31, 1999, at 1A.

n10 Ron Nissimov, Court-Appointed Doctors Declare Woman, Fetus Dead, Hous. Chron., Aug. 14, 1999, at 33A.

n11 Hanson, supra note 1.

n12 See Advance Directives Act § 1.02, Tex. Health & Safety Code Ann. § 166.049 (Vernon 2001) (stating that life- support cannot be removed from a pregnant patient).

n13 See infra note 16 (listing the states that have pregnancy exceptions to their living will statutes).

n14 California was the first state to enact a living will statute when it enacted the Natural Death Act in 1976. Natural Death Act, ch. 1439, § 1, 1976 Cal. Stat. 6478 (repealed 1999); see also Gregory Gelfand, Living Will Statutes: The First Decade, 1987 Wis. L. Rev. 737, 739 n.3 (setting forth the statutory citations for every living will statute in effect as of 1987 in order of enactment). Gelfand's article also gives an excellent review of the status of the living will statutes, and a comparison between them, a decade after the first one was penned.

n15 See Bretton J. Horttor, A Survey of Living Will and Advanced Health Care Directives, 74 N.D. L. Rev. 233, 239-92 (1998) (providing brief descriptions of every state's living will or advanced-health-care-directive statutes); see also Gelfand, supra note 14, at 739 n.3 (listing the statutes of the states in chronological order by date of enactment as of 1987).

n16 See Natural Death Act § 4, Ala. Code § 22-8A- 4(e) (LexisNexis 1997 & Supp. 2004) (indicating that the advance- health-care directive of a pregnant patient does not have effect when the doctor knows the patient is pregnant); Health Care Decisions Act § 1, Alaska Stat. § 13.52.055(b)(4) (2004) (prohibiting the living will of a pregnant woman from taking effect if "it is probable that the fetus could develop to the point of live birth if the life-sustaining procedures were provided"); Arkansas Rights of the Terminally Ill Act or Permanently Unconscious Act § 6(c), Ark. Code Ann. § 20-17- 206(c) (2000 & Supp. 2003) (prohibiting the living will of a pregnant patient to be given effect if "the fetus could develop to the point of live birth with continued application of life- sustaining treatment"); Colorado Medical Treatment Decision Act § 1, Colo. Rev. Stat. § 15-18-104(2) (2004) (prohibiting a pregnant woman's living will from being given effect if a medical examination shows the fetus to be viable and, to a reasonable degree of certainty, capable of developing to live birth if the mother is given continued life support); An Act Concerning Death With Dignity § 5, Conn. Gen. Stat. Ann. § 19a-574 (West 2003) (making the protections of a living will inapplicable to pregnant women); Delaware Death with Dignity Act § 1, Del. Code Ann. tit. 16, § 2503(j) (2003) (prohibiting life- sustaining treatment from being withdrawn from a pregnant patient if "it is probable that the fetus will develop to be viable outside the uterus with the continued application of a life- sustaining procedure"); Natural Death and Medical Consent Act, ch. 45, 2005 Idaho Sess. Laws 380 (to be codified at Idaho Code Ann. § 39-4510) (providing a form that must be used when writing a living will that includes a provision that does not give effect to the directive if the declarant is pregnant, but also allowing for the use of an alternate form, as long as all of the elements of the form are included); Illinois Living Will Act § 3(c), 755 Ill. Comp. Stat. Ann. 35/3-3(c) (West 1992) (giving the living will of a pregnant woman no effect if the physician determines "it is possible that the fetus could develop to the point of live birth with the continued application of death delaying procedures"); Living Wills and Life-Prolonging Procedures Act § 11(d), Ind. Code Ann. § 16-36-4-8(d) (LexisNexis 1993) (nullifying the effect of a living will declaration by a pregnant patient); Life-Sustaining Procedures Act § 7, Iowa Code Ann. § 144A.6(2) (West 1997) (refusing to give effect to a living will if the patient is pregnant and "the fetus could develop to the point of live birth with continued application of life-sustaining procedures"); Natural Death Act § 3, Kan. Stat. Ann. § 65-28,103(a) (2002) (prohibiting the living will of a pregnant patient, as

