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Con Law is as Con Law Does: A Survey of Planned Parenthood v. Casey in the State and Federal Courts

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CON LAW IS AS CON LAW DOES:† A SURVEY OF *PLANNED PARENTHOOD V. CASEY* IN THE STATE AND FEDERAL COURTS

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† Paraphrasing LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 24 (1990) and FORREST GUMP (Paramount 1994).

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I. INTRODUCTION

Liberty finds no refuge in a jurisprudence of doubt.[1]

So began Justice O'Connor for the plurality in *Planned Parenthood v. Casey*.[2] Two years later, however, the promise of certainty in that opening line remains unrealized. The Court's decision in

1. Planned Parenthood v. Casey, 112 S. Ct. 2791, 2803 (1992). Throughout this Comment, when we refer to "*Casey*" we refer to the Supreme Court's 1992 opinion in which the Court articulated its undue burden standard. *Id.*; *see infra* part II.D. For the tortured procedural history of *Planned Parenthood v. Casey*, see *infra* note 18.

2. *Id.*

Casey has produced neither clarity nor certainty in the often-emotional abortion debate.

This Comment analyzes state and federal applications of *Casey*'s "undue burden" test in the privacy rights arena, and concludes that the lower courts have failed to apply the test as intended by the *Casey* plurality—when they have applied it at all. The cases are marked by confusion about the applicable standard and uncertainty as to the proper analysis. After reviewing the disarray among the cases, it becomes clear that the level of protection afforded a constitutional right truly can be a product of what courts choose to do, not necessarily what the Supreme Court directs.

An understanding of *Casey* is essential to make sense of opinions applying *Casey*'s constitutional analysis. Therefore, Part II analyzes the *Casey* opinion in detail, interpreting the plurality's undue burden test and examining its application to the abortion regulations in question.[3] Under the Court's undue burden test, the degree of impingement upon a protected liberty interest is weighed against the justification for that impingement: The more legitimate the state's purpose, the more burdensome its effects must be to render the statute unconstitutional.[4]

The *Casey* opinion was not, however, limited to the expression of a new constitutional standard, the undue burden test, by which abortion regulations were to be measured. The Court also suggested a more fundamental alteration in constitutional analysis. Traditionally, a plaintiff who brought a facial challenge must have shown that "no set of circumstances" existed wherein the statute would be constitutional.[5] The *Casey* Court, without explicitly rejecting that standard, applied a more liberal analysis.[6] As articulated by Justice O'Connor, a statute need not be unconstitutional in all circumstances to be rendered facially invalid;[7] it need only pose a substantial obstacle in a large percentage of the cases in which it is relevant.[8] The plurality applied this standard to strike down Pennsylvania's spousal notification provision[9] and relied on extensive factual findings to analyze the impact on the identified group. Lower courts[10]—indeed the Justices

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3. *See infra* part II.
4. *See infra* part II.D.5.
5. United States v. Salerno, 481 U.S. 739, 745 (1987).
6. *See infra* part II.D.6.
7. *See* United States v. Salerno, 481 U.S. 739 (1987).
8. *Casey*, 112 S. Ct. at 2829-30.
9. *Id.*; *see infra* part II.E.3.
10. *See infra* part III.B.1.a, III.B.2.

themselves[11]—have disputed the boundaries of Justice O'Connor's opinion and have struggled with both the appropriate standard of review in facial challenge cases and the relevance of factual findings.

Part III analyzes state and federal cases applying *Casey*'s precepts. When we began our research, we anticipated that post-*Casey* case law would have fleshed out the contours of the admittedly ambiguous undue burden test. We expected that courts considering abortion regulations, even provisions similar to those at issue in *Casey*, would have considered the factual findings before them to determine if a particular statute actually imposed an undue burden.[12]

What the cases reveal, however, is not a focus on the undue burden test. Rather, the courts have focused on the related facial challenge standard, a focus that has sometimes allowed them to avoid applying the undue burden test at all.[13] Even when a court attempted to analyze a particular provision, it often resorted to reliance on the fact that the provision at issue "looked and smelled" like the Pennsylvania regulations considered in *Casey* and concluded that *Casey*'s constitutional determinations controlled. Rarely did a court look to the record before it or permit evidence to be introduced that might distinguish the purpose or effect of the regulation at issue from the regulations in *Casey*.[14]

Other trends are also notable. The undue burden test has been applied outside the abortion context to statutes affecting other privacy rights, most notably in the area of assisted suicide.[15] State courts have considered the effect of *Casey* on state constitutional analysis, sometimes considering themselves bound by the decision and sometimes reaching the opposite conclusion.[16] Occasionally, state courts have relied on their state constitutions to afford greater freedom to the abortion right than provided under the undue burden standard.[17] Ultimately, because the *Casey* plurality opinion articulated both the undue burden and facial challenge standards so ambiguously, lower courts have largely either misapplied the analysis or simply ignored the directive of the Supreme Court.

