University of Colorado Law Review

Volume 88
Issue 2 *Annual John Paul Stevens Lecture*

Article 9

Spring 2017

Money Matters: Why the ADA's Undue Hardship Framework Could Save Casey and Legal Abortion in America

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MONEY MATTERS: WHY THE ADA'S UNDUE HARDSHIP FRAMEWORK COULD SAVE *CASEY* AND LEGAL ABORTION IN AMERICA

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Since Roe v. Wade, *the Supreme Court has upheld a woman's right to choose previability abortion on several occasions.* Planned Parenthood of Southeastern Pennsylvania v. Casey *was one such case that grew out of the Court's abortion jurisprudence and changed the way states regulated abortion. However,* Casey's *decision is fraught with ambiguities that have facilitated legislative overreach, judicial abuse, and inconsistent interpretation and application of the constitutional standard. In some states, legislatures have regulated a woman's right to choose to such an extent that it is a practical impossibility.*

Recently, the Supreme Court struck down Texas's House Bill 2–a highly restrictive abortion statute that imposed oppressive standards on both abortion clinics and their physicians, leading to widespread clinic closures across the state of Texas. Although Texas's law did not survive the Supreme Court's scrutiny, the Court's failure to comprehensively address Casey's *deeply rooted ambiguities has all but guaranteed that a woman's right to choose previability abortion will continue to be vulnerable to future attacks.*

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* J.D. Candidate, 2017, University of Colorado School of Law; B.A., Political Science, University of Colorado, 2004. The following Note is the result of the hard work and dedication of so many, most notably my fellow law review colleagues, family, and friends. I am deeply appreciative to everyone on the *Colorado Law Review* who has had a hand in helping to bring this Note to publication. For their patience, knowledge, and input, many thanks to Jessica Pingleton, Simon Vickery, Will Hauptman, Amelia Gunning, Reid Galbraith, Casey Klekas, and Colleen Koch. I am overwhelmingly grateful to my family and friends for their unflinching and continued support throughout this formidable process. Lastly, and perhaps most importantly, I am indebted to John R. Crone for his insightful conversation and willingness to share both his time and general knowledge—without whom, this article may never have come to pass. Many thanks to everyone.

If the Court truly intends to protect a woman's right to choose, the undue burden standard elicited in Casey *must be modified in a manner that provides guidance and clarity to lower courts, while facilitating fair and just results across jurisdictions. Where a circumstance as commonplace as poverty can functionally deny a woman her constitutional right to choose a previability abortion, the protections that* Roe *guaranteed to all women are merely illusory for many. This Note argues that rather than focusing on the minutiae of* Casey*'s test, the Supreme Court should have adopted a test similar to the undue hardship standard found in the Americans with Disabilities Act (ADA). Part I begins by describing the Supreme Court's approach to abortion jurisprudence since its decision in* Roe. *Part II evaluates the district court and appellate court decisions that led to the Supreme Court's decision in* Whole Woman's Health v. Hellerstedt. *Part III details the ADA's undue hardship standard and its applicability to* Casey, *and Part IV concludes with an explanation of why the ADA's economic cost-based framework would have been the more appropriate method to address* Casey*'s underlying problems.*

INTRODUCTION

> *That we have one [abortion] law for women of means and another for poor women is not a satisfactory situation.*
>
> —Justice Ruth Bader Ginsburg[1]

When the Supreme Court struck down Texas's House Bill 2 (H.B. 2)[2] in June 2016, it was hailed as a victory for the nation's women and the pro-choice movement generally.[3] Absent the Court's ruling, H.B. 2's highly restrictive regulations—which targeted physicians and providers of abortion services with surgical precision—would have reduced the already dwindling number of Texas clinics offering safe legal abortion services to a mere eight facilities.[4]

Under H.B. 2's proposed regulations, a woman living in El

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1. Samantha Lachman, *Ruth Bader Ginsburg Calls 'Choice' An Empty Concept For Poor Women*, HUFFPOST POLITICS (Jul. 30, 2015, 1:45 PM), http://www.huffingtonpost.com/entry/ruth-bader-ginsburg-reproductive-rights_us_55ba42c9e4b095423d0e0716 [https://perma.cc/UYM7-TCTC].

2. H.B. 2, 83d Leg., 2d Called Sess. (Tex. 2013).

3. Samantha Allen, *Supreme Court's Texas Decision is the Greatest Victory for Abortion Rights Since* Roe v. Wade, DAILY BEAST (June 27, 2016, 9:06 AM), http://www.thedailybeast.com/articles/2016/06/27/supreme-court-s-texas-decision-is-the-greatest-victory-for-abortion-rights-since-roe-v-wade.html [https://perma.cc/H7G9-234T].

4. *See* Tom Dart, *The Biggest City Without and Abortion Clinic: El Paso's Sole Facility Faces Closure*, GUARDIAN (Jun. 30, 2015, 8:46 AM), http://www.theguardian.com/us-news/2015/jun/30/el-paso-abortion-texas-hb2 [https://perma.cc/WJ6Y-DTHJ] (explaining that since Texas implemented H.B. 2 in 2013, nearly half of Texas's abortion clinics had closed, reducing the number of operating clinics from forty-one to twenty-two or fewer). The eight clinics that would remain after H.B. 2 was fully implemented were located in Austin, Dallas, Fort Worth, Houston, and San Antonio. Whole Woman's Health v. Lakey, 46 F. Supp. 3d 673, 680 (W.D. Tex. 2014), *aff'd in part, rev'd in part, vacated in part sub nom.*, Whole Woman's Health v. Cole, 790 F.3d 563 (5th Cir. 2015), *modified*, 790 F.3d 598, *rev'd sub nom.*, Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016). This would have left much of western rural Texas, home to nearly five million reproductive-age women, without an abortion facility. *See id.* at 681.

Paso, Texas, would have been forced to travel 550 miles to San Antonio, Texas—the nearest open clinic—to obtain an abortion.[5] For a woman of means, this may pose little to no burden at all, but for a poor, struggling mother living in rural Texas, it is a substantial burden, if not a complete barrier, to obtaining an abortion.

Let us suppose that a young woman living in rural Texas has two young children. She works two minimum wage jobs and is still barely able to make ends meet.[6] Her annual income is $20,735—scarcely above the poverty level.[7] Although she took necessary precautions, she discovers that she is pregnant for a third time. At ten weeks into her pregnancy, she is fast approaching the cut-off to obtain a first trimester abortion[8]—a procedure that costs, at most, $700 to $800.[9] Because she must

5. The Supreme Court stayed the injunction, which permitted the El Paso clinic to remain open. Whole Woman's Health v. Cole, 135 S. Ct. 2923 (2015) (mem. granting stay); *see also* Dart, *supra* note 4 (decrying the State of Texas's expectation that El Paso women should travel to New Mexico, a different state that affords fewer protections than Texas, to undergo abortions).

6. This hypothetical is not based on a particular set of facts, but has been derived from general socioeconomic statistics regarding women and abortion. *See U.S. Abortion Statistics: Facts and Figures Relating to the Frequency of Abortion in the United States*, ABORT73.COM, http://www.abort73.com/abortion_facts/us_abortion_statistics/ (last updated July 7, 2016) [https://perma.cc/XV3V-EDM2] (citing statistics from the Guttmacher Institute (AGI) and the Centers for Disease Control showing that in 2012, the percentages of unmarried women seeking abortions and women seeking abortions who had one-to-two prior live births was 85.3 percent and 45.8 percent respectively); *see also State Facts About Abortion: Texas*, GUTTMACHER INST., https://www.guttmacher.org/pubs/sfaa/pdf/texas.pdf [https://perma.cc/QWV8-4PNP] (2011 percentages of women ages 20-29 having abortions and economically disadvantaged women having abortions was 58 percent and 69 percent, respectively).

7. The 2016 federal poverty level for a family of three is $20,160. DEP'T OF HEALTH & HUMAN SERVS., FEDERAL POVERTY LEVEL (2016), https://www.healthcare.gov/glossary/federal-poverty-level-FPL/ (last visited Feb. 24, 2016) [https://perma.cc/P969-6TU9].

8. University of California San Francisco, *UCSF Medical Center: Surgical Abortion (First Trimester)*, UNIV. OF S.F. MED. CTR., https://www.ucsfhealth.org/treatments/surgical_abortion_first_trimester/ (last visited Feb. 24, 2016) [https://perma.cc/LP28-D2CX]. A pregnancy is considered within the first trimester from week one through week twelve, though certain first trimester abortion procedures may be utilized up to the fourteenth week. *Id.* Women face increased complications and risks the longer they wait to undergo the procedure. Heather D. Boonstra, *The Heart of the Matter: Public Funding of Abortion for Poor Women in the United States*, 10 GUTTMACHER INST. 12, 15–16 (2007).

9. This number was derived from costs listed on the Whole Woman's Health website; these costs include counseling, pill or procedure, sedation, and post-treatment costs. Some women may qualify for reduced fees or funding assistance. *Fees and Funding*, WHOLE WOMAN'S HEALTH, http://wholewomanshealth.com/

now pay for transportation, lodging, food, and child care expenses following H.B. 2's implementation, this same procedure for our single mother of two, living in rural Texas, could now cost her as much as $1,650—a more than two-fold increase. In states with mandatory waiting periods and highly restrictive informed consent requirements,[10] like Texas, she will also likely incur several days' worth of lost wages for a procedure that would typically require only a three to five hour visit to the doctor.[11] For this woman living at the federal poverty level, an abortion in Texas under H.B. 2 could cost her nearly twenty percent of her annual gross income.[12]

The presumption of many courts that cost has no bearing on an impoverished woman's choice is misguided and fails to acknowledge the financial realities tied to exercising this important protected liberty, namely, that abortion is not free.[13]

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san-antonio/fees-and-funding.html (last visited Feb. 24, 2016) [https://perma.cc/DW2V-ENMZ].

10. Texas imposes many restrictions on women seeking previability abortions that create additional hurdles including: a twenty-week gestational ban, mandatory counseling, parental notification and consent for minors, mandatory physician-performed ultrasounds, a description of the ultrasound image, and a twenty-four hour waiting period. GUTTMACHER INST., *supra* note 6. Texas's waiting period also applies to medical abortion, except that women who live more than one hundred miles from clinics may waive the twenty-four hour waiting period. TEX. VOLUNTARY & INFORMED CONSENT CODE ANN. § 171.012 (West 2015). Only two states, Texas and Virginia, provide an exception from the mandatory waiting period for increased travel distances. *State Policies in Brief*, GUTTMACHER INST. (Mar. 1, 2016), https://www.guttmacher.org/sites/default/files/pdfs/spibs/spib_MWPA.pdf [hereinafter *State Policies in Brief*] [https://web.archive.org/web/20160810222204/https://www.guttmacher.org/sites/default/files/pdfs/spibs/spib_MWPA.pdf].

11. *Frequently Asked Questions - About Abortion Appointments*, FEMINIST WOMEN'S HEALTH CTR., http://www.fwhc.org/abortion/faq.htm (last updated June 10, 2011) [https://perma.cc/X46Z-5WSX].

12. DEP'T OF HEALTH & HUMAN SERVS., *supra* note 7. To put the numbers in perspective, 20 percent of a $35,000 annual gross income is $7,000.

13. Erica Hellerstein & Tara Culp-Ressler, *Pricing American Women Out of Abortion, One Restriction at a Time*, THINK PROGRESS (Feb. 25, 2015), https://thinkprogress.org/pricing-american-women-out-of-abortion-one-restriction-at-a-time-c545c54f641f#.qxjstsyud [https://perma.cc/68ED-4AT2] (discussing language and transportation barriers); *see also* Carolyn Jones, *Need an Abortion in Texas? Don't be Poor*, TEX. OBSERVER (May 8, 2013, 9:30 AM), http://www.texasobserver.org/need-an-abortion-in-texas-dont-be-poor/ [https://perma.cc/8QL7-W7DW] (emphasizing how poverty, inequality, and limited access exacerbate the effects of abortion regulations); Becca Aaronson, *In State Records, Little Evidence to Back Abortion Law*, TEX. TRIB. (Sept. 15, 2013), http://www.texastribune.org/2013/09/15/records-offer-little-evidence-back-new-abortion-la/ [https://perma.cc/P5SN-HN39] (noting higher rates of self-induction in towns along the Texas border).

Texas's law would have disproportionately burdened women in rural communities not only because it would have forced these women to travel significant distances to reach an abortion clinic, but also because the realities of rural life suggest that these women are already more likely to be impoverished—compounding the problems that increased travel distances pose.[14] In order to protect *Roe* and legal abortion in Texas, H.B. 2 could not be permitted to take effect.

A lawsuit filed on April 2, 2014, in the United States District Court for the Western District of Texas by clinics and physicians on behalf of themselves and their patients sought to prevent the closure of abortion clinics threatened by Texas's law.[15] The plaintiffs in *Whole Woman's Health v. Hellerstedt*, sought—and were granted—declaratory and injunctive relief from H.B. 2's overtly restrictive ambulatory surgical center (ASC) and admitting privilege provisions.[16] On appeal, the Fifth Circuit reversed and vacated the district court's grant of a permanent injunction, instead concluding that H.B. 2's provisions did not create a "substantial obstacle" for all women in Texas seeking previability abortions and was therefore not invalid.[17]

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14. Lisa R. Pruitt & Marta R. Vanegas, *Urbanormativity, Spatial Privilege, and Judicial Blind Spots in Abortion Law*, 30 BERKELEY J. GENDER L. & JUST. 76, 90–92 (2015).

