Religious Liberties

An Abortion Exception to the First Amendment?

Evaluating Recent Efforts to Regulate Speech About Pregnancy Options

*By Mark L. Rienzi**

Abortion is a highly-charged and intensely-debated issue. Partisans on both sides believe abortion implicates fundamental human rights, with abortion supporters comparing abortion prohibitions to slavery, and abortion opponents comparing a permissive abortion regime to the holocaust. Some people believe so strongly that abortion should be available that they endure protests, threats, and physical violence to provide a service they deem critically important.[1] Others refuse to refer or provide for abortions under any circumstances.

This intense debate extends to virtually every aspect of the abortion controversy. For example, the two sides strongly dispute the history of abortion, and particularly whether it was a crime at common law.[2] They disagree about the scientific facts concerning abortion, such as at what stage a fetus suffers pain during an abortion,[3] or whether abortion can result in adverse health consequences such as breast cancer, future difficulty having children, and psychological trauma.[4] They cannot even agree on issues of language related to abortion.[5]

Not surprisingly, speakers on both sides of this intense abortion debate frequently cite to the information that supports their view. The Court in *Roe*, for example, cited to the work of historians working for NARAL in order to claim that abortion may not have been recognized as a common law crime.[6] *Roe*'s critics, of course, tell a very different story.[7] Those seeking to persuade women to have abortions cite the studies that say it does not cause breast cancer and minimize those that suggest that it does.[8] Those seeking to dissuade women from having abortions emphasize those studies that do show an increased risk of health problems, including breast cancer.[9]

What does the Constitution say about this state of affairs? That is, in the midst of this controversial and highly-charged dispute, are speakers on both sides free to believe—and to refer to—the scientific evidence they choose? Or does the Constitution permit the government to decide which set of competing evidence is "true" and to proscribe or regulate the other arguments as "false"? Can the government subject people who refuse to refer or provide for abortions to special speech restrictions? Or must it treat all speakers equally?

These issues have come into sharp relief during a recent wave of legislation focusing on pregnancy-related speech. In three jurisdictions—Baltimore, Maryland; Montgomery County Maryland; and Austin, Texas—local legislatures have enacted laws that they admit are targeted at specific speakers with whom the legislatures disagree over facts about abortion. In states from Oregon to Michigan to New York City, legislatures have considered but not yet enacted such laws.

* *Assistant Professor, The Catholic University University of America, Columbus School of Law.*

In Baltimore and Austin, individuals who wish to talk about pregnancy but refuse to refer for abortions must post prominent signs announcing their opposition to abortion. No similar requirement applies to abortion clinics, requiring them to disclose that they do not offer adoption services, or requiring them, for example, to disclose that they earn money if a woman chooses abortion, but not if she makes a different choice. In Montgomery County, speakers are required to post signs announcing that they are not licensed healthcare providers, and informing women that the County Health Director thinks they should go discuss their pregnancy with someone who is.[10] No similar requirement is imposed on unlicensed counselors at abortion clinics.

Generally speaking, these laws are defended by their proponents as necessary to protect women from what they view to be "false and misleading" speech about abortion. Proponents argue that false speech is beyond the protection of the First Amendment, that pregnancy-related speech restrictions are judged under a special standard announced in *Planned Parenthood v. Casey*, and that pregnancy-related speech is commercial speech.

In my view, each of these arguments fails. The government has no power to decide that one side of the abortion debate is "true" and the other side is "false," particularly in the face of competing scientific evidence. Nor did *Casey* establish an abortion exception to the First Amendment, giving governments greater power to regulate speech about abortion than other topics. And the vast majority of speech targeted by these laws is not commercial at all, but is provided as a free service, usually by people with strong religious, moral, ethical, and/or political reasons for speaking.

Ultimately, the pregnancy-related speech restrictions enacted to date are invalid for a variety of reasons. First and foremost, they are invalid on free speech grounds, because they deliberately target protected speech of a particular content (namely, speech about pregnancy), with a particular viewpoint (opposition to abortion), by particular speakers (namely "crisis pregnancy centers" or "pregnancy resource centers"), requiring the announcement of government-mandated messages, and do so because the government disagrees with the speakers about the health risks of abortion. In addition, in certain instances, they are invalid on conscience grounds, because they treat a refusal to refer for abortion as an element of a crime—in direct contradiction of state conscience laws.[11]

I. The Government Cannot Broadly Regulate Pregnancy Speech by Claiming to Find Some of It False.

Proponents of pregnancy speech regulations argue that the laws are necessary and justified as a response to the "false and misleading" past speech of pregnancy centers. This argument fails for several reasons.