11. *See infra* parts II.D.6, III.B.1.b.
12. *See infra* part III.B.2.
13. *See infra* part III.B.1.
14. *See infra* part III.B.3.
15. *See infra* part III.C.1.
16. *See infra* part III.D.
17. *See infra* part III.D.

II. THE *CASEY* DECISION

In 1992 the U.S. Supreme Court agreed to hear *Planned Parenthood v. Casey*, six years after the first district court decision.[18]

18. 112 S. Ct. 2791, *cert. granted*, 112 S. Ct. 931 (1992). From its origin in 1988 to the present, *Casey* has progressed through no fewer than 11 court opinions. In the initial case, the district court granted an injunction barring enforcement of amendments to the Pennsylvania Abortion Act of 1982. Planned Parenthood v. Casey, 686 F. Supp. 1089, 1092 (E.D. Pa. 1988) (citing Act of Mar. 25, 1988, Pub. L. 262, No. 31, § 4) [hereinafter *Casey I*]. Proceedings were stayed pending the Supreme Court's decision in Webster v. Reproductive Health Services, 492 U.S. 490 (1989). Following the Court's decision in *Webster*, the district court extended the injunction to encompass the 1989 amendments and permitted the plaintiffs to file an amended complaint. Planned Parenthood v. Casey, 736 F. Supp. 633, 633 (E.D. Pa. 1990) [hereinafter *Casey II*].

In the trial on the merits, the district court made extensive factual findings relative to the challenged provisions. Planned Parenthood v. Casey, 744 F. Supp. 1323, 1373-74 (E.D. Pa. 1990) [hereinafter *Casey III*], *aff'd in part and rev'd in part by* Planned Parenthood v. Casey, 947 F.2d 682 (3d Cir. 1991), *aff'd in part and rev'd in part by* Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992). Applying what appears to be a strict scrutiny standard, *see id.* at 1373-74, the court struck down the parental consent, spousal notification, waiting period, and informed consent requirements, but upheld some reporting requirements. *Id.* at 1396.

On appeal, the Third Circuit rejected the district court's application of a strict scrutiny standard. Planned Parenthood v. Casey, 947 F.2d 682 (3d Cir. 1991) [hereinafter *Casey IV*], *aff'd in part and rev'd in part by Casey*, 112 S. Ct. 2791 (1992). The court argued—with prescience—that in light of the splintered perspectives on the bench, Justice O'Connor's undue burden standard, the most narrow view capable of garnering a majority, was the applicable standard of review. *Id.* at 696-97. The court applied the undue burden standard, however, as articulated in O'Connor's previous opinions; thus, statutes that unduly burden the right to privacy were evaluated under strict scrutiny, while those that did not were subject only to rational basis review. *Id.* at 689-91.

The Supreme Court granted certiorari in Planned Parenthood v. Casey, 112 S. Ct. 931 (1992) [hereinafter *Casey V*].

The Supreme Court issued its decision in *Casey*, 112 S. Ct. 2791 (1992). A highly splintered Court affirmed most of the Third Circuit's decision, but refined the undue burden analysis. *Id.* at 2821-22; *see infra* part II.D. In the process the Court also suggested it was modifying the traditional facial challenge standard. *Casey*, 112 S. Ct. at 2829; *see infra* part II.D.6. The Court remanded to the district court "for proceedings consistent with this opinion, including consideration of the question of severability." *Casey*, 112 S. Ct. at 2833.

On remand, the Third Circuit determined that the spousal notification provision and the reporting requirement struck down by the Supreme Court were severable, and remanded to the district court for further proceedings. Planned Parenthood v. Casey, 978 F.2d 74, 77-78 (3d Cir. 1992) [hereinafter *Casey VII*].

