

# RESPECTING LEGISLATORS AND REJECTING BASELINES: REBALANCING CASEY

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## INTRODUCTION

In the last three years state legislatures have written and passed a torrent of abortion regulations across the United States.<sup>1</sup> These laws have come as pro-life politicians have taken control of many states' legislatures and executive offices.<sup>2</sup> Other contributing factors in this trend may include an increased number of people who define themselves as pro-life<sup>3</sup> and the exposure of bad actors within the abortion industry whose practices have led some to question the safety of current abortion practices.<sup>4</sup> Needless to say, many

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1 See *2012 Saw Second-Highest Number of Abortion Restrictions Ever*, GUTTMACHER INST. (Jan. 2, 2013), <http://www.guttmacher.org/media/inthenews/2013/01/02/>; *AUL's 2013 Life List: Mapping the Momentum Toward a Pro-Life America*, AMS. UNITED FOR LIFE, <http://www.aul.org/auls-life-list-2013/> (last visited Nov. 18, 2014); *Monthly State Update: Major Developments in 2014*, GUTTMACHER INST. (Sept. 1, 2014), <http://www.guttmacher.org/statecenter/updates/index.html>; Mailee R. Smith, *2011 State Legislative Report*, AMS. UNITED FOR LIFE, <http://www.aul.org/wp-content/uploads/2012/04/state-legislative.pdf> (last visited Nov. 18, 2014);

2 See Michael Barone, *The Depth & Breadth of GOP Victories*, REAL CLEAR POLITICS (Nov. 8, 2010), [http://www.realclearpolitics.com/articles/2010/11/08/gop\\_poised\\_to\\_reap\\_re\\_districting\\_rewards\\_107871.html](http://www.realclearpolitics.com/articles/2010/11/08/gop_poised_to_reap_re_districting_rewards_107871.html) (discussing the takeover by republicans during the 2010 election); Huma Khan, *Will Redistricting Be a Bloodbath for Democrats?*, ABC NEWS (Nov. 4, 2010), <http://abcnews.go.com/Politics/republicans-historic-win-state-legislatures-vote-2010-election/story?id=12049040> ("Republicans took control of at least 19 Democratic-controlled state legislatures Tuesday and gained more than 650 seats, according to the National Conference of State Legislatures."). But see Michael J. Gerhardt, *Why Gridlock Matters*, 88 NOTRE DAME L. REV. 2107 (2013) (discussing congressional gridlock in Washington, D.C.).

3 See Guy Benson, *Gallup: 58 Percent of Americans Oppose All or Most Abortions*, TOWNHALL.COM (May 10, 2013), <http://townhall.com/tipsheet/guybenson/2013/05/10/gallup-58-percent-of-americans-oppose-all-or-most-abortions-n1592505>; Lydia Saad, *More Americans "Pro-Life" than "Pro-Choice" for First Time*, GALLUP (May 15, 2009), <http://www.gallup.com/poll/118399/more-americans-pro-life-than-pro-choice-first-time.aspx>.

4 See *Abortion Doc Guilty in Woman's Death*, CBS NEWS (Feb. 20, 2001), [http://www.cbsnews.com/2100-201\\_162-273313.html](http://www.cbsnews.com/2100-201_162-273313.html); Jon Hurdle, *Doctor Starts His Life Term in Grisly Abortion Clinic Case*, N.Y. TIMES, May 15, 2013, <http://www.nytimes.com/2013/05/16/us/>

states have entered a bold era of regulations of abortion facilities, driving the market price for an abortion in many states to a level that puts many clinics out of business.<sup>5</sup>

Pro-life legislators and policymakers have developed and passed a variety of regulations, including stricter building codes for abortion clinics,<sup>6</sup> hospital admitting privilege requirements for abortion practitioners,<sup>7</sup> increased wait-

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kermit-gosnell-abortion-doctor-gets-life-term.html?\_r=0; Helen Pow, *Second 'House of Horrors' Abortion Clinic Where Doctor 'Twisted Heads off Fetus' Necks with His Bare Hands' is Investigated in Texas*, DAILY MAIL (May 16, 2013, 5:24 PM), <http://www.dailymail.co.uk/news/article-2325786/Douglas-Karpen-Second-house-horrors-abortion-clinic-investigated-Texas.html>; see also Samuel W. Calhoun, *Stopping Philadelphia Abortion Provider Kermit Gosnell and Preventing Others Like Him: An Outcome That Both Pro-Choicers and Pro-Lifers Should Support*, 57 VILL. L. REV. 1 (2012) (discussing the recent atrocities of the abortion doctor Kermit Gosnell). But see Clarke D. Forsythe & Bradley N. Kehr, *A Road Map Through the Supreme Court's Back Alley*, 57 VILL. L. REV. 45, 46 (2012) (criticizing Professor Calhoun's proposals for stopping "future Gosnells").

5 See, e.g., Laura Basset, *Planned Parenthood to Close Three Texas Clinics*, HUFFINGTON POST (July 18, 2013, 1:01 PM), [http://www.huffingtonpost.com/2013/07/18/planned-parenthood-texas\\_n\\_3617299.html](http://www.huffingtonpost.com/2013/07/18/planned-parenthood-texas_n_3617299.html) (discussing recent closure of abortion clinics as a result of new restrictions); Amanda Peterson Beadle, *Mississippi's Only Abortion Clinic Could Be Forced to Close in January*, THINKPROGRESS (Nov. 28, 2012, 4:15 PM), <http://thinkprogress.org/health/2012/11/28/1252261/mississippis-only-abortion-clinic-could-be-forced-to-close-in-january/> (same); Susan Berry, *Abortion Clinics Closing at Record Rate Nationwide*, BREITBART (Sept. 17, 2013), <http://www.breitbart.com/Big-Government/2013/09/16/Abortion-Clinics-Closing-At-Record-Rate-Nationwide> (same); Esmé E. Deprez, *Abortion Clinics Close at Record Pace After States Tighten Rules*, BLOOMBERG (Sept. 3, 2013, 8:52 AM), <http://www.bloomberg.com/news/2013-09-03/abortion-clinics-close-at-record-pace-after-states-tighten-rules.html> (same); Celina Durgin, *Stricter Standards Force Virginia's Busiest Abortion Clinic to Close*, WASH. TIMES (July 15, 2013), <http://www.washingtontimes.com/news/2013/jul/15/stricter-standards-force-virginias-busiest-abortion/?page=all> (same); Darrel Rowland & Alex Felser, *More Ohio Abortion Clinics Closing*, COLUMBUS DISPATCH (Oct. 16, 2013, 6:48 PM), <http://www.dispatch.com/content/stories/local/2013/10/16/1016-abortion-clinics-closing.html> (same); Cheryl Sullenger, *44 Abortion Clinics Closed in 2013 as Two More Close in Cleveland, Montana*, LIFE NEWS.COM (Sept. 20, 2013, 10:37 AM), <http://www.lifenews.com/2013/09/20/44-abortion-clinics-closed-in-2013-as-two-close-in-cleveland-montana/> (same).

6 See, e.g., Kathy Lohr, *Clinics Close as Texas Abortion Fight Continues*, NPR (Oct. 25, 2013, 3:27 AM), <http://www.npr.org/2013/10/25/240547579/clinics-close-as-texas-abortion-fight-continues> (discussing the effect of new building codes on abortion providers); Rachel Weiner & Antonio Olivo, *Challenge to Stricter Regulations for Virginia Abortion Clinics Moves Forward*, WASH. POST (Oct. 9, 2013), [http://articles.washingtonpost.com/2013-10-09/local/42862546\\_1\\_virginia-board-abortion-clinics-terry-mcauliffe](http://articles.washingtonpost.com/2013-10-09/local/42862546_1_virginia-board-abortion-clinics-terry-mcauliffe) (same). But see Tom Ciesielka, *California Governor Brown's New Laws Endanger Women*, CROSSMAP (Oct. 30, 2013), <http://crossmap.christianpost.com/news/california-governor-browns-new-laws-endanger-women-6131> (discussing a provision that would remove certain building code requirements in California).

7 See, e.g., *Planned Parenthood of Wis. v. Van Hollen*, No. 13-cv-465-wmc, 2013 WL 3989238, at \*2 (W.D. Wis. Aug. 2, 2013) *aff'd*, 738 F.3d 786 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 2841 (2014) (noting that plaintiff physicians did not have hospital admitting privileges within thirty miles of the clinic).

ing periods,<sup>8</sup> and restrictions on the use of medical abortions.<sup>9</sup> Judicial responses to these regulations have been mixed, though largely negative.<sup>10</sup> Despite the diversity of state abortion regulations, these laws are subject to scrutiny under the standard set forth in *Planned Parenthood of Southeast Pennsylvania v. Casey*.<sup>11</sup> Scholars and judges on all sides of the abortion issue view the undue burden standard developed in *Casey* as fraught with ambiguity and uncertainty, with an untold number of law review articles, cases, and books attempting to interpret it.<sup>12</sup> Perhaps because of the contentious nature and stakes of interpreting this standard, no consensus has arisen to allow for a unified understanding of what “undue burden” means.<sup>13</sup> As a result, judges’ and justices’ attempts at utilizing the undue burden standard have been erratic, often yielding conflicting results from state to state and circuit to circuit.<sup>14</sup> The Supreme Court has done little to clarify its previous holdings in this matter.<sup>15</sup>

This Note will investigate ways in which judges analyze the cost and accessibility of abortion services after implementation of these new state reg-

8 Kate Pickert, *What Missouri’s New Abortion Law Means for Women*, TIME (Sept. 11, 2014), <http://time.com/3329253/missouri-abortion-law-waiting-period/>.

