carry their pregnancy to term simply because the Government provide[d] funds for the associated medical services, even though [the] same women would have chosen to have an abortion if the Government had also paid for that option," or if the Government had never gotten involved in the first place.<sup>108</sup> Thus, according to Justice Brennan, the state could use its "largesse" to discriminate against the exercise of fundamental liberties with the same effectiveness as an outright denial of those liberties through criminal sanctions.<sup>109</sup>

The Privacy Act addresses these concerns through two provisions: RCW 9.02.160 and RCW 9.02.100. RCW 9.02.160 requires that:

If the state provides, directly or by contract, maternity care benefits, services, or information to women through any program administered or funded in whole or in part by the state, the state shall also provide women otherwise eligible for any such program with substantially equivalent benefits, services, or information to permit them to voluntarily terminate their pregnancies.<sup>110</sup>

This provision addresses concerns that selective funding has a direct influence on a woman's choice to terminate her pregnancy. It prevents the State from funding childbirth but not abortion.<sup>111</sup>

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105. *Harris v. McRae*, 448 U.S. 297, 333–34 (1980) (Brennan, J., dissenting).

106. *Id.* at 333.

107. *Id.* at 333–34.

108. *Id.* at 334.

109. *Id.*

110. WASH. REV. CODE § 9.02.160 (2014).

111. *11th Hour Election Guide—Initiative 120: Abortion Rights*, SEATTLE TIMES, Nov. 3, 1991, at B6 (describing that "equivalent benefits" would require the state to be neutral in offering poor women options in pregnancy); Joan Fitzpatrick, *Initiative 120—Should Abortion Laws Be*

Next, RCW 9.02.100 places an additional obligation on the State when it provides abortion care. RCW 9.02.100(2) declares that “[e]very woman has the fundamental right to choose or refuse to have an abortion,” except as otherwise limited by the Privacy Act.<sup>112</sup> RCW 9.02.100(4) prohibits the State from discriminating against the exercise of that right in its provision of benefits, facilities, services, or information.<sup>113</sup> Unlike RCW 9.02.160, which is concerned with the right of choice,<sup>114</sup> RCW 9.02.100(4) addresses the exercise of that right.<sup>115</sup>

Taken together, these provisions require that the State meet a certain minimum standard when it provides abortion care. From the plain language, it is evident that the State cannot discriminate against exercise of the right of choice, and when it provides maternity care, it must also provide substantially equivalent abortion care. But the Act does not define “substantially equivalent” and provides no guidance as to what constitutes discrimination. Can the State, for example, fulfill its obligation under the Act by only providing abortion information but not the actual procedure? Similarly, could the State permissibly provide the abortion care at a facility separate from the maternity care? Thus far, the Washington Attorney General is the only authority to have interpreted the Act. The Attorney General’s opinion concluded that when a public hospital district contracts with a private provider for the provision of maternity care, it has an obligation to provide substantially equivalent abortion care under RCW 9.02.160.<sup>116</sup> A failure to provide that abortion care constituted a violation of both RCW 9.02.160 and 9.02.100(4).<sup>117</sup> But the opinion leaves several key questions unanswered. First, it only considers the obligations of a public hospital district that contracts with a private provider—it does not delve into whether other healthcare providers can trigger the Act.<sup>118</sup> Second, it provides no guidance as to

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*Revised?—Yes*, SEATTLE TIMES, Oct. 13, 1991, at A17 (“Initiative 120 also assures that the state will remain evenhanded in its provision of health care for pregnant low-income women.”); see Carol M. Ostrom, *Pro-Choice Groups Gather Money and Names for Initiative*, SEATTLE TIMES, Aug. 22, 1990, at H1 (describing that the Court’s *Webster* decision helped catalyze the formation of the PACs that sponsored Initiative 120).

112. WASH. REV. CODE § 9.02.100(2).

113. *Id.* § 9.02.100(4).

114. See *supra* note 111 and accompanying text; *Harris v. McRae*, 448 U.S. 297, 333–34 (1980) (Brennan, J., dissenting).

115. See WASH. REV. CODE § 9.02.100(4) (forbidding the state from discriminating against the exercise of the right of choice).

116. 2013 Attorney General Opinion, *supra* note 102, at 9.

117. *Id.*

118. See *generally id.* at 5–8.

what constitutes substantially equivalent abortion care under RCW 9.02.160.<sup>119</sup> Finally, although it suggests that a failure to provide substantially equivalent abortion care violates both RCW 9.02.160 and RCW 9.02.100(4), the opinion does not provide an effective way to harmonize the two provisions.<sup>120</sup>

Ultimately, this Comment seeks to answer the questions left open by the Attorney General's opinion, and offers a framework for courts to apply the Act. It suggests that, like the Attorney General, courts should first engage in an analysis under RCW 9.02.160. They should determine whether, under the specific facts presented, the State has an obligation to provide abortion care, and if it does, whether the provided abortion care is substantially equivalent. Second, if the State is unable to meet its substantially equivalent obligation, courts should evaluate whether the State discriminated against a woman's exercise of the right of choice in violation of RCW 9.02.100(4). This Comment analyzes these questions in turn.

A. *Substantially Equivalent Abortion Care Under RCW 9.02.160*

RCW 9.02.160 applies only when two conditions are met. First, at least a portion of the maternity care benefits, services, or information must be provided by the "state."<sup>121</sup> The Act's definition of state includes the State of Washington, "counties, cities, towns, municipal corporations, and quasi-municipal corporations."<sup>122</sup> Second, the State must provide, "directly or by contract, maternity care benefits, services, or information" (hereinafter "maternity care"), through a program that is administered in whole or in part by the State.<sup>123</sup> "Maternity care" includes a broad spectrum of "prenatal, childbirth, and postpartum services and information,"<sup>124</sup> ranging from inpatient and outpatient medical care, public health nursing assessment and follow-up, psychological assessment and counseling, outreach services, family planning services, nutritional assessment and counseling, and financial aid.<sup>125</sup> The definition of "program" administered or funded in whole or in part by the State has a similarly broad scope. The Attorney General

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119. *See generally id.*

120. *See generally id.*

121. *See id.* at 4–5.

122. WASH. REV. CODE § 9.02.170(6) (2014).

123. *Id.* § 9.02.160.

124. 2013 Attorney General Opinion, *supra* note 102, at 6.

125. *Id.* at 5.



has interpreted the definition of “program” such that any time the State administers or funds the provision of maternity care, it is engaged in a program for the purposes of the Act, even if the State only funds a portion of the care.<sup>126</sup> It is important to note that health care facilities can avoid triggering RCW 9.02.160 by using private funds—instead of state funds—for maternity care, or by not providing maternity care at all.<sup>127</sup>

Thus, the State has an obligation to provide substantially equivalent abortion care in a variety of circumstances. These instances are best divided into two categories: private healthcare facilities and public healthcare facilities.

### 1. *Private Healthcare Facilities*

A private medical facility is “any medical facility that is not owned or operated by the state.”<sup>128</sup> Private healthcare facilities may trigger the State’s obligation in two instances. The first is when the facility furnishes maternity care with state funding from Medicaid or CHIP, which are “programs” within the meaning of the Act.<sup>129</sup> The second is when a public hospital district contracts with a private healthcare provider for the construction or operation of a hospital, but the private provider ultimately owns and operates the hospital.<sup>130</sup> This was the case in the recent agreement between PeaceHealth and San Juan County Public Hospital District Number 1. Pursuant to that agreement, the public hospital district subsidized the construction of a new hospital<sup>131</sup> that would serve county residents, but the ultimate ownership and operation of the hospital lay with PeaceHealth.<sup>132</sup> Therefore, the new facility remained private in nature.<sup>133</sup> Finally, in the case of private facilities, the obligation to provide abortion care remains with the State, making the State partially dependent on the private provider’s

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126. *Id.* at 7; WASH. REV. CODE § 9.02.160.

127. 2013 Attorney General Opinion, *supra* note 102, at 6; WASH. REV. CODE § 9.02.160 (providing that the state shall provide abortion care when the state provides maternity care).

128. WASH. REV. CODE § 9.02.170(7).

129. *See* 2013 Attorney General Opinion, *supra* note 102, at 7 (finding “funding mechanisms” to be within the definition of program).

130. *See id.* at 8 (“It therefore follows that if a public hospital district contracts for the provision of maternity care benefits, services, or information to women, and subsidizes those benefits through public funds, it is required to provide the substantially equivalent [abortion care].”).

131. *See* Subsidy Agreement for a Combined Clinic and Hospital Facility ¶ 2.1.2 (May 6, 2009), available at <http://sjcphd.org/wp-content/uploads/2011/02/PIMC-Subsidy-Agreement-Contract.pdf>.

132. *See id.* at ¶¶ 1.1.1, 1.1.11.

133. *See* WASH. REV. CODE § 9.02.170(7).

accommodation.<sup>134</sup>

## 2. *Public Healthcare Facilities*

Public healthcare facilities also trigger RCW 9.02.160. Public facilities are those that are owned or operated by the State,<sup>135</sup> and include hospitals that are owned or operated by a public hospital district.<sup>136</sup> Similarly, public hospitals that contract with private providers can remain public, so long as ultimate ownership or operation of the hospital remains with the State.<sup>137</sup> For example, based on a letter of intent between the University of Washington and PeaceHealth, the two parties would collaborate in the provision of services through UW Medicine,<sup>138</sup> but the University would retain ownership and control.<sup>139</sup> Thus, under the terms of the letter of intent, UW Medicine remained a public facility, and as a subdivision of the State, would be obligated to provide substantially equivalent abortion care if it provided maternity care.<sup>140</sup>

## 3. *Substantially Equivalent*

Once a provider triggers RCW 9.02.160, the State must provide substantially equivalent abortion care. Although the Act does not define “substantially equivalent,” the statute’s purpose provides guidance.<sup>141</sup> The driving force behind RCW 9.02.160 was the State’s evenhanded provision of maternity and abortion care.<sup>142</sup> Therefore, the abortion

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134. *See id.* § 9.02.160 (providing that the *state* shall provide substantially equivalent abortion care).

135. *See id.* § 9.02.170(7) (defining private facilities as those that are neither owned nor operated by the state). Although the Act does not define public facilities, this Comment treats facilities that are not private as public.

136. *See id.* § 9.02.170(6) (defining state to include municipal and quasi-municipal corporations); *id.* § 9.02.160 (providing that any time the State provides maternity care directly, it must provide equivalent abortion care).

137. *See generally id.* § 9.02.170(7).