On remand from the Third Circuit, the district court agreed to reopen the record to receive evidence as to whether the provisions upheld by the Supreme Court were, in fact, undue burdens on the abortion right under Justice O'Connor's fact-specific analysis. Planned Parenthood v. Casey, 822 F. Supp. 227, 230 (E.D. Pa. 1993) [hereinafter *Casey VIII*], *rev'd by* Casey v. Planned Parenthood, 14 F.3d 848 (3d Cir. 1994), *and stay denied by* Planned Parenthood v. Casey, 114 S. Ct. 909, 909 (1994) (Souter, J., as Circuit Justice); *see infra* part II.D.6.

This decision was appealed to the Third Circuit which held that the district court had no authority to reopen the record; the only question before it was that of severability.

Observers on both sides of the abortion issue anticipated that the Court was poised to overturn the constitutional right to choose abortion recognized in *Roe v. Wade*.[19] The result was a highly fractured opinion that reflected the Court's deep division on the abortion issue. Surprisingly, however, Justice O'Connor garnered a majority to affirm the "essential holding" of *Roe*:[20] A woman's fundamental liberty interests preclude a state from enacting a total ban on abortion.[21]

Roe's trimester framework did not, however, survive the opinion.[22] Instead, the Court redrew the constitutional line at viability,

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Casey v. Planned Parenthood, 14 F.3d 848, 852 (3d Cir. 1994) [hereinafter *Casey IX*], *stay denied by* Planned Parenthood v. Casey, 114 S. Ct. 909, 909 (1994) (Souter, J., as Circuit Justice). According to the Third Circuit, the Supreme Court in *Casey* had disposed of all other issues, and the district court was not free to review the Supreme Court's conclusions. *Id.* at 857.

The plaintiffs appealed to Justice Souter as Circuit Justice for the Third Circuit, requesting a stay of the Third Circuit's decision pending the filing of a petition for certiorari. Planned Parenthhod v. Casey, 114 S. Ct. 909, 909 (1994) (Souter, J., as Circuit Justice) [hereinafter *Casey X*]. Justice Souter refused to issue the stay, seemingly with reluctance, holding that it was unlikely the Court would grant certiorari or that the plaintiffs would prevail on a facial challenge. *Id.* at 911-12. Justice Souter suggested, however, that an "as applied" challenge might enjoy greater success. *Id.* at 910 n.3.

Subsequently, the district court granted $221,971 in costs and attorneys' fees to plaintiffs as prevailing parties in *Casey*. Planned Parenthood v. Casey, No. 88-3228, 1994 U.S. Dist. LEXIS 16675, at *27 (E.D. Pa. Nov. 21, 1994) [hereinafter *Casey XI*]. The figure represented a 60% reduction in the total costs because the plaintiffs had prevailed on only some of the issues advanced. *Id.* at *21.

19. 410 U.S. 113 (1973). Under *Roe*, most courts held that "any regulation touching upon the abortion decision must survive strict scrutiny, to be sustained only if drawn in narrow terms to further a compelling state interest." *Casey*, 112 S. Ct. at 2817.

Justice Blackmun articulated the general expectation that the Court stood prepared to eliminate reproductive freedom and expressed surprise that it did not.

> [In 1989] four Members of this Court appeared poised to "cas[t] into darkness the hopes and visions of every woman in this country" who had come to believe that the Constitution guaranteed her the right of reproductive choice. All that remained between the promise of *Roe* and the darkness of the plurality was a single, flickering flame. Decisions since *Webster* gave little reason to hope that this flame would cast much light. But now, just when so many expected the darkness to fall, the flame has grown bright.

Id. at 2844 (Blackmun, J., concurring in part and dissenting in part) (citations omitted) (quoting Webster v. Reproductive Health Servs., 492 U.S. 490, 557 (1989) (Blackmun, J., concurring in part and dissenting in part)).

20. *Casey*, 112 S. Ct. at 2804.

21. *Id.* at 2820 (stating that statute with purpose of placing substantial obstacle in path of woman seeking to abort nonviable fetus was invalid because means state chooses must be calculated to inform free choice, not hinder it).

22. *Id.* at 2818 ("We reject the trimester framework, which we do not consider to be part of the essential holding of *Roe*.").