15. Plaintiffs included: Whole Woman's Health, Austin Woman's Health Center, Killeen Woman's Health Center, Nova Health Systems, Sherwood C. Lynn, Jr., M.D., Pamela J. Richter, D.O., and Lendol L. Davis, M.D., on behalf of themselves and their patients. Whole Woman's Health v. Lakey, 46 F. Supp. 3d 673, 673 (W.D. Tex. 2014) *aff'd in part, modified in part, vacated in part, rev'd in part sub nom.* Whole Woman's Health v. Cole, 790 F.3d 563 (5th Cir. 2015), *modified*, 790 F.3d 598, *rev'd sub nom.* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016). Plaintiffs had to show standing for the as-applied and facial challenges as well as for the ASC and admitting privilege regulations. *See id.* at 678. Whole Woman's Health is a comprehensive gynecological practice offering abortion services in Texas. It has seven facilities nationwide providing care for more than 30,000 patients annually and has operated in Texas since 2003. *About Us*, WHOLE WOMAN'S HEALTH, http://wholewomanshealth.com/about-us.html (last visited Feb. 7, 2016) [https://perma.cc/69A3-4EK2].

16. *Lakey*, 46 F. Supp. 3d at 677. Texas's law would have "impose[d] extensive new standards on abortion facilities"—requiring them to meet the more stringent ambulatory surgical center code requirements and mandating that physicians performing abortions have admitting privileges at a hospital located not more than thirty miles from the clinic. *Id.* at 682.

17. *Cole*, 790 F.3d at 580. Although the Fifth Circuit affirmed the injunction as-applied to ASCs and admitting privileges in McAllen, Texas, the court stipulated that the injunction would cease to apply when a credentialed physician was hired and when another clinic opened that was closer to the Rio Grande. *Id.*

In a 5–3 decision issued on June 27, 2016, the Supreme Court reversed the Fifth Circuit's decision and struck down H.B. 2's controversial provisions.[18] In its decision, the Court rejected the Fifth Circuit's use of res judicata[19] as a complete bar to the Plaintiffs' claims and applied the undue burden test from *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[20] focusing its analysis primarily on *Casey*'s purpose prong and emphasizing the appropriate level of deference due to the district court's development of the factual record.[21]

The *Casey* test has now defined how courts evaluate the constitutionality of state abortion regulations for more than two decades. In *Casey*, the Court formulated an ill-defined two-prong balancing test (the *Casey* undue burden test) in light of concerns that the bright-line trimester framework elicited in *Roe v. Wade* was inherently too rigid and unfairly diminished a state's valid interest in protecting life during the first trimester.[22] Under *Casey*, courts are required to (1) evaluate the purpose and effect of a state's regulation, and (2) determine whether the regulation creates a "substantial obstacle" for a woman seeking a previability abortion.[23]

States with anti-abortion agendas such as Texas have taken extensive liberties with abortion regulations under *Casey*, passing laws that are arguably antithetical to the central tenets of *Roe*. These laws, commonly referred to as targeted restriction of abortion provider—or TRAP—laws,[24] impose unduly restrictive regulations on physicians and providers.[25] Further, the laws unapologetically trample on the

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at 594.

18. *Hellerstedt*, 136 S. Ct. at 2320.

19. *See infra* note 157 and accompanying text.

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

21. *Hellerstedt*, 136 S. Ct. at 2310, 2315, 2309–10.

22. *Casey*, 505 U.S. at 872; *see* Roe v. Wade, 410 U.S. 113, 162–64 (1973) (describing the trimester framework).

23. *Id.* at 877.

24. TRAP laws proliferate under the guise of promoting maternal health and safety; these laws typically mandate that clinics meet or exceed more stringent ambulatory surgical center requirements even though statistics demonstrate that clinic-performed abortions are as safe—or safer—than other medical procedures performed in ASCs. *See* Jason Del Rosso, *It's a Trap: The Constitutional Dangers of Admitting Privileges for Both Women and Abortion Providers*, 24 B.U. PUB. INT. L.J. 195, 198–200 (2015). TRAP laws are successful because they increase operating costs for abortion clinics, thereby forcing many clinics to suspend abortion services or close their doors. *Id.*

25. *See* Sybil Shainwald, *Reproductive Injustice in the New Millennium*, 20

doctrine of informed consent.[26] This flagrant disregard for the right originally articulated in *Roe* will not cease in the wake of *Hellerstedt*—just days after the Court handed down its decision, anti-abortion groups began strategizing their next move.[27] For now, *Hellerstedt* safeguards a woman's protected right to previability abortion. Unfortunately, the Court did little to comprehensively clarify *Casey*'s undue burden test and protect this right for the long-term.

The Court's decision in *Hellerstedt* offers women in the United States short-lived protection. Impoverished women in particular will find themselves in the same predicament as they did prior to *Hellerstedt*—legally entitled to exercise an *illusory* right. So long as the Court continues to deny the economic realities intertwined with the abortion right,[28] and

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WM. & MARY J. WOMEN & L., 123, 154–70 (2013) (describing the abundance of laws that have been proposed or enacted across the United States limiting a woman's access to abortion); *see also* Esmé E. Deprez, *U.S. Abortion Rights Fight*, BLOOMBERG QUICKTAKE (July 7, 2016, 2:18 PM), http://www.bloombergview.com/quicktake/abortion-and-the-decline-of-clinics [https://perma.cc/B4SP-VKAB] (listing five states that currently have only one operating abortion clinic).

26. Maya Manian, *The Irrational Woman: Informed Consent and Abortion Decision Making*, 16 DUKE J. GENDER L. & POL'Y 223, 251 (2009). The informed consent doctrine "reflects the notion of patient control and self-determination" to the extent that patients should have all the necessary and accurate information to make an informed decision to choose—or refuse—a particular course of treatment. *Id.* at 239 (citation omitted). *See generally id.* at 241–42 (discussing the historical principles and purposes of informed consent). The approach to informed consent that has been adopted by many jurisdictions controverts this principle, instead promoting the notion that pregnant women are incapable of making informed decisions when it comes to abortion. *Id.* at 262–63. Certain regulations have gone so far as to endorse the *imposition* of certain procedures, namely ultrasounds, "on . . . patient[s] in violation of the right to refuse treatment." *Id.* at 261.

27. Betsy Woodruff & Samantha Allen, *'Fetal Pain' is the Next Battlefield for Pro-Lifers*, DAILY BEAST, http://www.thedailybeast.com/articles/2016/06/28/what-do-pro-lifers-do-now.html (last updated June 27, 2016) [https://perma.cc/3VRT-K542]; *see also* Dr. Joel McDurmon, *Texas Abortion Failure Exposes Need for a More Radical #EndAbortionNow Strategy*, AMERICAN VISION (June 27, 2016), https://americanvision.org/13471/texas-abortion-failure-exposes-need-for-a-more-radical-endabortionnow-strategy/ [https://perma.cc/BR3R-UMRJ].

28. Outside of *Harris v. McRae*, 448 U.S. 297 (1980), a case that continues to raise questions and generate scholarly criticisms, the Court has refused to engage in virtually any meaningful discussion pertaining to the economic aspects of access to abortions. *See* Jill E. Adams & Jessica Arons, *A Travesty of Justice: Revisiting* Harris v. McRae, 21 WM. & MARY J. WOMEN & L. 5, 6, 23 (2014) (noting that *McRae* predates *Casey* and the undue burden test and focuses primarily on whether the Hyde Amendment's restrictions on access to public funding created an obstacle to indigent women); *see also* Kenneth L. Karst, *Poverty and Rights: A Pre-Millennial Tryptich*, 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 399, 406–07 (explaining why this decision is troubling in the context of equal protection).

persists in addressing *Casey* in piecemeal fashion absent constructive guidance,[29] *Casey* will continue to facilitate unfair and inconsistent applications. This Note argues that the Court should have resolved the ambiguities in *Casey* by applying a test similar to Congress's undue hardship test enacted under the Americans with Disabilities Act (ADA).[30] Part I details the Supreme Court's evolving abortion jurisprudence, closely examining the Court's analysis in *Roe* and *Casey*. Using *Hellerstedt* as an example, Part II examines the Court's response to H.B. 2 and how, absent legislative restraint or impartial judicial oversight, the undue burden standard lends itself to inconsistent interpretations, misapplication, and abuse.[31] Part III discusses the ADA's cost-based undue hardship standard, including its history, purpose, and application. Finally, Part IV explains that in order to promote justice, and fairly balance the complex and sensitive interests that are at stake in the abortion discussion, the Supreme Court should have adopted a framework similar to the ADA's when it decided *Hellerstedt*.

I. COMMON LAW, *CASEY*, AND UNDUE BURDEN: THE DEVOLUTION OF ABORTION JURISPRUDENCE IN AMERICA

Roe v. Wade marked the end of the all-out anti-abortion

29. The Court has addressed *Casey*'s multiple rules in a piecemeal fashion. *See generally* Stenberg v. Carhart, 530 U.S. 914 (2000) (addressing the constitutionality of regulations that lacked a health exception for the mother); Gonzales v. Carhart, 550 U.S. 124 (2007) (overturning the health exception requirement and discussing medical uncertainty); Mazurek v. Armstrong, 520 U.S. 968 (1997) (detailing how, in a particular situation, the courts could not evaluate purpose). In *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), the Court evaluated *Casey*'s purpose and effects prongs, but it could be argued that they have narrowly cabined their analysis to situations involving only unnecessary health regulations.

30. Americans with Disabilities Act of 1990 § 101(10), 42 U.S.C. § 12111(10) (2012). For a brief discussion regarding why the judiciary, rather than the legislature, is the appropriate branch to address the abortion issue, *see infra* note 164.

31. There are intense religious, moral, and political debates about abortion and whether there should be a recognized right to procure one. Though this author believes in a woman's right to choose to the extent outlined in *Casey*, this Note centers on the ADA's undue hardship framework as applied to the undue burden test in *Casey* and the effects that modifying the test would have on state abortion regulations. For that reason, moral and political debates are not addressed.

era in America.[32] The decision decriminalized abortion, prohibited outright abortion bans, and has been acknowledged—perhaps somewhat grudgingly at times by the Court—as a "rule . . . of personal autonomy and bodily integrity, with doctrinal affinity to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection."[33] The Court's decision to extend the constitutional privacy protections in *Griswold v. Connecticut*[34] to women seeking previability abortions shifted regulatory power away from the states, subjecting state abortion laws to federal oversight and federal common law.[35] However, twenty years later, *Planned Parenthood of Southeastern Pennsylvania v. Casey*[36] signaled a retreat from federal oversight and the protections *Roe* afforded to women across the nation. Although the *Casey* Court affirmed the central tenets of *Roe* in its holding, it discarded *Roe*'s bright-line trimester framework[37] in favor of a more discretionary approach that encouraged increased deference to the state's interest in protecting life.[38] This change created an unsustainable tension whereby the state is at odds with itself, being forced to uphold the woman's protected liberty interest while simultaneously exercising its interest in protecting life.[39]

The internal tension that *Casey* created was revealed through a series of inconsistent and contradictory court

32. Prior to *Roe*, abortion was largely illegal in America and often only available under exceptional circumstances. Katha Pollitt, *Abortion in American History*, ATLANTIC, http://www.theatlantic.com/magazine/archive/1997/05/abortion-in-american-history/376851/ (last visited Sept. 17, 2016) [https://perma.cc/MF4G-2ZEG]. However, the right of a woman to obtain an abortion is not an "absolute right." Roe v. Wade, 410 U.S. 113, 156 (1973). In order to protect the state's right to police and protect the health and welfare of its citizens, the Court qualified this right through the development of the trimester framework. *Id.* at 154, 163.

33. *Roe*, 410 U.S. at 164–66; Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 857 (1992).

34. 381 U.S. 479, 485–86 (1965).

35. *See generally* Dawn Johnsen, *State Court Protection of Reproductive Rights: The Past, The Perils, and the Promise*, 29 COLUM. J. OF GENDER & L. 41, 50–52 (2015) (explaining the U.S. federalist system and the protections afforded by state and federal courts and constitutions).

36. *Casey*, 505 U.S. at 833.

37. *See infra* section I.B.

38. *Casey*, 505 U.S. at 873–74.

39. *See id.* at 875–78; Adams & Arons, *supra* note 28, at 32–35 (describing the tensions that arise when a state attempts to simultaneously protect the woman's liberty interest and its own interest in protecting potential life).

decisions.[40] Prior to *Hellerstedt,* the Supreme Court's only guidance came from two decisions[41]—*Stenberg v. Carhart*[42] and *Gonzales v. Carhart*[43]—both of which adversely affected women's constitutionally protected abortion rights and encouraged the TRAP laws that would eventually strip poor and impoverished women of their ability to exercise their fundamental right to an abortion.[44] This Part examines the Court's evolving abortion jurisprudence, beginning with *Roe*'s expansive decision, which affirmed—with qualifications—a woman's right to privacy and bodily autonomy, and continuing through the Court's piecemeal retreat from *Roe* in *Casey*, *Carhart*, and *Gonzales*.

A. Roe v. Wade

The first step on the path to constitutional protection for abortion came in *Griswold v. Connecticut.*[45] In *Griswold*, the Court acknowledged a constitutional right to privacy that protected individuals from unwarranted governmental intrusions.[46] Though *Griswold* did not speak directly to the abortion issue, it acknowledged that a right to privacy existed within the marital relationship.[47] As noted by the Court, this right also extended to family planning decisions, such as contraception use, which functionally paved the way for *Roe v.*

40. Linda J. Wharton et al., *Preserving the Core of* Roe*: Reflections on* Planned Parenthood v. Casey, 18 YALE J.L. & FEMINISM 317, 387 (2006).

41. The Court also decided a third case after *Casey*, Mazurek v. Armstrong, 520 U.S. 968 (1997). *Mazurek* focused on *Casey*'s purpose prong and was relied on by the Fifth Circuit in both the *Abbott* and *Cole* decisions. *See infra* section II.B.

42. 530 U.S. 914 (2000) (holding that a Nebraska regulation banning a particular abortion method was unconstitutional because it lacked a health exception for the mother and was overly broad in its application).