9 A medical abortion uses prescription medication to facilitate the termination of the fetus, as opposed to a surgical abortion, where the fetus is destroyed using surgical instruments and is removed at the hospital or other facility. Many of the statutes limiting the use or sale of the medical abortion drug RU-486 have been held unconstitutional. See OHIO REV. CODE ANN. § 2919.123 (West 2014); OKLA. STAT. ANN. tit. 63, § 1-729a (West 2014).

10 See *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 951 F. Supp. 2d 891 (W.D. Tex. 2013) (striking down an admitting privileges provision in a statute while upholding others), *rev’d in part*, 748 F.3d 583 (5th Cir. 2014); see also *Van Hollen*, 2013 WL 3989238; *Planned Parenthood Se., Inc. v. Bentley*, 951 F. Supp. 2d 1280 (M.D. Ala. 2013); *Jackson Women’s Health Org. v. Carrier*, 940 F. Supp. 2d 416 (S.D. Miss. 2013) *aff’d as modified*, 760 F.3d 448 (5th Cir. 2014).

11 505 U.S. 833 (1992).

12 See, e.g., *Abbott*, 748 F.3d at 588 (noting the debate around the level of scrutiny applied to abortion cases); Khiara M. Bridges, “*Life*” in the Balance: *Judicial Review of Abortion Regulations*, 46 U.C. DAVIS L. REV. 1285 (2013) (same); Alan Brownstein, *How Rights Are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine*, 45 HASTINGS L.J. 867 (1994) (same); Emma Freeman, Note, *Giving Casey Its Bite Back: The Role of Rational Basis Review in Undue Burden Analysis*, 48 HARV. C.R.-C.L. L. REV. 279, 279 (2013) (same); Ania O. Wlodek, Note, *Legal Does Not Mean Rational: The Practicality of Treating First-Trimester Abortion Clinics the Same as Hospitals*, 18 WM. & MARY J. WOMEN & L. 395, 404 (2012) (same).

13 See, e.g., Lucy E. Hill, *Seeking Liberty’s Refuge: Analyzing Legislative Purpose Under Casey’s Undue Burden Standard*, 81 FORDHAM L. REV. 365 (2012) (addressing the divide in how courts address purpose-based challenges under the *Casey* standard).

14 See *Gonzales v. Carhart*, 550 U.S. 124, 167 (2007) (“What that burden consists of in the specific context of abortion statutes has been a subject of some question.”); compare *Tucson Woman’s Clinic v. Eden*, 379 F.3d 531, 541 (9th Cir. 2004) (concluding that the result of increased travel distances renders the law unconstitutional), with *Women’s Med. Prof’l Corp. v. Baird*, 438 F.3d 595, 605 (6th Cir. 2006) (concluding that the result of increased travel distances *does not* render the law unconstitutional), and *Greenville Women’s Clinic v. Bryant*, 222 F.3d 157, 171–72 (4th Cir. 2000) (same).

15 See *Carhart*, 550 U.S. 124; *Mazurek v. Armstrong*, 520 U.S. 968 (1997).

ulations in determining whether the new regulations constitute an undue burden. In the absence of a clear Supreme Court ruling that defines what constitutes an “undue burden” under these new regulations, judges are forced to determine inconsistent “baselines” of cost and accessibility that constitute a misreading of *Casey*. For example, a judge may reason that a certain number of women are likely to seek abortions in the coming year in their state, and that a certain percentage of those will not end up being able to access that service if a regulation goes into effect. The number of potential abortions may decrease in response to increased cost of abortions—determined in light of travel time to alternate states or locations for abortion services, or other barriers that deter a woman from seeking an abortion. The judge then makes a determination of whether that interference is “undue.” What results is an arbitrary ruling based on hypothetical percentages: while one judge might find that a twenty percent decrease in the number of abortions means the regulation is constitutional because it does not impose an undue burden, another judge might estimate that a similar regulation will result in a sixty percent decrease in the number of abortions and therefore is an undue burden. This Note will refer to these judicial estimates as “baselines,” which is an appropriate term because judges often treat the number of clinics or number of abortions that occur in a state at a given time as a kind of benchmark from which they are not willing to depart. The fundamental issue with this trend is that restricting access to abortion itself does not necessarily constitute an undue burden.

As this Note will show, the current market demand for abortions in a particular state should not drive the *Casey* undue burden standard. Rather, the *Casey* standard seeks to balance the competing interests of a woman’s constitutional right to an abortion with the state’s legitimate interest in protecting both maternal health and promoting life.<sup>16</sup> While pro-choice advocates and certain judges will promote a view of *Casey* that looks only to the number of women prevented access to abortion services or the number of clinics shut down, the Supreme Court has never ruled that there is anything sacrosanct about the current or projected number of abortions in the undue burden calculation. The unreliability and sheer guesswork of these numbers aside, no precedent supports judges seeking to set or maintain these baselines, and these judges commit extreme judicial error when they do so.

Subjective determinations of what constitutes an undue burden under *Casey* will have implications beyond the confines of the specific case at bar. By stating unconstitutional baseline minimums of acceptable abortion access,

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16 *Casey*, 505 U.S. at 872, 878 (joint opinion of O’Connor, Kennedy, and Souter, JJ.) (“[T]he Constitution does not forbid a State or city, pursuant to democratic processes, from expressing a preference for normal childbirth.” (quoting *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 511 (1989)) (internal quotation marks omitted)); *Roe v. Wade*, 410 U.S. 113, 162–64 (1973); see also *Carhart*, 550 U.S. at 157 (“The government may use its voice and its regulatory authority to show its profound respect for the life within the woman.”); *Id.* at 145 (“[T]he government has a legitimate and substantial interest in preserving and promoting fetal life . . .”).

courts will confuse the public, litigators, legislators, and other judges by improperly determining the proper inputs into the undue burden analysis. Unclear statements of the law additionally mean less persuasive precedent,<sup>17</sup> which undermines the courts' ability to uphold the rule of law. Particularly in the realm of abortion cases and the *Casey* balancing test, improper use or abuse of the standard allows courts to set precedents that will lead to a cycle of confused reasoning in later important and divisive cases. If courts regularly abuse the discretion given by *Casey*, they influence future courts' abilities to similarly abuse *Casey* and unconstitutionally deprive the states of their legitimate rights and the deference they deserve.

Part I of this Note describes the background cases leading to the Supreme Court's decision in *Casey* and the resulting undue burden standard. This Part also explains the limited circumstances in which the undue burden standard gives more definitive guidelines for judicial decisionmaking. Part II works through several federal district and appellate court cases to identify some of the underlying baseline presumptions and normative value judgments influencing judicial decisions in this area of the law. These baselines are often dispositive in determining whether a restriction on abortion is due or undue, cutting against the goodwill attempts by legislatures to make abortion as safe as possible while adhering to the Supreme Court's constitutional protection of the procedure. Importantly, this Note does not impute upon judges any bad faith or malfeasance in relation to their adjudications in this area, but rather seeks to emphasize the inherent vagueness of the undue burden standard.<sup>18</sup> Part III analyzes the impropriety of judicially created baselines and calls judges to account more clearly for their values on these matters when using the undue burden standard.

As a threshold matter, this Note does not support the undue burden standard as stated in *Casey*. While the use of a balancing test in important and controversial constitutional matters may be appropriate at times, the underlying premise of the *Casey* undue burden standard is deeply flawed. While at once stating that women should be free to decide when life begins,<sup>19</sup> the Court demands that for all states an unborn child is only a potential life, rather than an actual life, and establishes the balancing test using those unwavering parameters. States should have the authority to decide that a fetus, as an unquestionably distinct member of the human species,<sup>20</sup> is a person whose full value needs to be balanced against the liberty

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17 See generally Kurt T. Lash, *The Cost of Judicial Error: Stare Decisis and the Role of Normative Theory*, 89 NOTRE DAME L. REV. 2189 (2014) (analyzing the ways that the Court attempts to ameliorate prior judicial error).

18 See *infra* Part III.

19 *Casey*, 505 U.S. at 851 (joint opinion of O'Connor, Kennedy, and Souter, JJ.) ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.")

20 See PATRICK LEE, ABORTION AND UNBORN HUMAN LIFE 1-5 (1996); see also Robert P. George, *Embryo Ethics: Justice and Nascent Human Life*, 17 REGENT U. L. REV. 1 (2004) (discussing the arguments against the proposition that human life begins at conception).

interests of his or her mother. Such a standard would both allow state lawmakers who value unborn human life to make laws to properly defend it, while giving other states the freedom to deny the personhood and value of the unborn or instead identify situations where liberty interests are deemed more valuable than life.

## I. FROM *ROE* TO *CASEY*: THE JOURNEY FROM STRICT SCRUTINY TO UNDUE BURDEN

### A. *The Fundamental Right to Abortion: Roe v. Wade*

Abortion shifted from a predominately state-centered issue to a strongly federal matter with the 1973 Supreme Court decision of *Roe v. Wade*.<sup>21</sup> *Roe* sought to resolve the constitutionality of a Texas statute that prohibited abortion at all stages except in circumstances where abortion was necessary to save the mother's life.<sup>22</sup> Following the constitutional reasoning of privacy cases such as *Griswold v. Connecticut*,<sup>23</sup> *Eisenstadt v. Baird*,<sup>24</sup> *Loving v. Virginia*,<sup>25</sup> *Meyer v. Nebraska*,<sup>26</sup> and *Pierce v. Society of Sisters*,<sup>27</sup> the Court held that women have a fundamental right to abortion.<sup>28</sup> Limiting access to this right via regulation required a "compelling state interest" with the regulation "narrowly drawn to express only the legitimate state interests at stake."<sup>29</sup> Courts would be required to analyze abortion regulations using the rigorous strict scrutiny standard.<sup>30</sup> This right was only fully unrestricted during the first trimester when the mortality rate from abortion was lower than the mortality rate in normal childbirth.<sup>31</sup> After the first trimester the state could regulate abortion to the extent necessary to protect "maternal health."<sup>32</sup> Only after viability could the states make regulatory efforts to protect the fetal life.<sup>33</sup> Regulations to protect unborn fetal life could go so far as to prohibit all abortion after viability, "except when it is necessary to preserve the life or health of the mother."<sup>34</sup> By raising the issue of abortion to the federal level, *Roe*

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21 410 U.S. 113 (1973). See generally Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007) (analyzing the complex history and jurisprudential reaction to the *Roe v. Wade* decision).