First, peer-reviewed articles in prestigious medical journals provide scientific support for the three chief alleged "lies" told by the pregnancy centers—that there is a link between abortion and breast cancer, that abortion can cause subsequent fertility problems, and that abortion is linked to subsequent mental health problems.[12] What proponents of pregnancy speech restrictions frequently call "lies" are ultimately different conclusions drawn from conflicting medical evidence. For example, a 1997 study of 1.5 million Danish women that appeared in the *New England Journal of Medicine* concluded that abortion did not lead to an increase in breast cancer when judged across the entire population, but the same study showed an increase in breast cancer rates of thirty-eight percent when looking at women who had abortions in the second trimester.[13] Indeed, the American Cancer Society acknowledges that "study findings vary" on this issue.[14] Likewise, recent studies in other journals have continued suggesting a link between abortion and breast cancer,[15] and several states actually affirmatively require that women be informed of the breast cancer and other health risks in order to provide informed consent.[16] Thus, because the information provided has scientific support, and therefore cannot be inherently false and misleading, the laws cannot be justified as responses to allegedly "false and misleading" speech.[17]

In any case, speech about a different interpretation of conflicting evidence is not proscribable, because "[u]nder the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."[18] Thus it is no surprise that even while purporting to regulate the centers *because of this speech*, Montgomery County specifically acknowledged that the centers "can cite alternate studies to their clients."[19]

Third, it is well-established that the government cannot regulate present and future speech based on past legal speech.[20] Thus, just as the government cannot outlaw discussion of conflicting study results, it is also barred from regulating pregnancy counselors' speech based on their past discussions of this information.

II. *Casey* Did Not Establish an Abortion Exception to the First Amendment.

Proponents of pregnancy-speech regulations sometimes argue that the government has wide latitude to regulate speech about abortion because the Supreme Court's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[21] permitted state regulation of physician speech related to informed consent. For example, Maryland's Attorney General asserted that proposed restrictions were permissible under *Casey* and *Planned Parenthood v. Rounds*,[22] a recent appellate decision applying *Casey*.[23]

These cases, however, concerned state law requirements enacted as part of the state's regulation of the medical profession and as part of the requirement that physicians obtain informed consent before providing medical services.[24] In *Casey*, the Supreme Court held that "a requirement that a doctor give a woman certain information as part of obtaining her consent to an abortion" implicates a physician's First Amendment right not to speak, "but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State."[25] Likewise, in *Rounds*, the Eighth Circuit addressed a South Dakota requirement that physicians provide certain information to patients as part of obtaining informed consent. Among other things, the law required doctors to inform patients that "the abortion will terminate the life of a whole, separate, unique, living human being."[26] Relying on *Casey*, the court found that "while the State cannot compel an individual simply to speak the State's ideological message, it can use its regulatory authority to require a physician to provide truthful, non-misleading information relevant to a patient's decision to have an abortion."[27] The Eighth Circuit found that the required statement was permissible, noting that it was largely consistent with statements by Planned Parenthood's own experts.[28]

Any attempt to rely on *Casey* and *Rounds* to insulate the pregnancy counseling regulations fails for two reasons. First, unlike the doctors in *Casey* and *Rounds*, people talking about pregnancy are not engaged in the regulated practice of medicine. They do not seek to perform medical procedures or practice medicine—for which they would need a license from the state—but rather to *talk about* pregnancy and medical issues, for which the government cannot and does not require a license. Second, unlike the doctors in *Casey* and *Rounds*, pregnancy counselors generally are not seeking to perform surgery or any other procedure that requires them to obtain informed consent. Doctors performing medical procedures need to obtain informed consent because, absent such consent, the procedure would constitute a battery and would expose them to liability. Thus while it is entirely consistent with historical practice for state courts and legislatures to dictate the terms on which informed consent must be obtained by a doctor, these courts and legislatures have no similar role in requiring informed consent before merely *talking about* medical issues, much less as a required step before merely offering support and assistance to help someone through a pregnancy.[29] As such, their discussions of abortion are simply beyond the state regulatory powers that supported the regulations in *Casey* and *Rounds*.[30]