43. 550 U.S. 124 (2007) (holding that a federal regulation banning a particular abortion method was *not* unconstitutional even though it lacked a sufficient health exception).

44. *See infra* section II.C.

45. Griswold v. Connecticut, 381 U.S. 479 (1965).

46. *Id.* at 484–85 (explaining that the First, Third, Fourth, Fifth, and Ninth amendments in the Bill of Rights, through the Fourteenth Amendment's Equal Protection Clause, created a constitutional right to privacy that protected individuals from unwarranted state governmental intrusions). Additionally, in *Griswold*, the marital relationship and a married couple's decision to use contraceptives fell within this protected "zone of privacy." *Id.*

47. *Id.* at 497 (Goldberg, J., concurring) (explaining that it would be inappropriate for the state to abridge the right of a married couple to determine family size).

Wade.[48]

Prior to *Roe*, Texas prohibited abortions and subjected physicians who performed them to criminal liability.[49] When plaintiffs, Jane Roe[50] and Dr. Hallford,[51] sought declaratory and injunctive relief from Texas's abortion regulations,[52] the district court found that Texas's statute was vague and overbroad;[53] it nevertheless denied Roe's request for relief.[54] In a decision that would spark debate and give rise to conflict for years to come, the Supreme Court held that the constitutional privacy right first established in *Griswold* was sufficiently broad to "encompass a woman's decision whether or not to terminate her pregnancy."[55] The Court's decision deftly threaded the needle—while *Roe* recognized a woman's fundamental right to choose abortion, the Court tempered this right by weighing it against the state's "important interests in safeguarding health, in maintaining medical standards, and in protecting potential life."[56]

To strike this balance, the Court created the trimester framework—a bright-line rule supported by medical and historical concepts of fetal viability and intended to provide

48. *Id.*

49. Roe v. Wade, 314 F. Supp. 1217, 1219–23 (N.D. Tex. 1970) (permitting an exception for extreme cases where the mother's life was determined to be in jeopardy).

50. Norma McCorvey, known under the pseudonym "Jane Roe," went on to become an active member of the pro-life movement—speaking, protesting, and even seeking to have *Roe* overturned. *The Story of Norma McCorvey: The Woman Who Became "Jane Roe"*, ENDROE.ORG, http://www.endroe.org/roebio.aspx (last visited Sept. 17, 2016) [https://perma.cc/4BZR-2BTX].

51. James Hubert Hallford, M.D. intervened in the case on behalf of "himself and the class of people who are physicians, licensed to practice medicine under the laws of the State of Texas and who fear future prosecution." *Roe*, 314 F. Supp. at 1219 n.1.

52. *Id.* at 1219–20.

53. *Id.* at 1223 (explaining that the Texas abortion statutes failed to give physicians adequate notice as to their criminal liability and vaguely prohibited all abortions except those necessary "for the purpose of saving the life of the mother") (citation omitted).

54. As support for its decision, the district court cited the non-interference doctrine, which provides that federal courts should be hesitant to interfere with state enacted criminal statutes unless they "abridg[e] free expression" on their face or have the "purpose of discouraging protected activities." *Id.* at 1224 (citation omitted).

55. Roe v. Wade, 410 U.S. 113, 152–53 (1973) (describing the contexts when the personal privacy right is applicable, including marriage, procreation, contraception, family relationships, and child-rearing).

56. *Id.* at 154.

guidance to lower courts while protecting both parties' unique interests.[57] Under the trimester framework, a pregnant woman was granted virtually unrestricted freedom to choose an abortion during her first trimester; however, as the pregnancy progressed, state intervention was permitted to an ever greater degree, such that, in the second trimester, the state was permitted to regulate maternal health and, during the third trimester, could ban abortion outright.[58] The Court's decision to condition the woman's fundamental liberty interest in this manner limited the strict scrutiny review that would normally apply, which left *Roe* open to future attacks and left women across the United States in a less-than-certain position.[59]

B. The Burden of Casey

Fueled by political and ideological shifts in the Court, as well as increased pressure from anti-abortion groups, the Court revisited the abortion issue in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[60] The Court voiced concern that *Roe*'s trimester framework was too inflexible and restrictive, creating a disparity whereby courts accorded

57. *Id.* at 162–65. The trimester rule has been widely criticized from both sides of the abortion debate. Using viability, a medically subjective term, as the critical determinative factor has given rise to controversies regarding the fetus's legal status and changing viability statistics. *See* Randy Beck, *Gonzales, Casey, and the Viability Rule*, 103 NW. U. L. REV. 249, 258–60 (2009); *see also* Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 27–30 (1992) (discussing how the trimester rule was the Court's attempt to reach a middle ground between the pro-life and pro-choice political poles).

58. *Roe*, 410 U.S. at 164–65.

59. *Id.* at 162–64 (explaining that because a state's interests and a woman's interests are distinct, the State's interest in protecting potential life will become sufficiently compelling at the point of fetal viability such that the State may justifiably interfere with a woman's decision to choose an abortion). This quasi-strict scrutiny approach was further undermined by the Court's decision in *Casey*. *See* Manian, *supra* note 26, at 226 n.11 (noting that the undue burden test was less protective than *Roe*'s strict scrutiny approach).

60. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992); *see also* Wharton et al., *supra* note 40, at 328–29 (describing the changing composition of the court prior to *Casey* and the potential for changes to *Roe*'s holding); Sullivan, *supra* note 57, at 95 (emphasizing that judicial shifts from rules to standards and vice versa often occur when there are shifts in the political make-up of the court). *See generally* Rachel K. Jones & Kathryn Kooistra, *Abortion Incidence and Access to Services in the United States, 2008*, 43 PERSPS. ON SEXUAL & REPROD. HEALTH 41 (2008), http://www.guttmacher.org/pubs/psrh/full/4304111.pdf [https://perma.cc/5B9L-HLHG] (providing statistics on anti-abortion activism and violence, which peaked in the early 1990s).

greater weight to the woman's liberty interest and undervalued the state's interest in potential life.[61] To rectify this perceived imbalance, the Court modified the State's interest from an "important and legitimate interest," to a "substantial . . . interest in potential life throughout pregnancy,"[62] and also formulated a test more akin to a standard—the undue burden test—that was intended to address the inherent tensions and protect both parties' divergent interests.[63]

Expanding the scope of the State's interest in this manner limited *Roe*'s fundamental privacy protections and granted states the power to regulate even previability abortion under certain loosely defined circumstances.[64] Under the Court's new formula, a state law regulating previability abortion would be deemed invalid *only* where the statute had the "purpose or effect" of placing a "substantial obstacle" in the path of the woman seeking a previability abortion.[65] State regulations that hindered "the woman's free exercise of the right to choose" would be deemed a substantial obstacle;[66] while "a structural mechanism by which the State . . . m[ight] express profound respect for the life of the unborn," one that merely informed or persuaded the woman, would not be found to impede the woman's ability to choose.[67]

The two-pronged balancing test in *Casey* created confusion among both courts and scholars alike.[68] Absent affirmative

61. *Casey*, 505 U.S. at 875–76.

62. *Id.*

63. *Id.* at 876 ("Not all burdens on the right to decide whether to terminate a pregnancy will be undue. In our view, the undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty.").

64. *Id.* ("The very notion that the State has a substantial interest in potential life leads to the conclusion that not all regulations must be deemed unwarranted.").

65. *Id.* at 877.

66. *Id.*

67. *Id.* at 877–78; *see also* Jeffrey A. Van Detta, *Constitutionalizing* Roe, Casey, *and* Carhart*: A Legislative Due-Process Anti-Discrimination Principle that Gives Constitutional Content to the "Undue Burden" Standard of Review Applied to Abortion Control Legislation*, 10 S. CAL. REV. L. & WOMEN'S STUD. 211, 270 (2001) (discussing the method the Court may have intended versus the actual restrictive and punitive methods that many states have adopted for "informing" and "persuading" women seeking abortions).

68. Danielle Lang, *Truthful But Misleading? The Precarious Balance of Autonomy and State Interests in* Casey *and Second-Generation Doctor-Patient Regulation*, 16 U. PA. J. CONST. L. 1353, 1368 (2014) (noting one scholar's suggestion that *Casey*'s undue burden standard lacks "any substantive content to

guidance from the Supreme Court, lower courts struggled to define the contours and boundaries of "undue burden" and "substantial obstacle."[69] Since the test's inception, regulations that are typically deemed unconstitutional include: "unnecessary health regulation[s],"[70] spousal notification and consent requirements that grant a husband veto power over the woman's choice,[71] regulations that create a substantial obstacle in a large number of cases,[72] parental consent requirements that lack adequate judicial bypass procedures,[73] or regulations that would facially prohibit a woman's choice.[74]

Unfortunately, many lower courts have interpreted *Casey* as providing *per se* rules that eliminate the need to evaluate the particularized facts of each case,[75] resulting in courts blindly upholding certain regulations simply because they were upheld in *Casey*.[76] Typically, the following restrictions have been upheld post-*Casey*: informed consent and physician compliance with informed consent,[77] parental consent with

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guide courts in negotiating the conflicting interests in abortion cases"); *id.* at 1370 (framing the limits of *Casey* in the context of autonomy and "autonomous decision-making"); *The Supreme Court, 1999 Term, Leading Cases*, 114 HARV. L. REV. 219, 225–26 (2000) (noting that *Casey* failed to address the constitutionality of, or define a standard for, evaluating state-implemented abortion regulations); Wharton et al., *supra* note 40, at 385–87 (arguing that with proper guidance, the *Casey* standard could protect all interests at stake); Sullivan, *supra* note 57, at 33–34 (describing *Casey*'s test in terms of permissible versus impermissible degrees of state coercion).

69. *See* Wharton et al., *supra* note 40, at 385 (listing the various ways that courts typically misconstrue *Casey* given the notable lack of Supreme Court guidance).

70. *Casey*, 505 U.S. at 878. *Casey* implied that there may be times when a health regulation might qualify as "unnecessary," but the Court has not addressed this question. *Casey*, 505 U.S. at 878. Many health regulations are upheld on the grounds that they are "furthering important state interests in protecting the health and safety of its female citizens" even though they may often have the effect of making abortion less safe by limiting access to clinics and procedures. *See* Del Rosso, *supra* note 24, at 199; Gonzales v. Carhart, 550 U.S. 124, 181 (2007) (Ginsburg, J., dissenting).

71. *Casey*, 505 U.S. at 896–98.

72. *Id.* at 893–95. The statutory provision must be "relevant" to the cases being considered in the "large fraction" test. *Id.*

73. *Id.* at 899.

74. *Id.* at 877.

75. *See infra* text accompanying note 76.

76. Wharton et al., *supra* note 40, at 357–61 (demonstrating that courts frequently fail to consider the relevant facts on the record before them and instead apply *Casey*'s findings as per se rules).

77. Van Detta, *supra* note 67, at 257–61 (describing how informed consent has been twisted to fit the agenda of those regulating abortion, rather than

adequate judicial bypass procedures, reasonable measures to ensure informed choice, twenty-four-hour waiting periods (even though they tend to increase both costs and risks to pregnant women), regulations that burden particular groups (qualifiedly),[78] one-parent consent requirements (but not two-parent consent requirements),[79] regulations that *incidentally* increase costs or decrease the availability of abortions, and the majority of record-keeping and reporting requirements.[80]

Additionally, these same courts have simultaneously interpreted *Casey* to bar any consideration of economic factors, such as the financial burdens that certain regulations impose on women seeking previability abortions.[81] Because the Supreme Court's undue burden test is defined in negative, amorphous terms, courts sympathetic to the anti-abortion movement have easily exploited *Casey*'s ambiguities to favor the political and ideological objectives of certain partisan groups and legislators.[82]

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comporting with the general principles that underlie the doctrine of informed consent).

78. *Casey*, 505 U.S. at 886–87. However, a factual showing on the record could substantiate a claim, on review, that additional costs could create a substantial obstacle for women in poverty (a particular group). *Id.*; *see also* Wharton et al., *supra* note 40, at 334–35 (discussing the apparent significance that the *Casey* court placed on the "empirical quantitative inquiry" and the "particular women affected by [the] abortion law").

79. *Casey*, 505 U.S. at 899. *But see* Barnes v. Mississippi, 992 F.2d 1335, 1343 n.7 (5th Cir. 1993) (Johnson, J., dissenting) (discussing the Supreme Court's disapproval of two-parent consent requirements without adequate judicial bypass and chastising the Fifth Circuit for upholding the Mississippi law on technical grounds while failing to reach the substance of the statute).

80. *See Casey*, 505 U.S. at 881–87, 899–901. *But see* Shainwald, *supra* note 25, at 158–60 (describing the attempts of states and regulators to impose overly burdensome consent requirements like ultrasounds, biased counseling, heartbeat laws, and general materials); *see id.* at 164–65 (demonstrating that even adequate bypass procedures may still provide the courts with too much discretion that creates substantial obstacles for some women).

81. *See, e.g.*, ACLU of Kan. & W. Mo. v. Praeger, 815 F. Supp. 2d 1204, 1211 (2011) (citing *Casey* as a bar to considering the incidental increased costs to women, but upholding the law based on the legislature's desire to reduce costs to the state); *see also* Planned Parenthood Sw. Ohio Region v. DeWine, 696 F.3d 490, 508 (2012) (citing *Casey* as a bar to considering incidental costs); Planned Parenthood of Wis. v. Van Hollen, 738 F.3d 786, 805 (2013) (citing *Casey* as a bar).

82. Wharton et al., *supra* note 40, at 353–54; Sullivan, *supra* note 57, at 29 (demonstrating that the Court has construed the liberty interest at issue as a "negative liberty"). It could be argued that the *Casey* standard demonstrates the inherent danger in adopting a flexible standard as opposed to a rule; specifically, that they have the potential to "collapse law into politics." *Id.* at 68.