22 *Roe*, 410 U.S. at 117–18.

23 381 U.S. 479, 485 (1965).

24 405 U.S. 438, 454–55 (1972).

25 388 U.S. 1, 12 (1967).

26 262 U.S. 390, 392 (1923).

27 268 U.S. 510, 535 (1925).

28 *Roe v. Wade*, 410 U.S. 113, 164–66 (1973).

29 *Id.* at 155–56.

30 *Id.*

31 *Id.* at 163.

32 *Id.*

33 *Id.* at 163–64.

34 *Id.*; see *Doe v. Bolton*, 410 U.S. 179, 192 (1973) (stating with regard to the health exception that "medical judgment may be exercised in the light of all factors—physical,

pushed the abortion issue to the fore of the national consciousness and sparked a debate that continues to rage today.

*B. Intermediary Cases: City of Akron, Thornburgh, and Webster*

Between *Roe* and *Casey*, the Supreme Court considered a number of cases regarding abortion, each time reaffirming the fundamental holding of *Roe*.<sup>35</sup> Three of these cases, in particular, demonstrate the development of the undue burden standard. Importantly, the meaning behind what constitutes an undue burden shifts throughout these cases, and none of the three cases sets forth a definitive definition in its holding.

In *City of Akron v. Akron Center for Reproductive Health, Inc.*,<sup>36</sup> the Court declared unconstitutional regulations requiring (1) that all second-trimester abortions take place in a hospital, (2) parental consent, (3) informed consent, (4) a 24-hour waiting period, and (5) “humane” disposal of fetuses.<sup>37</sup> Although the majority opinion used the term “significant obstacle” when discussing the hospitalization requirement, it did not mention “undue burden.”<sup>38</sup> In her dissent, however, Justice O’Connor argued against the trimester theory of *Roe*, saying that it cannot be accommodated under “sound constitutional theory.”<sup>39</sup> O’Connor linked the undue burden standard back to previous Supreme Court abortion cases and wrote “[i]n my view, this ‘unduly burdensome’ standard should be applied to the challenged regulations throughout the entire pregnancy without reference to the particular ‘stage’ of pregnancy involved.”<sup>40</sup> She concluded by expounding that abortion regulations should be acceptable if they rationally relate to a “legitimate state purpose,” so long as they do not “unduly burden” the fundamental right to abortion.<sup>41</sup> Her statements in *Akron* set the initial groundwork for the *Casey* undue burden standard, even if they did not clarify its meaning.

Dealing with a statute equivalent to the one in *Akron*, the Court similarly held the regulations at issue in *Thornburgh v. American College of Obstetricians and Gynecologists*<sup>42</sup> to be unconstitutional under *Roe*. Again, Justice O’Connor dissented from the majority opinion, retaining her views from *Akron* that the applicable standard should involve an undue burden analy-

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emotional, psychological, familial, and the woman’s age—relevant to the well-being of the patient. All these factors may relate to health.”).

35 For a more thorough analysis of *Akron*, *Thornburgh*, and *Webster*, see Freeman, *supra* note 12, at 288–89.

36 462 U.S. 416 (1983), *overruled by* Planned Parenthood Se. Pa. v. Casey, 505 U.S. 833 (1992).

37 *Id.* at 451–52.

38 *Id.* at 434.

39 *Id.* at 452 (O’Connor, J., dissenting).

40 *Id.* at 453.

41 *Id.* (citing *Maier v. Roe*, 432 U.S. 464, 473 (1977) (alteration omitted)).

42 476 U.S. 747, 772 (1986), *overruled by* Planned Parenthood Se. Pa. v. Casey, 505 U.S. 833 (1992).

sis.<sup>43</sup> She wrote: “[J]udicial scrutiny of state regulation of abortion should be limited to whether the state law bears a rational relationship to legitimate purposes such as the advancement of these compelling interests, with heightened scrutiny reserved for instances in which the State has imposed an ‘undue burden’ on the abortion decision.”<sup>44</sup> The compelling interests she referenced were “ensuring maternal health and . . . protecting potential human life.”<sup>45</sup> Under Justice O’Connor’s proposed analysis in *Thornburgh*, courts would allow all regulations to stand that rationally relate to a legitimate state purpose, including protecting the health of the mother and fetus, unless the burden on the woman was undue.<sup>46</sup> If the Court finds that an undue burden does exist, it would then use a more “exacting standard of review” in its constitutional analysis.<sup>47</sup>

Unlike *Akron* and *Thornburgh*, in *Webster v. Reproductive Health Services* the Court held that a statutory ban on the use of public resources for performance of certain abortions was not contrary to the Constitution.<sup>48</sup> Again, by finding that the law would not pose an undue burden, O’Connor wrote in her concurrence that a provision requiring an examination and tests to determine viability is constitutional.<sup>49</sup> Her concurring opinion did not yield a different result from the majority, which merely asked whether the law reasonably related to a legitimate state purpose—here a legitimate interest that an abortion not be performed on a viable fetus—and therefore found the tests to be constitutional.<sup>50</sup> Just three years later, the Court would decide *Casey*, and O’Connor would get her chance to more fully assert the undue burden standard.

### C. *The Undue Burden Standard: Planned Parenthood v. Casey*

*Casey* primarily involved an analysis of five provisions of the 1988 and 1989 amendments to the Pennsylvania abortion statute.<sup>51</sup> In a highly divided Court, a three-justice joint opinion, led by Justice O’Connor, rejected *Roe*’s trimester framework<sup>52</sup> and adopted the undue burden standard.<sup>53</sup> Mindful of cultural reliance on access to abortion services, the joint opinion reaffirmed the central holding of *Roe*<sup>54</sup> while also injecting into the constitu-

43 *Id.* at 828 (citing *Akron*, 462 U.S. at 459–66 (O’Connor, J., dissenting)).

44 *Id.* (citing *Akron*, 462 U.S. at 461–63 (O’Connor, J., dissenting)).

45 *Id.* (citing *Akron*, 462 U.S. at 461 (O’Connor, J., dissenting)).

46 *Id.* (citing *Akron*, 462 U.S. at 461–64 (O’Connor, J., dissenting)).

47 *Id.* (citing *Akron*, 462 U.S. at 467 (O’Connor, J., dissenting)).

48 492 U.S. 490, 522 (1989).

49 *Id.* at 530 (O’Connor, J., concurring).

50 *Id.* at 520 (majority opinion).

51 *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 844 (1992) (joint opinion of O’Connor, Kennedy, and Souter, JJ.).

52 *Id.* at 873.

53 *Id.* at 878.

54 *Id.* at 856, 860, 864–65 (majority opinion). Though whether the central holding of *Roe* was beyond the trimester framework is questionable, it appears that the court intended

tional balance the “life of the fetus that may become a child” throughout the length of the pregnancy.<sup>55</sup> Viability would again be the dividing line, with all laws restricting abortion before viability being subject to the undue burden standard, while leaving states free to regulate or even prohibit abortion after viability.<sup>56</sup> Additionally, a state could create regulations designed to “foster the health of a woman seeking an abortion” throughout the pregnancy as long as “they do not constitute an undue burden.”<sup>57</sup> Using the language from *Akron*, the joint opinion stated, “undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”<sup>58</sup> Absent such a substantial obstacle, a state regulation that “reasonably relate[s]” to expressing “profound respect for the life of the unborn” should be upheld.<sup>59</sup> Additionally, the joint opinion made clear:

The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it. Only where state regulation imposes an undue burden on a woman’s ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.<sup>60</sup>

In so stating, the Court indicated that incidental effects, such as increased cost in seeking abortion services, would not be sufficient to find a state regulation unconstitutional: that law must have the purpose or effect of placing a substantial obstacle in the way of a woman seeking an abortion to be found unconstitutional. Unfortunately, what makes a law meet the definition of a “substantial obstacle” is unclear.<sup>61</sup> Some guiding principles are nonetheless enunciated: “[w]hat is at stake is the woman’s right to make the ultimate decision, not a right to be insulated from all others in doing so.”<sup>62</sup>

Applying the undue burden standard, the Court upheld four amendments<sup>63</sup> to the Pennsylvania abortion statute, while striking down the spousal notification requirement as unconstitutional.<sup>64</sup> The Court’s application of the undue burden standard to each of these provisions provides minimal guidance to the meaning of substantial obstacle, although a few potential refer-

to affirm the idea that abortion is a fundamental right. What it meant for abortion to be a fundamental right, however, was clearly changed.

55 *Id.* at 846.

56 *Id.* (stating that a law which prohibits abortion after viability is permissible so long as it “contains exceptions for pregnancies which endanger the woman’s life or health”).

57 *Id.* at 878 (joint opinion of O’Connor, Kennedy, and Souter, JJ.).

58 *Id.* at 877.

59 *Id.* at 877–78.

60 *Id.* at 874.

61 *See infra* Part III.

62 *Casey*, 505 U.S. at 877 (joint opinion of O’Connor, Kennedy, and Souter, JJ.).