138. Letter of Intent ¶ 1.5 (May 20, 2013), available at <https://www.documentcloud.org/documents/703136-fully-executed-loi-both-parties.html>.

139. *Id.* ¶ 2.1.

140. WASH. REV. CODE § 9.02.170(6); *id.* § 9.02.160.

141. *Amalgamated Transit Union Local 587 v. State*, 142 Wash. 2d 183, 205–06, 11 P.3d 762, 780 (2000) (“Thus, in determining the meaning of a statute enacted through the initiative process, the court’s purpose is to ascertain the collective intent of the voters who, acting in their legislative capacity, enacted the measure . . . [I]f there is ambiguity in the enactment, the court may examine the statements in the voters pamphlet in order to determine the voters’ intent.”).

142. *See supra* note 111 and accompanying text.

services, benefits, or information should be proportional to the state-funded or -administered maternity care at the facility. If a facility provides a means for women to deliver children, the State must provide a means for those women to terminate their pregnancy. If a provider only supplies information on childbirth, the State must also provide information on abortion. In other words, the equivalent abortion care must be substantial enough that a woman does not feel compelled to choose childbirth because the State has appropriated its resources in such a way so as to make it a more attractive option.<sup>143</sup>

The application of the substantially equivalent inquiry is relatively straightforward when the State is able to provide abortion care and maternity care in the same facility; courts can make a side-by-side comparison. The inquiry, however, becomes more difficult when the State must provide the maternity care and abortion care at separate facilities. Consider this hypothetical: A public hospital district and a Catholic healthcare provider contract for the construction and operation of a new healthcare facility that will provide a full range of maternity care. Under the terms of the agreement, the public hospital district will contribute over ninety percent of the funding for the project, but the Catholic provider will retain ultimate ownership and control. Therefore, the facility is private within the meaning of the Act.<sup>144</sup> Under RCW 9.02.150, “[n]o person or private medical facility may be required by law or contract in any circumstances to participate in the performance of an abortion if such person or private medical facility objects to so doing.”<sup>145</sup> Thus, the private provider could refuse to facilitate the State’s provision of the abortion care.<sup>146</sup> But asserting the right to refuse to participate in the performance of an abortion does not relieve the State of its obligation under the Act.<sup>147</sup> Instead, the State would have to provide a

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143. *Id.*

144. *See* WASH. REV. CODE § 9.02.170(7) (“‘Private medical facility’ means any medical facility that is not owned or operated by the state.”).

145. *Id.* § 9.02.150.

146. *Id.* Similarly, doctors can opt out of providing an abortion. *Id.* This is at issue in the ACLU’s recent suit against Skagit Regional Health. Although the facts are unclear at this stage in the litigation, it appears that, allegedly, Skagit Regional Health permits doctors to opt out of providing abortions and instead has an unwritten policy of referring patients seeking abortion to an alternate facility. *See* Annie Zak, *Washington ACLU Sues Skagit Regional Health over Abortion Services*, PUGET SOUND BUS. J. (Feb. 19, 2015, 2:57 PM), [http://www.bizjournals.com/seattle/blog/health-care-inc/2015/02/washington-aclu-sues-skagit-regional-health-over.html?utm\\_source=feedburner&utm\\_medium=feed&utm\\_campaign=Feed%3A+industry\\_6+%28Industry+Health+Care%29&page=2](http://www.bizjournals.com/seattle/blog/health-care-inc/2015/02/washington-aclu-sues-skagit-regional-health-over.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+industry_6+%28Industry+Health+Care%29&page=2).

147. *See* WASH. REV. CODE § 9.02.160 (“[T]he state shall also provide . . . substantially equivalent benefits, services, or information to permit them to terminate their pregnancies.”); Am.

means for women to terminate their pregnancy at an alternate facility, and a court would evaluate whether that care was substantially equivalent.

Courts should evaluate the State's provision of maternity care at an alternate facility based on the Act's purpose—the evenhanded provision of maternity and abortion care.<sup>148</sup> Thus, the inquiry is qualitative and should take into account the practical concerns faced by those to whom the Act applies—low-income women qualifying for state assistance.<sup>149</sup> The first consideration is whether women know of the availability of abortion at the separate facility. At the very least, this would require the private provider to refer women to the State's alternate facility and provide a minimal amount of information on abortion.<sup>150</sup> This requirement is essential for the State to meet its obligation. First, if a physician could remain silent or refuse to provide abortion advice without referral, women may construe that as medical advice to forego an abortion.<sup>151</sup> Additionally, placing the burden to seek alternate abortion care entirely on women is not substantially equivalent. To be sure, some women could inform themselves about alternate care without the advice of a doctor. But many women may have insufficient access to resources to gather information. According to Census data, although roughly seventy-five percent of households in America have internet access, that number drops to less than sixty-seven percent in black or Hispanic households, and falls to roughly fifty percent in households with an annual income of less than 25,000 dollars or without a high school degree.<sup>152</sup> Further, even if a patient has access to resources, a general lack of knowledge raises questions about whether self-education

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Legion Post # 149 v. Wash. State Dep't of Health, 164 Wash. 2d 570, 588, 192 P.3d 306, 315 (2008) (“This court assumes the legislature does not intend to create inconsistent statutes. Statutes are to be read together, whenever possible, to achieve a harmonious total statutory scheme . . . which maintains the integrity of the respective statutes.” (alteration in original) (citations omitted) (internal quotation marks omitted)).

148. See *supra* note 111 and accompanying text.

149. See WASH. REV. CODE § 9.02.160 (“[T]he state shall also provide women *otherwise eligible* for any such program with substantially equivalent benefits, services, or information to permit them to voluntarily terminate their pregnancies.” (emphasis added)).

150. See Diana Lara et al., *Knowledge of Abortion Laws and Services Among Low-Income Women in Three United States Cities*, J. IMMIGRANT MINORITY HEALTH, at \*2 (2014) (“Lack of knowledge about abortion laws and services might also influence ability to access abortion services in a timely manner . . .”).

151. See *Rust v. Sullivan*, 500 U.S. 173, 217 (1991) (Blackmun, J., dissenting).

152. THOM FILE & CAMILLE RYAN, U.S. CENSUS BUREAU, COMPUTER AND INTERNET USE IN THE UNITED STATES: 2013, at 3 (2014), available at <http://www.census.gov/content/dam/Census/library/publications/2014/acs/acs-28.pdf>.

would be successful. Preliminary studies on the knowledge and attitudes of women seeking abortion have shown that subjects had little knowledge about state-level abortion laws,<sup>153</sup> and that just over half of women surveyed knew where to go if they needed an abortion and sources of financial support.<sup>154</sup> Another study has shown that over sixty percent of the population harbors incorrect beliefs about the safety of abortion, the relationship between abortion and breast cancer, the relationship between abortion and mental health, and the relationship between having an abortion and the ability to get pregnant in the future.<sup>155</sup> The proliferation of incorrect information on abortion,<sup>156</sup> language barriers,<sup>157</sup> and education level<sup>158</sup> could make it difficult if not impossible to correct these pre-existing misconceptions. Given these barriers, when faced with the choice between having her doctor provide childbirth services, or taking it upon herself to discover information on abortion and a new physician, a woman may well feel coerced into choosing the former. This is the exact kind of pressure that violates the Privacy Act.

Second, courts should consider the nature of the state's alternate facility. For example, if the facility is a standalone clinic, women may have a very different experience than at an integrated hospital.<sup>159</sup> Standalone abortion facilities are more vulnerable to violence.<sup>160</sup> "From 1977 to 2009, forty-one bombings and 175 arson incidents [at abortion clinics] were reported to the police, along with several hundred incidents

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153. Kat Cockrill & Tracy A. Weitz, *Abortion Patients' Perceptions of Abortion Regulation*, 20 WOMEN'S HEALTH ISSUES 12, 15 (2010).

154. Lara et al., *supra* note 150, at \*3–4. Note that this study was a "convenience" study and thus is not statistically representative of the population. *Id.* at \*7.

155. Megan L. Kavanaugh et al., *Connecting Knowledge About Abortion and Sexual and Reproductive Health to Belief About Abortion Restrictions: Findings from an Online Survey*, 23 WOMEN'S HEALTH ISSUES e239, e242 (2013). Table 2 illustrates the responses to questions regarding abortion. The "starred" answers indicate correct responses. For each of the questions indicated, over sixty percent of respondents provided an incorrect answer. *Id.*

156. For example, many states publish information on abortion which include significant scientific inaccuracies and false or misleading information. Cockrill & Weitz, *supra* note 153, at 13; Amy G. Bryant et al., *Crisis Pregnancy Center Websites: Information, Misinformation, and Disinformation*, 90 CONTRACEPTION 601, 603 (2014) (finding that the websites for eighty percent of crisis pregnancy centers listed in state-provided resource directories contained false or misleading information). Even if Washington does not publish those materials, they are still in the public sphere of information.

157. Lara et al., *supra* note 150, at \*5.

158. *See id.*

159. LORI FREEDMAN, *WILLING AND UNABLE: DOCTORS' CONSTRAINTS IN ABORTION CARE* 20 (1st ed. 2010).

160. *Id.*

of burglary, stalking, bomb threats, and anthrax threats.”<sup>161</sup> Further, standalone abortion facilities are regularly protested.<sup>162</sup> Although citizens have a constitutional right to protest on public sidewalks<sup>163</sup> and the demonstrations can be peaceful, protests can be highly disruptive.<sup>164</sup> From 1977 to 1995, over 6,000 abortion clinic blockades had been reported, resulting in confrontation and the temporary shutdown of some clinics.<sup>165</sup> Although it may be possible for a clinic to obtain injunctive relief,<sup>166</sup> even a short closure could be detrimental to patients’ health. Many women, for example, “must undergo a procedure known as laminaria, in which a doctor makes an insertion to expand the cervix several hours before the abortion.”<sup>167</sup> Timely removal of the laminaria device is crucial to prevent serious infection.<sup>168</sup> If for some reason the woman cannot timely reenter the clinic to have the device removed, she must seek medical care at a different facility to avoid infection.<sup>169</sup> And even if women can enter the clinic, protesters impact the procedure inside the facility. The protest activities may result in patients having elevated blood pressure and hyperventilation.<sup>170</sup> Under such circumstances, doctors may be faced with a difficult choice between sedating the patient, which increases the risk during a procedure, and chancing the patient becoming so agitated that she is unable to lie still during surgery.<sup>171</sup>

Moreover, even if a clinic is not subject to protests, the mere potential for violence forces isolated facilities to adopt elaborate security measures that may negatively impact a patient’s experience.<sup>172</sup> In some

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161. *Id.* at 25–26.