C. *Undermining Liberty After* Casey

Since deciding *Casey*, the Court has ruled on only three cases that challenged the undue burden test.[83] The cryptic rulings that came out of these cases only confused lower courts and granted states increased latitude to intrude into the woman's protected privacy realm. While neither *Carhart* nor *Gonzales* ostensibly changed the undue burden standard or diminished the core principles of *Roe*, each decision was tantamount to a wolf in sheep's clothing, paving the way for injudicious arguments claiming to protect women and increasingly more burdensome TRAP laws.[84]

On its face, *Stenberg v. Carhart* not only adhered to *Casey*'s requirements, but also appeared to illuminate ambiguities regarding maternal health and safety.[85] *Carhart* addressed the constitutionality of Nebraska's statute that criminalized "partial birth abortion."[86] The Nebraska statute failed to differentiate between particular pre- and post-viability abortion procedures and also neglected to include an adequate health exception for the mother's safety.[87] The Court held that the statute, given its indiscriminate breadth, "impose[d] an undue burden on a woman's ability' to choose a [particular abortion method], thereby unduly burdening the right to choose

83. Gonzales v. Carhart, 550 U.S. 124 (2007); Stenberg v. Carhart, 530 U.S. 914 (2000); Mazurek v. Armstrong, 520 U.S. 968 (1997). *Mazurek* is not discussed in this section; however, the Fifth Circuit relied on it as support for its assertion that in the face of medical uncertainty, the district court should have deferred to the legislature. Whole Woman's Health v. Cole, 790 F.3d 563, 573 (5th Cir. 2015), *aff'g in part, rev'g in part, vacating in part* Whole Woman's Health v. Lakey, 46 F. Supp. 3d 673 (W.D. Tex. 2014).

84. *See* Del Rosso, *supra* note 24, at 211–12 (arguing that that the Fifth Circuit made it easier for states to survive undue burden analysis because its decision in Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 769 F.3d 330 (5th Cir. 2014), misread *Gonzales* to apply rational basis review to abortion regulations); Shainwald, *supra* note 25, at 153–55 (demonstrating how the women-protective language utilized in *Gonzales v. Carhart* and *Casey* allowed legislators and courts to subvert the core holding in *Roe*).

85. *The Supreme Court, 1999 Term, Leading Cases*, *supra* note 68, at 225–26 (noting that the *Casey* standard failed to address state regulations that lacked health exceptions and explaining that *Carhart* resolves this issue).

86. *Carhart*, 530 U.S. at 930. "Partial birth abortion" refers to certain methods of abortion that take place at later gestational periods, typically after thirteen weeks, and vary depending on the circumstances. *Id.* at 923–25. *See id.* at 923–29 for a complete discussion of the processes, risks, and medical standards relating to partial birth abortion.

87. *Id.* at 930–31, 937–39.

abortion itself."[88] Even more importantly, the Court found that absent a clear health exception, regulations restricting a woman's ability to choose the most appropriate procedure put a woman's health and safety at even greater risk.[89]

Carhart was also notable because Justice Ginsberg, in her concurrence, addressed *Casey*'s purpose prong, an element of the test that had been frequently ignored or discounted.[90] Ginsberg drew attention to the pretextual nature of the State's purpose, explaining that the State's averred purpose appeared incongruent with the regulatory scheme because the "law does not save any fetus from destruction, for it targets only 'a *method* of performing abortion.'"[91] Because Nebraska's statute did not *actually* protect life, the legitimacy of the statute's purpose was questionable.[92]

Carhart created a bright-line rule requiring that courts evaluate the need for statutory health exceptions, "recogniz[ing] that a State cannot subject women's health to significant risks."[93] Although this decision afforded women greater protection under *Casey*'s undue burden standard, many opposed to abortion viewed it as a threat to the State and its ability to regulate abortion.[94]

Seven years later, in *Gonzales v. Carhart*,[95] the Court again addressed partial birth abortion and the undue burden

88. *Id.* at 930 (citation omitted).

89. *Id.* at 937–38 (citation omitted) (mandating that where a state bans a particular method of abortion, it must include a health exception to permit the procedure when it is medically necessary to "preserv[e] . . . the life or health of the mother").

90. The purpose prong of the *Casey* test is a powerful tool that the courts have historically been unwilling to utilize because it was not adequately fleshed out in *Casey*. *See* Wharton et al., *supra* note 40, at 377–78.

91. *Carhart*, 530 U.S. at 951 (Ginsburg, J., concurring) (citation omitted).

92. *Id.* at 952 (suggesting that the statute "prohibit[ed] the procedure because the state legislators [sought] to chip away at the private choice shielded by *Roe*") (citing Hope Clinic v. Ryan, 195 F.3d 857, 880–82 (7th Cir. 1999) (Posner, J., dissenting)).

93. *Id.* at 931; *see also The Supreme Court, 1999 Term, Leading Cases*, *supra* note 68, at 227–28. *But see* Wharton et al., *supra* note 40, at 348–49 (noting the tenuous majority in *Carhart* and Justice O'Connor's acknowledgement that she would have upheld the statute if it had "contained an adequate health exception and . . . [had been] limited to D & X abortions only").

94. Wharton et al., *supra* note 40, at 347–48 (explaining that critics of the decision viewed the health exception requirement as "an ever-expanding loophole in abortion jurisprudence" that would eventually eclipse the state's ability to regulate).

95. 550 U.S. 124, 132 (2007).

test. In *Gonzales*, however, the regulation at issue had been implemented at the federal level in accord with Justice O'Connor's recommendations in *Carhart*.[96] Unlike the *Carhart* Court, the *Gonzales* Court upheld the partial birth abortion ban, finding that it was not overbroad and did not, therefore, create an undue burden.[97] Like Nebraska's statute, the federal statute lacked a health exception for the mother, yet the Court abandoned the precedent it had set in *Carhart* and focused instead on evidence of medical uncertainty.[98] According to the Court, "medical uncertainty over whether the Act's prohibition create[d] significant health risks provide[d] a sufficient basis to conclude in this facial attack that the Act d[id] not impose an undue burden."[99]

Once again, the Court affirmed that *Roe*'s central tenets continued to apply[100]—but more tenuously than in prior decisions—while simultaneously undermining a woman's ability to make decisions respecting her bodily autonomy.[101] The Court accomplished this feat by relying on a woman-centric argument.[102] In a paternalistic and devaluing opinion, the majority suggested that the ban protected women from the regret they may experience after choosing to have an abortion.[103] The Court's decision further diminished a woman's

96. *Carhart*, 530 U.S. at 950–51 (2000) (explaining when a statute regulating partial-birth abortion would survive review).

97. *See Gonzales*, 550 U.S. at 150–52 (distinguishing the federal act in *Gonzales* from the Nebraska statute in *Carhart*).

98. *Id.* at 165–66.

99. *Id.* at 164. Because the Court was concerned that "*Stenberg* has been interpreted to leave no margin of error for legislatures to act in the face of medical uncertainty," it recommended an approach that was more deferential to legislatures where medical uncertainty existed. *Id.* at 166. In *Whole Woman's Health v. Cole*, 790 F.3d 563, 587 (5th Cir. 2015), the Fifth Circuit relied on *Gonzales* to justify an interpretation that forbade judicial review of legislative findings where medical uncertainty existed. *But see* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2310 (2016) ("And, in *Gonzales* the Court, while pointing out that we must review legislative 'factfinding under a deferential standard,' added that we must not 'place dispositive weight' on those 'findings.'") (quoting *Gonzales*, 550 U.S. at 165).

100. *See Gonzales*, 550 U.S. at 125–26.

101. *See id.* at 159–61.

102. *See id.* at 159–60; *see also* Lang, *supra* note 68, at 1378–81 (elaborating on the dangers of relying on gender assumption in the context of abortion and informed consent); Manian, *supra* note 26, at 224–25 (discussing the dangers that a woman-protective approach has on a woman's constitutional right to autonomy and health decisions).

103. *See Gonzales*, 550 U.S. at 159 ("It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow

autonomy by suggesting that a woman's emotional status during pregnancy affects both the ability of physicians to provide adequate information and the ability of female patients to make informed, rational choices.[104] Reframing the argument in terms of a woman's mental health and altered mental status during pregnancy provided courts and legislatures with a tool that has allowed them to "chip away at a right declared again and again by this Court—and with increasing comprehension of its centrality to women's lives."[105]

As can be seen in *Carhart* and *Gonzales*, the Court's jurisprudence following *Casey* lacked clarity and guidance. Combined with contradictory lower court decisions and legislative attempts to criminalize abortion, the issue was prime for reconsideration.[106] Amid political chaos and uncertainty, the Court missed its chance to address *Casey*'s ambiguities and guaranteed that a woman's right to choose will need to be revisited again in the future.

II. PERPETUATING *CASEY*'S CONFUSION

For many years, some judiciaries and state legislatures sympathetic to the anti-abortion agenda have hijacked and manipulated *Casey*'s standard—detrimentally subverting a woman's constitutionally protected right. By regulating abortion to the maximum extent allowed, they have successfully chipped away at a woman's protected right to the point that *Roe*'s protections are practically unavailable to many women, most significantly, women without means.[107] *Roe* and

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more profound . . . . ").

104. *Id.* at 159–60.

105. *Id.* at 191 (Ginsburg, J., dissenting); *see also* Shainwald, *supra* note 25, at 154 ("These regulations have resulted in a steady stream of legislation that continues to chip away at *Roe's* principles . . . . ").

106. *See, e.g.*, McCormack v. Heideman, 900 F. Supp. 2d 1128, 1144 (D. Idaho 2013) (reviewing Idaho's attempts to criminalize abortion for women and physicians); Planned Parenthood Sw. Ohio Region v. DeWine, 696 F.3d 490, 503 (6th Cir. 2012) (reviewing Ohio law that criminalized particular abortion procedures).

107. *State Policies in Brief: The Abortion Policy in the Absence of Roe*, GUTTMACHER INST., http://www.guttmacher.org/statecenter/spibs/spib_APAR.pdf (last visited Sept. 20, 2016) [https://perma.cc/U8TA-SXKK] (illustrating the numerous abortion regulations enforced in the United States against women, clinics, and physicians); *see also Evidence You Can Use: Targeted Restriction of Abortion Providers (TRAP) Laws*, GUTTMACHER INST., https://www.guttmacher.org/report/evidence-you-can-use-targeted-restriction-

Casey established explicit limits on a state's ability to regulate abortion,[108] but Texas and a handful of other states have increasingly relied on extreme judicial interpretations of *Casey* to exceed the constitutional boundaries of their regulatory authority.[109] These states have taken an aggressive approach to abortion regulation, enacting laws that: (1) create prohibitive barriers for women seeking safe, legal abortions, and (2) impose strict health and safety regulations that operate as significant hurdles to physicians and clinics offering legal abortion services.[110] *Whole Woman's Health v. Hellerstedt* exemplifies the judiciary's role in perpetuating these practices, as well as the wildly differing and subjective interpretations that *Casey*'s standard yields.

Utilizing *Whole Woman's Health v. Hellerstedt*,[111] this Part examines how *Casey*'s undue burden standard engenders paradoxical and extreme outcomes. Section A explains the district court's interpretation of *Casey*'s undue burden standard, followed by section B, which describes the Fifth Circuit's review of the district court's opinion and explains how the *Casey* standard enabled the appellate court to circumvent the substantive constitutional issue in *Hellerstedt*. Section C highlights and explains the Supreme Court's attempt at resolving *Casey*'s intrinsic inconsistencies in *Hellerstedt*.

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abortion-providers-trap-laws (last visited Oct. 5, 2016) [https://perma.cc/64V9-BRVW] (explaining the connection between TRAP laws, clinic closures, and the impact on poor women).

108. Roe v. Wade, 410 U.S. 113, 153 (1973); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992).

109. Wyoming, North Dakota, South Dakota, Mississippi, and Missouri each have only one open clinic remaining. Deprez, *supra* note 25; *see also* Emma Green, *State-Mandated Mourning for Aborted Fetuses*, ATLANTIC (May 14, 2016), http://www.theatlantic.com/politics/archive/2016/05/state-mandated-mourning-for-aborted-fetuses/482688/ [https://perma.cc/KAC8-GZNS] (discussing new TRAP laws that many states have recently passed mandating burial or cremation for miscarried or aborted fetuses prior to twenty weeks and other laws that redefine the term fetus); *see also* Adam Liptak, *Supreme Court Strikes Down Texas Abortion Restrictions*, N.Y. TIMES, (June 27, 2016), http://www.nytimes.com/2016/06/28/us/supreme-court-texas-abortion.html?_r=0 [https://perma.cc/3TFJ-NUVF] (noting that "[m]any states have enacted restrictions in recent years that test the limits of the constitutional right to abortion").

110. *See State Policies in Brief*, *supra* note 10.

111. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016).

A. The District Court

In *Whole Woman's Health v. Hellerstedt*, the Plaintiffs facially challenged the constitutionality of H.B. 2's ASC regulations.[112] They also challenged the constitutionality of both the ASC and the admitting privilege provisions, as-applied to women in McAllen and El Paso, Texas, alleging[113] that the provisions created an undue burden.[114]

After a four-day bench trial,[115] the district court declared that H.B. 2's ASC provisions created an undue burden and were facially unconstitutional as to all clinics in Texas, with two exceptions.[116] The district court also declared that H.B. 2's admitting privilege regulations created an undue burden and were unconstitutional as applied to the clinics and physicians in McAllen and El Paso, Texas.[117] The district court then went further, declaring that both provisions, when considered together, "create[d] an impermissible obstacle *as applied to all women* seeking a previability abortion."[118]

Using *Casey*'s two-prong undue burden test, the district court focused on H.B. 2's purpose and effects, and whether the

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112. Whole Woman's Health v. Lakey, 46 F. Supp. 3d 673, 677–78 (W.D. Tex. 2014), *aff'd in part, modified in part, vacated in part, rev'd in part sub nom.* Whole Woman's Health v. Cole, 790 F.3d 563 (5th Cir. 2015), *modified*, 790 F.3d 598, *rev'd sub nom.* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016).