63 These included an informed consent provision with a 24-hour wait period; a parental consent provision with a judicial bypass procedure; a definition of medical emergency; and certain reporting requirements for abortion providers. *Id.* at 880, 887, 899, 900.

64 *Id.* at 895, 901.

ence points are established. For example, in upholding the 24-hour waiting period between being informed of the risks of abortions and the actual procedure, the Court apparently creates a lower limit on what makes an acceptable wait time for an abortion procedure.<sup>65</sup> Similarly, the Court's finding that the informed consent provision is constitutional likely creates an amount of information that abortion doctors can be required to give in all circumstances.<sup>66</sup> On the other hand, the finding that the spousal notification provision creates an undue burden likely sets an upper limit on those kinds of regulations,<sup>67</sup> so that any similar or stricter kind of spousal notification or consent provision would also be found unconstitutional. The same logic could likely be used for the other holdings in *Casey*,<sup>68</sup> though this could be somewhat complicated by the fact that similar provisions may produce varying burdens in different states.<sup>69</sup>

#### D. *Supreme Court Decisions Since Casey*

Since *Casey* the Supreme Court has taken the opportunity to speak on abortion several times, though it has made no move to overturn either the essential holding of *Roe* or the undue burden standard established in *Casey*. Instead, the Supreme Court has applied the fact-intensive undue burden inquiry in several cases, with different results. In the 1997 decision of *Mazurek v. Armstrong*,<sup>70</sup> the court upheld the constitutionality of a provision requiring that abortions be performed by physicians.<sup>71</sup> The law at issue in this case was unique in that there was only one licensed non-physician abortion practitioner in the entire state of Montana.<sup>72</sup> Since this law applied to only one practitioner, the court determined that it would barely make any difference in the availability of abortion in Montana.<sup>73</sup> Despite the prevalence of "physician only" abortion laws,<sup>74</sup> the holding in this case did not go far in clarifying the undue burden standard. Indeed, the Supreme Court had upheld the constitutionality of such laws prior to *Casey*,<sup>75</sup> and the unique circumstances

65 *See id.* at 885.

66 *Id.* at 882. *But see id.* (requiring that the information be "truthful and not misleading").

67 *Id.* at 895.

68 *See supra* notes 63–64.

69 For example, a 24-hour wait period in Texas may require a woman to take a second round trip to an abortion facility which is substantially further and more expensive than the same 24-hour wait period requirement in Rhode Island. For more analysis of this issue, see *infra* Part III.

70 520 U.S. 968 (1997).

71 *Id.* at 974–75. Again, the issue is raised whether such a provision would be valid in a state where requiring that only physicians perform abortions creates a much greater burden than the one that resulted in *Mazurek*.

72 *Id.* at 971.

73 *Id.* at 973–74.

74 *See id.* at 969 ("Similar rules exist in 40 other States in the Nation.").

75 *Roe v. Wade*, 410 U.S. 113, 165 (1973) ("The State may define the term 'physician,' as it has been employed in the preceding paragraphs of this Part XI of this opinion, to

of Montana in 1999 as only having one non-physician abortion provider limited the decision's precedential effects.

In *Stenberg v. Carhart* (*Carhart I*), the Court held a Nebraska statute prohibiting partial birth abortions unconstitutional.<sup>76</sup> The majority of that court held the Nebraska law would effectively bar a broad range of abortion procedures, making it much more difficult to receive an abortion in the second trimester<sup>77</sup> and creating an undue burden on women.<sup>78</sup> However, in the 2007 decision of *Gonzales v. Carhart* (*Carhart II*), the Court upheld the constitutionality of the Federal Partial-Birth Abortion Ban Act of 2003.<sup>79</sup> The distinction the Court drew in this case was that the Act was not so vague as to create a chilling effect on as broad a range of procedures as the law at issue in *Carhart I*, therefore it did not cause the same undue burden.<sup>80</sup> The pair of cases likely creates upper and lower limits on the amount of permissible regulation in the area of undue burden, giving lower courts clear notice that restrictions such as the Partial-Birth Abortion Ban Act will be upheld, while anything creating a burden equal or greater to that in *Carhart I*, at least in the context of partial birth abortion, will be struck down.<sup>81</sup>

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mean only a physician currently licensed by the State, and may proscribe any abortion by a person who is not a physician as so defined.”).

76 530 U.S. 914, 945–46 (2000).

77 The second trimester occurs between weeks 12–24 of a pregnancy and includes both periods of time where the fetus is viable and where the fetus is not viable. *Id.* at 924, 930.

78 *Id.* at 945–46. The main problem with the Nebraska statute was that although it was intended to target only to ban “dilation and extraction” procedures, it would also apply to and subject abortion doctors to the penalties for the far more common “dilation and evacuation” procedure. *Id.* at 943–46.

79 550 U.S. 124, 168 (2007); see 18 U.S.C. § 1531 (2012).

80 *Carhart II*, 550 U.S. at 151–52. The Court distinguished from *Carhart I* by noting the presence of anatomical landmarks, which had the effect of giving abortion doctors objective standards. Combined with a scienter requirement, the court was satisfied that the statute would not have chilling effects on doctors performing other types of abortion procedures. *Id.* at 149 (“Unlike the statutory language in [*Carhart I*] that prohibited the delivery of a ‘substantial portion’ of the fetus—where a doctor might question how much of the fetus is a substantial portion—the Act defines the line between potentially criminal conduct on the one hand and lawful abortion on the other.” (citing *Carhart I*, 530 U.S. at 922)). The Court was also concerned with the “integrity and ethics of the medical profession” and the devaluation of human life. *Id.* at 157 (citing *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997)). However, that reasoning has had little traction in other contexts as it would seem to apply to basically any abortion procedure, all of which “perverts the birth process” and devalues human life. *Id.* at 129, 157.

81 The precedential value of this information will likely be limited due to the unique issues surrounding partial birth abortion. For example, clear guidelines in the realm of partial birth abortion are unlikely to influence a court's reasoning regarding hospital admissions requirements for abortion practitioners. Additionally, as a federal statute, the Partial-Birth Abortion Ban Act likely would preempt the need for any state to pass a ban on the same kind of statutes.

## II. CASEY APPLIED: THE BASELINES GUIDING JUDICIAL DECISIONMAKING

Since the *Casey* decision in 1992, the federal courts have had to handle a steady flow of challenges to state regulations restricting abortions.<sup>82</sup> This Part investigates several recent cases in this area to analyze the underlying value judgments that judges bring to the bench in setting baselines and determining if an undue burden exists. It is appropriate to focus on the particular cases that this Part analyzes because they represent either a major circuit court decision on the matter or have been decided within the last two years and deal with the most recent wave of state legislative restrictions on abortion. These cases reflect that the undue burden has not been applied consistently across jurisdictions because the lack of a clear definition permits judges to impose differing personal values in their evaluation of the law. While state legislatures are free to allow different values to drive their laws, the uniform values of the Constitution should apply everywhere equally. At a minimum, we should demand that they apply *similarly* in all jurisdictions. After explaining that the poorly defined undue burden standard does not live up to these expectations, Part III will identify some of the key areas where these courts went wrong, or got it right, in an effort to encourage the courts to adjudicate along these lines in the future.

### A. *The Baseline Fixation: Okpalobi v. Foster*

Many courts decide undue burden cases on the basis of the current availability of access to abortion and the reduction in abortions that will likely take place if a particular restriction goes into effect. *Okpalobi v. Foster*<sup>83</sup> dealt with two Louisiana statutes<sup>84</sup> that would have made “[a]ny person who performs an abortion . . . liable to the mother of the unborn child for any damage occasioned or precipitated by the abortion.”<sup>85</sup> Such damages could not be limited by waiver however, as when read in conjunction with another law the regulation would “ensure that a physician cannot insulate himself from liability by advising a woman of the risks, physical or mental, associated with abortion.”<sup>86</sup> According to the court, opening abortion practitioners up to such great liability would have put eighty percent of the state’s abortion providers out of business.<sup>87</sup>

The court analyzed the statute by examining both its purpose and effect.<sup>88</sup> Interpreting *Casey*, the court concluded that if either the purpose

82 In addition to some state restrictions, see *Carhart II*, 550 U.S. at 168 (upholding the constitutionality of 18 U.S.C. § 1531).

83 190 F.3d 337 (5th Cir. 1999), *rev’d en banc on other grounds*, 244 F.3d 405 (5th Cir. 2001) (en banc) (reversing and remanding on procedural grounds).

84 LA. REV. STAT. ANN. § 9:2800.12 (West 2013); Woman’s Right to Know Act, LA. REV. STAT. ANN. § 40:1299.35.6 (West 2013), *invalidated by Okpalobi*, 190 F.3d at 337.

85 *Okpalobi*, 190 F.3d at 356 (quoting LA. REV. STAT. ANN. § 9:2800.12(A)).

86 *Id.* at 357.