Under *Roe*, the woman's liberty interests were so compelling during the first trimester that the state could not interfere: "[T]he abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician." *Roe*, 410 U.S. at

holding that post-*Roe* decisions had undervalued the state's interests in regulating abortion prior to viability.[23] The change was significant: As articulated and applied in *Casey*, the new undue burden test allowed the Court to uphold state regulation to an extent that clearly would have been prohibited under *Roe*.[24]

The Court also modified the traditional facial challenge test of *United States v. Salerno*.[25] Without expressly articulating an intent to revise the standard, Justice O'Connor redefined the analysis, focusing the inquiry on the group affected by the statute rather than asking whether the statute could be constitutionally applied in other circumstances.[26] The change effectively reduced the plaintiff's burden in bringing a successful facial challenge.

A. *The Court Reaffirmed the Essential Holding of* Roe

Five members of the Court[27] joined part I of the plurality opinion which retained and reaffirmed the essential holding of *Roe*.[28] In the Court's view, this essential holding was comprised of three principles:

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164. Only at the end of the first trimester did the "State's important and legitimate interest in the health of the mother" become compelling since prior to that time mortality as a result of abortion appeared to be less likely than mortality as a result of normal childbirth. *Id.* at 163.

During and after the second trimester, state regulation of abortion was permitted "to the extent that the regulation reasonably relates to the preservation and protection of maternal health." *Id.* The "State's important and legitimate interest in potential life [became compelling] at viability . . . because the fetus then presumably ha[d] the capability of meaningful life outside the mother's womb." *Id.* Under the rubric of this purpose, a state "may go so far as to proscribe abortion during that period, except when it [was] necessary to preserve the life or health of the mother." *Id.* at 163-64.

23. *Casey*, 112 S. Ct. at 2818.

24. "Measures aimed at ensuring that a woman's choice contemplates the consequences for the fetus do not necessarily interfere with the right recognized in *Roe*, although those measures have been found to be inconsistent with the rigid trimester framework announced in that case." *Id.*; *see also id.* at 2850 (Blackmun, J., concurring in part and dissenting in part) ("Application of the strict scrutiny standard [of *Roe* would result] in the invalidation of all the challenged provisions."). For example, the Court overruled prior cases which had struck down informed consent requirements on the basis of *Roe* and upheld Pennsylvania informed consent requirements under the undue burden test. *Id.* at 2823.

25. 481 U.S. 739 (1987). Under *Salerno*, a party mounting a facial challenge to a statute must show that "*no set of circumstances* exists under which the [regulation] would be valid." *Id.* at 745 (emphasis added).

26. *Casey*, 112 S. Ct. at 2829 ("The analysis does not end with the one percent of women upon whom the statute operates; it begins there. . . . The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant."). *See infra* part II.D.6.

27. Justices Blackmun, Stevens, O'Connor, Kennedy, and Souter.

28. *Casey*, 112 S. Ct. at 2804.

(1) "the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State";[29] (2) "the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger a woman's life or health";[30] and (3) "the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus."[31]

B. *The Court Concluded That the Right to Choose Abortion Is Rooted in the Due Process Clause of the Fourteenth Amendment*

The same five Justices who upheld the essential holding of *Roe* also concluded that "[c]onstitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment."[32] The majority observed that marriage, procreation, contraception, family relationships, and child rearing "involv[e] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, [and] central to the liberty protected by the Fourteenth Amendment."[33]

Justice O'Connor avoided explicitly classifying a woman's right to choose abortion as "fundamental"[34] but rejected Chief Justice Rehnquist's view that laws infringing that right deserve only rational basis review.[35] Justice O'Connor also rejected Justice Scalia's view that "the power of a woman to abort her unborn child" does not even

29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.* at 2807.
34. In the usual case, laws that infringe upon a right deemed fundamental under the Due Process Clause of the Fourteenth Amendment invoke strict scrutiny. *See, e.g.*, *Casey IV*, 947 F.2d 682, 688 (3d Cir. 1991), *aff'd in part and rev'd in part by Casey*, 112 S. Ct. 2791 (1992). Perhaps because she rejected traditional strict scrutiny of abortion restrictions in favor of the undue burden test, Justice O'Connor instead spoke of "[c]onstitutional protection," "substantive liberties protected by the Fourteenth Amendment," "realm[s] of personal liberty which the government may not enter," and "substantive sphere[s] of liberty which the Fourteenth Amendment protects" when discussing a woman's right to choose abortion. *Casey*, 112 S. Ct. at 2804-05. Even so, this is consistent with Justice O'Connor's position in City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 453, 465 n.10 (O'Connor, J., dissenting), *overruled by Casey*, 112 S. Ct. 2791 (1992), that the right to abortion is a more "limited" fundamental right.
35. *See Casey*, 112 S. Ct. at 2859 (Rehnquist, C.J., concurring in judgment in part and dissenting in part) ("[I]n terming this right fundamental, the Court in *Roe* read the earlier opinions upon which it based its decision much too broadly.").