113. *Lakey*, 46 F. Supp. 3d at 678; *see also Cole*, 790 F.3d at 592–96 (noting that women in McAllen would be required to travel 235 miles to reach a Texas clinic; the physician at the McAllen facility was unable to obtain admitting privileges at the nearest hospital; El Paso women would be required to travel as far as 550 miles to reach a clinic in the State of Texas).

114. *Lakey*, 46 F. Supp. 3d at 677.

115. *See id.* at 678. Both parties stipulated to facts relating to the number and location of clinics that would remain after H.B. 2 went into effect. *Id.* at 680–81. Both parties also presented evidence during the bench trial, however the Fifth Circuit seemed to imply that the evidence and the time allocated for trial were insufficient because it was "highly-abbreviated." *Cole*, 790 F.3d at 577. It refused to credit testimony by Plaintiff's expert Dr. Grossman that related to the percentage of women required to travel increased distances or to the limited capacity and increased demand that the remaining clinics would encounter. *Id.* at 594 n.42.

116. *Lakey*, 46 F. Supp. 3d at 676.

117. *Id.* at 676–77.

118. *Id.* at 676 (emphasis added). The Fifth Circuit chastised the district court for facially invalidating the ASC and admitting privilege provisions on the grounds that it had overstepped its authority by granting unrequested relief and failing to follow precedent. *Cole*, 790 F.3d at 580–81. The Fifth Circuit also argued that the district court had failed to properly consider and apply the severability clause in the statute. *See id.* at 578–79.

provisions created a substantial obstacle to women seeking previability abortion.[119] Under *Casey*, a "state regulation [that] has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus" creates an undue burden.[120] A regulation's purpose or effect is "invalid because the means chosen by the State to further [its] interest in potential life" hinder, rather than inform, a woman's choice, essentially "strik[ing] at the right itself."[121]

Addressing the purpose prong, the district court found that the State's purpose was impermissible because H.B. 2 treated abortion clinics in a "disparate and arbitrary" manner.[122] The State's purpose was also questionable because it lacked a "credible medical or health rationale."[123] For these reasons, the district court concluded that H.B. 2's requirements were "intended to close existing licensed abortion clinics" and to "reduce the number of providers licensed to perform abortions, thus creating a substantial obstacle."[124]

H.B. 2's effects were also found to create an impermissible obstacle.[125] The district court's analysis highlighted several factors: Texas's size, the number of reproductive-age women whom H.B. 2 would affect, the distance between the women and the remaining eight clinics, and the ability of the remaining clinics to meet any increased demand resulting from

119. *Lakey*, 46 F. Supp. 3d at 679–80.

120. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992).

121. *Id.* at 877, 874.

122. *Lakey*, 46 F. Supp. 3d at 685. The statute made no distinction between clinics that provided only medical abortions—a method of non-invasive drug induced abortion commonly used in the first trimester—and those that provided surgical abortions. *See id.* at 684–85. *See generally* Shainwald, *supra* note 25, at 169 (explaining medical abortion). Additionally, H.B. 2 simultaneously required abortion facilities to comply with ASC regulations, but then refused to grant abortion clinics the same grandfathering or waivers that it had extended to existing ASCs. *Lakey*, 46 F. Supp. 3d at 685.

123. *Lakey*, 46 F. Supp. 3d at 684–85 (finding that H.B. 2's effects did not comport with its goal because there were higher risks to a woman's health caused by delaying an abortion, the ASC provision seems irrelevant to medical abortion, and the State's credentialing rationale with respect to the need for admitting privileges was "weak and speculative"). Furthermore, the State's expressed purpose—providing greater protections for maternal health and safety—was incongruent with the State's suggested remedy for El Paso women—that they could seek abortions in New Mexico, where there were no heightened health and safety regulations. *Id.* at 685–86.

124. *Id.* at 685.

125. *Id.* at 687.

H.B. 2's implementation.[126] The district court's findings established that travel distances, when considered in light of practical concerns unique to each woman,[127] could "establish a *de facto* barrier to obtaining an abortion for a large number of Texas women . . . ."[128] The district court also noted the "particularly high barrier" that H.B. 2 created for poor, rural, or disadvantaged Texas women seeking an abortion,[129] specifically pointing out that the economic barriers created for these particular women were significant and not merely "incidental."[130] In its analysis, the district court emphasized the cumulative effect that widespread clinic closures, increased travel costs, and Texas's many other onerous abortion regulations would have on women seeking previability abortions,[131] leading to its conclusion that implementing H.B. 2 would not only cause wide-scale closure of abortion clinics across Texas, but would also create a "lack of practical access" that was "compelling evidence of a substantial obstacle."[132] Although the Fifth Circuit, on review, purported to ground its decision in the *Casey* test as well, its interpretation resulted in

126. *Id.* at 680–83.

127. The district court considered practical effects such as childcare, transportation, overburdened clinics, time off, immigration status, poverty, and time and expenses. *Id.* at 683; *see* Wharton et al., *supra* note 40, at 338–39 (noting *Casey*'s suggestion that practical effects on the record create a substantial obstacle).

128. *Lakey*, 46 F. Supp. 3d at 683. The Fifth Circuit took issue with the district court's use of the terminology a "significant, but ultimately unknowable, number" when referring to the quantity of women affected by Texas's law. *See* Whole Woman's Health v. Cole, 790 F.3d 563, 586 (5th Cir. 2015), *aff'g in part, modifying in part, vacating in part, rev'g in part*, 46 F. Supp. 3d 673 (W.D. Tex. 2014). The Fifth Circuit maintained that the district court should have provided the particular number of women who would constitute the denominator in order to succeed on a facial challenge, noting that the district court "fail[ed] to specify what the number would be or how it might be derived." *Id.* at 589. *But see id.* at 573 (citing the *Casey* opinion using the language "large fraction" and "significant number" without an exact quantitative value).

129. *Lakey*, 46 F. Supp. 3d at 683.

130. *Id.*; *see also* Planned Parenthood of Se. Pa. v. Casey, 550 U.S. 833, 874 (1992) ("[A] law which serves a valid purpose, one not designed to strike at the right itself, [and] has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it."). *But see Casey*, 550 U.S. at 901 (suggesting that "increased cost[s] could become a substantial obstacle," but the evidence *must* be on the record before the reviewing court).

131. *Lakey*, 46 F. Supp. 3d at 681–82, 686.

132. *Id.* at 684. In *Casey*, the Court's discussion of mandated physician notification requirements and the twenty-four-hour waiting period alluded to practicality as a potential consideration. *Casey*, 550 U.S. at 884–86.

a wholly different conclusion.

B. The Appellate Court

Rather than focus on the *Casey* test, the Fifth Circuit attacked the district court's decision to hear the Plaintiffs' case and its decision to facially invalidate the statute.[133] According to the Fifth Circuit, the district court could not facially invalidate either the admitting privilege or the ASC provisions of H.B. 2, because (1) the Plaintiffs had not requested the relief granted,[134] and (2) relief was precluded by the Fifth Circuit's decision in *Abbott II*.[135] Even after summarily dismissing the district court's opinion, the Fifth Circuit proceeded to critique the district court's undue burden analysis.[136]

Addressing the district court's undue burden analysis, the Fifth Circuit found that the State's purpose was permissible because the provisions were not "disparate and arbitrary," but rather related and intentional.[137] Furthermore, it explained that the district court's reliance on the Plaintiffs' evidence that abortions performed in clinics were as safe, if not safer than, those procedures performed in licensed ASCs was insufficient to invalidate the State's legitimate purpose.[138] For these

133. *See Cole*, 790 F.3d at 580–81 (explaining that the claim was barred by res judicata and that the district court had granted an impermissible remedy that exceeded the relief requested).

134. *Id.* at 580.

135. *Id.* The Fifth Circuit found that the district court could not facially invalidate the admitting privilege provision because it had already been litigated in *Abbott II* and was therefore barred by *res judicata*. *Id.* at 580–81. It found that the remaining facial challenges were similarly barred because even though they had not been litigated in the prior suit, they involved some of the same parties and arose out of the same transaction because it was a suit related to H.B. 2. *Id.* at 581–82. *But see* Brief for Professors Michael Dorf et al. as Amici Curiae Supporting Petitioners at 4, Whole Woman's Health v. Cole, 790 F.3d 563 (5th Cir. 2015) (No. 15-274) (arguing that the Fifth Circuit's preclusion analysis was incorrect and therefore that the Supreme Court may hear this case).

136. *Cole*, 790 F.3d at 583–84 (proceeding *arguendo*).

137. *Id.* at 585. The Fifth Circuit conceded that the State's failure to provide a grandfathering clause to abortion clinics could be construed as disparate treatment, but it deemed that treatment to be "simply evidence that the State truly intends that women only receive abortion[s] in facilities that can provide the highest quality of care and safety," which the Fifth Circuit deemed to be consistent with the State's legitimate purpose. *Id.*

138. *Id.* (citing Mazurek v. Armstrong, 520 U.S. 968 (1997), for the proposition that even if all health evidence contradicts the claim, it is not necessarily invalid). *But cf. Mazurek*, 520 U.S. at 973 (suggesting that the case could be narrowly cabined to claims involving physician only abortion regulations).

reasons, the Fifth Circuit determined the district court could not conclude "from the mere fact of the law,"[139] nor from the evidence of "medical uncertainty" or harmful effect of law, that the State's purpose was impermissible.[140]

Next, the Fifth Circuit attacked the standard that the district court had applied. "Facial challenges relying on the effects of a law 'impose a heavy burden upon the parties maintaining the suit,'" the Fifth Circuit admonished.[141] Relying on this assertion, the Fifth Circuit condemned the district court's effects analysis and focused its attack on the Plaintiffs' inability to meet the requisite burden.[142] Although the Supreme Court in *Casey* had facially invalidated the spousal consent requirement using the large fraction test,[143] the Fifth Circuit explained that it was unclear whether *Casey*'s large fraction test or the general test for constitutional facial challenges applied to abortion regulations.[144] The Fifth Circuit adopted the more stringent general test and determined that the Plaintiffs had failed to meet their burden.[145] Finally, the

139. *Cole*, 790 F.3d at 585.

140. *Id.* at 584–86. *But cf. Mazurek*, 520 U.S. at 972 (inferring that where there are harmful effects *and* sufficient evidence of a "vitiating purpose," the legislature's purpose could be construed as invalid); *see also* Wharton et al., *supra* note 40, at 344–45 ("[T]he Court flirted with the suggestion that an unconstitutional purpose standing alone would not suffice to invalidate an abortion restriction.").

141. *Cole*, 790 F.3d at 584–86 (citing Gonzales v. Carhart, 550 U.S. 124, 167 (2007)).

142. *Id.* at 586.

143. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 893–95 (1992) (describing that where a regulation creates a substantial obstacle for a large fraction of women to whom the regulation is relevant, the regulation creates an undue burden).

144. *Cole*, 790 F.3d at 586.

145. *See id.* at 586, 588. The Fifth Circuit determined that the Court in *Casey* had "departed from the general standard for facial challenges" and that the significantly more burdensome constitutional test, which holds that a law can only be facially invalidated if that law would be unconstitutional in every application, was the applicable standard. *Id.* The Fifth Circuit relied on the holding and application of the general test in *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583, 588 (5th Cir. 2014). *Id.* at 588–90. *Abbott II* mirrors the *Salerno* no-set-of-circumstances test, which states that a challenger seeking to facially invalidate a legislative act "must establish that no set of circumstances exists under which the [a]ct would be valid." United States v. Salerno, 481 U.S. 739, 745 (1987). *But see* Wharton et al., *supra* note 40, at 234, 351–52 (discussing the challenges that the *Salerno* "no set of circumstances test" has created for courts when it comes to deciding which standard should be applied to facial challenges in the abortion realm and further noting that the majority of courts have rejected the *Salerno* test, the Fourth and Fifth Circuits excepted); *see*

Fifth Circuit denounced the district court's conclusion that practical factors such as transportation, poverty, immigration status, and child care combined with travel distances to create an effect that imposed an undue burden on impoverished women.[146]

The Fifth Circuit utilized technical arguments and convoluted logic to functionally skirt any substantive issues raised by the undue burden test.[147] While both the district court and the Fifth Circuit relied on *Casey*, they arrived at opposite conclusions. The district court analyzed the purpose prong and made evidentiary findings that the State's purpose was invalid and intended to strike at the abortion right itself,[148] its findings embraced *Casey*'s language regarding cost, and it successfully contextualized the effects that Texas's law would have on poor women.[149]

Conversely, the Fifth Circuit exploited *Casey*'s ambiguities to undermine the district court's substantive analysis. Relying on res judicata, the Fifth Circuit functionally inoculated H.B. 2 from any future challenges.[150] By disregarding or rationalizing the evidence of pretext and denying courts the authority to inquire into medical evidence, the Fifth Circuit attempted to create precedent that would functionally foreclose future challenges based on the purpose prong of the undue burden test.[151] The Fifth Circuit's decision eviscerated the effects

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also Gonzales, 550 U.S. at 167–68 (explaining that the large fraction test is the appropriate test for abortion regulations where it is an as-applied challenges.).