87 *Id.*

88 *Id.* at 354–57.

or effect of the statute “place[s] a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability,”<sup>89</sup> an undue burden exists and the restriction is unconstitutional.<sup>90</sup> Although the court was skeptical of the legislature’s purpose in passing this law, the court did not need to decide that Louisiana’s given purpose was a “sham.”<sup>91</sup> Rather, the court found the provisions unconstitutional by examining the *effect* of the statute.<sup>92</sup> Under review for clear error, the Fifth Circuit upheld the district court’s holding that the provision “‘sets a standard no physician can meet and creates a climate in which no provider can possibly operate,’ thereby significantly reducing the number of abortion providers in Louisiana.”<sup>93</sup> Therefore, the Fifth Circuit concluded that “[a] measure that has the effect of forcing all or a substantial portion of a state’s abortion providers to stop offering such procedures creates a substantial obstacle to a woman’s right to have a pre-viability abortion, thus constituting an undue burden under *Casey*.”<sup>94</sup> Combined with the vagueness of the statute, the court came to the conclusion that the statute was unconstitutional “in its entirety.”<sup>95</sup>

The *Okpalobi* court’s critical basis for its finding—that eighty percent of the state’s abortion providers would be forced to cease performing abortions should the law go into effect—lacks the essential weight for the finding of an undue burden.<sup>96</sup> While the provisions at issue undoubtedly placed a burden on abortion practitioners in the form of substantial medical liability, a finding of an *undue* burden requires more than a simple statement of a decrease in the number of abortions.<sup>97</sup> A bill providing free childcare, healthcare, food, clothing, entertainment, and housing for all children in a state may make live childbirth a more appealing option and thus decrease the number of abortions, perhaps even putting some abortion doctors out of business, but would not place an undue burden on women’s access to abortion services. Likewise, a statute like the one at issue in *Okpalobi*, which increases the availability of remedies for harms caused by an abortion procedure, may not be undue simply because it decreases the availability of abortions in a state. A finding of unconstitutionality requires either that there be no rational basis for the law or that a court, accounting for the policy deference given to the state, has found the burden undue.<sup>98</sup> The fundamental error that the *Okpalobi* court makes is its failure to balance the potential need for this statute against the potential burden placed on women seeking abortions. In so

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89 *Id.* at 354 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 878 (1992) (joint opinion of O’Connor, Kennedy, and Souter, JJ.)) (internal quotation marks omitted).

90 *Id.*

91 *Id.*

92 *Id.* at 357.

93 *Id.* (quoting *Okpalobi v. Foster*, 981 F. Supp. 977, 983–84 (E.D. La. 1998)).

94 *Id.*

95 *Id.* at 361.

96 *Id.* at 357.

97 *See infra* notes 105–06 and accompanying text.

98 *See supra* notes 57–60 and accompanying text.

doing, the court betrays its policy preference for more open access to abortion, relying simply on a decrease in the availability of abortion providers, rather than following the balancing test mandated by *Casey*. It is possible that the *Okpalobi* court simply sought to maintain the same number of abortion providers as were present at the time the legislature created the statute, but there is no precedent that supports that policy preference. By establishing their baseline (the current number and availability of abortions) and refusing to balance the policy preferences of the elected lawmakers of the state (reducing the number of abortion providers to only those willing to accept increased potential liability for their medical services), the court strays from the requirements of *Casey*.

B. *The Burden-Only Analysis: Jackson Women’s Health Org. v. Currier*<sup>99</sup>

Some courts treat the *Casey* analysis as a simple “search for burdens” rather than a balancing test to determine whether those burdens are undue. In *Jackson Women’s Health Organization v. Currier*, the only abortion clinic in Mississippi challenged a statute requiring that “all physicians associated with abortion clinics have admitting and staff privileges at a local hospital and be board certified.”<sup>100</sup> Given that the case was in the preliminary injunction stage, with the clinic looking for a preliminary injunction of the law, the court had to determine whether the clinic had a substantial likelihood of success on the merits.<sup>101</sup> If the court found that the clinic had a substantial likelihood of success on the merits along with three other factors,<sup>102</sup> it would grant the preliminary injunction, blocking enforcement of the law until the issues could be decided in an administrative hearing.<sup>103</sup>

In its as-applied constitutional analysis, the Southern District of Mississippi initially pointed out that the clinic’s physicians would not be able to receive the required admitting privileges, resulting in the closure of the only remaining abortion clinic in the state.<sup>104</sup> Among its defenses, Mississippi raised the possibility that if the clinic shuts down, women could always travel to the “at least four abortion facilities ranging from 121 to 209 miles from

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99 See Emily Wagster Pettus, *Jackson Women’s Health Organization, Mississippi’s Sole Abortion Clinic, May Not Survive*, HUFFINGTON POST (July 14, 2012, 10:45 AM), [http://www.huffingtonpost.com/2012/07/14/mississippi-abortion-acce\\_n\\_1673241.html](http://www.huffingtonpost.com/2012/07/14/mississippi-abortion-acce_n_1673241.html).

100 940 F. Supp. 2d 416, 417 (S.D. Miss. 2013).

101 *Id.* at 418.

102 *Id.* (“To obtain [the relief of a preliminary injunction], Plaintiffs must demonstrate four familiar requirements: (1) [a] substantial likelihood of success on the merits; (2) [a] substantial threat that plaintiff[s] will suffer irreparable injury; (3) [that the] injury outweighs any harm the injunction might cause the defendant[s]; and (4) [that the] injunction is in the public interest.” (citing *Women’s Med. Ctr. of Nw. Hous. v. Bell*, 248 F.3d 411, 419 n.15 (5th Cir. 2001))).

103 *Id.*

104 *Id.* at 420–21.

Jackson,” requiring a few more hours of travel to an out-of-state provider, which does not rise to the level of an unconstitutional undue burden.<sup>105</sup>

The question, the court states, is whether the increased difficulty of access to abortion rises to the level of a “substantial obstacle.”<sup>106</sup> Interpreting dicta from *Mazurek*, the court determined that extra travel time could be a factor in determining whether a law places a substantial obstacle on women seeking an abortion.<sup>107</sup> From this, the court distinguished the present case from others in which women were forced to drive further in order to seek an abortion by the fact that this case involved the closure of a clinic, the possibility of the need to travel to another state, and the large amount of traveling required.<sup>108</sup> Ultimately, in light of the combination of these factors, the court held that the plaintiff-clinic had a substantial likelihood of success on the merits in its undue burden claim.<sup>109</sup>

A number of factors weighing in favor of the state’s arguments are missing from the constitutional analysis in *Currier*. Leaving out such factors makes it impossible to decide whether the burden is “undue,” as the court does not balance the legitimate purposes of the regulation against the obstacles resulting from the rule. The first error occurs when the court fails to mention Mississippi’s legitimate interest in protecting the life and health of women seeking an abortion.<sup>110</sup> The court quickly dismisses the possibility of the state’s interest in protecting the unborn:

*Casey* reaffirmed the state’s “legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.” Yet contrary to the State’s current position, the Supreme Court did not stop there, noting that “a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman’s choice cannot be considered a permissible means of serving its legitimate ends.”<sup>111</sup>

The court’s discussion of a state’s interest in promoting birth over abortion or protecting the life of a fetus ends there. That kind of one-sided constitutional analysis could swiftly lead to absurd results. For example, a law requiring all abortion medical instruments to be cleaned prior to reuse

105 *Id.* at 421. On appeal, the Fifth Circuit affirmed the lower court’s ruling on the ground that “the undue burden analysis focuses solely on the effects within the regulating state,” so that Mississippi could not rely on other states to provide its citizens with a constitutional right. *Jackson Women’s Health Org. v. Currier*, No. 13-60599, 2014 WL 3730467, at \*9 (5th Cir. July 29, 2014).

106 *Currier*, 940 F. Supp. 2d at 421.

107 *Id.* at 421–22. Additional driving time is regularly cited as a burden on women seeking an abortion. See *infra* notes 116–23 and accompanying text.

108 *Currier*, 940 F. Supp. 2d at 422.

109 *Id.* at 423.

110 See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 878 (1992) (joint opinion of O’Connor, Kennedy, and Souter, JJ.) (stating that regulations designed to protect the life and health of women seeking abortions are permissible so long as they are not “undue”).

111 *Currier*, 940 F. Supp. 2d at 419 (emphasis omitted) (citation omitted).

would likely be upheld, no matter how many clinics such a regulation would shut down when initially imposed. Simply finding an obstacle, then, is not the end of the matter—finding whether that obstacle is truly *substantial* requires inquiry not only into the cost of the regulation, but also that regulation’s legitimate benefits—as determined by the legislature, not the courts.<sup>112</sup> When courts step in to deny a state its policy discretion to favor live childbirth or decide that a particular concern for the health of the mother is not important enough to make abortion marginally more expensive, they inappropriately step into the role of the legislator; the judge becomes an unelected policymaker. Whether or not the admitting privilege requirement at issue in *Currier* actually protects the health of women seeking abortions is a matter open to debate, but even if the court believes it has solved that debate definitively, it should mention the matter in balancing whether the burden is undue.

A second and related error occurs when the *Currier* court makes no investigation into the state’s legitimate interest in promoting birth in its state over abortion.<sup>113</sup> Perhaps the state sought to encourage its citizens to choose parenthood over abortion, which it has the authority to do under *Casey*.<sup>114</sup> In *Currier*, the court has failed to balance the elements of the constitutional question, instead seeking to completely focus on the burdens that the regulation will have on easy access to abortion.<sup>115</sup> By turning the focus completely off the legitimate concerns of the state and focusing entirely on the burdens that personally concern the court, the court necessarily ignores the policy values of legislators and elected officials, and replaces them with a judicial *fiat* that burdens on abortion are unconstitutional if the judge subjectively finds them to be “substantial.” Given that the Supreme Court has not spoken more concretely on whether regulations affecting abortion providers and clinics constitute an undue burden, judges should place far more emphasis on legislatures’ policy preferences, not their personal values, in calculating whether an obstacle to abortion access is truly substantial. If judges are will-

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112 Note that this is the opposite outcome as was found in *Okpalobi* above. *Okpalobi v. Foster*, 190 F.3d 337, 357 (5th Cir. 1999) (“A measure that has the effect of forcing all or a substantial portion of a state’s abortion providers to stop offering such procedures creates a substantial obstacle to a woman’s right to have a pre-viability abortion, thus constituting an undue burden under *Casey*.”), *rev’d en banc on other grounds*, 244 F.3d 405 (5th Cir. 2001) (*en banc*) (reversing and remanding on procedural grounds).