162. *Id.* at 26.

163. *See* McCullen v. Coakley, 573 U.S. \_\_\_, 134 S. Ct. 2518, 2527 (2014).

164. *See* Tara K. Kelly, Note, *Silencing the Lambs: Restricting the First Amendment Rights of Abortion Clinic Protesters in Madsen v. Women’s Health Center*, 68 S. CAL. L. REV. 427, 437–38 (1995).

165. *Id.* at 438.

166. *See* WASH. REV. CODE. § 7.40.020 (2014).

167. Kelly, *supra* note 164, at 438; *Surgical Abortion (Second Trimester)*, UCSF MED. CENTER, [http://www.ucsfhealth.org/treatments/surgical\\_abortion\\_second\\_trimester/](http://www.ucsfhealth.org/treatments/surgical_abortion_second_trimester/) (last visited Apr. 28, 2015).

168. Kelly, *supra* note 164, at 438.

169. *Id.*

170. *Id.* at 439.

171. *See id.*

172. Katrina Kimport et al., *Analyzing the Impacts of Abortion Clinic Structures and Processes: A Qualitative Analysis of Women’s Negative Experience of Abortion Clinics*, 85 CONTRACEPTION 204, 207 (2011).

cases, patients are buzzed in and must walk through metal detectors when they enter.<sup>173</sup> Some clinics only accept cash.<sup>174</sup> Others implement policies requiring the separation of patients from companions, including partners and parents.<sup>175</sup> These measures, though designed to protect patients, can make the experience feel secretive, lonely, and illicit.<sup>176</sup> This kind of experience perpetuates an ongoing narrative, fed by negative depictions of abortion clinics in popular culture, abortion protests,<sup>177</sup> and legal restrictions that stigmatize abortion, especially when performed at clinics.<sup>178</sup> In response, many women may choose to keep their abortion secret, which only continues the stigmatic culture surrounding abortion.<sup>179</sup>

As a result of these experiences, women often do not return to an isolated facility to obtain post-abortion contraception care,<sup>180</sup> which includes “the provision of information about contraception, as well as a contraceptive method, if requested.”<sup>181</sup> The majority of women having a second or third abortion were using contraceptives at the time they became pregnant, suggesting that these women try hard to avoid pregnancy but have trouble doing so.<sup>182</sup> Unfortunately, many standalone facilities are unequipped to handle anything but the abortion procedure.<sup>183</sup> This is largely due to the low demand from clients who, because of the experience at isolated facilities, are unlikely to return for repeat visits.<sup>184</sup> The result is an incomplete experience for many women and a perpetuation of the unwanted pregnancy problem.

Lastly, in addition to considering the referral and nature of the state’s alternate facility, courts should evaluate the distance between the facilities. Studies have found that the farther women must travel to obtain an abortion, the less likely they are to have one.<sup>185</sup> This is

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173. *Id.*

174. *Id.*

175. *Id.* at 207.

176. *Id.* at 207–08.

177. Kimport, *supra* note 172, at 204.

178. Alison Norris et al., *Abortion Stigma: A Reconceptualization of Constituents, Causes, and Consequences*, 21 *WOMEN’S HEALTH ISSUES* S49, S50 (2011).

179. *Id.* at S50.

180. Susan A. Cohen, *Repeat Abortion, Repeat Unintended Pregnancy, Repeated and Misguided Government Policies*, 10 *GUTTERMACHER POL’Y REV.* 8, 11 (2007).

181. *Id.*

182. *Id.* at 9.

183. *Id.* at 11.

184. *Id.*

185. See Stanley K. Henshaw, *Factors Hindering Access to Abortion Services*, 27 *FAMILY*

especially true for young and low-income women, who are disproportionately disadvantaged by the costs of travel, including a reliance on public transportation, a lack of access to child care, and inflexible work hours.<sup>186</sup> However, it is difficult to define a bright-line rule as to when a particular distance fails to be substantially equivalent. Federal courts of appeals have struggled with the same issue in applying *Casey*'s undue burden standard, resulting in a variety of outcomes.<sup>187</sup> For example, the Fifth Circuit determined that regulations resulting in an increase of travel of less than 150 miles were not an undue burden.<sup>188</sup> On the other hand, the Seventh Circuit upheld a preliminary injunction against a law that increased travel distance by up to 100 miles.<sup>189</sup> Whatever the result in the federal circuits, the substantially equivalent standard should be far more stringent than the undue burden standard, under which laws are invalidated if they create a substantial obstacle to a woman's choice to undergo an abortion.<sup>190</sup> Thus, when evaluating distance under RCW 9.02.160, courts should begin with the proposition that distances constituting an undue burden under *Casey* violate the Privacy Act per se, and should work backwards from there. Additionally, when evaluating distance, courts should take context into account. Given the lack of public transportation in many counties, an abortion facility that is fifty miles away in King County may be inherently different than a facility that is fifty miles away in a more rural county.<sup>191</sup> Other geographical considerations may also come into play. In San Juan Island County, for example, the fact that patients might have to ferry to neighboring abortion facilities may factor into a court's analysis. In other words, courts should not only examine the number of miles women must travel to the alternate facility, but the practical consequences of their personal situation and geographic location.

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PLANNING PERSPECTIVES 54, 54 (1995); James D. Shelton et al., *Abortion Utilization: Does Travel Distance Matter?*, 8 FAMILY PLANNING PERSPECTIVES 260, 262 (1976).

186. See *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 796 (7th Cir. 2013); *McCormack v. Hiedeman*, 694 F.3d 1004, 1017 (9th Cir. 2012); *Planned Parenthood Se., Inc. v. Strange*, 33 F. Supp. 3d 1330, 1357 (M.D. Ala. 2014); Shelton, *supra* note 185, at 260.

187. See, e.g., *Women's Med. Prof'l Corp. v. Baird*, 438 F.3d 595, 604-09 (6th Cir. 2006).

188. *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583, 598 (5th Cir. 2014).

189. *Van Hollen*, 738 F.3d at 796, 799.

190. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 837 (1992) (plurality).

191. See FED. TRANSIT ADMIN., U.S. DEP'T OF TRANSP., TRANSIT AT THE TABLE III: CASE STUDY WASHINGTON I (2011). Even though Washington has a state-funded inter-city transportation system, moving between cities outside of that network, or intra-county, may be difficult given the lack of local, county-sponsored public transit. See *id.*



These factors should not constitute an exhaustive list. Rather, they indicate the type of factors courts should evaluate when determining whether the State has met its obligation under the Act. It may, however, be impossible for the State to comply with these requirements. The private provider may refuse to give a referral to the State's abortion facility. Similarly, the nearest abortion facility might be impermissibly far away. As will be discussed in the next section, the State's inability to comply with its obligation under the Act triggers RCW 9.02.100(4). Courts should then subject the State's decision to strict scrutiny.<sup>192</sup>

*B. Discrimination Under RCW 9.02.100(4)*

RCW 9.02.100(4) provides that “[t]he state shall not discriminate against the *exercise* of [the fundamental right to choose or refuse to have an abortion] in the regulation or provision of benefits, facilities, services, or information.”<sup>193</sup> According to the Attorney General, to discriminate means to “make a difference in treatment or favor on a class or categorical basis in disregard of individual merit.”<sup>194</sup> It is unclear, however, at what point a difference in treatment becomes discriminatory. In some doctrinal areas, like equal protection, any differential treatment of those similarly situated may lead to a violation.<sup>195</sup> But in interpreting the Act, courts should read discrimination to mean a failure to provide the substantially equivalent abortion care outlined in RCW 9.02.160. If a court read a more stringent standard into discrimination—one that required the abortion and maternity care to be fully equivalent—it would eviscerate the substantially equivalent standard in RCW 9.02.160. Therefore, the State triggers RCW 9.02.100(4) when it fails to provide substantially equivalent abortion care.

It is unclear from the plain language of the statute whether a failure to provide substantially equivalent care is a per se violation of the Act, or whether the State could, as it would in a constitutional challenge to abortion regulation, nonetheless justify its failure under some form of judicial scrutiny.<sup>196</sup> Here, although the Act provides no explicit

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192. See *infra* Part II.2.

193. WASH. REV. CODE § 9.02.100(4) (2014) (emphasis added).

194. 2013 Attorney General Opinion, *supra* note 102, at 8 n.16 (internal quotation marks omitted).

195. See, e.g., *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992).

196. *Roe v. Wade*, 410 U.S. 113, 155 (1973); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 871 (1992) (plurality) (“Those cases decided that any regulation touching upon the abortion decision must survive strict scrutiny . . . .”); Khiara M. Bridges, “*Life*” in *the Balance: Judicial*

guidance, courts should again look to the Act's history and purpose. A major issue directly preceding the Act's enactment was a concern that the Court would overturn *Roe v. Wade*.<sup>197</sup> According to the voters pamphlet,<sup>198</sup> Initiative 120 sought to protect the “existing right to choose” that *Roe* recognized.<sup>199</sup> This is significant because *Roe* required courts to evaluate regulations of abortion using strict scrutiny.<sup>200</sup> Thus, the Act's declaration of a fundamental right—which typically requires strict scrutiny review<sup>201</sup>—coupled with statements that the Act sought to codify *Roe*, provide strong support for the proposition that once the State triggers RCW 9.02.100(4) by failing to provide substantially equivalent abortion care, the State violates the Act unless it passes strict scrutiny. To be sure, under the United States Constitution, courts scrutinize legislation burdening the right announced in *Roe* under the *Casey* standard—which some have likened to both intermediate scrutiny and rational basis.<sup>202</sup> But *Casey* came down after the Privacy Act was enacted, and thus, Washington voters could not have intended to be bound by the decision.<sup>203</sup> And absent a showing of voter intent to the

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*Review of Abortion Regulation*, 46 U.C. DAVIS L. REV. 1285, 1290 (2013); Linda J. Wharton et al., *Preserving the Core of Roe, Reflections on Planned Parenthood v. Casey*, 18 YALE J.L. & FEMINISM 317, 319 (2006); Linda J. Wharton, *Roe at Thirty-Six and Beyond: Enhancing Protection for Abortion Rights Through State Constitutions*, 15 WM. & MARY J. WOMEN & L. 469, 477–78 (2009).

