Indiana House Bill 1337’s Effect on Access to Abortion

**Thesis**

Indiana House Bill 1337 is an unconstitutional attempt to limit a woman’s right to an abortion in Indiana. The bill is the product of a conservative think tank, which has fostered a series of similar bills in conservative leaning states across the nation. The most prominent of which is Texas House Bill Two (HB2) a challenge to which has made its way through the federal court system and now is being debated by the U.S. Supreme Court. The outcome of this case will, in large part, decide the fate of Indiana House Bill 1337. The pro-life forces that support the Indiana bill have failed to consider the consequences of such a bill on Indiana citizens or more realistic approaches to the abortion concern.

**Introduction**

Indiana House Bill 1337 was signed by Indiana governor Mike Pence on March 24, 2016 and will now become the law in the state of Indiana effective July 1, 2016, as organized under Indiana Code 16-34-2-1. The bill mirrors other bills introduced in conservative leaning states in the last couple of years. Texas passed their notorious House Bill Two (HB2) in 2013 and Oklahoma passed Senate Bill 1848 in April of 2014 both of which, like the new Indiana law, are based in large part on “The Abortion Providers’ Privileging Act”. The Americans United for Life drafted this model language (AUL). The (AUL) drafted the language carefully and provided it to conservative legislators in various states in an attempt to push an anti-abortion agenda that would endure
constitutional scrutiny. The laws drawn up by conservative legislatures that regulate abortions are in pursuit to change abortion clinic standards such as the provision that any doctors who give abortions must be admitted by the hospital and as an excuse they say it is “protecting women’s health.” In reality, they are just trying to make it more difficult for women to receive abortions by cutting down on the amount of providers. The Indiana law will prohibit a woman’s ability to obtain an abortion by “holding doctors liable if a woman has an abortion solely because of objections to the fetus’s race, sex or a disability, like Down syndrome.” This could scare doctors who give abortions and make them much more cautious about who they give abortions, which might seem like a good thing but also could make it more difficult for women to access an abortion provider. This is also a negative because it causes patients to not have honest conversations with their doctors.

“Seeing them all in one place, that is very striking,” said Dawn Johnsen, an Indiana University law professor. “It’s like the kitchen sink: Everything that isn’t already in the law. And the law is already really restrictive.” Professor Johnsen went on to say it is “a clear attempt to interfere and harm and chill doctors’ willingness to perform abortions.” (Smith)

Indiana has now become one of only two states in America to make it a illegal to allow an abortion due to a diagnoses of Down’s syndrome or similar disabilities. The Indiana law requires the presence of the pregnant woman at least eighteen hours prior to an abortion procedure to be informed of procedural risks and available assistance from the physician. This information is consistent, excepting the time constraints, with the requirements of other medical procedures. However, the law continues to require, what opponents consider to be ‘shaming the woman’, the physician in minimum eighteen hour
time frame to inform the patient of the probable gestational age of the fetus, a picture of a fetus, dimensions of a fetus and information on the potential survival of an unborn fetus at that stage, acknowledge that the fetus can feel pain at or before twenty weeks, and offer fetal ultrasound imaging and auscultation of the fetal heart tone if the heart tone is audible. The woman is then required to sign in writing if she refuses the imaging and auscultation. (Indiana Code 16-34-2-1) Repercussions of this law include putting constraints on the doctor/patient relationship and the confidentiality of that relationship, a woman’s financial ability to meet the requirements, and the disregard for a woman’s personal choice for her own medical care. A woman seeking an abortion cannot disclose the reason to her doctor if that reason is considered discriminatory under the law. If a woman has an abortion after she finds out the baby is disabled the doctor is at risk. Any hint that the doctor might get that the fetus’ disability is the woman’s sole reason to get an abortion; the doctor would be subject to the law. The bill also requires that the women make a choice to deal with the remains of the fetuses by either burial or cremation. It does not, however, stop a woman from getting an abortion ‘just because she wants to’. (Smith)