113 *Casey* requires such an investigation. See *Casey*, 505 U.S. at 877–78 (joint opinion of O’Connor, Kennedy, and Souter, JJ.) (finding that the state had a legitimate interest in promoting life).

114 *Id.*

115 For an example of a court coming to the same conclusion, but incorporating explicitly many of the same values that the *Currier* court did, see *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 951 F. Supp. 2d 891, 896–97 (W.D. Tex. 2013) (striking down an admitting privileges provision in statute while upholding other restrictions), *rev’d in part*, 748 F.3d 583 (5th Cir. 2014). Note that the Texas district court explicitly weighed the state’s legitimate ability to favor live birth over abortion and the related state’s interest in protecting fetal life. *Id.*

ing to entertain specific data points about clinic closures, they must also look to specific statements from state legislators to fully understand the state's position on, and interest in, furthering maternal health and childbirth.

C. *Reliance on a Particular Market: Planned Parenthood Southeast, Inc. v. Bentley*

Some courts also rest their reasoning on the market for abortion services in a particular state rather than on whether the legislature has a rational basis for putting a restriction in place. In *Planned Parenthood Southeast, Inc. v. Bentley*,<sup>116</sup> the court granted a temporary restraining order enjoining enforcement of a provision requiring abortion practitioners to have admitting privileges at a nearby hospital.<sup>117</sup> In its analysis, the court suggests an interpretation of *Casey* whereby a provision that restricts abortion for a valid reason is acceptable even if it creates an "incidental inconvenience," but that such restrictions are invalid if they pose a substantial obstacle, despite being rational.<sup>118</sup> Using this reasoning, the court held that the restriction was invalid because it would close down three of the five abortion clinics in Alabama, forcing some women to drive up to 200 miles for the procedure.<sup>119</sup> This would add the burden of both time and additional money to the cost of procuring an abortion.<sup>120</sup> In reaching its conclusion, the court warned of the potential elimination of abortion services in Alabama should the restriction go into effect:

Such pressure [by the regulation] could render the consistent provision of abortion services in Alabama a Sisyphean effort. The number of abortion clinics in Alabama has already dwindled from seven to five in recent years. Thus, while the court's decision today hinges only on the three clinics imminently impacted by HB 57, the evidence raises the specter of an Alabama in which women are unable to exercise this due-process right at all.<sup>121</sup>

The court relies on the fact that abortion clinics were closing in Alabama, and in so doing drags a disturbing factor into the undue burden inquiry: the role the market for abortion plays in the court's determination that an undue burden exists.<sup>122</sup> Federal courts have held that the govern-

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116 951 F. Supp. 2d 1280 (M.D. Ala. 2013); *cf.* *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 415 (5th Cir. 2013) (noting that in addition to the challenged abortion restrictions, there are a number of unrelated reasons why access to abortion in particular areas is scarce and disclaiming that these have any influence on an undue burden analysis), *cert. denied*, 134 S. Ct. 506 (2013).

117 *Bentley*, 951 F. Supp. 2d at 1290.

118 *Id.* at 1285.

119 *Id.* at 1286.

120 *Id.*

121 *Id.* at 1288.

122 Though the courts do not have a responsibility to promote or ensure the viability of abortion services, they cannot seek to eliminate the possibility of those services. When courts are confronted with the possibility of shutting down access to all or most clinics in the state, it puts them in a difficult position. Yet the solution to that situation is not simply

ment is not responsible for propping up the abortion market, or fixing challenges for the abortion market.<sup>123</sup> But is the state required to forego imposing rational regulations on the abortion industry to keep it afloat despite external forces? Governments may choose to lower restrictions on or actively aid particular businesses as a policy choice to keep an industry alive in their jurisdictions, but are they constitutionally required to do so for abortion clinics?<sup>124</sup> What if those clinics closed down because so few women wanted abortions, or because clinics could not afford to run sanitary operations? What impact does that have on the state's abilities to keep women at the still-operating clinics safe?

Pro-choice proponents argue that the market approach means each further restriction makes abortion harder to access, placing a substantial obstacle in the path of women seeking an abortion. Baselines, accordingly, would be understood as a proxy for stating how much harder a law has made it to procure an abortion. Yet there are many other factors involved in the undue burden analysis, such as how many people live in an area, how many people wish to have abortions in that area, the cost of keeping a sanitary facility, etc. Why should the court leverage all these factors against legislation where the intended effect is to promote women's safety or fetal health? Courts avoid answering these difficult questions in setting arbitrary baselines for themselves, and impermissibly bypass the balance *Casey* intended to strike between protecting the decision to obtain an abortion and respecting the states' legitimate interests in furthering maternal health and promoting fetal life.

#### D. *Choosing Judicially Created Policy over Legislatively Enacted Policy: Planned Parenthood of Wisconsin, Inc. v. Van Hollen*

While acknowledging legitimate state policy discretion under the *Casey* analysis, courts can also fall into the trap of creating baselines regarding the appropriate number of abortion providers in a state. *Planned Parenthood of*

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to cite the fact that all clinics will be shut down in the state and call the burden "undue." Rather, what the standard developed in *Casey* asks the court to do is to acknowledge all of the state's interests in promoting parenthood and protecting the safety of the mother, and weigh those against the gravity of the harm to the abortion right in shutting down all of the clinics. Only once all of these rights have been acknowledged and properly weighed should the court make a determination about whether the burden is "undue."

123 See generally *K.P. v. LeBlanc*, 729 F.3d 427, 442 (5th Cir. 2013) (noting that "while 'government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those' obstacles" (quoting *Harris v. McRae*, 448 U.S. 297, 316 (1980))); *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 415 n.45 (5th Cir. 2013) (same), *cert. denied*, 134 S. Ct. 506 (2013).

124 I recognize the distinction between passively allowing the clinics to shut down and creating a burden that causes clinics to close down, and I believe this comparison still stands. That states do not need to actively save clinics recognizes a ceiling for requirements for the state, under which we know the proper responsibility of the state. The point is that it is not as important that these clinics stay open as it is that the states are forced to subsidize them. So how important is it that these clinics stay open? This question has been left open by the Court, yet is critical for these courts in analyzing these types of decisions.

*Wisconsin, Inc. v. Van Hollen*<sup>125</sup> granted a preliminary injunction against a Wisconsin state statute<sup>126</sup> that required abortion practitioners to obtain admitting privileges at a nearby hospital.<sup>127</sup> In coming to its conclusion, the court relied on the clinics' arguments that they would be shut down in absence of the injunction, as they were unable to comply with the admitting privileges requirement.<sup>128</sup> The closure of the plaintiffs' clinics would likely result in "reducing the availability of in-state abortion services by 69%."<sup>129</sup> The court balanced this increased burden on women's access to abortion with the potential medical benefits of hospital admitting privileges.<sup>130</sup> Finding the overall benefit of admitting privileges wanting, the court struck down the provision as unconstitutional.<sup>131</sup>

Although the court in *Van Hollen* applied the *Casey* undue burden analysis by acknowledging the legitimate state interests and balancing those against the protection of a woman's right to an abortion, the court still failed to state a clear rationale for why the particular decrease in access to abortion constitutes an undue burden. Metaphorically speaking, the court put the right items on each side of the scale, but failed to explain why it ascribed to each item the weight it did. Specifically, the court did not identify why the closure of the clinics that provided sixty-nine percent of the state's abortions would amount to an undue burden. The court stated that the closure of the clinics would lead to further travel, inconvenience, and increased costs.<sup>132</sup> There can be no doubt, and surely few people would debate, that these costs represent a burden on women seeking access to abortion in Wisconsin. What the court fails to explain, however, is why that burden is *undue*. What about reduced (not eliminated) access specifically constitutes an *undue* burden? Is it simply because the court thinks that the benefits of admitting privileges is "low" while the cost of having to drive an additional 100 miles each way is "high?" Where does the court anchor these determinations? The only guid-

125 No. 13-cv-465-wmc, 2013 WL 3989238, at \*1 (W.D. Wis. Aug. 2, 2013). The Seventh Circuit upheld the permanent injunction on similar grounds as the trial court, particularly noting the "feeble" medical grounds that the state had used to justify the statute. *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 798 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 2841 (2014). Yet, the Seventh Circuit's holding in the case is far from developed.

126 WIS. STAT. ANN. § 253.10 (West 2014).

127 *Van Hollen*, 2013 WL 3989238, at \*1, \*19.

128 *Id.* at \*2.

129 *Id.* at \*17.

130 *Id.* at \*19 ("[T]he court considers these obstacles in access to abortion services and undue burden in light of the dubious benefits to women's health of the admitting privileges restriction in Wisconsin.")

131 *Id.*

132 *Id.* at \*16 ("Along with gas, there are certainly other tangible costs to consider in reducing geographical access to a substantial portion of Northern Wisconsin and the Upper Peninsula of Michigan including payment for childcare and overnight accommodations and lost earnings. These costs are amplified given that the majority of patients are at or below the federal poverty line."). The court here primarily focused on the burden on women's access to abortion in the near term, avoiding any questions of women seeking access elsewhere or the possibility of new clinics opening.

ing light a judge has to make these decisions is her own personal values. For judges who think that access to abortion services is morally praiseworthy, that choice is an easy one. However, judges are not fit for these determinations of policy. Nothing about law school or being appointed to the federal judiciary makes someone uniquely better at policymaking than anyone else. The correct forums for these discussions are the legislatures to which citizens elect representatives to make the law, not the judges who are appointed or elected to interpret the law. Judges should leave the creation of the law to the legislators, who have the capacity to make those policy decisions and will be held accountable for those decisions by the public. *Casey* acknowledges that judges should not be policymakers,<sup>133</sup> and correctly tells courts to uphold laws for which the legislature has a rational basis, even where abortion access is somewhat restricted.