197. See WASHINGTON STATE VOTERS PAMPHLET, *supra* note 103, at 14; Linda J. Wharton & Kathryn Kolbert, *Preserving Roe v. Wade . . . When You Win Only Half the Loaf*, 24 STAN. L. & POL'Y REV. 143, 146–47 (2013) (discussing the events in 1991 that led to a fear that the Court would overturn *Roe*, including the appointment of Justice Thomas and Justice Alito's Third Circuit dissenting opinion in the *Casey* litigation).

198. *Amalgamated Transit Union Local 587 v. State*, 142 Wash. 2d 183, 205–06, 11 P.3d 762, 780 (2000) (“However, if there is ambiguity in the enactment, the court may examine the statements in the voters pamphlet in order to determine the voters' intent.”).

199. WASHINGTON STATE VOTERS PAMPHLET, *supra* note 103, at 14 (emphasis added).

200. See *supra* note 196.

201. Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1285 (2007); Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 862–63 (2006) (“Courts also use strict scrutiny to judge the constitutional validity of legislation infringing on fundamental rights under the Equal Protection and Due Process Clauses of the Fourteenth and Fifth Amendments.”).

202. Gillian E. Metzger, Note, *Unburdening the Undue Burden Standard: Orienting Casey in Constitutional Jurisprudence*, 94 COLUM. L. REV. 2025, 2032–33 (1994); Bridges, *supra* note 196, at 1287.

203. See Reproductive Privacy Act, 1992 Wash. Sess. Laws ch. 1, § 1, 1–3 (1992) (noting the Privacy Act's effective date was December 24, 1991); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 833 (1992) (plurality) (noting the case was decided on June 29, 1992); *Amalgamated Transit Union Local 587*, 142 Wash. 2d at 205–06, 11 P.3d at 780 (“Thus, in determining the meaning of a statute enacted through the initiative process, the court's purpose is to ascertain the collective intent of the voters who, acting in their legislative capacity, enacted the measure . . . [I]f there is ambiguity in the enactment, the court may examine the statements in the voters pamphlet in

contrary, the Supreme Court's decisions following *Roe* are not binding on the interpretation of a state statute.<sup>204</sup> Thus, applying strict scrutiny to the specific facts presented, if the State failed to show a compelling interest or that it used the least restrictive means, it would be in violation of RCW 9.02.100(4). If that were the case, any contracts, including agreements between the State and a Catholic provider, that cause the State to violate the Privacy Act would be void as a matter of law.<sup>205</sup>

In sum, courts should adopt the following framework to analyze the State's obligations under the Privacy Act. First, the court should inquire whether the State had an obligation to provide abortion care under RCW 9.02.160. The State has an obligation to provide abortion care in two circumstances: when public healthcare facilities provide maternity care, and when private providers either accept public funding as payment for maternity care or contract with public providers for the joint provision of maternity care. When such an arrangement triggers RCW 9.02.160, the court should evaluate whether the provided abortion care is substantially equivalent. When the State provides abortion and maternity care at the same facility, the inquiry only requires a side-by-side comparison. If the State is forced to provide abortion care at a separate facility, however, courts should examine the practical consequences of the State's provision. The relevant factors a court could analyze include: whether the private provider is willing to provide a referral and a minimum amount of information on abortion, the nature of the abortion facility, and the distance between the facilities. If the State is unable to meet its obligation under RCW 9.02.160, it triggers RCW 9.02.100(4), which forbids the State from discriminating against the fundamental right of choice. Once the State triggers RCW 9.02.100(4), it discriminates, within the meaning of the provision, if the failure to provide substantially equivalent abortion care does not pass strict scrutiny. Thus, regardless of whether the facility providing maternity care is public or private, or if the State provides the maternity care directly or by contract, the State cannot enter into an arrangement that causes it to violate the

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order to determine the voters' intent.").

204. *See* *State v. Gore*, 101 Wash. 2d 481, 487, 681 P.2d 227, 231 (1984) ("While the Supreme Court's interpretation of a similar federal statute is persuasive authority, it is not controlling in our interpretation of a state statute.").

205. *Failor's Pharm. v. Dep't of Soc. & Health Servs.*, 125 Wash. 2d 488, 499, 886 P.2d 147, 153 (1994) ("A contract in conflict with statutory requirements is illegal and unenforceable as a matter of law . . . Even where a contract is within an agency's substantive authority, failure to comply with statutorily mandated procedures is ultra vires and renders the contract void."); *Pierce Cnty. v. State*, 144 Wash. App. 783, 841, 185 P.3d 594, 624 (Wash. Ct. App. 2008) ("A contract that conflicts with statutory requirements is illegal and unenforceable as a matter of law.").

Act. If it does, the agreement is void as a matter of law.

### III. THE REPRODUCTIVE PRIVACY ACT AND THE FREE EXERCISE OF RELIGION

Catholic healthcare providers in Washington may challenge the Reproductive Privacy Act on free exercise grounds. Applying the framework the previous section outlined, if a private provider chose to accept state funds for maternity care, it would have to accommodate the state by providing a referral and a minimal amount of information on abortion.<sup>206</sup> This is not to downplay the moral dilemma an abortion referral could create for objecting providers. Many pro-life proponents are opposed to referral because it makes physicians complicit in the performance of acts that they find morally objectionable.<sup>207</sup> Accordingly, this Comment analyzes the arguments of two potential plaintiffs: healthcare providers and doctors. It assumes that the private provider chose to accept the State's terms by providing a referral and a minimum amount of abortion information. Those plaintiffs may challenge the Act under the First Amendment to the Constitution<sup>208</sup> or Article I section XI of the Washington Constitution.<sup>209</sup>

#### A. *The First Amendment Is Not an Attractive Option for Plaintiffs*

The First Amendment provides a highly deferential standard of review for neutral and generally applicable laws burdening the free exercise of religion. As such, it is an unattractive cause of action for those looking to challenge the Reproductive Privacy Act. Prior to 1990, the Court usually applied strict scrutiny, outlined in *Sherbert v. Verner*,<sup>210</sup> when evaluating a law on free exercise grounds.<sup>211</sup> Under the *Sherbert* test, the Court initially considered whether the plaintiff's claim

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206. See *infra* Part II.

207. See MARK R. WICCLAIR, CONSCIENTIOUS OBJECTION IN HEALTH CARE: AN ETHICAL ANALYSIS 38 (2011); Carolyn McLeod, *Referral in the Wake of Conscientious Objection to Abortion*, 23 HYPATIA 30, 30 (2008).

208. U.S. CONST. amend. I.

209. WASH. CONST. art. I, § XI. Note that plaintiffs could not challenge the Privacy Act under RFRA—which applies only to the federal government. See *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

210. 374 U.S. 398 (1963).

211. See *id.*; *Wisconsin v. Yoder*, 406 U.S. 205, 215–16 (1972). Note that the strict scrutiny employed by the Court in the free exercises cases is more of a weighted balancing test. Fallon, Jr., *supra* note 201, at 1306. This is different than the form of strict scrutiny employed in other areas, such as race discrimination. *Id.* at 1308.

was rooted in “religious belief.”<sup>212</sup> If so, the Court considered whether the law had a sufficiently coercive effect on religion to trigger First Amendment protection.<sup>213</sup> If the law expressly prohibited religious practice or forced the plaintiff to choose between violating the law or her religion, the Court considered it coercive.<sup>214</sup> If the law was coercive, it triggered the First Amendment and had to pass strict scrutiny.<sup>215</sup> Applying strict scrutiny, the Court would ask whether the law directly advanced a compelling state interest and utilized the least restrictive means.<sup>216</sup>

In the years leading up to the Court’s decision in *Employment Division Department of Human Resources of Oregon v. Smith*,<sup>217</sup> the *Sherbert* test began to lose favor with the Court.<sup>218</sup> Finally, in *Smith*, the Court limited *Sherbert* strict scrutiny to laws regulating the receipt of unemployment benefits, laws burdening “hybrid rights,” or those implicating free exercise interests in conjunction with other constitutional protections, and those laws that directly discriminate against religion.<sup>219</sup> The import of the *Smith* decision was that laws with a coercive effect on religion, though sufficient to trigger heightened scrutiny under *Sherbert*, need only survive deferential scrutiny as long as

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212. See *Yoder*, 406 U.S. at 216; *Sherbert*, 374 U.S. at 403. Thus, Thoreau’s choice to reject social values and isolate himself on Walden Pond would not give rise to a free exercise claim because his decision was personal rather than religious. *Yoder*, 406 U.S. at 216.

213. See *Lying v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 449 (1988).

214. *Id.*

215. *Id.* at 450–51.

216. *Sherbert*, 374 U.S. at 406–07. After the Court’s decision in *Burwell v. Hobby Lobby*, No. 13-34 (U.S. 2014), there is a dispute amongst the Justices about whether the *Sherbert* test included a least restrictive means component. Justice Alito’s majority opinion pointed to post-*Smith* decisions interpreting the *Sherbert* line as not requiring that the government use the least restrictive means. *Id.* slip op. at 6 n.3. In dissent, however, Justice Ginsburg argued that those decisions incorrectly read the least restrictive means requirement out of the *Sherbert* test. *Id.* slip op. at 12 (Ginsburg, J., dissenting). Although the majority opinion came close to holding that *Sherbert* does not have a least restrictive means component, it elected not to definitively answer that question. *Id.* slip op. at 17 n.18 (majority opinion). Despite the dispute, this Comment assumes that the *Sherbert* test includes a least restrictive means component because that understanding aligns with the Washington Supreme Court’s *Sherbert* interpretation. See *First Covenant Church of Seattle v. City of Seattle*, 120 Wash. 2d 203, 218–19, 840 P.2d 174, 183 (1992).

217. 494 U.S. 872 (1990).

218. *Id.* at 883 (noting that the Court declined to apply the *Sherbert* test in the cases immediately preceding *Smith*).

219. *Id.* at 872, 879, 881, 883. The Court does not always find a facially neutral law to be neutral in fact. For example, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Court applied strict scrutiny to a law that banned animal sacrifice. 508 U.S. 520, 533–34 (1993). Though the law did not expressly target religion, the Court found that in enacting the law, city officials targeted the Santeria religion. *Id.*

the law did not burden a “hybrid right”<sup>220</sup> or “discriminate” against religion.<sup>221</sup> Declining to breathe life into the already diminishing *Sherbert* test, *Smith* narrowed the potential applications of heightened scrutiny when evaluating laws on free exercise grounds. After *Smith*, to invoke strict scrutiny, plaintiffs must prove that the law discriminates against religion<sup>222</sup> or burdens a “hybrid right.”<sup>223</sup> Applying the *Smith* framework to a Catholic provider or doctor’s free exercise challenge, this Comment argues that the Privacy Act neither discriminates against religion nor burdens another constitutional right. Accordingly, plaintiffs would only be entitled to deferential scrutiny in a federal free exercise claim.