diagnosed by the attending physician, to be given effect); Kentucky Living Will Directive Act § 5, Ky. Rev. Stat. Ann. § 311.629(4) (LexisNexis 2001) (requiring a pregnant patient to remain on life support regardless of whether she had executed a living will "unless, to a reasonable degree of medical certainty," the attending physician and one other physician have certified that "the procedures will not maintain the woman in a way to permit the continuing development and live birth of the unborn child, will be physically harmful to the woman or prolong severe pain which cannot be alleviated by medication"); Adult Health Care Decisions Act (Minnesota Living Will Act) § 13 § 1, Minn. Stat. Ann. § 145B.13(3) (West 2005) (providing that a living will must not be given effect if the patient is pregnant and "the fetus could develop to the point of live birth with continued application of life-sustaining treatment"); Mo. Ann. Stat. § 459.025 (West 1992) (stating that the declaration will have no effect if the patient is pregnant); Montana Rights of the Terminally Ill Act § 12, Mont. Code Ann. § 50-9-106(6) (2004) (prohibiting life support from being removed from a pregnant patient "so long as it is probable that the fetus will develop to the point of live birth with continued application of life-sustaining treatment"); Rights of the Terminally Ill Act § 8(3), Neb. Rev. Stat. § 20-408(3) (1997) (requiring pregnant patients to remain on life support "so long as it is probable that the fetus will develop to the point of live birth with continued application of life-sustaining treatment"); Uniform Act on Rights of the Terminally Ill § 9(4), Nev. Rev. Stat. Ann. § 449.624(4) (LexisNexis 2005) (requiring pregnant patients to remain on life support if "it is probable that the fetus will develop to the point of live birth with continued application of life-sustaining treatment"); An Act Relative to Living Wills N.H. Rev. Stat. Ann. § 137-H:14(I) (2005) (prohibiting a pregnant patient's living will from being given effect if the attending physician knows she is pregnant); Health Care Directives § 10, N.D. Cent. Code § 23-06.5-09(5) (Supp. 2005) (prohibiting removal of life support from a pregnant woman unless "such health care will not maintain the principal in such a way as to permit the continuing development and live birth of the unborn child or will be physically harmful or unreasonably painful to the principal or will prolong severe pain that cannot be alleviated by medication"); Modified Uniform Rights of the Terminally Ill Act § 1, Ohio Rev. Code Ann. § 2133.06(B) (LexisNexis 2002) (requiring that life support not be withdrawn from a pregnant patient unless the attending physician, "to a reasonable degree of medical certainty", determines "the fetus would not be born alive"); Oklahoma Rights of the Terminally Ill or Persistently Unconscious Act § 8(C), Okla. Stat. Ann. tit. 63, § 3101.8(C) (West 2004) (stating that the advanced directive will not be operative if the patient is known to be pregnant); Advance Directive for Health Care Act § 5, 20 Pa. Cons. Stat. Ann. § 5414(a) (West Supp. 2005) (voiding a pregnant woman's health care directive unless it can be determined "to a reasonable degree of medical certainty" that prolonged life-sustaining measures "(1) will not maintain the pregnant woman in such a way as to permit the continuing development and live birth of the unborn child; (2) will be physically harmful to the pregnant woman; or (3) would cause pain to the pregnant woman which cannot be alleviated by medication"); Rights of the Terminally Ill Act § 1, R.I. Gen. Laws § 23- 4.11-6(c) (2001) (voiding the declaration of a pregnant patient if "it is probable that the fetus could develop to the point of live birth with continued application of life sustaining [sic] procedures"); Death with Dignity Act § 5(B), S.C. Code Ann. § 44-77-70 (2002) (rendering ineffective a pregnant patient's declaration for the entire course of the patient's pregnancy); An Act to Provide for Living Wills § 10, S.D. Codified Laws § 34-12D-10 (2004) (requiring life sustaining treatment to continue for pregnant patients with directives unless, "to a reasonable degree of medical certainty," the attending physician and one other physician determine that "such procedures will not maintain the woman in such a way as to permit the continuing development and live birth of the unborn child or will be physically harmful to the woman or prolong severe pain which cannot be alleviated by medication"); Advance Directives Act § 1.02, Tex. Health & Safety Code Ann. § 166.049 (Vernon 2001) (stating that life support cannot be removed from a pregnant patient); Personal Choice and Living Will Act § 1, Utah Code Ann. § 75-2-1109 (1993) (voiding the directive of a pregnant patient to be removed from life-support); Natural Death Act § 4, Wash. Rev. Code Ann. § 70.122.030(1) (West 2002) (setting forth in the form suggested for living wills a provision that the directive will have no effect if the declarant's physician knows the declarant is pregnant); Wis. Stat. Ann. § 154.07(2) (West 1997 & Supp. 2004) (voiding the declaration of a pregnant patient). Prior to the Governor's signing of the Health Care Decisions Act, the Alaska Attorney General issued an opinion stating that section 18.2.040(c) "is constitutionally problematic," as it may interfere with a woman's right to choose during the first two trimesters of pregnancy. 1986 Alaska Op. Att'y Gen. 523, available at 1986 WL 81138 (citing Roe v. Wade, 410 U.S. 113, 164-65 (1973)).

n17 Ala. Code § 22-8A-4(e) (LexisNexis 1997 & Supp. 2004); Conn. Gen. Stat. Ann. § 19a-574 (West 2003); Natural Death and Medical Consent Act, ch. 45, 2005 Idaho Sess. Laws 380 (to be codified at Idaho Code Ann. § 39-4510); Ind. Code Ann. § 16-36-4-8(d) (LexisNexis 1993); Kan. Stat. Ann. § 65- 28,103(a) (2002); Ky. Rev. Stat. Ann. § 311.629(4) (LexisNexis 2001); Mo. Ann. Stat. § 459.025 (West 1992); N.H. Rev. Stat. Ann. § 137-H:14(I) (2005); N.D. Cent. Code § 23-06.5-09(5) (Supp. 2005); Ohio Rev. Code Ann. § 2133.06(B) (LexisNexis 2002); Okla. Stat. Ann. tit. 63, § 3101.8(C) (West 2004); 20 Pa. Cons. Stat. Ann. § 5414(a) (West Supp. 2005); S.C. Code Ann. § 44-77-70 (2002); S.D. Codified Laws § 34-12D-10 (2004); Tex. Health & Safety Code Ann. § 166.049 (Vernon 2001); Utah Code Ann. § 75-2-1109 (1993); Wash. Rev. Code Ann. § 70.122.030(1) (West 2002); Wis. Stat. Ann. § 154.07(2) (West 1997 & Supp. 2004).

n18 Ky. Rev. Stat. Ann. § 311.629(4) (LexisNexis 2001); accord N.D. Cent. Code § 23-06.4-07(3) (Supp. 2005); 20 Pa. Cons. Stat. Ann. § 5414(a) (West Supp. 2005); S.D. Codified Laws § 34-12D-10 (2004); see also Ohio Rev. Code Ann. § 2133.06(B) (LexisNexis 2002) (permitting the living will to be given effect if "the fetus would not be born alive"). These five states have a general prohibition on giving effect to the living wills of pregnant patients. However, these states have attempted to soften their pregnancy exceptions, seemingly making the prohibition more humane to the mother by allowing the living will to be given effect if the fetus will not be born alive, or if keeping the mother alive will injure her, or result in prolonged pain that is not treatable with medication. This does not, however, alleviate the constitutional problems inherent in a general prohibition.

n19 See Colo. Rev. Stat. § 15-18-104(2) (2004) (deeming the living will void if a medical evaluation determines that "the fetus is viable and could with a reasonable degree of medical certainty develop to live birth with continued application of life-sustaining procedures").