146. *Cole*, 790 F.3d at 589. The Fifth Circuit further stated that these factors could not establish a substantial obstacle for a large fraction of women because indigency is a condition unrelated to the regulation's effects. *Id.* Furthermore, even if the practical circumstances could be considered, it is unclear "what fraction of women face an undue burden due to this [exact] combination of practical concerns and the effects of H.B. 2." *Id. But cf. Casey*, 505 U.S. at 893–94 (acknowledging that it was similarly unclear what fraction of women suffered spousal abuse; however, that circumstance did not prevent the Court from finding that the provision created a substantial obstacle).

147. The Fifth Circuit's opinion did not address whether the regulations created an undue burden. Instead, it focused on the threshold burden for facial challenges, the evidentiary standard for healthcare testimony, and the absence of particular numerical values in the large fraction analysis.

148. Whole Woman's Health v. Lakey, 46 F. Supp. 3d 673, 685–86 (W.D. Tex. 2014).

149. *Id.* at 682–84.

150. *Cole*, 790 F.3d at 582.

151. *Id.* at 584–87 (demonstrating how the Fifth Circuit's interpretation would grant near-limitless discretion to legislatures and preempt inquiries into the legislature's purpose in promulgating abortion regulations).

prong of the undue burden test by discounting the large fraction test, thereby ensuring that it would be exceedingly difficult for courts in that circuit to grant facial relief where abortion regulations were at issue.[152] If that were not enough, it dissected the large fraction test to the extent that virtually no group of women could ever constitute a large fraction[153]—in effect, guaranteeing that impoverished women could never claim that economic circumstances created a substantial obstacle.[154]

The Supreme Court attempted to reconcile these two inconsistent interpretations while adhering to the obtuse strictures of *Casey*. The Court's decision, handed down on June 26, 2016, was hailed as a victory for the nation's women and the pro-choice movement.[155] However, the Court's ability to ignore the economic reality in this narrative reveals the inherent dangers and injustices ensconced in *Casey*.

C. The Supreme Court

The Supreme Court's approach to *Hellerstedt* centered on the holding in *Casey* that "[un]necessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right."[156] Before clarifying the undue burden test's legal standard and explaining, to some degree, the correct approach to recognizing when a regulation is "unnecessary," the Court made short shrift of the Fifth Circuit's argument that principles of res judicata[157] barred the Plaintiffs' claims.

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152. *See* Gonzales v. Carhart, 550 U.S. 124, 167–68 (2007) (explaining why facial challenges to abortion statutes are typically disfavored: "[I]t would indeed be undesirable for [courts] to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation.") (quoting United States v. Raines, 362 U.S. 17, 21 (1960)).

153. *Cole*, 790 F.3d at 589 (choosing "all women of reproductive age" as the appropriate denominator).

154. *Id.*

155. Allen, *supra* note 3.

156. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2296 (2016) (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 878 (1992)).

157. Res judicata did not preclude the Plaintiffs' post-enforcement challenge, nor did the district court err when it granted relief that facially invalidated H.B. 2's provisions as applied to all women in Texas. *Id.* at 2307. The Court explained that changed circumstances and new facts, especially in situations where "important human values" are at stake, may give rise to new constitutional claims. *Id.* at 2305. Additionally, the Court emphasized that requiring a plaintiff

After rejecting the Fifth Circuit's "alternative grounds" for denying the Plaintiffs' claims, the Court attempted to once again clarify the *Casey* test.[158] *Casey*, the Court stated, requires that courts consider both the benefits a regulation confers and the burdens it imposes.[159] When analyzing benefits and burdens, courts must apply the appropriate standard of review—something more stringent than the rational basis review the Fifth Circuit favored.[160] Additionally, the Court clarified the debate surrounding the contested issue of medical uncertainty in the face of legislative motive by proscribing a fact-intensive, case-by-case approach that emphasized deference to the record and the evidence credited by the fact-finder.[161]

The Court devoted a significant portion of its decision to discussing the financial, economic, and practical costs that ASCs would face if they were required to comply with H.B. 2.[162] Noticeably absent from the Court's opinion, however, is *any* reference to the economic and financial costs that H.B. 2, and regulations like H.B. 2, impose on women.[163] The Court's decision utterly fails to acknowledge the elephant in the room: many women who need to seek abortions are impoverished, abortion is not free, and in the face of these near-to-complete economic barriers, the constitutional right is therefore illusory for many poor women.

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to bring all possible statutory claims at once would be illogical, and costly to plaintiffs, the state, and the judiciary. *Id.* at 2308 (noting that the Fifth Circuit's rule would "encourage a kitchen-sink approach . . . [whose] outcome is less than optimal—not only for litigants, but for courts"). Furthermore, the two provisions that were challenged "set forth two different, independent requirements with different enforcement dates." *Id.* (explaining that "[t]his Court has never suggested that challenges of two different statutory provisions that serve two different functions must be brought in a single suit").

158. *Id.* at 2303, 2309.

159. *Id.* at 2310.

160. *Id.* at 2309. ("[It] is wrong to equate the judicial review applicable to the regulation of a constitutionally protected liberty with the less strict review applicable where, for example, economic legislation is at issue.").

161. *Id.* at 2310–11.

162. *Id.* at 2316–18.

163. Justice Breyer briefly noted, almost in passing, the cumulative effect of increased travel distances "taken together with others"—without further analysis. *Id.* at 2313. Similarly, he noted the financial burden that H.B. 2 would place on ASCs, but made no mention of the costs that increased travel distances would have on women generally, much less impoverished women particularly. *Id.* at 2317–18. Justice Ginsburg was also silent on the topic. *See id.* at 2320–21 (Ginsburg, J., concurring).

The Court's functional prohibition on a legislature's ability to enact TRAP legislation based on maternal health concerns is nothing more than a tourniquet—a temporary fix that fails to address *Casey*'s underlying problems. The Court's decision ignores *Casey*'s underlying flaws and instead recommends another balancing test for yet another fragment of *Casey*'s ambiguous directive.

III. EASING THE BURDEN

The Supreme Court and Congress have historically utilized undue burden tests where there is a danger that federal authority has the potential to infringe on the states' right to regulate and police its own citizenry. However, in many cases where they are utilized, it is because there exists a heightened need to protect a party's constitutional rights from "dubious forms of state regulation, [often] involving discrimination."[164] Both the ADA and Title VII of the 1964 Civil Rights Act utilize undue hardship frameworks in their "reasonable accommodation" analyses.[165] Unlike *Casey*, however, these frameworks rely on economic factors and cost-based

164. Daniel A. Farber, *Climate Change, Federalism, and the Constitution*, 50 AZ. L. REV. 879, 923 (2008); *see also* Vincent Di Lorenzo, *Federalism, Consumer Protection and Regulatory Preemption: A Case for Heightened Scrutiny*, 10 U. PA. J. BUS. & EMP. L. 273, 282 (2008) (describing the conflict between the "need to uphold principles of federalism . . . and the need to promote the operation of federally chartered institutions . . . governed by federal law"). Whether abortion *should* be regulated by the courts or Congress is a matter of opinion. Typically, regulating health and welfare fall within a state's police power. *See* Catherine Maggio Schmucker, *Everything is Bigger in Texas—Especially the Abortion Debate: Why Texas House Bill 2 Can Survive a Constitutional Challenge and How it Should Change the Abortion Analysis*, 19 TEX. REV. L. & POL. 101, 113 (2014). Although Congress invaded this realm when it enacted the Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 (2012), at issue in *Gonzales v. Carhart*, 550 U.S. 124 (2007), the ban was narrowly circumscribed to a particular abortion procedure; otherwise, there may have been significantly more pushback regarding its authority under the Commerce Clause to enact the ban. If Congress attempted to regulate abortion in a broader context, it would likely run up against heavy opposition from states' rights activists and face questions regarding its legitimacy to act under Article I. Additionally, a woman's privacy right and the right to choose previability abortion are creatures of substantive due process and state statute, which may suggest that courts are better suited to offer protection. *See* Sarah K. Hofstadter, *Protecting State Procedural Rights in Federal Court: A New Role for Substantive Due Process*, 30 STAN. L. REV. 1019, 1036 n.77 (1978) (arguing that "[c]ourts in general are uniquely structured to interpret statutes and enforce judicial procedures . . . . ").

165. *See infra* text accompanying notes 174–176.

evaluations to determine whether an employee's request for a reasonable accommodation would result in an undue hardship to the employer. This Part explains the ADA's overall undue hardship framework and the underlying policy concerns, and demonstrates that the ADA framework has been successfully implemented and is sufficiently rigorous to protect both the State's interest in protecting life and the woman's constitutionally protected liberty interest—as mandated by the *Casey* Court.

A. Undue Hardship Under the Americans with Disabilities Act

The ADA was intended to expand protections for the handicapped, eliminate discrimination, and remedy the shortcomings of prior legislation in this area of law.[166] In contemplating the Act's policy and procedural goals, Congress recognized a "need to provide clear, strong, consistent, enforceable standards"[167] while preserving flexibility—a characteristic for which standards are lauded and valued.[168] To accomplish this, Congress outlined the statute's purpose and intent and provided specific evaluative guidelines and factors for the courts.[169]

The ADA comprehensively defined "undue hardship" as an "action requiring significant difficulty *or* expense."[170] Whether a "significant difficulty or expense" exists depends on an analysis of congressionally determined factors.[171] The ADA's factors create a realistic "snapshot" of the employer's burden, which courts can use to fairly and objectively balance the

166. Julie Brandfield, *Undue Hardship: Title I of the Americans with Disabilities Act*, 59 FORDHAM L. REV. 113, 115–16 (1990). Section 504 of the Rehabilitation Act of 1973 was the precursor to the ADA and provided "a general prohibition against discrimination on the basis of handicaps." *Id.* at 115. Although Section 504 applied an undue hardship test, it failed to provide adequate guidance when it came to determining the "degree of costs that [would] constitute undue hardship." *Id.* at 118. Courts relied heavily on fact-intensive inquiries, which resulted in inconsistent decisions that had minimal precedential value. *Id.* at 127.

167. *Id.* at 120 (citing S. REP. NO. 101-116, at 19 (1989)).

168. Sullivan, *supra* note 57, at 66–67; *see also* H.R. REP. NO. 101-485(III), at 41 (1990), *as reprinted in* 1990 U.S.C.C.A.N 445, 463–65 (noting that the factors used to evaluate an undue hardship are meant to be flexible).

169. H.R. REP. NO. 101-485(III), at 40–42.

170. 42 U.S.C. § 12111(10)(A) (2012) (emphasis added).

171. *Id.* § 12111(10)(B).

parties' interests. These factors include: the nature and cost of the accommodation, their impact on operations, the overall financial resources of the facility, and the particular scope of the facility's operations.[172] Unlike the ADA's holistic approach, *Casey* lacks both a clearly defined burden and consistent, comprehensive evaluative factors—leading to inconsistent applications.

B. Congressional Guidance

In construing the ADA's Title I burden, Congress considered, but ultimately rejected, the ADA's "readily achievable" standard in Title III, and the *de minimis* undue hardship standard found in Title VII of the 1964 Civil Rights Act in favor of an approach that would provide adequate guidance to courts interpreting the statute.[173]

Congress explicitly stated that Title III of the ADA, which addresses handicapped access in public accommodations and invokes a "readily achievable" standard similar to the undue hardship standard in Title I, is insufficient when evaluating whether an accommodation imposes an undue hardship on an employer.[174] Congress similarly explained that Title VII's reasonable accommodation provision, which required an employer to accommodate an employee's religious practices as long as the practice did not impose an undue hardship, was also insufficient.[175] Title VII's provisions are generally more permissive, relieving the employer of its burden if the accommodation would require more than a *de minimis* cost to the employer.[176]

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172. *Id.*

173. H.R. REP. NO. 101-485(III), at 40–42.

174. *Id.* at 40 (explaining that an employer's duty and obligation to provide a reasonable accommodation in the employment context is far greater than its duty to alter or remove barriers to public access in existing structures).

175. 42 U.S.C. § 2000e(j) (2012) (stating that an employer is required to accommodate an employee's religious practice "unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business"); *see also* H.R. REP. NO. 101-485(III), at 40 (specifically differentiating Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977), which has a less stringent undue hardship standard).

176. *Hardison*, 432 U.S. at 65 (interpreting Title VII's undue hardship requirement to mean that an employer is not required to bear more than a *de minimis* cost for accommodating an employee's religious beliefs).

Legislative history demonstrates that, much like *Casey*'s undue burden test, the ADA's undue hardship framework is intended to be rigorous.[177] Furthermore, judicial interpretation consistent with Congress's intent suggests that adequate guidance was key to the ADA's successful implementation and enforcement. For these reasons, transposing the ADA standard to *Casey* would likely not diminish the burden that the *Casey* Court had originally intended.

C. Facilitating Flexibility and Fairness

When Congress enacted the ADA, it not only intended a rigorous standard, but also to promote judicial consistency; however, it did not intend to impose a rigid, inflexible rule.[178] For example, Congress initially considered formulating a purely quantitative undue hardship test that would have valued an employee's reasonable accommodation on a fixed percentage of the employee's salary. Congress rejected this bright-line rule because it would also have created a cost "ceiling" that disadvantaged and discriminated against those employees who worked in the same company but earned lower salaries.[179] Although a bright-line rule would have guaranteed consistent results, it would also have come at the expense of flexibility, fairness, and judicial discretion.

Instead, Congress opted for a "flexible approach"[180] implementing a hybrid framework that incorporated standardized evaluative factors and discretionary balancing.[181] Courts would contemplate the burden on each individual employer in light of the circumstances and resources of each employer's particular business.[182] These factors focused on

177. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 876–79 (1992) (explaining that the trimester framework insufficiently protected a state's very important interests).

178. H.R. REP. NO. 101-485(III), at 41.

179. *Id.* For example, if the cost of an accommodation was to be capped at 10% of the employee's salary, an employee earning $20,000 per year in company A would be allotted an accommodation of no more than $2,000, whereas their supervisor, earning $70,000 per year, would be allotted an accommodation of $7,000 for the same handicap.