Most importantly, nothing in *Casey* or *Rounds* themselves suggests that those courts intended to permit governments to broadly regulate speakers whenever they discuss abortion. *Casey* does not stand for the idea that Pennsylvania could have required *everyone* talking about abortion to have the same conversation required for a doctor performing one, and *Rounds* does not mean that South Dakota can make *all speakers* refer to a human fetus as "a whole, separate, unique, living human being." These cases do not create an abortion exception to the First Amendment.

III. The Restrictions Do Not Target Commercial Speech.

Nor can these pregnancy speech regulations be defended by attempting to classify speech about pregnancy as "commercial speech." Although regulations to ensure the accuracy of commercial speech can be permissible in certain circumstances,[31] those circumstances do not apply here. As explained by the Court in *Central Hudson Gas & Electric Corp v. Public Service Commission*, the ability to regulate commercial speech extends only to "expression solely related to the economic interests of the speaker and its audience."[32] Here, the regulated pregnancy centers have no economic interests at all—they are non-profit

centers that do not charge for their services. Moreover, the primary argument against these centers is that they have a political, social, and/or religious agenda to dissuade women from seeking abortion—in other words, the exact opposite of the "solely economic" speech to which the commercial speech analysis applies.[33]

The recently proposed New York City law attempts to sidestep this inquiry by defining the regulated speakers as those who will not refer for abortion and who provide "commercially valuable pregnancy-related services."[34] But Supreme Court case law is clear—the test is not whether the speaker ever provides information or services that are "commercially valuable"—a standard that would certainly apply to much of the information in the New York Times and the Wall Street Journal—but whether the regulated speech is speech "that *proposes* a commercial transaction, which is what defines commercial speech."[35] Thus the New York law, if enacted, must also be treated as regulating non-commercial speech.

IV. Pregnancy-Related Speech Restrictions Fail First Amendment Analysis.

A. The First Amendment Generally Prohibits Government-Required Speech.

The Baltimore, Montgomery, and Austin regulations all require certain speakers discussing pregnancy to engage in government-dictated speech about their services and/or about the government's view about whether women should go talk to someone else. Generally speaking, however, the First Amendment forbids the government from requiring private citizens to engage in government-dictated speech. As the Supreme Court has explained, "the government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government."[36]

This analysis does not change merely because the required speech is purportedly factual. Rather, the Supreme Court has held that the general prohibition on forced speech applies to the exact sorts of mandatory factual statements implicated by the pregnancy speech restrictions, explaining that compelled statements of fact "burden[] protected speech" as much as compelled statements of opinion.[37] For these reasons, the Court has explained that there is no constitutionally significant difference between the standards applied to government-required factual disclaimers and those applied to government prohibitions on speech.[38]

B. The Laws Are Content-Based.

As the Supreme Court has explained, "[i]t is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys."[39] Thus while content-neutral speech restrictions can be permissible in certain circumstances, the Supreme Court has repeatedly stated that *content-based* restrictions of speech are presumptively unconstitutional.[40]

The Baltimore, Montgomery, and Austin pregnancy speech regulations are content-based because they single out speech about one and only one subject—pregnancy—for special restrictions and financial penalties. Indeed, the *only* way to determine whether a particular speaker or entity needs to post a sign is to inquire whether they wish to discuss pregnancy. If the speaker wants to discuss any other subject—including any crucially important *medical* subject, such as drug abuse, heart disease, obesity, or vaccinations—the laws would not apply. Thus the laws are content-based, and therefore unconstitutional, because their application is entirely governed by whether or not speakers discuss a single regulated topic—pregnancy. This is the essence of content-based regulation, and it is precisely what the First Amendment forbids.[41]

C. The Laws Are Viewpoint-Based.

Viewpoint discrimination is a particularly pernicious form of content discrimination. For this reason, laws that discriminate based on viewpoint are presumptively unconstitutional and essentially forbidden. As the Supreme Court has explained:

> When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.[42]

Here, the text, history, operation, and public justification for the pregnancy speech regulations confirm that they target speakers with a particular viewpoint. The laws are therefore invalid viewpoint-based speech restrictions.