n20 Del. Code Ann. tit. 16, § 2503(j) (2003); accord Alaska Stat. § 13.52.055(b)(4) (2004); Ark. Code Ann. § 20- 17-206(c) (2000); 755 Ill. Comp. Stat. Ann. 35/3(c) (West 1992); Iowa Code Ann. § 144A.6(2) (West 1997); Minn. Stat. Ann. § 145B.13 (West 2005); Mont. Code Ann. § 50-9-106(6) (2004); Neb. Rev. Stat. § 20-408(3) (1997); Nev. Rev. Stat. Ann. § 449.624(4) (LexisNexis 2005); R.I. Gen. Laws § 23- 4.11-6(c) (2001).

n21 See Ariz. Rev. Stat. Ann. § 36-3262 (2003) (providing an optional living will form allowing a woman to leave directions if she is found to be pregnant; this language is not mandatory and can be changed at the declarant's discretion); Health Care Advance Directives § 2, Fla. Stat. Ann. § 765.113(2) (West 2005) (requiring a court order or express delegation from the patient to the surrogate or proxy in order for removal of "life-prolonging procedures from a pregnant patient prior to viability"); Ga. Code Ann. § 31-32-8(a)(1) (2001) (requiring the living will to expressly provide for removal from life support if the patient is pregnant and that the fetus not be viable); Health Care Decision Act § 2, Md. Code Ann., Health-Gen. § 5-603 (LexisNexis 2005) (providing language in the sample forms that allows for specific instructions should the declarant be pregnant); New Jersey Advance Directives for Health Care Act § 4, N.J. Stat. Ann. § 26:2H-56 (West 1996) (permitting "[a] female declarant [to] include in an advance directive executed by her, information as to what effect the advance directive shall have if she is pregnant").

n22 N.H. Rev. Stat. Ann. § 137-H:14(I). Nothing in this chapter shall be construed to condone, authorize, or approve the withholding of life-sustaining procedures from or to permit any affirmative or deliberate act or omission to end the life of a pregnant woman by an attending physician when such physician has knowledge of the woman's pregnant condition. Id. New Hampshire is not alone however. See supra note 17 (listing other states that automatically void the living will if the declarant is pregnant).

n23 See Roe v. Wade, 410 U.S. 113, 164-65 (1973) (holding that states lack a sufficient interest to regulate abortion prior to the end of the first trimester); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 860, 873 (1992) (rejecting the rigid Roe trimester framework, but adhering to the principle "that viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions").

n24 § 137-H:2(III).

n25 See DiNino v. State ex rel. Gorton, 684 P.2d 1297, 1300-01 (Wash. 1984) (finding no justiciable issue because the plaintiff was neither pregnant nor in a terminal condition, therefore concluding "[t]his case presents a hypothetical, speculative controversy"); Gabrynowicz v. Heitkamp, 904 F. Supp. 1061, 1063 (D.N.D. 1995) (finding that since the female plaintiff was not pregnant, did not want to become pregnant, was in good health, and was not incompetent, there was "no 'realistic danger' that the statutes [would] directly injure the plaintiff[]," and therefore the plaintiff did not have standing and the matter was not ripe for review).

n26 Planned Parenthood of N. New England v. Heed, 390 F.3d 53, 56 n.2 (1st Cir. 2004) (citing Singleton v. Wulff, 428 U.S. 106, 117 (1976)), cert. granted sub nom. Ayotte v. Planned Parenthood of N. New England, 125 S. Ct. 2294 (May 23, 2005) (No. 04-1144).

n27 Id. (quoting Planned Parenthood of Idaho, Inc. v. Wasden, 376 F.3d 908, 917 (9th Cir. 2004)).

n28 See In re Caulk, 480 A.2d 93, 95 (N.H. 1984) (citing Comm'r of Corr. v. Myers, 399 N.E.2d 452, 455-56 (Mass. 1979)) (finding a constitutional right to privacy).

n29 Opinion of the Justices, 509 A.2d 749, 751 (N.H. 1986) (quoting parenthetically Carter v. Craig, 90 A. 598, 600 (N.H. 1914)); see N.H. Const. pt. II, art. 5 ("[F]ull power and authority are hereby given and granted to the said general court, from time to time, to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, ordinances, directions, and instructions, either with penalties, or without, so as the same be not repugnant or contrary to this constitution, as they may judge for the benefit and welfare of this state . . . .").

n30 N.H. Const. pt. I, art. 3.

n31 " Live Free or Die," the New Hampshire state motto, was penned by General John Stark on July 31, 1809. N.H. Rev. Stat. Ann. § 3:8 (2003).

n32 Id. § 137-H:1 to :16 (originally enacted as An Act Relative to Living Wills, ch. 137-h, 1985 N.H. Laws 319, amended by An Act Relative to Living Wills, ch. 239, 1991 N.H. Laws 312). The statute reads in part: 137-H:1 Purpose and Policy. The state of New Hampshire recognizes that a person has a right, founded in the autonomy and sanctity of the person, to control the decisions relating to the rendering of his own medical care. In order that the rights of persons may be respected even after they are no longer able to participate actively in decisions about themselves, and to encourage communication between patients and their physicians, the legislature hereby declares that the laws of this state shall recognize the right of a competent person to make a written declaration instructing his physician to provide, withhold, or withdraw life-sustaining procedures in the event such person is in a terminal condition or is permanently unconscious. . . . . 137-H:14 Exceptions. I. Nothing in this chapter shall be construed to condone, authorize, or approve the withholding of life- sustaining procedures from or to permit any affirmative or deliberate act or omission to end the life of a pregnant woman by an attending physician when such physician has knowledge of the woman's pregnant condition. Id. §§ 137-H:1, :14.

n33 Id. § 137-H:1.

n34 See Gelfand, supra note 14, at 739 n.3 (listing the states with living will statutes, as of November 1987, in chronological order).

n35 Id. at 778, 778-79 n.169 (listing, as of 1987, the states with outright pregnancy exceptions in chronological order by date of enactment). Note that several of the states listed in that footnote have since repealed the laws cited therein, or have revised the language. See, e.g., Natural