reach the level of a constitutionally protected liberty because it was neither mentioned in the Constitution nor traditionally protected in American society.[36] In fact the plurality freely admitted that "adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment. Its boundaries are not susceptible of expression as a simple rule."[37]

C. *The Court Relied on Stare Decisis to Affirm the Essential Holding of* Roe

The Court relied upon stare decisis, at least in part, to justify its affirmation of *Roe*'s central holding,[38] noting that none of the four "prudential and pragmatic considerations" that guide the Court in reexamining a prior decision supported overturning *Roe*.[39] First, *Roe* had not proved unworkable[40] since it set "a simple limitation beyond which a state law [was] unenforceable,"[41] and applying its rule was well "within judicial competence."[42] Second, subsequent decisions had been extensively relied upon: "[F]or two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail."[43] Third, subsequent constitutional decisions had neither eroded *Roe*'s doctrinal footings[44] nor left it "a remnant of [an] abandoned doctrine."[45]

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36. *Id.* at 2874 (Scalia, J., concurring in judgment in part and dissenting in part).

Oddly enough, Justice Scalia joined Justice Rehnquist's opinion. The positions represented by the two opinions are facially inconsistent because Justice Rehnquist would find a constitutionally protected, though not fundamental, liberty interest, while Justice Scalia would deny *any* level of constitutional protection to a woman's privacy interest in the abortion decision. *Compare id.* at 2858-60 (Rehnquist, C.J., concurring in judgment in part and dissenting in part) *with id.* at 2874 (Scalia, J., concurring in judgment in part and dissenting in part). As a practical matter, however, rational basis review and no review achieve the same result—no real protection of the woman's interest.

37. *Id.* at 2806. "Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects." *Id.* at 2805.

38. *Id.* at 2808-16.

39. *Id.* at 2808.

40. *Id.* at 2809.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 2810.

45. *Id.* at 2808.

Finally, although "time ha[d] overtaken some of *Roe*'s factual assumptions"—medical advances permitted safer abortions later into the pregnancy and viability was possible at an earlier gestational age—those assumptions had bearing only on the time scheme controlling the weight of the competing interests of the woman and the state.[46] They did not bear on the validity of *Roe*'s central holding "that viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions."[47] Only the Court's "doctrinal disposition to come out differently" had changed; its understanding of the facts had not.[48]

D. The Undue Burden Test for Impingement on the Right to Choose Abortion and Justifications for Restrictions of That Right

The *Casey* plurality opinion rejected *Roe*'s strict scrutiny test, contending that *Roe* undervalued the state's interest in the abortion decision.[49] In its place, the Court erected an undue burden framework, concluding that "the undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty."[50] Justice O'Connor articulated the undue burden test in a part of the opinion joined only by Justices Kennedy and Souter.[51]

Simply stated, "[a]n undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."[52] Unfortunately, however, the test is more easily articulated than applied.

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46. *Id.* at 2811. At viability the state's legitimate interests become so compelling as to permit direct restrictions on abortion. *See infra* part II.D.2.

47. *Casey*, 112 S. Ct. at 2811.

48. *Id.* In contrast, the Supreme Court had overturned Lochner v. New York, 198 U.S. 45 (1905), *overruled in part by* Day-Brite Lighting, Inc. v. Mississippi, 342 U.S. 421 (1952), and by Plessy v. Ferguson, 163 U.S. 537 (1896), *overruled in field of public education by* Brown v. Board of Educ., 347 U.S. 483 (1954)—cases similar in importance to *Roe*. However, these actions were defensible "as applications of constitutional principle to facts as they had not been seen by the Court before." *Casey*, 112 S. Ct. at 2813.

49. *Casey*, 112 S. Ct. at 2829.

50. *Id.* at 2820.

51. *Id.* at 2816-21.

52. *Id.* at 2821.