First, the text of the Baltimore law is expressly viewpoint-discriminatory. The law does not apply to all discussions relating to pregnancy, nor does it apply to all discussions of pregnancy by speakers without medical licenses. Rather, it applies only to those discussions of pregnancy by a particular group of speakers who are, thus, regulated solely because they refuse to "refer or provide for abortion." By using a speaker's position on abortion to determine whether or not to regulate speech, the law is impermissibly viewpoint-based.[43]

Furthermore, pregnancy speech regulations generally have been publicly justified based on the legislature's disagreement with the substance of past speech about pregnancy. It is axiomatic that the government may not enact a restriction on speech "because of disagreement with the message it conveys."[44] Yet legislatures enacting such laws have openly admitted that the laws were designed to target particular speech by abortion opponents with which the government disagreed.[45] While these legislatures are of course free to draw their own conclusions about, for example, whether there is any link between abortion and breast cancer, they are not permitted to regulate the speech of private speakers who take a different view of the evidence.

D. The Laws Discriminate Among Speakers.

As set forth above, the history and text of the pregnancy speech restrictions confirm that they are aimed only at specified speakers. Thus, for example, even unlicensed counselors at abortion clinics remain entirely unregulated in their discussions of pregnancy, while counselors at pregnancy centers opposed to abortion are regulated. This leads pregnancy center speech regulations to another First Amendment problem: the

government is not free to decide to regulate the speech only on one side of a contentious public debate.[46]

The Supreme Court's recent decision in *Citizens United v. Federal Election Commission*, confirms that this type of speaker regulation is impermissible under the First Amendment.[47] In *Citizens United*, the Court addressed regulations on campaign-related speech by certain corporations. When explaining general principles of First Amendment law (i.e., those that apply outside the campaign finance context) the Court explained that the First Amendment does not permit the government to make such speaker distinctions:

> Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints. ***Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others.*** As instruments to censor, these categories are interrelated: Speech restrictions based on the identity of the speaker are all too often simply a means to control content.
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> ***Quite apart from the purpose or effect of regulating content, moreover, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers.*** By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice. . . . ***We find no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers***.[48]

Here, the proposed speech regulations apply only to certain speakers who wish to talk about abortion—the most contentious political and social issue of our time. In this manner, the government would be "impos[ing] restrictions on certain disfavored speakers" in precisely the way forbidden by the Court.[49] *Citizens United* makes clear that the Constitution does not permit the government to create different rules for different speakers.

V. Conclusion

For these reasons, the type of pregnancy center speech restrictions being enacted and considered by various legislatures are impermissible under the First Amendment. Yet this does not leave the government without tools to advance its legitimate interests. If a government wishes to counter pregnancy center speech about the health effects of abortion, they remain free to do so, but they must do so by speaking with their own voices, and not by forcing others to speak their message. Likewise, to the extent these governments have legitimate concerns about false advertising, actual fraud, impersonation of doctors, or the unlicensed practice of medicine, they of course retain the power to enforce their advertising, tort, and licensing laws.

Ultimately, governments may find it more difficult to target the actual wrongdoing with these laws than to simply regulate all speech by a particular group abortion opponents. Yet as the Supreme Court explained in *Riley*, the government cannot enact broad speech regulations to avoid the difficulty of finding and prosecuting the actual fraud. "If this is not the most efficient means of preventing fraud, we reaffirm simply and emphatically that the First Amendment does not permit the State to sacrifice speech for efficiency."

Endnotes

1 *See* David Barstow, *An Abortion Battle, Fought to the Death*, N.Y. Times, July 26, 2009, at A1 (discussing the life and death of abortion provider George Tiller). Dr. Tiller devoted his entire career to performing abortions, focusing particularly on late-term abortions that few other doctors will provide, and enduring bombings, death threats and multiple attempts on his life. Dr. Tiller was murdered by an abortion opponent on May 31, 2009. *Id.*