Death Act, ch. 1439, § 1, 1976 Cal. Stat. 6478, 6478 (repealed 1999).

n36 In re Caulk, 480 A.2d 93, 95 (N.H. 1984) (emphasis added) (alteration in original) (quoting Comm'r of Corr. v. Myers, 399 N.E.2d 452, 455-56 (Mass. 1979)) (applying the holding of the Massachusetts Supreme Judicial Court to the New Hampshire Constitution to find a right to privacy); see also N.H. Const. pt. I, art. 2 ("All men have certain natural, essential, and inherent rights-among which are, the enjoying and defending life and liberty; acquiring, possessing, and protecting, property; and, in a word, of seeking and obtaining happiness. Equality of rights under the law shall not be denied or abridged by this state on account of race, creed, color, sex or national origin."); N.H. Const. pt. I, art. 3 ("When men enter into a state of society, they surrender up some of their natural rights to that society, in order to ensure the protection of others; and, without such an equivalent, the surrender is void.").

n37 N.H. Rev. Stat. Ann. § 137-H:2(III) (2005).

n38 Id. § 137-H:3.

n39 Id. § 137-H:4.

n40 Gelfand, supra note 14, at 758-59.

n41 § 137-H:4 (requiring that the living will must be acknowledged pursuant to the Uniform Acknowledgement Act, N.H. Rev. Stat. Ann §§ 456:1 to :15 (2004), or the Uniform Recognition of Acknowledgements Act, N.H. Rev. Stat. Ann § 456-A:1 to :9 (2004)).

n42 See Id. § 456:4 (2004) (including notary publics among those authorized to acknowledge an instrument in New Hampshire); see also § 456-A:1 (giving the requirements for recognizing notarial acts performed outside of New Hampshire). On January 1, 2006, the Uniform Acknowledgement Act and the Uniform Recognition of Acknowledgements Act will be repealed and replaced by the Uniform Law on Notorial Acts. H.B. 672, 159th Leg., Reg. Sess. (N.H. 2005).

n43 Compare id. § 551:1 (1997) ("Every person of the age of eighteen years and married persons under that age, of sane mind, may devise and dispose of their property, real and personal, and of any right or interest they may have in any property, by their last will in writing."), with id. § 137-H:3 (2005) ("A person of sound mind who is 18 years of age or older may execute at any time a document commonly known as a living will, directing that no life-sustaining procedures be used to prolong his life when he is in a terminal condition or is permanently unconscious.") The only difference in the requirement of who can be a testator and who can execute a living will is that persons who are married and under the age of eighteen are permitted to execute testamentary wills, but are not permitted to execute living wills. This indicates a level of inconsistency as to how New Hampshire regards the competency of minors: married minors are competent enough to execute a will disposing of their property at death, but they are not competent enough to execute living wills. For a discussion of the inconsistency in prohibiting minors from executing living wills, see generally Lisa Anne Hawkins, Note, Living-Will Statutes: A Minor Oversight, 78 Va. L. Rev. 1581 (1992).

n44 Compare § 551:2(IV) (1997) (requiring only that two or more witnesses attest, in the testator's presence, to the testator's signature), with N.H. Rev. Stat. Ann. § 137-H:4 (2005) (requiring, in addition to subscription by at least two witnesses, acknowledgement pursuant to the Uniform Acknowledgement Act, N.H. Rev. Stat. Ann §§ 456:1 to :15 (2004), or the Uniform Recognition of Acknowledgements Act, N.H. Rev. Stat. Ann § 456-A:1 to :9 (2004)). The additional requirement under the living will statute may have a chilling effect on the execution of living wills in New Hampshire, since in order for one to be valid it must be acknowledged by "I. A judge of the supreme court, superior court, probate court or municipal court; II. A clerk or deputy clerk of a court having a seal; III. A commissioner or register of deeds; IV. A notary public; or V. A justice of the peace." Id. § 456:4. For persons who are unable to meet these requirements, their living wills will be invalid. Id. § 137-H:4 (2005).

n45 Id. § 137-H:7.

n46 Id.

n47 Id. § 551:13 (1997).

n48 Gelfand, supra note 14, at 766.

n49 Compare § 137-H:7 (2005) (setting forth the only three ways by which a living will may be revoked), with N.C. Gen. Stat. § 90-321(e) (2003) (providing that a person may revoke a living will "in any manner by which he is able to communicate his intent to revoke, without regard to his mental or physical condition").

n50 See Gelfand, supra note 14, at 768 (explaining that some formality in revocation of living wills can prevent unintended revocation).

n51 See id. at 766 ("[O]nce an incompetent has revoked a living will, he will be unable to reinstate it."). Compare N.H. Rev. Stat. Ann. § 137-H:3 (2005) (stating that a person must be "of sound mind" in order to execute a living will), with id. § 137-H:7 (setting forth the circumstances under which a living will may be revoked, but not making any mention of the person's competence at the time of revocation).

n52 Compare §§ 137-H:1 to :16 (living will statute), with id. §§ 551:1 to :16 (1997) (testamentary- will statute).

n53 Id. § 137-H:14(I).

n54 Id. § 137-H:14(II).

n55 Id. § 137-H:3.

n56 Roe v. Wade, 410 U.S. 113, 152-53 (1973).

n57 Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 278 (1990).

n58 Roe, 410 U.S. at 152-53.

n59 Roe, 410 U.S. at 164; see also U.S. Const. amend XIV, § 1, cl. 2 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

n60 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 860, 873 (1992).

n61 See Roe, 410 U.S. at 164 (referring to the Texas statute that criminalized abortion at any stage in pregnancy).

n62 See N.H. Rev. Stat. Ann. § 137-H:14(I) (2005) (nullifying a woman's living will when her attending physician knows she is pregnant).