Justice O'Connor selected a term, undue burden,[53] outside the traditional rational basis-strict scrutiny framework.[54] Because the latter terms have been defined and interpreted extensively in case law, they are more easily applied. The Court has generally filled out the contours of the analyses and predetermined the levels of justification and impingement that render a law constitutional or unconstitutional. In contrast, the *Casey* opinion remains ambiguous; the plurality did not explicitly specify how the undue burden test weighs justification and impingement in its constitutional balancing.[55]

1. Revaluing the legitimate interests of the state in the abortion decision

Having recognized the "constitutional liberty of the woman to have some freedom to terminate her pregnancy,"[56] the plurality hastened to assert that the exercise of that right could still be limited by justifiable state interests:

> The woman's liberty is not so unlimited, however, that from the outset the State cannot show its concern for the life of the unborn, and at a later point in fetal development the State's interest in life has sufficient force so that the right of the woman to terminate the pregnancy can be restricted.[57]

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53. Justice O'Connor used a different undue burden test in prior abortion cases. *See* Hodgson v. Minnesota, 497 U.S. 417, 459 (1990) (O'Connor, J., concurring in part and concurring in judgment in part); Webster v. Reproductive Health Servs., 492 U.S. 490, 530 (1989) (O'Connor, J., concurring in part and concurring in judgment); Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 828 (1986) (O'Connor, J., dissenting), *overruled by Casey*, 112 S. Ct. 2791 (1992); Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 453 (1983) (O'Connor, J., dissenting), *overruled by Casey*, 112 S. Ct. 2791 (1992). In *Akron*, Justice O'Connor characterized her undue burden standard as a threshold inquiry that simply determined the correct level of judicial review to apply, 462 U.S. at 463 (O'Connor, J., dissenting), in contrast to the complex impingement and justification test in *Casey*, *see infra* part II.D.5.

54. Strict scrutiny is the standard of review generally used in fundamental rights cases, while the deferential rational basis test is generally used in reviewing social and economic legislation. *Casey IV*, 947 F.2d 682, 688 (3d Cir. 1991), *aff'd in part and rev'd in part by Casey*, 112 S. Ct. 2791 (1992). Because the *Roe* Court determined that the abortion decision was a fundamental right, regulations limiting that right had to be justified by a compelling state interest and narrowly drawn to further that interest. *Id.* at 689 (citing Roe v. Wade, 410 U.S. 113, 153 (1973)). In contrast, "[a] statute is struck down under rational basis review only if it is not rationally related to a legitimate state interest . . . and state legislation is rarely invalidated." *Id.*

55. We offer one possible interpretation below. *See infra* part II.D.5.

56. *Casey*, 112 S. Ct. at 2816; *see supra* part II.B-C.

57. *Casey*, 112 S. Ct. at 2816.

Roe also spoke of the State's important and legitimate interests, but the plurality considered that part of the decision to have been given "too little acknowledgment and implementation by the Court in its subsequent cases."[58]

In *Casey* the Court identified the primary legitimate state interest as "concern for the life of the unborn."[59] This interest figured repeatedly in the plurality's analysis. The Court referred to it as the state's " 'important and legitimate interest in protecting the potentiality of human life' ";[60] the state's " 'important and legitimate interest in potential life' ";[61] the state's "interest in protecting the life of the unborn";[62] and the state's "substantial interest in potential life."[63] In fact, interest in the "life of the fetus that may become a child" was part of the essential holding of *Roe* that was reaffirmed by the plurality.[64] Therefore, persuasive measures that favor childbirth over abortion can be permissible even if they do not further a health interest.[65]

The Court also determined that the state has a justifiable interest in ensuring that the abortion choice is "thoughtful and informed."[66] Thus, "[e]ven in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage [the woman] to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term."[67] In fact, this interest flows from the state's interest in potential life: "States are free to enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning. This . . . [is] the inevitable consequence of our holding that the State has an interest in protecting the life of the unborn."[68]

58. *Id.* at 2817.

59. *Id.* at 2816.

60. *Id.* at 2817 (quoting *Roe*, 410 U.S. at 162).

61. *Id.* (quoting *Roe*, 410 U.S. at 163).

62. *Id.* at 2818.

63. *Id.* at 2820.

64. *Id.* at 2804. After viability " 'the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion *except* where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.' " *Id.* at 2821 (emphasis added) (quoting *Roe*, 410 U.S. at 164-65) .