2 *Compare, e.g.*, Roe v. Wade, 410 U.S. 113, 135-136, n.26 (1973) (expressing doubt that abortion "was ever firmly established as a common law crime") *with* Lynn Wardle, *"Time Enough":* Webster v. Reproductive Health Services *and the Prudent Pace of Justice*, 41 Fla. L. Rev. 881, 985 (1989) (noting that *Roe's* suggestion that abortion was not established as a common law crime "has been thoroughly discredited"), *and* Jeffrey D. Jackson, *Blackstone's Ninth Amendment: A Historical Common Law Baseline for the Interpretation of Unenumerated Rights*, 62 Okla. L. Rev. 167, 218 (2010) ("Although Justice Blackmun's majority opinion in Roe attempted to infuse some doubt into the status of the common law crime of abortion, stating at one point that research 'makes it now appear doubtful that abortion was ever firmly established as a common-law crime even with respect to the destruction of a quick fetus,' his opinion was based on faulty history and was quickly debunked by scholars.").

3 *See, e.g.*, *The Science, Law, and Politics of Fetal Pain Legislation*, 115 Harv. L. Rev. 2010 (2002).

4 *See, e.g.*, Dolle, Daling, White, Brinton, Doody, et al., *Risk Factors for Triple-Negative Breast Cancer in Women Under the Age of 45 Years*, Cancer Epidemiology, Biomarkers & Prevention, Vol. 18(4), April 2009, at 1157 (listing abortion among "known and suspected risk factors" and showing a forty percent increased risk for "triple negative" breast cancer).

5 For example, partisans on the two sides often dispute whether to use the term "fetus," "baby," or "products of conception," and whether to call the different sides "pro-life," "anti-abortion," "pro-choice," or "pro-abortion."

6 *See Roe*, 410 U.S. at 132-135 (relying on histories by Cyril Means); *see also* Joseph W. Dellapenna, Dispelling the Myths of Abortion History 14 (2004) (noting Means' employment as NARAL's General Counsel).

7 *See* Wardle, *supra* note 2; Jackson, *supra* note 2.

8 *See, e.g.*, http://www.plannedparenthood.org/resources/research-papers/anti-choice-claims-about-abortion-breast-cancer-5095.htm (finding that studies showing a cancer link are "difficult to interpret" and "unreliable" while those rejecting a link are "rigorous").

9 *See, e.g.*, http://www.nrlc.org/news/2000/NRL03/brind.html (citing the "large and growing body of studies has demonstrated a link between a woman's decision to undergo an induced abortion and a subsequent increased risk of contracting breast cancer").

10 *See* Montgomery County, Md., Resolution No. 16-1251, Board of Health Regulation Requiring a Disclaimer for Certain Pregnancy Resource Centers, at 2 (Nov. 10, 2009), *available at* http://www.montgomerycountymd.gov/content/council/pdf/res/2010/20100202_16-1252.pdf.

11 For example, because refusal to refer for abortions is an element of the offense under Baltimore's law, the ordinance is a clear violation of Maryland's state conscience statute, which provides that a person's refusal to refer or provide for abortion "may not be a basis for . . . disciplinary or other recriminatory action." Md. Code Ann., Health-Gen. § 20-214.

12 Mads Melbye, M.D. et al., *Induced Abortion and the Risk of Breast Cancer*. New Eng. J. Med. 81, 83 (1997); Am. Cancer Soc'y, Cancer Reference Information: Is Abortion Linked to Breast Cancer?, http://www.cancer.org/Cancer/BreastCancer/MoreInformation/is-abortion-linked-to-breast-cancer (last visited Nov. 23, 2010) (acknowledging that "study findings vary" and that some studies show "a slight increase" in abortion risk); Peng Xing et al., *A Case-Control Study of Reproductive Factors Associated with Subtypes*

of Breast Cancer in Northeast China, 26 MED. ONCOLOGY 37 (2009), *available at* http://www.springerlink.com/content/60h727v546373185/.

13 *See* Melbye, *supra* note 12.

14 *See* Am. Cancer Soc'y, *supra* note 12 (acknowledging that "study findings vary" and that some studies show "a slight increase" in abortion risk). Wooley v. Maynard, 430 U.S. 705 (1977), prohibits the government from requiring forced speech to support the alleged majority view of conflicting evidence.

> The fact that most individuals agree with the thrust of New Hampshire's motto is not the test; most Americans also find the flag salute acceptable. The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable.

Wooley, 430 U.S. at 705.