n63 Roe, 410 U.S. at 164; cf. Casey, 505 U.S. at 873 (holding that the state has an interest in the fetus and can regulate so as to make sure the decision to abort is an informed one).

n64 Casey, 505 U.S. at 873.

n65 Id. at 860; Roe, 410 U.S. at 164-65.

n66 Casey, 505 U.S. at 874.

n67 See Black's Law Dictionary 6 (8th ed. 2004) (defining abortion as "[a]n artificially induced termination of a pregnancy for the purpose of destroying an embryo or [a] fetus").

n68 See Webster's New International Dictionary of the English Language 6 (2d ed. 1950) (defining abortion as "[a]nything that fails to attain full development, or that ceases to progress before it is matured or perfect; a complete failure"). In Roe, the Supreme Court held that states must allow for abortion when the fetus is viable "for the preservation of the life or health of the mother." Roe, 410 U.S. at 165. However, the Supreme Court's dictate in Roe does not support the argument that the "life" of the mother has already passed because she is terminally ill or permanently unconscious and that maintaining her artificially in "life" in order to promote the birth of the child will neither harm nor benefit the mother. This argument should not prevail because it perpetuates the belief that the mother's life is not as important as the life of the fetus. In addition, it raises an interesting issue of whether after child birth, when the patient is no longer pregnant, the previously nullified living will is given effect thus allowing the life-sustaining measures to cease.

n69 See N.H. Const. pt. I, art. 2 ("All men have certain natural, essential, and inherent rights-among which are, the enjoying and defending life and liberty . . . ."); In re Caulk, 480 A.2d 93, 95 (N.H. 1984) (finding a state constitutional right to privacy).

n70 Roe, 410 U.S. at 164-65 (allowing a state to regulate or proscribe abortion when the fetus is viable).

n71 Id. at 165. The converse, of course, is that Roe also permits state regulation of abortion pre-viability to protect the health of the mother. See id. at 154 (noting that states may regulate to assert their interest in protecting health). It should be reiterated that the New Hampshire pregnant-woman exception does not provide for different stages of pregnancy; it treats all pregnant women alike. N.H. Rev. Stat. Ann. § 137-H:14(I) (2005).

n72 Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 278 (1990).

n73 Id. at 284.

n74 In re Quinlan, 355 A.2d 647 (N.J. 1976), cert. denied sub nom. Garger v. New Jersey, 429 U.S. 922 (1976).

n75 Id. at 663-64.

n76 Id. at 664.

n77 Roe, 410 U.S. at 164.

n78 Quinlan, 355 A.2d at 664.

n79 Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 278 (1990).

n80 See Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 873 (1992) (finding that a state is "free to enact laws to provide a reasonable framework for a woman to make a decision").

n81 The New Hampshire Legislature has failed to pass informed-consent legislation three times since Casey was decided in 1992. S.B. 466, 152nd Leg., Reg. Sess. (N.H. 1992); H.B. 1587, 155th Leg., Reg. Sess. (N.H. 1998); H.B. 1340, 158th Leg., Reg. Sess. (N.H. 2004). Another bill was introduced in the New Hampshire House during the 2005 session regarding informed consent, H.B. 399, 159th Leg., Reg. Sess. (N.H. 2005). The majority house report deemed the bill inexpedient to legislate and a roll call was initiated. The status and the full text of all of the above bills can be found at http://www.gencourt.state.nh.us/ie/billstatus/quickbill.html. But see N.H. Rev. Stat. Ann. 132:24-28 (2005) (setting forth an informed-consent requirement for minors seeking an abortion), found unconstitutional by Planned Parenthood of N. New England v. Heed, 296 F. Supp. 2d 59, 68 (D.N.H. 2003), aff'd 390 F.3d 53 (1st Cir. 2004), cert. granted sub nom. Ayotte v. Planned Parenthood of N. New England, 125 S. Ct. 2294 (May 23, 2005) (No. 04-1144).

n82 See, e.g., Gabrynowicz v. Heitkamp, 904 F. Supp. 1061, 1062-63 (D.N.D. 1995) (dismissing, on ripeness and standing grounds, a woman's claim that the North Dakota Living Will statute was unconstitutional because it prohibited medical treatment to be withdrawn from a pregnant woman with a terminal condition, unless the "medical treatment will not maintain the patient in such a way as to permit the continuing development and live birth of the unborn child or will be physically harmful or unreasonably painful to the patient or will prolong severe pain that cannot be alleviated by medication") (quoting Terminal Condition Treatment Option, ch. 309, § 7, 1989 N.D. Laws 858, 862); DiNino v. State ex rel. Gorton, 684 P.2d 1297, 1298-1300 (Wash. 1984) (dismissing, on ripeness grounds, a constitutional challenge to the Washington State provision requiring living wills to include the declaration "[i]f I have been diagnosed as pregnant and that diagnosis is known to my physician, this directive shall have no force or effect during the course of my pregnancy") (quoting Wash. Rev. Code Ann. § 70.122.030(1) (West 2002)).

n83 Gabrynowicz, 904 F. Supp. at 1063 (holding the plaintiffs' claim was not ripe and the plaintiffs had no standing because the woman was in good health, competent, not pregnant, nor did she wish to become pregnant, and "there is no 'realistic danger' that the statutes will directly injure the plaintiffs in the ways they assert"); DiNino, 684 P.2d at 1300-01 (finding that since the woman was neither pregnant nor terminally ill, there was no justiciable claim presented).

n84 Gabrynowicz, 904 F. Supp. at 1063; DiNino, 684 P.2d at 1300-01.

n85 But see Gabrynowicz, 904 F. Supp. at 1064 (indicating that a section of the living will statute could implicate some of the plaintiff's rights because it "appears to mandate medical treatment of a pregnant patient without distinguishing on the basis of fetal viability"). The pregnant-woman exception of the North Dakota code, N.D. Cent. Code § 23-06.5-09(5) (Supp. 2005), is similar to the New Hampshire pregnant-woman exception, N.H. Rev. Stat. Ann. § 137-H:14(I) (2005), except that the North Dakota statute contains a provision allowing for medical treatment to cease if the fetus will not be able to born alive or if the treatment is "harmful or unreasonably painful to the principal or will prolong severe pain that cannot be alleviated by medication." N.D. Cent. Code § 23-06.5-09(5) (Supp. 2005).