### 1. *The Reproductive Privacy Act Does Not Discriminate Against Religion*

There is no indication that the Reproductive Privacy Act discriminates, facially or otherwise, against religion. A law discriminates against religion if “the object of [the] law is to infringe upon or restrict practices because of their religious motivation.”<sup>224</sup> There are, however, “many ways of demonstrating that the object or purpose of a law is the suppression of religion or religious conduct.”<sup>225</sup> The first indicium of a law’s purpose is its text.<sup>226</sup> “A law [is facially discriminatory] if it refers to a religious practice without a secular meaning discernable from the language or context.”<sup>227</sup>

The Reproductive Privacy Act is facially neutral. The law makes no reference to any religious practice. Although the law refers to the performance of “abortion”—which could violate religious practices—the use of “abortion” within the Act has secular meaning.<sup>228</sup> The Act refers to the performance of abortion universally, not just in the context of

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220. See Adam Schwartzbaum, Comment, *The Niqab in the Courtroom: Protecting Free Exercise of Religion in a Post-Smith World*, 159 U. PA. L. REV. 1533, 1545 (2011).

221. Noel E. Horton, Comment, *Article I, Section 11: A Poor “Plan B” for Washington’s Religious Pharmacists*, 85 WASH. L. REV. 739, 744 n.41 (2010).

222. *Church of the Lukumi Babalu Aye*, 508 U.S. at 533.

223. *Smith*, 494 U.S. at 881–82.

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. See WASH. REV. CODE § 9.02.160 (2014) (referencing services to voluntarily terminate one’s pregnancy); *id.* §§ 9.02.150, 9.02.160, 9.02.100(2).

religious practice.<sup>229</sup> Accordingly the Act is not facially discriminatory.

However, “[f]acial neutrality is not determinative.”<sup>230</sup> A law may discriminate against religion despite textual neutrality.<sup>231</sup> A court may look at the history or operation of the law to find evidence of animus towards religion.<sup>232</sup> Adverse impact on religion, however, will not always lead to a finding of impermissible discrimination.<sup>233</sup> The law’s object may be social harms that are legitimate governmental concerns.<sup>234</sup> For example, in *Locke v. Davey*<sup>235</sup> the Court determined that Washington State’s refusal to allow a student to use a state-sponsored scholarship to pursue a college degree in theology did not discriminate against religion.<sup>236</sup> Because the State had a legitimate antiestablishment interest, the Washington State Legislature did not intend to single out religious practice for discriminatory treatment.<sup>237</sup> This distinguished *Davey* from *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,<sup>238</sup> in which the City of Hialeah utilized the force of criminal law to suppress ritualistic animal sacrifices of the Santeria religion.<sup>239</sup> Unlike Washington State, the City of Hialeah used the law to accomplish a “religious gerrymander,” by singling out the Santeria religion and its religious practices.<sup>240</sup>

The Reproductive Privacy Act is more like the Washington law in *Davey* than the City of Hialeah’s ordinance. The Act does not impose criminal sanctions.<sup>241</sup> It does not target a particular religion, but applies uniformly to all healthcare providers. Most importantly, as discussed

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229. *Id.*

230. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993).

231. *See id.*

232. *See Locke v. Davey*, 540 U.S. 712, 724 (2004) (“In short, we find neither in the history . . . nor in the operation of [the law], anything that suggests animus towards religion.”).

233. *Church of the Lukumi Babalu Aye*, 508 U.S. at 535.

234. *Id.*

235. 540 U.S. 712.

236. *Id.* at 724–25.

237. *Id.* at 721–22.

238. 508 U.S. 520.

239. *Davey*, 540 U.S. at 720 (citing *Church of the Lukumi Babalu Aye*, 508 U.S. at 535).

240. *See Church of the Lukumi Babalu Aye*, 508 U.S. at 535. The Court determined that the ordinances excluded “almost all killings of animals except for religious sacrifice, and . . . narrow[ed] the proscribed category even further, in particular by exempting kosher slaughter.” *Id.* at 536. “The net result of the gerrymander [was] that few if any killings of animals [were] prohibited other than Santeria sacrifice . . .” *Id.* Further, such practices were proscribed only because they occurred during a religious ceremony. *Id.*

241. *Cf. Davey*, 540 U.S. at 720 (noting that unlike the Hialeah ordinance, the scholarship did not impose criminal sanctions).

later, the Act pursues legitimate government interests in protecting the health and safety of pregnant women and ensuring the efficacy of a woman's right of choice.<sup>242</sup> It is therefore apparent, from both the text and operation of the Act, that Washington voters did not intend to single out religious groups for discriminatory reasons, but rather, intended to pursue other goals resulting in an incidental burden on religious practice.<sup>243</sup>

## 2. *The Reproductive Privacy Act Does Not Burden a "Hybrid" Right*

The second way plaintiffs may escape deferential scrutiny under *Smith* is if they can show that the law burdens free exercise "in conjunction with other constitutional protections, such as freedom of speech and of the press."<sup>244</sup> This "hybrid rights" doctrine has been the source of substantial criticism because, as Justice Souter noted, if plaintiffs could bootstrap other constitutional claims to their free exercise claim, the hybrid right exemption would swallow the deferential *Smith* rule.<sup>245</sup> As such, some circuits treat the hybrid rights doctrine as unworkable dicta and ignore hybrid claims.<sup>246</sup> The Ninth Circuit requires plaintiffs asserting the hybrid rights doctrine to make out a "colorable claim that a companion right has been violated—that is, a fair probability or a likelihood, but not a certitude, of success on the merits."<sup>247</sup> If the plaintiff succeeds in establishing a colorable claim, she would be entitled to strict scrutiny.<sup>248</sup> But recently, the Ninth Circuit

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242. See *infra* Part IV.B.

243. The Western District of Washington's decision in *Stormans Inc. v. Selecky*, 844 F. Supp. 2d 1172, 1176 (W.D. Wash. 2012), is inapposite. In *Stormans*, the court evaluated, on free exercise grounds, a rule that required pharmacies to stock and deliver birth control. *Id.* Analyzing the rule under *Lukumi*, the court determined that the rule was not neutral because it was riddled with secular exemptions, but made no such accommodation for religion. *Id.* at 1190–91. Further, the court found that the State had adopted a general air of non-enforcement except when it came to *Stormans*. *Id.* at 1194. Unlike *Stormans*, however, the Reproductive Privacy Act does not contain secular exemptions. In fact, the only exemption is for religion. WASH. REV. CODE § 9.02.150 (2014). Moreover, there is no indication that the Act has been enforced in a discriminatory fashion.

244. *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 881 (1990); Schwartzbaum, *supra* note 220, at 1547.

245. *Church of the Lukumi Babalu Aye*, 508 U.S. at 567 (Souter, J., concurring). Indeed, the exemption would seemingly cover the scenario in *Smith* because the peyote ritual also implicated free speech and associational rights. *Id.*

246. Note, *The Best of a Bad Lot: Compromise and Hybrid Religious Exemptions*, 123 HARV. L. REV. 1494, 1498–99 (2010).

247. *Miller v. Reed*, 176 F.3d 1202, 1207 (9th Cir. 1999) (citation omitted) (internal quotation marks omitted).

248. *Id.* at 1207–08.



noted that no court had ever allowed a plaintiff to succeed on a hybrid rights claim and declined to be the first.<sup>249</sup> Thus, it is unclear whether the hybrid rights doctrine is good law in the Ninth Circuit. Nevertheless, this Comment assumes for the sake of argument that the Ninth Circuit still follows the hybrid rights doctrine. Healthcare providers and doctors subject to the Act may argue that it burdens their freedom of speech in addition to free exercise, triggering the hybrid rights doctrine. If, however, the Ninth Circuit no longer recognizes hybrid rights, the following will serve as an independent analysis of a potential plaintiff's free speech claim.

a. *Healthcare Providers*

A Catholic healthcare provider could argue that the requirement that it facilitate the state's provision of abortion services and counseling at its facility burdens free speech as well as free exercise. A court could find that a hospital's provision of Catholic, anti-abortion health services is a form of protected speech.<sup>250</sup> RCW 9.02.160 arguably burdens that speech by conditioning the use of government funds on engaging in a type of speech the government mandates. In other words, if a Catholic provider wished to engage in the provision of healthcare that only promoted a Catholic message, it could not use government funds for maternity care.

The government cannot, consistent with the First Amendment, "penalize" the exercise of free speech by denying government benefits; and the "government may not coerce people into relinquishing [speech] rights through regulation, spending, and licensing."<sup>251</sup> It is unconstitutional, for example, for the government to declare that property tax exemptions will only be available to those veterans who declare that they will not advocate the forcible overthrow of the government.<sup>252</sup> To deny the exemption "to claimants who engage in certain forms of speech is in effect to penalize them for such speech."<sup>253</sup>

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249. *Jacobs v. Clark Cnty. Sch. Dist.*, 526 F.3d 419, 440 & n.45 (9th Cir. 2008).

250. *Cf. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995) (holding that the message of a parade was protected expression because "[s]ymbolism is a primitive but effective way of communicating ideas" (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943) (modifications in original)). The argument here is that the provision of healthcare in accordance with the Catholic mission is a form of symbolic speech.

251. Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine Is an Anachronism (with Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593, 601 (1990).

252. *Speiser v. Randall*, 357 U.S. 513, 518 (1958).

253. *Id.*

On the other hand, the government may constitutionally choose not to fund certain activities. In *Rust v. Sullivan*,<sup>254</sup> the Court upheld a Health and Human Services regulation forbidding projects that were receiving federal family planning funds under Title X of the Public Health Service Act from counseling or referring women for abortion and from encouraging, promoting, or advocating abortion.<sup>255</sup> The Court held that the regulation was not an unconstitutional penalty, but rather a permissible decision to “selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program . . . .”<sup>256</sup>

The distinction between a subsidy that impermissibly penalizes speakers for engaging in certain speech and the government’s constitutional choice to fund certain kinds of speech to the exclusion of others is blurred at best. The critical inquiry is whether “the Government has placed a condition on the recipient of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program.”<sup>257</sup> In other words, if the speaker must relinquish its speech due to an inability to segregate its activities based on the source of its funding, the law is an unconstitutional burden on speech.<sup>258</sup> This distinction, in part, saved the Title X funding restrictions in *Rust* from constitutional infirmity.<sup>259</sup> The Title X funding recipients were not forced to relinquish any speech right.<sup>260</sup> Because the restriction pertained only to Title X projects, rather than Title X grantees, funding recipients could engage in abortion-related speech as long as it was separate and

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254. 500 U.S. 173 (1991).