180. *Id.*

181. *See id.*

182. 42 U.S.C. § 12111(10)(B) (2012); *see also* Bryant v. Better Bus. Bureau of Greater Md., Inc., 923 F. Supp. 720, 737 (D. Md. 1996) ("The [ADA] analysis is essentially one of balancing the benefits and the burdens of the proposed

particular circumstances, such as the employer's business structure, size, locale, profitability, and external costs.[183] Under the standard, no factor was intended to be outcome determinative.[184] Utilizing an unweighted balancing test allowed a discretionary approach without undermining fairness or consistency.[185]

The policies underlying the ADA and the need to fairly and adequately protect both parties' interests and constitutional rights significantly influenced the standard's construction.[186] To accomplish this, Congress shifted the burden of proving undue hardship onto the employer and created a fee-shifting provision.[187] Congress hoped that by modifying the burden and including a fee-shifting provision, the ADA would discourage unmeritorious lawsuits, protect employers from unnecessary and burdensome costs, reduce legal access barriers for employees, and promote judicial economy.[188]

Fact-intensive cases, such as those litigated under the ADA and abortion regulation cases, often give rise to judicial decisions that embody the old adage "bad facts make bad law." Undue hardship cases tend to be extremely fact-intensive.[189] Congress addressed these dangers by mandating analysis on a case-by-case basis, thereby limiting their precedential effect.[190] Particularized and independent analysis gave courts the

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accommodation for a particular employer.").

183. H.R. REP. NO. 101-485(III), at 41.

184. *Id.*

185. Sullivan, *supra* note 57, at 58–59 (explaining that totality of the circumstances tests function like standards and provide courts with flexibility and discretion); *see also* U.S. COMM'N ON CIVIL RIGHTS, SHARING THE DREAM: IS THE ADA ACCOMMODATING ALL? ch. 2 (2000) [hereinafter U.S. COMM'N ON CIVIL RIGHTS] (ascribing a ninety-five percent success rate for the EEOC out of 200 cases litigated and explaining that these consistent outcomes act as notice to employers—facilitating compliance with the ADA's policies).

186. *See infra* text accompanying note 212.

187. H.R. REP. NO. 101-485(III), at 42.

188. *See generally* Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651, 652–53 (1982) (discussing various legal rationales for implementing fee shifting structures).

189. H.R. REP. NO. 101-485(III), at 42; *see also* Bryant v. Better Bus. Bureau of Greater Md., Inc., 923 F. Supp. 720, 737 (D. Md. 1996) (describing undue hardship as a "multi-faceted, fact-intensive inquiry"); Brandfield, *supra* note 166, at 124 (noting the fact specific nature of the courts' interpretations under Section 504); Del Rosso, *supra* note 24, at 216 (explaining that the undue burden test is a "fact intensive inquiry").

190. Steven B. Epstein, *In Search of a Bright Line: Determining When an Employer's Financial Hardship Becomes "Undue" Under the Americans With Disabilities Act*, 48 VAND. L. REV. 391, 403 (1995).

freedom to engage in fact-intensive inquiries without prejudicing future parties or sacrificing judicial discretion, consistency, or fairness.[191] Unlike the ADA standard, which harmonizes flexibility and functionality, *Casey*'s undue burden test elevates flexibility to the extent that it swallows the test itself.[192]

D. The ADA's Success

The ADA is enforced through the Equal Employment Opportunity Commission (EEOC).[193] In the initial stages of a claim or charge, the EEOC may decline to proceed with adjudication where its investigation finds that the claim is unreasonable.[194] If, however, the charge appears reasonable, the EEOC will proceed to the next phase and attempt to effectuate a settlement.[195] The statistics show that once the litigation process begins, the EEOC has a very successful track record.[196] These statistics suggest either that the ADA's process is fair and facilitates consistent judicial results, or that

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191. *But see* Brandfield, *supra* note 166, at 124 (arguing that fact-intensive analysis will lead to "the same fact-specific interpretations that crippled the Rehabilitation Act").

192. *But see* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 878 (1992) (suggesting that the court knew that the test would be applied inconsistently across the states and intended the lower courts to exercise broad discretion).

193. MATTHEW S. EFFLAND, DISABILITY ACCOMMODATION UNDER THE ADA 25 (2010), http://www.americanbar.org/content/dam/aba/events/labor_law/am/2014/1h_disability_accommodation.authcheckdam.pdf [https://perma.cc/PZB4-L5D9]. Because the ADA is enforced through the EEOC, the process differs from filing a claim in state or federal court, which skews the statistics to an extent. Charges (or claims) are first reviewed by the EEOC. *Id.* After an investigation, charges that the EEOC finds to have reasonable cause will then be mediated and settled. *Id.* If the conciliation process is not effective, the claim may then be litigated. *Id.*

194. *Id.* However, even if the EEOC dismisses the claim, the plaintiff will have ninety days from the time the EEOC issues a "right to sue" notice to bring a private suit. 20 AM. JUR. PROOF OF FACTS 3D *Disability Discrimination Under the Americans with Disabilities Act* § 24 (1993) [hereinafter *Disability Discrimination*].

195. *Disability Discrimination*, *supra* note 194, § 23.

196. The EEOC had a ninety-five percent success rate for resolved cases litigated between 1992 and 1998. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 185. *But see* Eliza Kaiser, *The Americans with Disabilities Act: An Unfulfilled Promise for Employment Discrimination Plaintiffs*, 6 U. PA. J. LAB. & EMP. L. 735, 738 (2004) (contradicting these statistics and arguing that the EEOC's success rate is significantly lower in ADA cases, with employer-defendants winning approximately ninety-three percent of the time).

the EEOC pursues only the strongest claims.[197] Regardless, the percent of cases resolved in the plaintiff's favor suggests that courts are consistently applying the law.[198]

Increased litigation following the ADA's initial passage led some to argue that the ADA's undue hardship standard was vague and ambiguous, leading to adverse court rulings.[199] It is likely, however, that the increase in litigation was due to the ADA's expanded coverage.[200] Furthermore, this increase was not nearly as devastating as many had predicted, and employers were quick to adapt.[201] Reactions to the ADA are mixed, but it has been more successful at addressing discrimination and providing plaintiffs an avenue for recourse than previously available options.[202]

The ADA's success is likely due in part to its ability to

197. More than 91,000 charges were filed with the EEOC between 1992–1998. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 185. The EEOC successfully resolved over 11,000 out of court, litigating only approximately 300 during that period. *Id.*

198. Applicable data to determine courts' applications of the undue hardship framework is difficult to divine. *See* Jason Zarin, *Beyond the Bright Line: Consideration of Externalities, the Meaning of Undue Hardship, and the Allocation of the Burden of Proof Under Title I of the Americans with Disabilities Act*, 7 S. CAL. INTERDISC. L.J. 511, 522 (1998).

199. *Id.* at 512–13 (acknowledging that some believe there is too much ambiguity in the ADA); *The Americans with Disabilities Act*, CTR. FOR AN ACCESSIBLE SOC'Y, http://www.accessiblesociety.org/topics/ada (last visited Sept. 14, 2016) [https://perma.cc/GF3D-LKRB] (suggesting that some believe progress is too slow and that adverse court rulings are to blame). *But cf. id.* (noting that it may not be the courts, but rather conflicting federal and state statutes like Medicaid and Medicare, that restrict disabled individuals' ability to secure paid employment, that are to blame).

200. Brandfield, *supra* note 166, at 114–17. The ADA expanded the protections afforded to the handicapped and disabled from those under the Rehabilitation Act section 504, which merely provided protection under federally funded programs, to protection in accommodations, transportation, and employment. *Id.*

201. CTR. FOR AN ACCESSIBLE SOC'Y, *supra* note 199.

202. Prior to the ADA, the handicapped were required to bring suits under the Rehabilitation Act section 504, which did not offer protections as broad as those promulgated under the ADA. Brandfield, *supra* note 166, at 116–17. Two hundred and sixty-five suits were filed under the Rehabilitation Act during the seventeen-year period leading up to the ADA's enactment. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 185. Following the ADA's passage, 975 suits were filed from 1997–2014. *EEOC: Litigation Statistics, FY 1997 through FY 2014*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm (last visited Sept. 19, 2016) [https://perma.cc/P4MP-L89N]. Furthermore, statistics suggest that ADA suits are on the decline since 1997. *Id.* However, whether the ADA claims are Title I or Title III claims is unclear from the data, which fails to distinguish between the two. *Id. But see* Kaiser, *supra* note 196, at 738 n.24 (listing a breakdown of cases based on an examination of Title I appellate cases).

generate consistent judicial outcomes. Even if the ADA's guidance is imperfect, its consistent results suggest that congressional guidance has been crucial to the courts' interpretive development and application of the statute.[203] Consistent judicial outcomes are vital to the ADA's efficacy—acting as a form of notice and facilitating compliance—because employers can rely on them to inform their decisions.[204] Conversely, *Casey*'s ambiguity encourages unbounded judicial discretion, producing inconsistent and arbitrary decisions that fail to promote the Court's stated purpose or provide parties with reliable notice.[205] Rather than facilitating compliance with *Roe*, *Casey* has become a vehicle that allows political agendas, special interests, and religious morality to intrude into the realm of the judiciary.

IV. RECTIFYING *CASEY*'S INJUSTICE

Prior to *Hellerstedt*, the Court addressed *Casey*'s undue burden test on three separate occasions, and on each occasion, only in piecemeal fashion—resulting in minimal guidance for lower courts.[206] Currently, the abortion debate is rife with political conflict and confusion regarding *Casey*'s applicable legal standard.[207] The Court's most recent decision, *Whole*

203. *See* Kaiser, *supra* note 196, at 736 (disagreeing with the case outcomes and the courts' narrow interpretations, despite the possibility that it clearly demonstrates that lower courts are consistently interpreting and applying the ADA as defined by Congress and the higher courts). *But see* Brandfield, *supra* note 166, at 122, 126 (explaining that courts should interpret undue hardship narrowly and that Congress intended the courts to flesh out the boundaries).

204. *See* Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787, 792–93 (2012) (asserting that consistency permits parties to create expectations and evaluate the potential worthiness of their suit); *see also* U.S. COMM'N ON CIVIL RIGHTS, *supra* note 185 (describing the importance of notice to compliance).

205. *See supra* text accompanying note 80.

206. *See* Wharton et al., *supra* note 40, at 342–43; Stenberg v. Carhart, 530 U.S. 914, 938 (2000) (mandating health exceptions for the safety of the pregnant woman); Gonzales v. Carhart, 550 U.S. 124, 159–60, 163–65 (2007) (abandoning the health exception requirement, addressing medical uncertainty, and framing the abortion discussion in terms of a women protective argument); Mazurek v. Armstrong, 520 U.S. 968, 973 (1997) (addressing the purpose prong and medical uncertainty).

207. Caitlin E. Borgmann, *In Abortion Litigation, It's the Facts the Matter*, 127 HARV. L. REV. F. 149, 151–52 (2014) (listing several recent cases that are being litigated across the United States).

Woman's Health v. Hellerstedt,[208] is a step in the right direction, but also fails to holistically address *Casey*'s ambiguities and inequities.

In *Hellerstedt*, the Court was in a position to dramatically reframe the abortion discussion and resolve much of the confusion that *Casey*'s mystifying test has generated. Instead, the Court again took a piecemeal approach that will serve only to confuse lower courts and legislatures and create additional ambiguities for activists to exploit. This Part explains why the Court should have adopted a framework similar to the ADA's undue hardship framework and addresses several contentious points relating to cost-based theories in the context of abortion.

A. Shifting the Paradigm

The Court's primary concern in *Casey* was the nature of the bright-line trimester framework, and specifically, its impact on the state's legitimate interest in protecting life. The Court explained that the framework was too "rigid" and "problematic" because it "misconceive[d] the nature of the pregnant woman's interest; and . . . undervalue[d] the State's interest in potential life . . . ."[209] It asserted that a more flexible standard was required to adequately protect the state's valid interests and prevent the state's interests from being unfairly superseded by the woman's protected liberty interest.[210] The following text explains what steps the Court should have taken to arrive at a decision that would have comported with *Roe*'s protections.

1. Confronting the Reality of Cost

Choice cannot exist in the absence of access; however, before the Court can craft a functional framework similar to the ADA's, it must first concede that cost is invariably linked to choice and access, and cannot be neatly excised from the abortion right.[211] Denying that economic circumstances create a substantial obstacle will allow anti-*Roe* courts and legislatures to continue generating regulations that eviscerate

208. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016).
209. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 873 (1992).
210. *Id.*
211. Boonstra, *supra* note 8, at 14–16.

the constitutional abortion rights of impoverished women. The Court must recognize that acknowledging economic circumstances does not undermine the objectives of undue burden or delegitimize the Court, but rather effectuates the purposes and goals of both *Roe* and *Casey*.

Congress created the ADA's undue hardship standard to address substantive and procedural concerns similar to those described in *Casey*, namely flexibility, fairness, and the protection of handicapped individuals from discrimination.[212] In practice, the test achieved fair and just outcomes through balancing the benefits that a reasonable accommodation would provide for a handicapped or disabled employee with the economic burden to the business and employer.[213] Although the interests inherent in the abortion context are unique under the law,[214] this should not, in and of itself, preclude application of a framework similar to the ADA's. Quite the opposite, a framework that provides guidance and clarity, like the ADA's, would be more appropriate *because of* the complicated interests and liberties entangled in the abortion context.[215]

Though some critics argue that an economic cost-based framework undermines a state's interests, and will ultimately lead to increased facial invalidation of abortion regulations,[216]

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212. *See generally* H.R. REP. NO. 101-485(III), at 25–27, 40–42 (demonstrating that Congress derived the handicapped employees' rights from civil rights language in section 504 of the Rehabilitation Act, the Fair Housing Act, and the Civil Rights Act of 1964; the report also articulates that the employer's interest is sufficiently important to warrant protection as well).