n86 See Heed, 390 F.3d at 56 n.2 (finding the plaintiffs had standing based in part on the fact that abortion providers "are routinely recognized as having standing to bring broad facial challenges to abortion statutes") (quoting Planned Parenthood of Idaho, Inc. v. Wasden, 376 F.3d 908, 917 (9th Cir. 2004)). The court also recognized that "providers routinely have jus tertii standing to assert the rights of women whose access to abortion is restricted." Id.

n87 Supra notes 1-11 and accompanying text.

n88 In re Caulk, 480 A.2d 93, 94 (N.H. 1984).

n89 Id.

n90 Id. at 97.

n91 Opinion of the Justices, 465 A.2d 484, 488 (N.H. 1983).

n92 Id. at 489. The New Hampshire Supreme Court allowed two legitimate state interests to override the mentally ill's right to refuse medical treatment: (1) "the State's interest in protecting the individual and others from harm," and (2) "the State's interest, as parens patriae, in caring for persons who are unable to care for themselves." Id. Neither of these state interests would affect a competent pregnant woman in a terminal state from exercising her right to refuse treatment, since she is not under the State's guardianship and arguably more harm is being done to her by

staying alive than if she were permitted to have life-support removed.

n93 Caulk, 480 A.2d at 94.

n94 Id. at 97.

n95 See Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 279 (1990) (citing Youngberg v. Romeo, 457 U.S. 307, 321 (1982)) (weighing the State's interest against the individual's circumstances); Caulk, 480 A.2d 93, 97 (same); Opinion of the Justices, 465 A.2d 484, 488 (same).

n96 Caulk, 480 A.2d at 97.

n97 Cruzan concluded that states may apply a clear and convincing standard of proof when a guardian seeks to have a patient in a terminal vegetative state removed from life support. Cruzan, 497 U.S. at 284. That standard would be met easily by the decision of the patient herself, as in this situation.

n98 See Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 873 (1992) (allowing states to pass laws providing "a reasonable framework" that requires women to give their informed consent before having an abortion).

n99 See Roe v. Wade, 410 U.S. 113, 164-65 (1973) (allowing state regulation of abortion to promote the health of the mother).

n100 Casey, 505 U.S. at 887.

n101 Id.

n102 Caulk, 480 A.2d at 95.

n103 See supra Part III.A (analyzing the state's interest in the fetus when a competent, conscious, pregnant woman has made the decision to

remove herself from life-support).

n104 N.H. Rev. Stat. Ann. §§ 137-H:1 to :16 (2005). Cruzan v. Director, Missouri Department of Health held that a state may require clear and convincing evidence of the patient's desire to have life-support removed before a guardian can remove the life-support. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 284-85 (1990). It seems logical that a patient's living will would provide such "clear and convincing" evidence of the patient's desires.

n105 See Caulk, 480 A.2d at 97 (finding the state's interest in preserving life "dominates" over the person's right to die when a person not dying from a terminal illness chooses to "set the death-producing agent in motion").

n106 Id.

n107 N.H. Rev. Stat. Ann. § 137-H:3 (2005).

n108 Id. § 137-H:4.

n109 See id. § 137-H:2(III) (defining a living will).

n110 Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 279 (1990).

n111 Washington v. Harper, 494 U.S. 210, 221-22 (1990) (finding that the Due Process Clause conferred "a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs" upon respondent); Vitek v. Jones, 445 U.S. 480, 488 (1980) (noting that state statutes may create liberty interests protected by the Fourteenth Amendment's Due Process Clause).

n112 Cruzan, 497 U.S. at 279 (citing Youngberg v. Romeo, 457 U.S. 307, 321 (1982)).

n113 Id. at 280-82.

n114 Id. at 284.

n115 Id. at 283.

n116 Id. at 285.

n117 Id.

n118 Id.

n119 Some state statutes specifically require the declarant to put in the living will itself her intent to be removed from life support even if she is pregnant. See, e.g., Ariz. Rev. Stat. Ann. § 36-3262 (2003) (providing the declarant with the option of making specific decisions if she is pregnant); Fla. Stat. Ann. § 765.113(2) (West 2005) (requiring express language in the directive or a court order to remove a pregnant woman from life support); Ga. Code Ann. § 31-32- 8(a)(1) (2001) (requiring the living will to make an express provision to remove the declarant from life support); see also Md. Code Ann., Health-Gen. § 5-603 (LexisNexis 2005) (providing language in the sample forms that allow for specific instructions should the declarant be pregnant). But see DiNino v. State ex rel. Gorton, 684 P.2d 1297, 1298-99 (Wash. 1984) (refusing to give effect to changed language to the model living will that would have allowed for the plaintiff to be removed from life support if she were pregnant).

n120 N.H. Rev. Stat. Ann. § 137-H:14 (2005). Unlike New Hampshire, some states do have exceptions. See, e.g., Ariz. Rev. Stat. Ann. § 36-3262 (2003) (providing an optional living will form allowing a woman to leave directions if she is found to be pregnant; this language is not mandatory and can be changed at the declarant's discretion); Fla. Stat. Ann. § 765.113(2) (West 2005) (requiring a court order or express delegation to the surrogate or proxy of the patient from the patient in order for removal of "life-prolonging procedures from a pregnant patient prior to viability"); Ga. Code Ann. § 31-32-8(a)(1) (2001) (requiring the living will to provide expressly for removal from life support if the patient is pregnant and a finding by the attending physician that the fetus is not viable).

n121 N.H. Rev. Stat. Ann. § 137-H:3 (2005).

n122 See id. (providing that the sample living will "may be, but need not be" followed "in form and substance").

n123 Id. (emphasis added).