255. *Id.* at 179–81, 203.

256. *Id.* at 193.

257. *Id.* at 197 (emphasis omitted).

258. *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 400 (1984). Compare, for example, *FCC v. League of Women Voters* with *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540 (1983). In *League of Women Voters*, the Court struck down a provision of the Public Broadcasting Act requiring that any public broadcasting station receiving a federal grant from the Corporation for Public Broadcasting refrain from editorializing. 468 U.S. at 366, 402. Because public broadcast corporations could not create an affiliate corporation, which could then use the parent station’s facilities to engage in editorializing, the stations were unconstitutionally forced to choose between engaging in protected speech and losing the funds. *Id.* at 400. The Court distinguished *Taxation with Representation*, in which the Court upheld a provision of the Internal Revenue Code barring non-profit organizations engaged in lobbying from receiving tax deductible contributions, because the non-profits in *Regan* could, by operation of law, lobby through an affiliate organization while still receiving tax deductible contributions. *Id.*

259. *See Rust*, 500 U.S. at 196.

260. *Id.*

distinct from the Title X funds.<sup>261</sup> By contrast, the ability to segregate funds was not available to the plaintiffs in *Speiser v. Randall*,<sup>262</sup> as the funding condition was placed on veterans themselves.<sup>263</sup> Therefore, the condition forced veterans to choose between exercising their free speech rights and receiving the tax exemption.<sup>264</sup>

The funding restriction in RCW 9.02.160 operates in the same way as the Title X restriction in *Rust*. The law does not force hospitals to choose between providing anti-abortion health services and using state money for maternity care.<sup>265</sup> To the contrary, hospitals remain free to provide anti-abortion maternity care while receiving state funding.<sup>266</sup> Although the law potentially forces hospitals to engage in speech they disagree with, the same was true in *Rust*. Pro-abortion hospitals receiving Title X funding were required to tell patients that the project “d[id] not consider abortion an appropriate method of family planning.”<sup>267</sup> As long as the speaker still has the option of engaging in their speech, advocating a government message contrary to the speaker’s position does not violate the Constitution.<sup>268</sup> Further, Washington hospitals are in no way required to accept the state funds for maternity care.<sup>269</sup> “[T]o avoid the force of the regulations, [hospitals] can simply decline the subsidy.”<sup>270</sup> The Court has never held that the government violates the First Amendment by

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261. *Id.*

262. 357 U.S. 513 (1958).

263. *Id.* at 518–19.

264. *Id.*

265. *See generally* WASH. REV. CODE § 9.02.160 (2014) (providing only that the State shall provide abortion care when it provides maternity care).

266. *See id.*

267. *Rust v. Sullivan*, 500 U.S. 173, 180 (1991) (“The Title X project is expressly prohibited from referring a pregnant woman to an abortion provider, even upon specific request. One permissible response to such an inquiry is that the project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion.” (internal quotation marks omitted)).

268. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541–42 (2001) (“The Court in *Rust* did not place explicit reliance on the rationale that the counseling activities of the doctors under Title X amounted to governmental speech; when interpreting the holding in later cases, however, we have explained *Rust* on this understanding. We have said that viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker, or instances, like *Rust*, in which the government ‘used private speakers to transmit specific information pertaining to its own program.’” (citations omitted) (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995))).

269. *See* UNDERPAYMENT BY MEDICARE AND MEDICAID FACT SHEET, AM. HOSPITAL ASS’N 1 (Dec. 2010) (“Hospital participation in Medicare and Medicaid is voluntary.”); 2013 Attorney General Opinion, *supra* note 102, at 8.

270. *Rust*, 500 U.S. at 199 n.5.

offering hospitals the choice between accepting the funds subject to the government's conditions or declining the subsidy and offering their own unsubsidized program.<sup>271</sup> Accordingly, if Catholic providers wish to challenge the Act under the United States Constitution, a court will subject the Act to the deferential *Smith* standard of review because the Privacy Act does not unconstitutionally burden a hospital's right of free speech.

*b. Doctors*

In addition to Catholic providers, doctors at a hospital may argue that the Act unconstitutionally compels speech through the referral and information requirement. To be sure, the Act compels professional speech—that is “speech . . . uttered in the course of professional practice.”<sup>272</sup> The distinction between professional and private speech is essential. In the context of private speech, we hope to spark a robust debate.<sup>273</sup> We assume censorship of speech because of its message is unconstitutional.<sup>274</sup> In the realm of professional speech, however, we insist on competence, not debate, resulting in permissible regulation.<sup>275</sup> In fact, the government and medical associations often prescribe what doctors can and cannot say to their patients.<sup>276</sup> Courts have repeatedly upheld such requirements.<sup>277</sup> Indeed, as Dean Robert Post remarked,

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271. *Id.*

272. See Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL L. REV. 939, 947 (2007).

273. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964).

274. Post, *supra* note 272, at 949–50.

275. *Id.* at 950.

276. Lauren R. Robbins, Comment, *Open Your Mouth and Say “Ideology”: Physicians and the First Amendment*, 12 U. PA. J. CONST. L. 155, 165; see also, e.g., *Lowe v. SEC*, 472 U.S. 181, 228 (1985) (White, J., concurring) (“The power of government to regulate the professions is not lost whenever the practice of a profession entails speech.”).

277. See, e.g., *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007) (“The State has an interest in ensuring so grave a choice is well informed.”); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 882 (1992) (“We also see no reason why the State may not require doctors to inform a woman seeking an abortion of the availability of materials relating to the consequences to the fetus, even when those consequences have no direct relation to her health.”); *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 573, 579–80 (5th Cir. 2012) (upholding Texas statute requiring physicians performing an abortion to display a sonogram of fetus, make audible the heartbeat, and explain the results of the procedure); *Comprehensive Health of Planned Parenthood of Kan. & Mid-Mo., Inc. v. Templeton*, 954 F. Supp. 2d 1205, 1212, 1216–17 (D. Kan. 2013) (denying Plaintiff's motion for preliminary injunction to bar enforcement of Kansas statute requiring physicians to inform patients that the unborn child can feel pain); *Eubanks v. Schmidt*, 126 F. Supp. 2d 451, 452–53 (W.D. Ky. 2000) (holding it was constitutional for the state to require abortion providers to provide a woman with informed consent materials that favor childbirth over

“The history and importance of mandated medical disclosures is so entrenched that it cannot be called into constitutional question.”<sup>278</sup>

Nevertheless, physician speech is entitled to some First Amendment protection. Generally, the government cannot force physicians to engage in ideological speech,<sup>279</sup> or speech that expresses a particular point of view on matters of opinion, like politics, religion, or morality.<sup>280</sup> There is currently disagreement amongst the circuits as to the point at which physicians cease to give relevant medical information and instead promote the State’s view on the morality of abortion.<sup>281</sup> In evaluating the Privacy Act, however, it is unnecessary to resolve that debate because, again, *Rust* controls. In that case, doctors also challenged the funding restrictions as a violation of their free speech.<sup>282</sup> In denying their challenge, the Court held that “[t]he employees’ freedom of expression [was] limited during the time that they actually work for the project; but this limitation [was] a consequence of their decision to accept employment in a project, the scope of which is permissibly restricted by the funding authority.”<sup>283</sup> This is critically different than challenges to laws that mandate that all physicians within their jurisdiction make certain disclosures, regardless of whether government funds are present.<sup>284</sup> Further, the Court acknowledged the argument that “traditional relationships such as that between doctor and patient should enjoy protection under the First Amendment from Government regulation, even when subsidized by the Government.”<sup>285</sup> It was unnecessary, however, to resolve that argument because “the Title X program regulations [did] not significantly impinge upon the doctor-patient relationship. Nothing in them require[d] a doctor to represent as

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abortion despite freedom of speech challenges by providers).

278. Post, *supra* note 272, at 981.

279. See *Wooley v. Manyard*, 430 U.S. 705, 717 (1977); Jennifer M. Keighley, *Physician Speech and Mandatory Ultrasound Laws: The First Amendment’s Limit on Compelled Ideological Speech*, 34 *CARDOZO L. REV.* 2347, 2378 (2013).

280. *Wooley*, 430 U.S. at 715; Keighley, *supra* note 279, at 2364.

281. See, e.g., *Stuart v. Camnitz*, 774 F.3d 238, 242 (4th Cir. 2014) (holding that a North Carolina statute that required physicians to display a sonogram and describe the fetus to women seeking abortions unconstitutionally compelled speech); *Lahey*, 667 F.3d at 579–80 (finding that a Texas statute requiring a physician performing an abortion to perform and display a sonogram of the fetus, make audible the heartbeat for the woman to hear, and to explain to the pregnant mother the results of the procedure did not violate the First Amendment because the requirements were nothing but truthful medical information that was pertinent to a woman’s decision).

282. *Rust v. Sullivan*, 500 U.S. 173, 192 (1991).

283. *Id.* at 198–99.

284. See cases cited *supra* note 277.

285. *Rust*, 500 U.S. at 200.

his own any opinion that he does not in fact hold.”<sup>286</sup> The same is true of the Privacy Act. It does not require physicians to represent an opinion nor does it impinge on their ability to provide alternate advice. It merely requires that a physician provide a referral and certain information on abortion that is a result of the physician accepting employment at a healthcare facility that uses government funds for maternity care.<sup>287</sup>

Accordingly, neither doctors nor providers can successfully argue that the Act burdens their free speech. To the extent that the Ninth Circuit recognizes the hybrid rights doctrine, courts will subject the Act to deferential *Smith* scrutiny if challenged on federal grounds.<sup>288</sup> Given the choice between the deferential *Smith* standard or the Washington Constitution’s strict scrutiny standard, plaintiffs will almost certainly choose the latter. Accordingly, this Comment analyzes a free exercise challenge to the Act under the Washington Constitution.

#### IV. THE REPRODUCTIVE PRIVACY ACT PASSES STRICT SCRUTINY UNDER THE WASHINGTON CONSTITUTION

The First Amendment provides the “floor” of free exercise rights, leaving states to enact more protective measures.<sup>289</sup> The Washington Constitution declares:

Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscious hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state.<sup>290</sup>

Washington courts claim to interpret the Washington Constitution as providing more free exercise protection than the United States Constitution.<sup>291</sup> They employ the *Sherbert* test, regardless of whether the law is neutral, and frequently look to federal cases for interpretative guidance.<sup>292</sup> Courts applying *Sherbert* must engage in a three-part

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286. *Id.*

287. *See supra* Part II.