213. Bryant v. Better Bus. Bureau of Greater Md., Inc., 923 F. Supp. 720, 736–37 (D. Md. 1996) (relying on congressional reports and the statute itself to explain how the benefits and burdens should be fairly balanced).

214. *Casey*, 505 U.S. at 852 ("[T]he liberty of the woman is at stake in a sense unique to the human condition and so unique to the law.") (Blackmun, J., concurring in part and dissenting in part).

215. Consistency in the law is encouraged through a variety of legal mechanisms, in particular, *stare decisis*, for the benefit of the courts and the public. Mead, *supra* note 204, at 792–93 (explaining that where there is consistency in the law, there is often "predictability, fairness, appearance of justice, and efficiency").

216. Neither *Hellerstedt* nor the ADA's undue hardship standard would alter the preferred method of adjudicating claims involving abortion regulations. *See* Gonzales v. Carhart, 550 U.S. 124, 167 (2007) (explaining that as-applied challenges are the preferred method of adjudicating abortion regulation claims). The burden has not changed—plaintiffs are still required to meet the burden imposed by the "large fraction test" and courts still have the authority to grant facial relief if the facts necessitate such a finding. *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2306–07 (2016) (explaining that plaintiffs brought as-applied claims, met their burden, and the district court was not precluded from

applying the ADA's undue hardship framework to *Casey* follows the original reasoning and rationale underlying the Court's initial adoption of the undue burden test. The Court is unlikely to abuse its discretion or stray too far afield by evaluating cost as part of the undue burden analysis; in fact, the *Casey* Court mentioned that increased costs could create a substantial obstacle for some women seeking an abortion.[217] While *Casey* stated that a "valid purpose" having the "incidental effect of making it more difficult or expensive to procure an abortion cannot be enough to invalidate [the statute],"[218] it later suggested that there was a point at which "increased cost could become a substantial obstacle" for women seeking previability abortions.[219] The Court has yet to address when such costs may become prohibitive, but it left the door open and the time is right for the Court to step through.[220]

2. No Longer a Burden: Imbuing *Casey* with Consistency, Protection, and Flexibility

The ADA's undue hardship framework would be the most effective means to protect the complex interests at stake. In promulgating the ADA, Congress contemplated the myriad complexities that could arise from using a cost-based approach and crafted a standard that addressed those concerns. It rejected a purely quantitative approach, instead incorporating factors that limited inequities and abuse, and it provided a clear definition to facilitate fair and just outcomes.[221] Refining the definition of "access" to include cost in conjunction with "substantial obstacle" and utilizing factors that realistically assess a regulation's burden upon a woman's free exercise of choice would holistically define the scope of lower courts' analyses, and limit opportunities for abuse, exploitation, and inconsistent application.

Incorporating economic considerations into *Casey*'s analysis does not sacrifice the Court's legitimacy, so long as the formula that it develops is fair, reasonable, and comports with

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granting facial relief).

217. *Casey*, 505 U.S. at 901.

218. *Id.* at 874.

219. *Id.* at 901.

220. *Id.*

221. H.R. REP. NO. 101-485(III), at 40–42.

Casey's intent.[222] To this end, the standard should: (1) clearly define "substantial obstacle" in order to encourage consistent applications across jurisdictions, (2) protect the interests of both women and the state, and (3) provide the judiciary with flexibility and discretion.

The Court's opinion in *Hellerstedt* emphasized the importance that access plays in a woman's ability to choose, explaining that H.B. 2's benefits were not "sufficient to justify the burdens upon access" that the regulations imposed.[223] However, the Court must go further and explicitly define "substantial obstacle" in a manner that would justify a finding of "undue burden" for any regulation that imposes a "significant difficulty or expense" to a woman's access to choice. The legitimacy of courts is inexorably tied to the public's perception that judicial procedures are fair, impartial, and lead to just outcomes.[224] However, excluding cost from the undue burden analysis results in an unjust outcome—impoverished women not entitled to the same rights and protections as women of means.

Next, the Court must devise particular factors that could be used to evaluate whether a state's regulation imposes significant difficulty or expense to women seeking to exercise their protected liberty. These factors should realistically contemplate the complexities of each party's position and should be considered when balancing the parties' interests in both *Casey*'s "purpose" and "effects" analyses. Relevant factors should include: travel distances, the regulation's potential negative effects on access, the demographics of the affected region,[225] the number of abortions that facilities perform and from where they draw their client base, the cumulative effect

222. *Casey*, 505 U.S. at 876 ("[T]he undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty."); *id.* at 878 ("We reject the *rigid* trimester framework of *Roe v. Wade*.") (emphasis added). Accusing the Court of judicial activism would be unconvincing because the Court is not overruling precedent and abandoning its stare decisis doctrine. Rather, it would be merely amending its current standard utilizing elements from a tested, objective congressional standard.

223. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2300 (2016).

224. Tom R. Tyler & Justin Sevier, *How do the Courts Create Popular Legitimacy?: The Role of Establishing the Truth, Punishing Justly, and/or Acting Through Just Procedures*, 77 ALB. L. REV. 1095, 1096–97 (2014).

225. Exigent demographics might include the wage rate, income, unemployment rate, immigration statistics, the number of women and children on Medicaid, and other federal or state assistance programs.

that the state's abortion laws would have on women seeking legal abortions, and the cost increase that the regulation would have on the medical procedure itself.[226] This approach would facilitate consistent interpretation and application across jurisdictions because courts would be required to review the record for the same evidence.

Finally, the Court should expand the "purpose" analysis elicited in *Hellerstedt* to all "purpose" analyses where abortion regulations are at issue—not just those regulations that may qualify as unnecessary health regulations—and establish a functional and fair method to balance the comprehensive factor analysis against the states' interests. In the past, unrestricted freedom to balance the parties' interests has resulted in courts abusing their discretion.[227] In several states, the woman's liberty interest has been completely subsumed by the protections that courts have afforded to the states—primarily through past purpose prong jurisprudence and misapplied rational basis scrutiny.[228] Applying the benefits and burdens balancing test and the *Hellerstedt* Court's pronounced directive regarding evidentiary review would effectuate *Casey*'s goals and protect the interests of both parties.

While permitting inquiry into pretext as well as legislative intent and instituting a benefits-and-burdens balancing test would counteract many problems stemming from *Casey*'s ambiguity, there is always the danger that the pendulum could swing too far in the opposite direction or spill over into other areas of constitutional law. To protect against judicial overreach, the Court would need to clearly delineate the boundaries of these tests and definitively cabin them to the abortion context.

Adopting relevant factors and applying an equitable balancing test will provide guidance and clarity, thereby increasing the likelihood that decisions will be fair and consistent. Because no factor is dispositive under an ADA-type framework, and because matters are addressed on a case-by-

226. Many of these factors were taken into consideration by the district court as practical concerns in Whole Woman's Health v. Lakey, 46 F. Supp. 3d 673, 683 (W.D. Tex. 2014).

227. *See* Wharton et al., *supra* note 40, at 380–84, 387 (explaining the proclivity of appellate courts to be too deferential to the states proffered purposes).

228. *See id.* at 385–86 (explaining the guidance that the Court should offer to rectify past misapplications and interpretations).

case basis, courts must be cognizant of the interplay between factors and the need for factual specificity on the record if they wish to seize and retain the judicial discretion and flexibility offered by the standard. Under this structure, the Court maintains the benefits of a standard, while acquiring the clarity of a rule.[229]

B. Counter-Arguments to an Economic Approach

States' rights advocates and anti-abortion groups may express justifiable concern that incorporating economic considerations into *Casey*'s undue burden analysis will inevitably lead to federal overreach and increased judicial invalidation of state abortion regulations. However, this concern is overstated because the ADA's framework accounts for circumstances that would lead to this negative result.

While it could be argued that relying on certain cost-based economic factors could foreseeably lead to more frequent facial invalidation of currently enacted abortion regulations, the mechanisms favored by the ADA's undue hardship framework and advocated by this Note would temper many of the associated risks. For instance, if "undue burden" was quantifiably defined as a fixed percent of a woman's income, invalidating virtually any abortion regulation would be relatively simple. However, because both the purpose prong evaluation and the factor test proposed here are totality of the circumstances tests, no single cost or factor can alone invalidate a statute.[230] Additionally, a clear framework that guaranteed consistent results would effectively put states on notice, alerting them to the federal government's intentions as interpreted by the Court. Adequate guidance that provided clear boundaries could also operate to discourage state legislatures from generating wasteful and contrary regulations that act merely to frustrate the Court's intentions.[231]

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229. Sullivan, *supra* note 57, at 57–60.

230. *See supra* text accompanying note 184.

231. In some states, legislators sponsor legislation that almost certainly violates the Court's precedent on abortion rights. *See* Del Rosso, *supra* note 24, at 217 (describing a Nebraska statute that clearly violated *Casey*'s test where the statute "sought to add dozens of stringent requirements to an informed consent statute that already contained thirty-six separate and 'discrete' requirements for informed consent to an abortion"); *see also* Shainwald, *supra* note 25, at 156 (describing a Nebraska fetal pain regulation, which has been adopted in other

Furthermore, an economic approach would be the appropriate method for evaluating what constitutes an undue burden because injecting a cost analysis would correct the imbalance that has flourished under *Casey*. Consider that sixty-nine percent of women seeking abortions in Texas are below the poverty level;[232] combine this with the fact that the federal government and many state governments will not provide financial assistance to low income women for abortions,[233] and it becomes painfully clear how inextricably linked access and choice are to cost.[234]

Finally, in order to redress constitutional violations that have occurred under *Casey* and return to women across the nation their constitutionally protected right, many states may initially have any invalid abortion regulations overturned. This is not increased facial invalidation, but merely a system changing course and correcting after years of misuse and abuse.

CONCLUSION

Under an undue burden test that applies the ADA's framework, our young, single mother from El Paso would not have to dedicate multiple days and untold expense to exercise her protected liberty interest—now, or in the future. The new framework would consider her, and the many impoverished women like her, when evaluating the burdens that a state's abortion regulations could impose. No longer would her poverty render her invisible in the eyes of the law.

Not only would the new framework protect women in Texas, it would also protect women in Mississippi, Alabama, Montana, North Dakota, and other states where legislatures have trampled on a woman's protected right without consequence.[235] Because an undue burden test grounded in the

states, passed for the sole purpose of challenging *Roe*).

232. Amanda Marcotte, *The Demographics of Abortion: It's Not What You Think*, AM. PROSPECT (Jan. 22, 2013), http://prospect.org/article/demographics-abortion-its-not-what-you-think [https://perma.cc/BME7-FRCJ].

233. *Id.*; Boonstra, *supra* note 8, at 12.

234. Cost is likely a deciding factor in a woman's decision to elect to have, or not have, an abortion. A study in North Carolina found that thirty-seven percent of women receiving Medicaid would have had an abortion but for lack of funds. STANLEY K. HENSHAW ET AL., RESTRICTIONS ON MEDICAID FUNDING FOR ABORTIONS: A LITERATURE REVIEW 20 (2009).

235. *See supra* text accompanying note 26.

ADA's framework would promote consistent results, these women, too, will be protected.

One of the many purposes of the Supreme Court is to ensure "uniform interpretation and application of federal law" and to resolve conflicting circuit decisions resulting from "divergent interpretations."[236] Though uniformity and consistency may not be called for in all circumstances, where states are permitted to regulate a constitutionally protected liberty interest, such as here, consistency is of the upmost importance. "[E]nforcement of constitutional rights is clearly called for to the extent that all states must provide the individual with the minimum degree of protection assured by Supreme Court decisions."[237] The minimum degree of protection in this instance is a woman's guaranteed right to have access to a choice.

The Court's failure to acknowledge that increased costs create a substantial barrier for poor and impoverished women guarantees that a woman's right to choose will continue to be vulnerable to attack in years to come. It is imperative that the Court adopt a test that realistically contemplates the economic circumstances which inform a woman's decision to choose abortion. In deciding *Hellerstedt*, the Court missed its opportunity to secure for all women—not just those of means—the bodily autonomy and economic independence that *Roe* promised.

236. Christina M. Rodriguez, *Uniformity and Integrity in Immigration Law: Lessons from the Decision of Justice (and Judge) Sotomayor*, 123 YALE L.J. F. 499, 502 (2014); *see also* Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1569 (2008) ("Not only is uniform interpretation of federal law assumed to be desirable as a matter of policy, some judges and scholars claim that the Constitution requires federal courts to standardize the meaning of federal law for the nation.").

237. Donald L. Beschle, *Uniformity in Constitutional Interpretation and the Background Right to Effective Democratic Governance*, 63 IND. L.J. 539, 545 (1988) (referencing Justice Stevens's dissent in Michigan v. Long, 463 U.S. 1032 (1983), where a Fourth Amendment right was at issue).

UNIVERSITY OF COLORADO LAW REVIEW

UNIVERSITY OF COLORADO LAW REVIEW (U.S.P.S. 651-080, ISSN 0041-9516)
Published quarterly by the University of Colorado Law Review,
320-D Wolf Law Building, 401 UCB, Boulder, CO 80309-0401.

Periodicals postage paid at Boulder, Colorado,
and at additional mailing offices.

POSTMASTER: Please send address changes to University of Colorado
Law Review, 320-D Wolf Law Building, 401 UCB,
Boulder, CO 80309-0401.

An association of students, sponsored by the
University of Colorado Law School.

Published as the ROCKY MOUNTAIN LAW REVIEW from 1928 to 1962.

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Cite as: 88 U. COLO. L. REV. __ (2017).

UNIVERSITY OF

COLORADO LAW REVIEW

Volume 88, Issue 3 *2017*

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