n124 Terminal Illness Declarations, ch. 251, § 2, 1993 N.D. Laws 868, 870 (codified as amended at N.D. Cent. Code § 23-06.5-09(5) (Supp. 2005)); See Gabrynowicz v. Heitkamp, 904 F. Supp. 1061, 1062 (D.N.D. 1995) (interpreting the former version of the North Dakota statute, which included a clause in the health-care-directive form that nullified the directive if the declarant is pregnant).

n125 Gabrynowicz, 904 F. Supp. at 1064.

n126 Id.

n127 Id.

n128 See supra note 81 (discussing the New Hampshire Legislature's three failed attempts at passing an informed- consent law and providing a resource for accessing the latest proposed bill).

n129 See Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 873 (1992) (deciding that it is permissible for states "to enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning").

n130 Id. at 887.

n131 N.H. Rev. Stat. Ann. § 137-H:2(III) (2005); see supra Part III (discussing the requirements necessary to challenge the New Hampshire statute).

n132 § 137-H:3.

n133 Id. § 137-H:1.

n134 Roe v. Wade, 410 U.S. 113, 163 (1973).

n135 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 887 (1992).

n136 Cruzan, 497 U.S. at 284. The Court noted that clear and convincing evidence had been defined by the New York Court of Appeals as "proof sufficient to persuade the trier of fact that the patient held a firm and settled commitment to the termination of life supports under the circumstances like those presented," id. at 285 n.11 (quoting In re Westchester County Med. Ctr. ex rel. O'Connor, 531 N.E.2d 607, 613 (N.Y. 1988)), and by the New Jersey Supreme Court "as evidence which 'produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.'" Id. (alteration in original) (quoting In re Jobes, 529 A.2d 434, 441 (N.J. 1987)).

n137 In re Westchester County Med. Ctr., 531 N.E.2d at 613.

n138 Id. at 614.

n139 Vacco v. Quill, 521 U.S. 793, 800 (1997).

n140 See Gelfand, supra note 14, at 780 (stating that a mother in a terminal condition "wanted the child to be born (or she would have already aborted)").

n141 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 874 (1992).

n142 Id. at 887.

n143 Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 280, 284 (1990).

n144 Id. at 283.

n145 Stephanie McCrummen, Brain-Dead Va. Woman Gives Birth; Baby Appears Healthy After 3-Month Ordeal, Wash. Post, Aug. 3, 2005, at

A01.

n146 Id.

n147 Id.

n148 Id.

n149 See Roe v. Wade, 410 U.S. 113, 153 (1973) (suggesting that the physical, psychological, and social harms that can result from forcing a woman to carry a fetus to term can be addressed by preserving the woman's right to choose in consultation with her physician).

n150 Id.

n151 See, e.g., Elizabeth Carlin Benton, Note, The Constitutionality of Pregnancy Clauses in Living Will Statutes, 43 Vand. L. Rev. 1821, 1826 (1990) (asserting that some concerns present in the abortion context, such as medical harm to the woman or infliction of a difficult future, are not concerns in the living will context).

n152 N.H. Const. pt. I, art. 3.

n153 Id. pt. II, art. 5.

n154 Opinion of the Justices, 509 A.2d 749, 751 (N.H. 1986) (quoting parenthetically Carter v. Craig, 90 A. 598, 600 (N.H. 1914)).

n155 Jean Reith Schroedel, Is the Fetus a Person? A Comparison of Policies Across the Fifty States 150-51 tbl.5.5. (2000).

n156 N.H. Rev. Stat. Ann. § 132:24 to :28 (2005).

n157 See Planned Parenthood of N. New England v. Heed, 296 F. Supp. 2d. 59, 65, 68 (D.N.H. 2003) (finding unconstitutional the parental notification law for lack of an exception to the law for protecting the minor's health and imposing a permanent injunction against enforcement of the law), aff'd, 390 F.3d 53 (1st Cir. 2004), cert. granted sub nom., Ayotte v. Planned Parenthood of N. New England, 125 S. Ct. 2294 (May 23, 2005) (No. 04-1144).

n158 See supra note 81 (providing citations for the four failed bills that proposed an informed decision-making law, including the citation to the most recently proposed bill in the 2005 legislative session).

n159 Amanda Parry, Remembering the Example She Set, Concord Monitor (N.H.), Feb. 15, 2005, at A-1.

n160 Rachel Roth, Making Women Pay: The Hidden Costs of Fetal Rights 124 (2000) (citation omitted).

n161 Id.

n162 See, e.g., April L. Cherry, Roe's Legacy: The Nonconsensual Medical Treatment of Pregnant Women and Implications for Female Citizenship, 6 U. Pa. J. Const. L. 723, 740-50 (2004) (considering the effect of pregnancy exceptions on the subordination of women and their status as second-class citizens); Katherine A. Taylor, Compelling Pregnancy at Death's Door, 7 Colum. J. Gender & L. 85, 138-64 (1997) (taking a macroscopic view of how pregnancy exceptions infringe upon a woman's status in society); Timothy J. Burch, Note, Incubator or Individual?: The Legal and Policy Deficiencies of Pregnancy Clauses in Living Will and Advance Health Care Directive Statutes, 54 Md. L. Rev. 528, 560 (1995) (identifying the need as a society "to change laws that indiscriminately deny half our population individual rights long protected by common-law and the Constitution").

n163 Taylor, supra note 162, at 138-39.

n164 Cherry, supra note 162, at 750 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 928-29 (1992) (Blackmun, J., concurring in part and dissenting in part); see also Taylor, supra note 162, at 163 ("The pregnancy restrictions similarly enforce a double standard for the citizenship status of men and women.").

n165 Taylor, supra note 162, at 149-50 (internal quotation marks omitted).

n166 Id. at 159.

n167 Cherry, supra note 162, at 742.

n168 Roe v. Wade, 410 U.S. 113, 163 (1973).

n169 Cherry, supra note 162, at 742.

n170 Taylor, supra note 162, at 149-51 (internal quotation marks omitted).