*E. Legislatively Inspired Balancing: Greenville Women’s Clinic v. Bryant*

When courts do weigh a state’s reasonable interests in their constitutional balancing test under *Casey*, they often come out upholding regulations on abortion clinics.<sup>134</sup> The court in *Greenville Women’s Clinic v. Bryant*<sup>135</sup> undertook such a disciplined analysis and upheld as constitutional strict new standards for abortion clinics.<sup>136</sup> The regulations at issue were promulgated by the South Carolina Department of Health and Environmental Control in response to a state legislative measure that sought to license clinics that performed five or more first trimester abortions or any number of second tri-

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133 *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 849 (1992) (joint opinion of O’Connor, Kennedy, and Souter, JJ.) (stating that the Court must use its “reasoned judgment” when interpreting the law, but that this does not “mean [it is] free to invalidate state policy choices with which [it] disagree[s]”); *id.* at 965 (Rehnquist, J., concurring in part and dissenting in part) (disagreeing with the “undue burden” standard because the standard is largely based on a judge’s subjective findings and personal views); *id.* at 999–1000 (Scalia, J., concurring in part and dissenting in part) (“How upsetting it is, that so many of our citizens . . . think that we Justices should properly take into account their views, as though we were engaged not in ascertaining an objective law but in determining some kind of social consensus.”).

134 *See Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583, 590 (5th Cir. 2014) (recognizing the unitary interest in protecting “mothers’ and children’s health” in upholding a Texas abortion regulation). For a case that considers the legislature’s legitimate interests but ultimately strikes down a law, see *Planned Parenthood Se., Inc. v. Strange*, No. 2:13cv405-MHT, 2014 WL 3809403, at \*47 (M.D. Ala. Aug. 4, 2014) (“While the court finds that the State’s justifications for the law are weak, it must emphasize that its conclusion that the staff-privileges requirement is unconstitutional does not turn solely on that finding. In the alternative, the court further finds that the justifications are by no means sufficiently robust to justify the obstacles that the requirement would impose on women seeking abortion.”). Although *Strange* does include a discussion of relevant interests at stake, it still fails to offer a principled account of why the scales tip in favor of striking down the rule.

135 222 F.3d 157 (4th Cir. 2000).

136 *Id.* at 159. The court in *Greenville Women’s Clinic* does not draw an arbitrary and illegitimate baseline, as other courts do in cases identified throughout this Note.

mester abortions.<sup>137</sup> The regulations made operation of an abortion clinic without a license illegal, set up regular inspections, and mandated certain safety procedure requirements, laboratory medical tests, admitting privileges or other transportation plans to a local hospital, medical reports, disaster preparedness, daily sanitation and other cleanliness measures, building design and equipment standards, some prerequisites, and certain “best practices.”<sup>138</sup> Calculating the increased costs to abortion providers, delays in access to abortion, increased travel distance, and patient privacy concerns, the district court found that the regulations presented an undue burden to women seeking abortions.<sup>139</sup> Identifying the scope of the abortion right reaffirmed in *Casey*,<sup>140</sup> the Fourth Circuit reversed the district court and upheld the abortion restrictions.<sup>141</sup> In *Greenville*, the court determined an appropriately balanced baseline, taking into account the legitimate interests of the state.<sup>142</sup> While acknowledging that restrictions that “reach into the heart of the liberty protected” are unconstitutional, the court allowed room for the state to set its policy of protecting women and the unborn, despite increased costs to those seeking abortions.<sup>143</sup> To that end, the court remembered that “[i]f a regulation serves a valid purpose—one not designed to strike at the right itself—the fact that it also has ‘the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it.’”<sup>144</sup> The court gave the state a great deal of leeway in making abortion restrictions, finding that “[o]nly when the increased cost of abortion is prohibitive, essentially depriving women of the choice to have an abortion, has the Court invalidated regulations because they impose financial burdens.”<sup>145</sup> Setting aside situations in which the state groundlessly eliminates access through increased costs, the Fourth Circuit made a rule whereby it would defer to the will of the legislature when the burden to women seeking abortions constituted merely some increased cost.<sup>146</sup>

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137 *Id.* at 160.

138 *Id.* at 160–62.

139 *Id.* at 163. The lower court also found that the regulations unfairly “single[d] out” abortion providers, violating their equal protection rights. *Id.* The circuit court overturned this ruling on appeal, finding that because the restrictions did not place an undue burden on women, there would be no need to go into an equal protection and strict scrutiny analysis. *Id.* at 173.

140 *Id.* at 165–66 (“The scope of [the abortion] right, however, is framed by the State’s ‘legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.’” (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992) (joint opinion of O’Connor, Kennedy, and Souter, JJ.))).

141 *Id.* at 159.

142 *Id.* at 165–66.

143 *Id.* at 166 (quoting *Casey*, 505 U.S. at 874 (joint opinion of O’Connor, Kennedy, and Souter, JJ.)).

144 *Id.* (quoting *Casey*, 505 U.S. at 874 (joint opinion of O’Connor, Kennedy, and Souter, JJ.)).

145 *Id.* at 167.

146 *Id.*

The court applied the above rule to the regulations at issue in a manner highly deferential to the state, accepting the values of duly elected officials rather than trying to impose its own. The court also gave great weight to the fact that the restrictions at issue were recognized and promulgated by the American Congress of Obstetricians and Gynecologists, the National Abortion Federation, and Planned Parenthood.<sup>147</sup> Given the general acceptance of these standards, upon which both parties agreed, the court found that the restrictions were “reasonably designed to promote South Carolina’s valid interest in women’s health.”<sup>148</sup> This conclusion sufficiently convinced the court that the restrictions were more than just an attempt to make abortion harder to access—the restrictions rationally related to women’s health.<sup>149</sup> That the law made these restrictions mandatory rather than merely voluntary, which the abortion groups would have preferred, was controversial but did not deter the court: “[t]he fact that not all healthcare professionals agree with the adoption of each specific aspect of the Regulation is immaterial in light of South Carolina’s ‘considerable discretion’ in adopting licensing requirements aimed at the health of women seeking abortions.”<sup>150</sup>

Having favorably interpreted the restrictions in line with the state’s interest in protecting women, the court next looked at whether the restrictions constituted an undue burden.<sup>151</sup> In searching for what might make these restrictions unduly burdensome, the court distinguished between “*the ability to make a decision* to have an abortion” and “*the financial cost of procuring an abortion.*”<sup>152</sup> The reason behind this distinction was apparently that because no women who had been prevented from having an abortion were joined in this case, there was no actual proof that anyone had been prevented from making the decision to obtain an abortion.<sup>153</sup> Any statements about how many women would be prevented from getting abortions would necessarily be guesswork.<sup>154</sup> Nevertheless, the court was willing to measure the increased cost to get an abortion, and found it to be somewhere between \$23 and \$75, or possibly an additional seventy mile drive.<sup>155</sup> The court considered such an increase in cost “modest when one considers that [the regulations’] purpose is to protect the health of women seeking abortions.”<sup>156</sup> Therefore, the court found that the clinics had failed to prove the regula-

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147 *Id.* at 167–68.

148 *Id.* at 168.

149 *Id.* at 170.

150 *Id.* at 169 (quoting *Simopoulos v. Virginia*, 462 U.S. 506, 516 (1983) (“In view of its interest in protecting the health of its citizens, the State necessarily has considerable discretion in determining standards for the licensing of medical facilities.”)).

151 *Id.* at 170–72.

152 *Id.* at 170.

153 *Id.*

154 *Id.*

155 *Id.*

156 *Id.* at 171.

tions imposed an undue burden on women seeking abortions.<sup>157</sup> The court also determined that any other finding would have led to unacceptable results:

To conclude that any of the figures in this case would place an obstacle in the path of a woman's right to choose to have an abortion would necessitate the formulation of an arbitrary cost threshold beyond which a price increase may not pass. This would irrationally hamstring the State's effort to raise the standard of care in certain abortion clinics, the procedures and facilities of which do not adequately safeguard the health of their patients, simply because the clinics' performance falls so far below appropriate norms that the expense of upgrading their practices and equipment exceeds the arbitrarily defined amount.<sup>158</sup>

As the court points out, for rational health regulations, the cost increases will likely be the greatest for the worst clinics, further invalidating increased costs for abortions as a legitimate method of determining when an abortion is undue.<sup>159</sup> Indeed, the closure of clinics or increased travel to clinics may simply mean that such "eggshell" clinics nearby were never adequately safe.

Though the court oscillates between an interpretation of *Casey*, that if any woman is prevented from procuring an abortion the restriction is unconstitutional, and strong deference to the state's ability to protect women's health, the court ultimately embraces the latter line of reasoning. The importance of this holding is that it identifies that any kind of strict line drawing, besides gratuitous prohibition, on the part of the court for when a burden caused by a restriction is undue would be arbitrary and involves the court coopting the state's prerogative in balancing the abortion right with the importance of protecting women's health. The court, following *Casey*, allowed the state to regulate clinics while also following its duty in ensuring that states do not impose restrictions on abortion that bear no rational relation to women's health or the protection of fetal life. *Greenville Women's Clinic* represents the best lower court analysis of *Casey* so far, and should be applied by other courts in judging abortion restrictions.<sup>160</sup>

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157 *Id.* The court also concluded that the ability to inspect abortion facilities and copy their documents also did not constitute an undue burden on the abortion facilities. *Id.*; see also *Women's Med. Prof'l Corp. v. Baird*, 438 F.3d 595, 605 (6th Cir. 2006) (holding that forcing women to drive a "reasonable distance" to obtain an abortion did not constitute an undue burden); *Fargo Women's Health Org. v. Schafer*, 18 F.3d 526, 533 (8th Cir. 1994) ("Although the distance a woman must travel to obtain an abortion may be a factor in obtaining an abortion, it is not a result of the state regulation. We do not believe a telephone call and a single trip, whatever the distance to the medical facility, create an undue burden.").