288. *See supra* Part III.

289. Horton, *supra* note 221, at 754.

290. WASH. CONST. art. I, § 11.

291. *First Covenant Church of Seattle v. City of Seattle*, 120 Wash. 2d 203, 223–26, 840 P.2d 174, 185–87 (1992).

292. *See id.* at 226–27, 840 P.2d at 187; *Open Door Baptist Church v. Clark Cnty.*, 140 Wash. 2d 143, 161, 995 P.2d 33, 43 (2000) (“As we have done in all other Const. art. I, § 11 cases, we can

analysis. First, they must determine whether the law has a coercive effect on religious exercise. If the court finds a coercive effect, it must determine whether the law furthers a compelling government interest. Finally, if the law furthers a compelling interest, it must employ the least restrictive means to further that interest.

A. *The Reproductive Privacy Act May Have a Coercive Effect on Doctors but Not Providers*

As a threshold matter, the complaining party must first prove that the law has a coercive effect on religious exercise.<sup>293</sup> To demonstrate coercive effect, the plaintiff must show both a sincerely held religious belief and that the government action burdens that belief.<sup>294</sup> Although the threshold burden for coercive effect is ill-defined, the Washington State Supreme Court stated that “a burden can be a slight inconvenience without violating article I, section 11, but the State cannot impose substantial burden on exercise of religion.”<sup>295</sup> A substantial burden is one that somehow compels or pressures the individual to violate a tenet of his faith.<sup>296</sup>

The Act does not substantially burden the free exercise of Catholic providers, who may argue that the Act forces them to choose between accepting government funds subject to the State’s conditions, and their statutory right and religious obligation to refuse to participate in the performance of an abortion.<sup>297</sup> Although the Washington State Supreme Court recognized the coercive effect of a monetary burden when it diminishes the value of church assets,<sup>298</sup> it has held that a law does not

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also look to the reasoning of opinions construing the Free Exercise Clause of the First Amendment for persuasive guidance.”); Katie Hosford, Comment, *The Search for a Distinct Religious-Liberty Jurisprudence Under the Washington State Constitution*, 75 WASH. L. REV. 643, 655 (2000) (“[T]he court’s current test is virtually identical to the federal strict scrutiny test under *Sherbert*.”).

293. *First United Methodist Church of Seattle v. Hearing Exam’r for the Seattle Landmarks Pres. Bd.*, 129 Wash. 2d 238, 246, 916 P.2d 374, 378 (1996).

294. Horton, *supra* note 221, at 766.

295. *City of Woodinville v. Northshore United Church of Christ*, 166 Wash. 2d 633, 645, 211 P.3d 406, 411 (2009).

296. *State v. Motherwell*, 114 Wash. 2d 353, 361, 788 P.2d 1066, 1070 (1990).

297. WASH. REV. CODE § 9.02.150 (2014).

298. *First United Methodist Church of Seattle*, 129 Wash. 2d at 249, 916 P.2d at 380 (“While not all financial burdens have a coercive effect on the practice of religion, gross financial burdens violate the right to free exercise. ‘Designation of First Covenant’s church so grossly diminishes the value of the Church’s principal asset that it impermissibly burdens First Covenant’s right to free exercise of religion.’” (citations omitted) (quoting *First Covenant Church of Seattle v. City of Seattle*, 120 Wash. 2d 203, 220, 849 P.2d 174, 183–84 (1992))).

impose a substantial burden when the government refuses to provide financial assistance for individuals to better exercise their religious beliefs.<sup>299</sup> The difference being that, in the first instance, the law acts as a prior restraint<sup>300</sup> to the practice of religion.<sup>301</sup> In the second, the claimant's own financial trouble creates the burden, rather than the government.<sup>302</sup> In other words, as in *Rust*, when the government merely withholds funds, it does not actually place an obstacle in the individual's path, and thus does not create a coercive effect.<sup>303</sup> To be sure, in applying *Sherbert* to the denial of unemployment benefits, the U.S. Supreme Court held that "[w]here the state conditions receipt of an important benefit upon conduct proscribed by a religious faith . . . a burden on religion exists."<sup>304</sup> But the Court has typically limited this reasoning to the unemployment benefit context where the importance of the benefit makes the pressure to forego a particular practice unmistakable.<sup>305</sup> In the instance of government support for the provision of healthcare, the Act simply does not place that kind of pressure on Catholic providers. The Act does not function as a kind of prior restraint, nor does the importance of funding rise to the level of unemployment benefits. Unwilling providers can avoid triggering the Act by segregating their funds so that no state money is used for maternity care.

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299. *Witters v. State Comm'n for the Blind*, 112 Wash. 2d 363, 372, 771 P.2d 1119, 1123 (1989) ("In the present case, the Commission's denial of vocational aid to the [applicant] did not compel or pressure him to violate his religious beliefs. . . . The Commission's decision may make it financially difficult, or even impossible, for [applicant] to become a minister, but this is beyond the scope of the free exercise clause." (quoting *Witters v. State Comm'n for the Blind*, 102 Wash. 2d 624, 631, 689 P.2d 53, 57 (1984)); see also *Sherbert v. Verner*, 374 U.S. 398, 412 (1963) (Douglas, J., concurring) ("The fact that government cannot exact from me a surrender of one iota of my religious scruples does not, of course, mean that I can demand of government a sum of money, the better to exercise them.").

300. A prior restraint is a "governmental restriction on speech or publication before its actual expression." BLACK'S LAW DICTIONARY 1232 (8th ed. 2007).

301. *Open Door Baptist Church v. Clark Cnty.*, 140 Wash. 2d 143, 181–82, 995 P.2d 33, 53 (2000) ("Prior restraint on religious exercise has been highly suspect at least since the time the United States Supreme Court told municipalities over half a century ago they could not require religious colporteurs to pay a license tax as a condition to the pursuit of their activities, even if the license ordinance were facially nondiscriminatory.").

302. *Bob Jones Univ. v. United States*, 461 U.S. 574, 603–04 (1983) ("Denial of tax benefits will inevitably have a substantial impact on the operation of private religious schools, but will not prevent those schools from observing their religious tenets."); *Witters*, 112 Wash. 2d at 371–72, 771 P.2d at 1123.

303. See *Rust v. Sullivan*, 500 U.S. 173, 201–02 (1991).

304. *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 141 (1987) (citing *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 717–18 (1981)).

305. See *Hobbie*, 480 U.S. at 139–40; *Thomas*, 450 U.S. at 717–18; *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).



This does not impair their ability to receive government assistance to fund the rest of their operation. Although the inability to use government funds for maternity care is a slight inconvenience, it is not a substantial burden.

Unwilling doctors, on the other hand, may have a legitimate claim that the Act substantially burdens their exercise of religion. To illustrate, consider the previous Part's hypothetical: A public hospital district and a Catholic healthcare provider contract for the construction and operation of a new healthcare facility that will provide a full range of maternity care. Under the terms of the agreement, the public hospital district will contribute over ninety percent of the funding for the project, but the Catholic provider will retain ultimate ownership and control. Although that facility could refuse to participate in the performance of an abortion under RCW 9.02.150, doing so would void the contract because it would prevent the State from fulfilling its statutory obligation under the Act.<sup>306</sup> Suppose instead that the provider accepts the State's conditions—which does not burden the provider's free exercise—and agrees to provide referrals at its facility. The provider's doctors could arguably decline to give the abortion referrals and information under RCW 9.02.150,<sup>307</sup> but opting out would force the healthcare facility to alter staffing decisions to ensure that a willing physician was always working. This could result in the termination of the unwilling doctor as a cost-cutting measure.<sup>308</sup> Pressure that forces an employee to choose between her job and violating a tenet of her faith is a substantial burden on the exercise of religion.<sup>309</sup> Having found a coercive effect on doctors, the next step is to subject the law to strict scrutiny.

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306. See *infra* Part II.C.

307. See WASH. REV. CODE § 9.02.150 (2014) (providing that “[n]o person . . . may be required . . . to *participate* in the performance of an abortion if such person . . . objects to so doing” (emphasis added)). The argument would be that referral qualifies as participation.

308. See *Stormans Inc. v. Selecky*, 844 F. Supp. 2d 1172, 1177 (W.D. Wash. 2012). Note that in *Stormans*, this pressure existed only because the pharmacy needed one pharmacist on duty at a time. *Id.* As objecting pharmacists could opt out of the delivery rule, the pharmacy had to staff two pharmacists to accommodate the objection. *Id.* This incentivized the pharmacy to replace the unwilling pharmacist with a willing pharmacist. *Id.* This problem could be easily avoided in a larger healthcare facility, where more than one physician is required at a time.

309. See *id.* at 1176–77, 1199.

*B. The Reproductive Privacy Act Furthers the State's Compelling Interests in Health and Safety, and Ensures that Women Have the Opportunity to Make an Autonomous, Informed Choice*

To satisfy the first prong of strict scrutiny, the State must demonstrate that the law furthers a compelling government interest.<sup>310</sup> It is well established under Washington law that the government has a compelling interest in furthering the health and safety of its residents.<sup>311</sup> Ensuring that women wishing to terminate their pregnancies have access to abortion directly furthers this interest.<sup>312</sup> Despite the prevalence of birth control, in 2006, forty-nine percent of pregnancies in Washington were unplanned,<sup>313</sup> and the majority of women who had an abortion were using contraceptives during the time in which they became pregnant.<sup>314</sup> This is especially true for low-income and minority women. According to a 2006 study, between 1994 and 2001, the unintended pregnancy rate in the lowest income bracket was four times higher than in the upper income bracket.<sup>315</sup> Hispanic and black women were two and three times, respectively, more likely than white women to have an unintended pregnancy.<sup>316</sup> The disproportionate pregnancy rates result from contextual dynamics such as poverty, racism, and the structure of health services.<sup>317</sup>

These unwanted pregnancies have numerous undesirable health outcomes: “inadequate or delayed initiation of prenatal care, use of

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310. *First United Methodist Church of Seattle v. Hearing Exam'r for the Seattle Landmarks Pres. Bd.*, 129 Wash. 2d 238, 250, 916 P.2d 374, 380 (1996).