The restrictions of the new Indiana law will have negative consequences to Indiana citizens by limiting their access to abortions. Women who state they seek an abortion under any of the discriminatory terms will need to travel out of state to achieve that medical service. That, combined with the new law’s minimum eighteen-hour consultation requirements, will force women to incur additional costs of travel. The law will have a large constitutional challenge to overcome that has already played out to a large degree with regard to the similar Texas law. The private sector push back will likely
be similar to what Indiana faced with the passage of the religious objections bill, perceived by many as anti-gay. The proper policy on the abortion issue is not to put up legal roadblocks to abortion, but to offer more funding and programs for poor, single mothers.

**General Legal Rules and Authority**

Constitutional abortion jurisprudence began with the 1973 decision of *Roe v. Wade*. Contrary to some misperceptions, however, *Roe* did not constitutionalize abortion on demand. Rather, *Roe* set up a trimester system whereby in the third trimester, states could regulate and even ban abortions. Nevertheless, *Roe* required that these abortion bans include an exception for “the preservation of the life or health of the mother.” As of 1973, the line between the second and third trimester was roughly equivalent to viability. Due to improving medical technology, however, the age of the viability occurs earlier and earlier. In the 1992 case of Planned Parenthood v. Casey, the Supreme Court replaced the trimester system with a distinction made at viability. Today, prior to viability, states may not place an “undue burden” on a mother’s choice to obtain an abortion. After viability, however, states may prohibit abortions as long as they provide an exception for the health and life of the mother. Finally, in the 2000 case of *Stenberg v. Carhart*, although limited in its application to partial birth abortion bans, the “Supreme Court strongly implies that a mental health exception is not required in the post-viability context.” (80 Notre Dame L. Rev. 465, Nov. 2004)

The Indiana law tests the constraints of the U.S. Supreme Court’s precedent on when an abortion can be restricted. Critics of the Indiana law suggest that it will prevent abortions prior to a fetus’ age of 20 weeks, which is unconstitutional because a women
has the unrestricted right to have an abortion before a fetus is viable. Prior to the bill’s passage in Indiana, the Indianapolis Star interviewed Elizabeth Nash. Elizabeth Nash is a reporter for a reproductive rights group called the Guttmacher Institute and she states that the new law is unconstitutional and it is likely to be overturned by the Supreme Court.

“What the Supreme Court has said is that the states cannot ban abortions before viability, and these potentially would ban some abortions before viability. The court has never said that the woman has to give a reason for seeking an abortion, so these types of bans are in conflict with the Supreme Court,” said Nash. (Wang)

The relevant legal test to determine if the Indiana law is constitutional is currently being debated and is likely to have a new interpretation within a year. All of the state laws that were patterned on the language from “The Abortion Providers’ Privileging Act” attempt to push the limits of the constitutional standard established by *Roe v. Wade* and based on the 5th and 14th Amendments to the Constitution that standard prohibits states from placing an “undue burden” on a woman’s right to an abortion before viability. The Texas law (HB2), which is very similar to the Indiana law, has made its way to the U.S. Supreme Court. The case of *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 1001, involves a lawsuit by an abortion provider against John Hellerstedt, the Commissioner of the Texas Department of State Health Services. A federal district court judge in Texas stayed the enforcement of the Texas law only to be overturned in large part by the Federal Court of Appeals. The Court of Appeals ruling found almost all of the Texas law to be constitutional. The U.S. Supreme Court has heard argument on the case and was preparing to deliberate it when Justice Antonin Scalia passed away earlier this year. This has left advocates, both for and against the law, holding their breath. It is widely accepted
that the Court prior to Scalia’s death would be split 4-4 between the conservatives and liberals with Justice Kennedy providing the swing vote. It appeared Justice Kennedy was critical of the Texas law during oral argument. With the death of Justice Scalia, one of the most conservative members of the Court, and an almost guaranteed vote to uphold the Texas law, the outcome is less certain. President Obama would like to appoint a liberal leaning judge but he is being blocked by a conservative congress. If the Court decides the case before a replacement is made, it could end in a standstill depending on what Justice Kennedy does. This will, in effect, uphold the Texas law since the Court of Appeals decision will stand. If congress is successful in blocking the President’s appointment until after the next President takes office, the outcome of the Hellerstedt case, the Texas law, and in turn, Indiana’s law will center on whom that next President will be. A republican will make a conservative appointment and a democrat will make a liberal appointment. Whomever the judge is, will of course have his or her own opinion on what constitutes an undue burden on a woman’s right to choose, but it’s likely predictable given his or her political affiliation. In short, it’s difficult to pinpoint where the constitutional interpretation of this area of the law will end up. The issue of access to abortion is being debated at the highest levels of government and action is inevitable one way or the other.