n171 Id. at 152-53.

n172 Id. at 155.

n173 See Kristin A. Mulholland, Note, A Time to Be Born and a Time to Die: A Pregnant Woman's Right to Die with Dignity, 20 Ind. L. Rev. 859, 873 (1987) ("Once delivery is completed, the mother may be allowed to die naturally.").

n174 Id.

n175 Benton, supra note 151, at 1826-27.

n176 Roe v. Wade, 410 U.S. 113, 153 (1973).

n177 Id.

n178 Id.; Benton, supra note 151, at 1827 (stating that the woman's survivors would be burdened with "the financial and emotional problems of caring for a motherless child").

n179 Benton, supra note 151, at 1826-27.

n180 Roe, 410 U.S. at 153.

n181 See supra note 16 (naming the twenty-nine states that have pregnancy exceptions to their living will statutes).

n182 E.g., Colorado Medical Treatment Decision Act § 1, Colo. Rev. Stat. § 15-18-104(2) (2004) (prohibiting a pregnant woman's living will from being given effect if a medical examination shows the fetus to be viable).

n183 E.g., Ariz. Rev. Stat. Ann. § 36-3262 (2003) (providing an optional living will form allowing a woman to leave directions if she is found to be pregnant; this language is not mandatory and can be changed at the declarant's discretion); Health Care Advance Directives § 2, Fla. Stat. Ann. § 765.113(2) (West 2005) (requiring a court order or express delegation from the patient to the surrogate or proxy in order for removal of "life-prolonging procedures from a pregnant patient prior to viability"); Ga. Code Ann. § 31-32-8(a)(1) (2001) (requiring the living will to expressly provide for removal from life support if the patient is pregnant and that the fetus not be viable); Health Care Decision Act § 2, Md. Code Ann., Health-Gen. § 5-603 (LexisNexis 2005) (providing language in the sample forms that allows for specific instructions should the declarant be pregnant); New Jersey Advance Directives for Health Care Act § 4, N.J. Stat. Ann. § 26:2H-56 (West 1996) (permitting "[a] female declarant [to] include in an advance directive executed by her, information as to what effect the advance directive shall have if she is pregnant").

n184 E.g., Kentucky Living Will Directive Act § 5, Ky. Rev. Stat. Ann. § 311.629(4) (LexisNexis 2001) (requiring a pregnant patient to remain on life support regardless of whether she had executed a living will "unless, to a reasonable degree of medical certainty" the attending physician and one other physician have certified that "the procedures will not maintain the woman in a way to permit the continuing development and live birth of the unborn child, will be physically harmful to the woman or prolong severe pain which cannot be alleviated by medication"); Health Care Directives § 10, N.D. Cent. Code § 23-06.5-09(5) (Supp. 2005) (prohibiting removal of life support from a pregnant woman unless "such health care will not maintain the principal in such a way as to permit the continuing development and live birth of the unborn child or will be physically harmful or unreasonably painful to the principal or will prolong severe pain that cannot be alleviated by medication"); Modified Uniform Rights of the Terminally Ill Act § 1, Ohio Rev. Code Ann. § 2133.06(B) (LexisNexis 2002) (requiring that life support not be withdrawn from a pregnant patient unless the attending physician, "to a reasonable degree of medical certainty", determines "the fetus would not be born alive"); Advance Directive for Health Care Act § 5, 20 Pa. Cons. Stat. Ann. § 5414(a) (West Supp. 2005) (voiding a pregnant woman's health care directive unless it can be determined "to a reasonable degree of medical certainty" that prolonged life-sustaining measures "(1) will not maintain the pregnant woman in such a way as to permit the continuing development and live birth of the unborn child; (2) will be physically harmful to the pregnant woman; or (3) would cause pain to the pregnant woman which cannot be alleviated by medication"); An Act to Provide for Living Wills § 10, S.D. Codified Laws § 34-12D-10 (2004) (requiring life sustaining treatment to continue for pregnant patients with directives unless, "to a reasonable degree of medical certainty," the attending physician and one other physician determine that "such procedures will not maintain the woman in such a way as to permit the continuing development and live birth of the unborn child or will be physically harmful to the woman or prolong severe pain which cannot be alleviated by medication").

n185 See supra notes 21, 119 and accompanying text (providing the citations of state statutes that allow declarants to include provisions in their living will that will give effect to their living will if they are pregnant).

n186 See supra note 18 and accompanying text (setting forth the citations of state statutes that allow the declarant's living will to be given effect if life-support would not result in a live birth or would prolong severe pain not able to be alleviated by medication).

n187 See, e.g., S.D. Codified Laws § 34-12D-10 (2004) (invalidating the living will of a pregnant woman unless two physicians determine to a "reasonable degree of medical certainty" that the woman's pain will be unalleviated by medication or that the fetus will not be born alive).

n188 E.g., id.

n189 S.B. 134, 159th Leg., Reg. Sess. (N.H. 2005).

n190 Id.; see also H.B. 656, 159th Leg., Reg. Sess. (N.H. 2005). The House Bill was introduced on January 26, 2005.

n191 12 State of New Hampshire, Senate Journal 251, 265-66 (2005), available at http://www.gencourt.state.nh.us/scaljourns/Journals/2005/SJ%2012.pdf.

n192 Id.

n193 Planned Parenthood of N. New England v. Heed, 390 F.3d 53, 61 (1st Cir. 2004).

n194 State v. Chaplinsky, 18 A.2d 754, 757 (N.H. 1941).

n195 Id.

n196 Id. at 762.

n197 Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942).

n198 See Roe v. Wade, 410 U.S. 113, 153 (1973) (holding that the right to privacy is large enough to encompass a woman's right to terminate her pregnancy).

n199 Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 281 (1990) (finding a Due Process right to refuse "life- sustaining medical treatment").

n200 See supra Part IV (considering various policy rationales for the pregnancy exception of the New Hampshire living will statute).

n201 Mulholland, supra note 173, at 878.