15 *See* Peng Xing et al., *supra* note 12.

16 Minn. Stat. § 145.4242 (2009) (prohibiting abortions without informed consent and providing that such consent is only effective if the women is informed of "the particular medical risks associated with the particular abortion procedure to be employed including, when medically accurate, the risks of infection, hemorrhage, breast cancer, danger to subsequent pregnancies, and infertility); *see also* Tex. Health & Safety Code § 171.012 (2009) (consent only valid if woman is told of "the possibility of increased risk of breast cancer following an induced abortion and the natural protective effect of a completed pregnancy in avoiding breast cancer").

17 Similar scientific evidence exists to support the centers' claims about the physical and mental health risks of abortion, or at the very least demonstrate the existence of a legitimate medical dispute over which the government should not pass laws to penalize speakers with one view or another. *See* David M. Ferguson et al., *Abortion and Mental Health Disorders: Evidence from a 30-Year Longitudinal Study*, 193 BRIT J. PSYCHIATRY 444, 449 (2008) (finding that "women who had had abortions had rates of mental disorder that were about 30% higher than other women"). "The specific issue of whether or not induced abortion has harmful effects on women's mental health remains to be fully resolved. The current research evidence base is inconclusive—some studies indicate no evidence of harm, whilst other studies identify a range of mental disorders following abortion." The Royal College of Psychiatrists, Position Statement on Women's Mental Health in Relation to Induced Abortion, Mar. 14, 2009, *available at* http://www.rcpsych.ac.uk/member/currentissues/mentalhealthandabortion.aspx. *See also* P.S. Shah, Knowledge Synthesis Group of Determinants of Preterm/LBW Births, *Induced Termination of Pregnancy and Low Birthweight and Preterm Birth: A Systematic Review and Meta-Analysis*, 116 Brit. J. Obstetrics & Gynaecology 1425 (2009) (finding that abortion increased risks of preterm delivery and low birth weight in future pregnancies), *available at* http://www3.interscience.wiley.com/cgi-bin/fulltext/122591273/PDFSTART.

18 Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-341 (1974).

19 Montgomery County Council, Worksession Memorandum, Jan. 21, 2010, at 2.

20 *See, e.g.*, Vance v. Universal Amusement Co., 445 U.S. 308, 310-11 (1980); Ackerley Commc'ns of Mass., Inc. v. City of Somerville, 878 F.2d 513, 520-21 (1st Cir. 1989); Eller Media Co. v. Montgomery County, 795 A.2d 728, 751 (Md. App. 2002) (deeming "well-founded" the claim that the First Amendment prohibits regulation of future speech based on past lawful speech).

21 505 U.S. 833, 884 (1992).

22 530 F.3d 724, 733-34 (8th Cir. 2008).

23 Letter from Attorney General's Office to Delegate Roger P. Manno, Mar. 14, 2008, at 2-3 (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 884 (1992) and Planned Parenthood of Minn., N.D., S.D. v. Rounds, 530 F.3d 724, 733-34 (8th Cir. 2008).

24 *Id.*

25 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 884 (1992).

26 Planned Parenthood of Minn., N.D., S.D. v. Rounds, 530 F.3d 724, 735 (8th Cir. 2008)

27 *Id.*

28 *Id.* at 736.

29 For example, while Michelle Obama spends much of her time talking about medical issues related to proper diet and exercise, she is not engaged in the practice of medicine, nor could any state or local government regulate her speech by forcing her to give disclaimers about her lack of training, any biases she has related to food, and/or any stock holdings she has in food companies. Rather, the First Amendment leaves Mrs. Obama free to speak about this and any other medical issue of her choice.

30 In fact, proponents of the regulations have been exceedingly clear in explaining that the pregnancy centers are generally *not* engaged in the practice of medicine, and therefore *not* subject to the state's regulatory authority over the medical profession. *See, e.g.*, Montgomery County Council, Worksession Memorandum, Jan. 21, 2010, at 4 ("Although they discuss issues related to medical conditions (i.e., pregnancy)[, the centers] remain unregulated unless they have a licensed medical professional on staff or they perform laboratory services."); Letter from Attorney General's Office to Delegate Roger P. Manno, Mar. 14, 2008 at 2 (Pregnancy centers "are subject to no state licensing or permit requirement, and there is no agency oversight of their activities.").