**Effect of Indiana House Bill 1337 on Its Citizens**

If we take, by way of an example, a woman of limited financial means in rural Indiana that has a desire for an abortion, it’s obvious that the new Indiana law puts an undue burden on her ability to obtain an abortion.

According to the Guttmacher Institute, in 2011, “9,430 women obtained abortions in Indiana, producing a rate of 7.3 abortions per 1,000 women of reproductive age. Some
of these women were from other states, and some Indiana residents had abortions in other states, so this rate may not reflect the abortion rate of state residents. Abortions in Indiana represent 0.9% of all abortions in the United States.” (Guttmacher) “As of April 14, 2016, there are six licensed abortion centers in Indiana.” (Lee) The new Indiana law requirements on abortion providers will have a similar effect on the law as in Texas where the restrictions drove down the number of abortion clinics from roughly 40 to about 10. (Smith) If Indiana’s law has a similar effect, 75% of abortion providers will be lost, leaving Indiana with only one to two service providers. This will have the obvious consequence of women having to travel much further, having to travel and take off work or school two separate days, and face much longer waiting times for appointments. Given the fact that abortion must be completed before 20 weeks in the majority of cases, and many women don’t know of their pregnancy until they’ve missed a menstrual cycle, which could be as far as eight weeks into the pregnancy, the limitation on abortion providers will drastically reduce these women’s options to obtain that abortion which runs afoul of the constitutional prohibition against placing an undue burden on the woman’s right to choose.

This law has brought up lots of controversy on how the state is not paying enough attention to the women who have to pay for their child’s disability and how forcing a woman to carry on her pregnancy could be a detriment on that mother’s life and bank account. The state also does not offer to put more money towards facilities that take care of the disabled after the mother has passed. Sue Braunlin, co-president of the Indiana Religious Coalition for Reproductive Justice, says it best, “It’s going to drive up infant mortality and suffering. It will cause bankruptcies that end marriages and disrupt
families. It does not take into account the amount of resources that are needed to care for a baby with severe disabilities.” (Wang)

**Conclusion**

It is likely that a democrat will win the presidency and the Supreme Court will be more liberal leaning so therefore the Texas law will be struck down in whole or in part. That will be quickly followed by a challenge to the Indiana law, which will be supported by the new Supreme Court precedent on the issue. The Indiana law will then also be struck down.

If it is agreed that abortion is not an ideal form of contraception, other solutions and/or assistance needs to be put in place. It’s questionable if lawmakers are ‘pro-life’ or simply ‘pro-birth’ by forcing unwanted births while at the same time cutting social program funding. Lawmakers are making it impossible for women to abort fetuses based on disability or other discriminatory reasons. This will certainly increase the number of unwanted babies requiring expensive care and treatment. Before criminalizing any abortions, laws and funding should have been put in place for healthcare and long-term treatment options for these babies, expansion of and increased funding for orphanages, increased support for foster care, education on how to care for a special needs child, reduction in adoption costs, and free daycare for single moms. Education on how to prevent pregnancy should be made more prevalent and contraceptives need to be affordable and more widely available/accessible. Lawmakers are doing everything they can to make it harder to get an abortion and not enough to make it easier to raise a newborn baby.
Bibliography