158 *Greenville*, 222 F.3d at 171.

159 *Id.*

160 *But cf. Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 541 (9th Cir. 2004) ("We depart from the Fourth Circuit's holding in *Greenville Women's Clinic* to the extent it neglects that '[a] significant increase in the cost of obtaining an abortion alone can constitute an undue burden on the right to have an abortion.'" (quoting *Greenville*, 222 F.3d at 201 (Hamilton, J., dissenting))).

### III. CALLING TO ACCOUNT: JUDICIAL INTERFERENCE WITH LEGISLATIVE DETERMINATIONS

Justice Scalia initially predicted the problem identified in this Note in his dissent of the *Casey* decision.<sup>161</sup> The problem he identified is that the joint opinion in *Casey* essentially defined “undue burden” as “undue hindrance,” which provides no guidance on how lower courts should rule on these issues.<sup>162</sup> Scalia accurately portended, “[c]onsciously or not, the joint opinion’s verbal shell game will conceal raw judicial policy choices concerning what is ‘appropriate’ abortion legislation.”<sup>163</sup> As seen in Part II above, this has been exactly the case with many judges, who often insert their policy preferences in striking down legitimate state restrictions on abortion.<sup>164</sup>

The nebulosity of the undue burden standard also stems from its varied application in different states, where the market for abortion and the size of the state have an enormous impact on undue burden analysis. Such distinguishing facts in each individual case can lead to potentially opposing results, injecting an inherent vagueness in the *Casey* undue burden standard. For example, in North Dakota, there is only one abortion clinic,<sup>165</sup> so a restriction that led to the closure of that clinic would result in women having to travel out of state—a result the courts have found to be repugnant in the past.<sup>166</sup> Suppose that a theoretical law requires strict licensing provisions. Such a law in North Dakota may result in that single clinic shutting down. The same strict law in California, which boasts hundreds of abortion facilities,<sup>167</sup> may result in the closure of many facilities, but still could end up not increasing driving time or costs for anyone in California seeking an abortion. The same law may create different burdens in different states, and in one state the burden may be undue, while in the other the court may find it to be due.

A proponent of the *Casey* standard might argue that such state-by-state analysis is exactly what is needed to tailor judicial reasoning to the discrepan-

161 See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 985–87 (1992) (Scalia, J., concurring in part and dissenting in part).

162 *Id.* at 987.

163 *Id.*; see *supra* cases discussed Part II.

164 See *supra* cases discussed Part II.

165 *State Facts About Abortion: North Dakota*, GUTTMACHER INST., [http://www.guttmacher.org/pubs/sfaa/north\\_dakota.html](http://www.guttmacher.org/pubs/sfaa/north_dakota.html) (last visited Nov. 17, 2014) (“In 2011, there were [sic] 1 abortion providers in North Dakota; 1 of those were [sic] clinics. This represents no change in overall providers and a no change in clinics from 2008, when there were [sic] 1 abortion providers overall, of which 1 were [sic] abortion clinics. In 2011, 98% of North Dakota counties had no abortion clinic. 73% of North Dakota women lived in these counties.”).

166 See, e.g., *Jackson Women’s Health Org., Inc. v. Amy*, 330 F. Supp. 2d 820, 827 (S.D. Miss. 2004) (“[T]he court is not persuaded that this burden is adequately ameliorated by the possible availability of abortions in surrounding states.”).

167 *State Facts About Abortion: California*, GUTTMACHER INST., <http://www.guttmacher.org/pubs/sfaa/california.html> (last visited Nov. 17, 2014) (“In 2011, there were 512 abortion providers in California; 160 of those were clinics.”).

cies in access and unique situations of each state. Yet, that makes guidance for lower courts nearly impossible, as a statement of what is constitutional to protect women's health in one state, or at one time, may be unconstitutional in another. For that reason, the holding in *Casey* (finding a 24-hour wait period acceptable) may not necessarily transfer to states other than Pennsylvania. This kind of ambiguity or relativity in a legal standard is not necessarily untenable,<sup>168</sup> but it does make it much more difficult for appeals courts to guide the lower courts. Left to their own devices, many lower court judges have improperly asserted their approbation of abortion into their decisions, forcing out legitimate state interests that are protected under *Casey* and other Supreme Court cases.

As exemplified in the cases discussed in Part II, judges often ignore states' limited constitutional prerogative as expressed in *Roe* and *Casey* to favor parenthood over abortion.<sup>169</sup> Some judges are apparently motivated by an understanding that access to abortion has a social value that needs to be protected. Although, to some extent, the holdings of *Casey* and *Roe* create a constitutional policy in favor of *more* open access to abortion,<sup>170</sup> that policy preference is limited by the primary role of the state as the decider of how much to prefer live birth over abortion.<sup>171</sup> Additionally, the holding of *Roe*, which was reaffirmed in *Casey*, strictly condemned any state preference of unduly encouraging abortion, curtailing any policy in favor of pushing for more abortions.<sup>172</sup> That policy requirement goes for judges as well as legislatures. But when it comes down to making policy decisions regarding abortions, legislatures have a great deal of discretion, while the constitutional structure leaves little room for judges to interfere.

Judges should not be in the business of guarding particular market-places.<sup>173</sup> However, through the undue burden standard, *Casey* often thrusts judges into making decisions regarding the appropriate condition of the abortion market in particular states. Regrettably, when a confluence of laws and other circumstances happen to reduce the market for abortion in a state,<sup>174</sup> judges have insufficient guidance for which of the laws causing the market change to strike down. Restrictive abortion regulations may, for example, have valuable effects individually, but due to their quantity, may have the effect of placing substantial obstacles in the path of women seeking abortions. Which of the laws creating the obstacle is the judge to strike down as unconstitutional? Laws that arguably offer scant benefits in the way of

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168 *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006) ("It is axiomatic that a statute may be invalid as applied to one state of facts and yet valid as applied to another." (citation omitted) (internal quotation marks omitted)).

169 *See supra* note 16 and accompanying text.

170 Assuming that constitutionally protected rights are favored as a matter of policy under the Constitution.

171 *See supra* note 124 and accompanying text.

172 *See supra* note 16 and accompanying text.

173 *See supra* note 123 and accompanying text.

174 *See supra* cases cited Part II.

protecting fetal and maternal health but cause great hardships for abortion providers may be easy targets.<sup>175</sup> Ultimately, without proper explanation of judicial decisionmaking and without full analysis of the rights at issue, court decisions will necessarily be flawed and incongruous, leaving poor precedent for future cases and a poor analysis for cases on appeal.<sup>176</sup>

More generally, how should courts think about the market effects of abortion regulations? Take the hypothetical clean instruments example above,<sup>177</sup> where the resulting market effect of a requirement that all abortion providers use clean instruments would be to shut down all of the abortion clinics in the state.<sup>178</sup> In such situations, must courts use the current level of abortion access or abortion numbers as their baselines in these determinations? What about having to drive an additional 200 miles makes a burden on abortion access undue? There is no objective value that can be ascribed to the burdens placed on women in this situation. Simply put, courts are viewing these facts and independently interpreting those facts unguided by statute or precedent. In doing so, the courts are misinterpreting *Casey* and coming to results inconsistent with its holding.

In thinking about judicially created baselines, it is helpful to consider other medical procedures where the state may regulate medical providers in order to ensure safety or meet some other policy goal. One need not look just to medical procedures generally, but even to comparable types of procedures such as hysterectomies. States may regulate these procedures, but cannot unduly regulate them. Abortion is not special in this regard and there is no legal justification for protecting it over these other, sometimes medically required, procedures. In writing decisions on the matter of abortion, judges should accept reasonable restrictions on abortions aimed at promoting the health of patients as they would for any other medical procedure.

The importance of judicial clarity is not limited or unique to the abortion context. Yet this field of law, largely dominated by the vague *Casey* standard,<sup>179</sup> demands a higher level of judicial candor. In many instances, this may require the courts to write lengthier opinions to accommodate all sides of the issue. By bringing out into the open the values put onto the *Casey* balancing scales, judges and justices will strengthen their written opinions and function as more appropriate actors within our constitutional system.

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175 See, e.g., *supra* Part II (discussing the doctor's admitting privileges).

176 While findings of law are usually reviewed de novo, findings of law in lower court cases often still play an important role in appellate court analysis.

177 See *supra* notes 111–12 and accompanying text.

178 The Fifth Circuit acknowledged but ultimately refused to engage with such a hypothetical raised by the state in the appeal of *Jackson Women's Health Org. v. Currier*, No. 13-60599, 2014 WL 3730467, at \*9 (5th Cir. July 29, 2014). Instead, the court decided to remain focused on the facts of the case at bar. *Id.*

179 See *supra* Part III.

## CONCLUSION

The *Casey* undue burden standard creates an exceptionally vague standard that is ripe for judicial abuse. One such example of that abuse occurs when judges create arbitrary baselines for minimum abortion services and insert personal values into opinions at the expense of legitimate state concerns. For the sake of legal clarity and better decisionmaking, judges should strive to undo this trend by fully balancing the competing issues, respecting the state legislatures' legitimate prerogatives in the matter of abortion, and refraining from setting baselines for what they deem to be the right number of abortions in their jurisdictions.