31 *See, e.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980).

32 *Id.* at 561; *see also* Board of Trustees of State University of New York v. Fox, 492 U.S. 469, 482 (1989) (noting that even speech engaged in for a profit is not commercial speech if it does not "consist of speech that *proposes* a commercial transaction, which is what defines commercial speech.").

33 Nor can the government deem the centers' speech commercial simply because it is speech about a commercial enterprise, namely abortions provided for money. The Supreme Court expressly rejected this argument. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 761-62 (1976) ("[T]he speech whose contend deprives it of protection cannot simply be speech on a commercial subject. No one would contend that our pharmacist may be prevented from being heard on the subject of whether, in general, pharmaceutical process should be regulated or their advertisement forbidden."). Thus, for example, while the sale of cigarettes is undoubtedly a commercial enterprise and can be regulated as such, an anti-smoking campaign would not be. *Id.*

34 *See* New York City Council, Int. No. 371, §20-815(e) (proposed).

35 *See Fox*, 492 U.S. at 482.

36 Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781 (1988). The Court's opinion in Wooley v. Maynard, 430 U.S. 705 (1977), also is instructive. In *Wooley,* the Court considered whether New Hampshire could require citizens to use license plates with the state's motto "Live Free or Die" on them. The plaintiffs alleged that the inclusion of the motto on the required license plate forced them to engage in speech with which they disagreed. The Court began its analysis "with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Wooley*, 430 U.S. at 714 (citing Bd. of Educ. v. Barnette, 319 U.S. 624, 633-634 (1943)). The Court then explained that "a system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of "individual freedom of mind." *Wooley*, 430 U.S. at 714.

37 Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 797-798 (1988) (Prior cases "cannot be distinguished simply because they involved compelled statements of opinion while here we deal with compelled statements of 'fact': either form of compulsion burdens protected speech. Thus, we would not immunize a law requiring a speaker favoring a particular government project to state at the outset of every address the average cost overruns in similar projects, or a law requiring a speaker favoring an incumbent candidate to state during every solicitation that candidate's recent travel budget. Although the foregoing factual information might be relevant to the listener, and, in the latter case, could encourage or discourage the listener from making a political donation, a law compelling its disclosure would clearly and substantially burden the protected speech.").

38 *Id.* at 796-97 (noting that difference between compelled silence and compelled speech is "without constitutional significance").

39 Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 828-29 (1995) (citing Police Dept. of Chi. v. Mosley, 408 U.S. 92, 96 (1972)).

40 *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid.").

41 *See Rosenberger,* 515 U.S. at 828-29; *R.A.V.,* 505 U.S. at 382.

42 *Rosenberger*, 515 U.S. at 828-29.

43 Indeed, *The Washington Post* editorialized that this type of regulation "is suspect because it singles out pregnancy centers while absolving abortion clinics of any disclosure requirements regarding adoption or parenting options." Editorial, *Pregnant and In Need of Help*, Wash. Post, Nov. 23, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/11/22/AR2009112201605.html. Likewise, the Montgomery County Council staff concluded that the Baltimore approach "could violate the First Amendment's prohibition against viewpoint discrimination because it singles out for regulation only those [centers] that have a particular view of abortion." Montgomery County Council, Worksession Memorandum, Jan. 21, 2010, at 2.

44 Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

45 *See, e.g.*, Montgomery County Council, Worksession Memorandum, Agenda Item #13, Feb. 2, 2010, *available at* http://www.montgomerycountymd.gov/content/council/pdf/agenda/col/2010/100202/20100202_13.pdf (noting that the "the issue the proposed regulation is designed to address" was what the Montgomery County Council viewed as "misinformation/incomplete information" about the health effects of abortion).

46 *See, e.g.,* R.A.V. v. City of St. Paul, 505 U.S. 377, 392 (1992) (Government may not "license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules."); *see also* City of Ladue v. Gilleo, 512 U.S. 43, 51 (1994) ("[A]n exemption from an otherwise permissible regulation of speech may represent a governmental 'attempt to give one side of a debatable public question an advantage in expressing its views to the people.'") (quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 785-86 (1978)).

47 Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010).

48 *Id.* at 24-25 (emphasis added).

49 *Id.*