311. *See* *Backlund v. Bd. of Comm'rs of King Cnty. Hosp. Dist. 2*, 106 Wash. 2d 632, 642, 724 P.2d 981, 987 (1986) (“In the area of health and safety, governmental interests often override individual objections to regulations relating thereto.”); *City of Sumner v. First Baptist Church of Sumner, Wash.*, 97 Wash. 2d 1, 9, 639 P.2d 1358, 1363 (1982) (“It is also generally conceded that there is a valid state interest in applying reasonable health, fire and safety standards to private, religious schools.”); *State ex rel. Holcomb v. Armstrong*, 39 Wash. 2d 860, 864, 239 P.2d 545, 548 (1952) (“Here the public interest threatened is the health of all of the students and employees of the university. It may be lawfully protected.”).

312. *See* John Santelli et al., *The Measurement and Meaning of Unintended Pregnancy*, 35 PERSP. ON SEXUAL & REPROD. HEALTH, Mar./Apr. 2003, at 94, 95 (describing the health consequences associated with a lack of abortion access), available at <http://www.guttmacher.org/pubs/journals/3509403.pdf>.

313. Lawrence B. Finer & Kathryn Kost, *Unintended Pregnancy Rates at the State Level*, 43 PERSP. ON SEXUAL & REPROD. HEALTH, June 2011, at 78, 81 tbl.1, available at <http://www.guttmacher.org/pubs/psrh/full/4307811.pdf>.

314. Cohen, *supra* note 180, at 8, 9.

315. Finer & Kost, *supra* note 313, at 78.

316. *Id.*

317. Santelli et al., *supra* note 312, at 97.

tobacco and alcohol during pregnancy, premature birth, low birth weight, lack of breast-feeding, and negative physical and mental health outcomes among children.”<sup>318</sup> Unintended pregnancies that result in live births are associated with physical abuse and violence—both during pregnancy and the twelve months before conception—“and with household dysfunction and exposure to psychological, physical or sexual abuse during the woman’s childhood.”<sup>319</sup> Further, not having access to abortion exacerbates these conditions. “In countries where abortion is illegal and unsafe, unintended pregnancy is a major contributor to maternal morbidity and mortality. Abortion is estimated to have caused 400,000 of the 700,000 deaths resulting from unintended pregnancy worldwide between January 1995 and December 2000.”<sup>320</sup> In the United States, where abortion is legal, abortion-related mortality and morbidity are less common than birth-related mortality and morbidity.<sup>321</sup>

In addition to an interest in health and safety, the State has a compelling interest in ensuring that women can make an informed decision, unencumbered by exterior pressures. Courts recognize a state interest in protecting the fundamental right of choice.<sup>322</sup> They have also identified a compelling interest in ensuring that a woman’s choice is well informed.<sup>323</sup> The Privacy Act directly furthers these interests by preventing the State from influencing the decision making process, and by increasing access to abortion information and counseling so that women are familiar with the abortion procedure and know that state funding is an option for those who qualify.<sup>324</sup> Accordingly, the Act furthers the State’s compelling interest in health and safety and in ensuring that women make an informed, autonomous decision.

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318. *Finer & Kost*, *supra* note 313, at 78.

319. *Santelli et al.*, *supra* note 312, at 95.

320. *Id.*

321. *Id.*

322. *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 767 (1994) (recognizing the state’s interest in protecting “a woman’s freedom to seek lawful medical or counseling services in connection with her pregnancy”); *Bering v. SHARE*, 106 Wash. 2d 212, 229–30, 721 P.2d 918, 929 (1986) (“Given this court’s previous commitment to personal privacy, protection of [the] right [of choice], even from private invasion, constitutes a compelling State interest . . .” (citations omitted)).

323. *See supra* note 277 and accompanying text.

324. *See generally* WASH. REV. CODE § 9.02.160 (2014) (requiring that the State provide substantially equivalent abortion care).

C. *The Reproductive Privacy Act Uses the Least Restrictive Means*

To survive strict scrutiny, once the State demonstrates its compelling interest, it must also show that the “means chosen to achieve its compelling interest are necessary and the least restrictive available.”<sup>325</sup> The Washington State jurisprudence interpreting this requirement is relatively undeveloped. The most concrete principle to emerge from the Washington cases is that the least restrictive means requirement does not require the State to create an all-out religious exemption to accommodate free exercise.<sup>326</sup> In other words, the regulation must be the least restrictive imposition on religion that can still satisfy the compelling government interest.<sup>327</sup> The State need not subrogate its interest to accommodate the religious belief.<sup>328</sup> For example, in *State v. Motherwell*,<sup>329</sup> three religious counselors were convicted of violating RCW 26.44.030(1), which required them to report incidents of suspected child abuse.<sup>330</sup> The counselors, who were told about three separate incidents in the course of counseling,<sup>331</sup> argued that the statute interfered with their ability to counsel their congregation.<sup>332</sup> In holding that the State used the least restrictive means, the Court noted that the State was only requiring individuals to report child abuse, not take any steps to prevent it.<sup>333</sup> Nevertheless, exempting religious officials from the reporting requirement would inhibit the State’s fulfillment of its compelling interest of preventing child abuse.<sup>334</sup>

The *Motherwell* decision follows directly from the Supreme Court’s decision in *United States v. Lee*.<sup>335</sup> In that case, the Court denied the constitutional challenge of an Amish sole proprietor who claimed that the imposition of the social security tax violated his free exercise rights and those of his Amish employees.<sup>336</sup> In denying the farmer’s claim, the

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325. *First Covenant Church of Seattle v. City of Seattle*, 120 Wash. 2d 203, 227, 840 P.2d 174, 187 (1992).

326. *See Open Door Baptist Church v. Clark Cnty.*, 140 Wash. 2d 143, 167, 995 P.2d 33, 46 (2000).

327. *State v. Motherwell*, 114 Wash. 2d 353, 365, 788 P.2d 1066, 1072 (1990).

328. *Id.* at 365–66, 788 P.2d at 1072–73.

329. *Id.* at 353, 788 P.2d 1066.

330. *Id.* at 355, 788 P.2d at 1067.

331. *Id.* at 356, 788 P.2d at 1067.

332. *Id.* at 362, 788 P.2d at 1070–71.

333. *Id.* at 366, 788 P.2d at 1073.

334. *Id.*

335. 455 U.S. 252 (1982).

336. *Id.* at 254.

Court accepted the burden the social security system placed on Lee's religion.<sup>337</sup> Nonetheless, the burden was essential to accomplish the government's overriding interest because the tax system would not function if various denominations could object to paying taxes.<sup>338</sup> Thus, under *Lee*, the state need not accommodate religious conduct to the extent that the accommodation "would radically restrict the operating latitude of the legislature."<sup>339</sup>

The Reproductive Privacy Act uses the least restrictive means. The Act potentially burdens doctors' religious exercise through the referral requirement. Although doctors could arguably opt out of the referral requirement through RCW 9.02.150, doing so could force a facility to alter staffing decisions, which may result in the firing of an objecting doctor. The State could alleviate the burden on doctors by waiving the requirement that it only provide funding to providers that also provide referrals, even if the provider itself does not have a free exercise claim. The question is whether Washington could satisfy its interest without the referral. The answer is no. First and foremost, without the referral, the State could not meet its statutory obligation to provide substantially equivalent abortion care under RCW 9.02.160.<sup>340</sup> Moreover, granting an exemption would undermine the State's interest. The Catholic Healthcare Directives forbid abortion or abortion referral in all circumstances.<sup>341</sup> Given the ubiquity of Catholic healthcare in the Washington market, allowing doctors to opt out of providing referrals would create the "myriad exemptions" that so troubled the Court in *Lee*.<sup>342</sup> When the state's success depends on the administration of a comprehensive, uniform system, it need not grant religious exemptions if doing so would destroy that uniformity.<sup>343</sup> That is the case here. Granting an exemption that could encompass over forty percent of the market would undermine the State's interest. The Washington State Constitution does not require the State to handcuff itself in order to

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337. *Id.* at 257.

338. *Id.* at 259–60.

339. *Id.* at 259 (quoting *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961)).

340. *See supra* Part II.C.

341. *See* U.S. CONFERENCE OF CATHOLIC BISHOPS, ETHICAL AND RELIGIOUS DIRECTIVES FOR CATHOLIC HEALTH CARE SERVICES 26 (2009), available at <http://www.usccb.org/issues-and-action/human-life-and-dignity/health-care/upload/Ethical-Religious-Directives-Catholic-Health-Care-Services-fifth-edition-2009.pdf>; Erik Eckholm, *Bishops Sued Over Anti-Abortion Policies at Catholic Hospitals*, N.Y. TIMES (Dec. 2, 2013), [http://www.nytimes.com/2013/12/03/us/lawsuit-challenges-anti-abortion-policies-at-catholic-hospitals.html?\\_r=0](http://www.nytimes.com/2013/12/03/us/lawsuit-challenges-anti-abortion-policies-at-catholic-hospitals.html?_r=0).

342. *Lee*, 455 U.S. at 260.

343. *See id.*

accommodate religious beliefs. Accordingly, the Act passes strict scrutiny under the Washington Constitution. It furthers a compelling government interest in health and ensuring women make an informed choice. Additionally, the Act utilizes the least restrictive means because accommodating religious objectors would not only undermine the State's interest, it would cause the State to violate the Act.

## CONCLUSION

In response to the federal limitations on a woman's right of choice, Washington enacted the Reproductive Privacy Act. It addresses concerns that selective appropriation of state resources may influence a woman's choice. Accordingly, the Act provides that, any time the State provides maternity care, it must also provide substantially equivalent abortion care. It also forbids the State from discriminating against the right of choice.

Although the Act was enacted in 1992, it has only been interpreted in one Washington Attorney General opinion, which left many interpretive issues open. The lack of answers has been troubling, especially in recent years, with the growth of Catholic healthcare in the state. Many of Washington's public hospital districts, which are subject to the Act, are considering agreements with Catholic providers that may cut off access to state resources for abortion. This Comment seeks to interpret the Reproductive Privacy Act and provide guidance for courts in assessing whether the State has met its statutory obligation under the Act. Mainly, it seeks to answer questions left unanswered by the Attorney General opinion—especially what constitutes substantially equivalent abortion care, and how to harmonize RCW 9.02.160 and RCW 9.02.100(4).

In addition, this Comment's interpretation of the Act will survive a free exercise challenge. It argues that potential plaintiffs would only be entitled to deferential *Smith* scrutiny in a First Amendment challenge. Accordingly, plaintiffs would likely proceed under the Washington Constitution. Applying strict scrutiny, the Comment argues that the Act has a coercive effect on doctors' religious exercise. The Act, however, likely passes strict scrutiny because it furthers a compelling interest in health and ensuring women make an informed choice, and uses the least restrictive means.