65. *Id.* 112 S. Ct. at 2825. *Contra Roe*, 410 U.S. at 164 (stating that after first trimester state could only "regulate the abortion procedure in ways that are reasonably related to maternal health").

66. *Casey*, 112 S. Ct. at 2818.

67. *Id.*

68. *Id.*

Finally, the state has a legitimate interest in " 'protecting the health of the pregnant woman.' "[69] This too is a part of the reaffirmed essential holding of *Roe*.[70]

2. The viability line

The Court made clear that the state's legitimate interests in regulating abortion are present from the outset of the pregnancy.[71] Later in the pregnancy, however, "the State's interest in life has sufficient force so that the right of the woman to terminate the pregnancy can be restricted."[72] The plurality drew the constitutional line at viability. Before viability the woman has a right to choose to terminate her pregnancy.[73] After viability abortion can be restricted or, presumably, banned.[74] The undue burden test implicitly weighs the state's interests against the woman's right to choose abortion only *before* viability.[75]

The plurality concluded that it must draw a clear line at viability "to give some real substance to the woman's liberty to determine whether to carry her pregnancy to full term."[76] Furthermore, the plurality noted that stare decisis favored the viability line. "The woman's right to terminate her pregnancy before viability is the most central

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69. *Id.* at 2820 (quoting *Roe*, 410 U.S. at 162); *see also id.* at 2821 ("Regulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden.").

70. *Id.* at 2804. The state's interest in "preserving and protecting the health of the pregnant woman," *Roe*, 410 U.S. at 162, was one of only two recognized legitimate state interests. The other was protecting the potentiality of human life. *Casey*, 112 S. Ct. at 2847 (Blackmun, J., concurring in part and dissenting in part).

71. *See, e.g.*, *Casey*, 112 S. Ct. at 2804 ("[T]he State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child."); *id.* at 2816 ("The woman's liberty is not so unlimited, however, that from the outset the State cannot show its concern for the life of the unborn . . . .").

72. *Id.* at 2816.

73. *Id.*

74.

> Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. [But the plurality opinion] is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger a woman's life or health.

Id. at 2804.

75. *Id.* at 2820 (stating that undue burdens have "purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus").

76. *Id.* at 2816.

principle of *Roe v. Wade*,"[77] and the *Roe* opinion was a statement "twice reaffirmed in the face of great opposition."[78]

In addition, viability "is the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman."[79] Finally, drawing the line at viability was "fair" in the plurality's view because "[i]n some broad sense it might be said that a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child."[80]

3. Rejecting *Roe*'s trimester framework

The plurality rejected *Roe*'s trimester framework, replacing it with a decisional framework based on viability.[81] The undue burden test constitutionally protects a woman's right to choose abortion before viability.[82] After viability, the state may more freely restrict the right.[83] To the contrary, under *Roe*,

> almost no regulation at all [was] permitted during the first trimester of pregnancy; regulations designed to protect the woman's health, but not to further the State's interest in potential life, [were] permitted during the second trimester; and during the third trimester, when the fetus [was] viable, prohibitions [were] permitted provided the life or health of the mother [was] not at stake.[84]

According to Justice O'Connor, the trimester framework was flawed because "in its formulation it misconceive[d] the nature of the pregnant woman's interest; and in practice it undervalue[d] the State's interest in potential life."[85]

The trimester framework was unnecessary "to ensure that the woman's right to choose not become so subordinate to the State's interest in promoting fetal life that her choice exists in theory but not in fact."[86] Furthermore, because the trimester framework incorrectly

77. *Id.* at 2817.
78. *Id.* at 2816 (citing *Thornburgh*, 476 U.S. at 759; *Akron*, 462 U.S. at 419-20).
79. *Id.* at 2817.
80. *Id.*
81. *Id.* at 2818.
82. *Id.*
83. *Id.*
84. *Id.* at 2817-18.
85. *Id.* at 2818.
86. *Id.*

weighed the woman's right relative to the state's interest, "[m]easures aimed at ensuring that a woman's choice contemplates the consequences for the fetus [did] not necessarily interfere with the right recognized in *Roe*."[87] In place of the trimester framework, the plurality imposed a previability—postviability framework.[88] The Court did not, however, attempt to identify a specific point during pregnancy at which viability began.

4. Impingement: Not every law that makes the right more difficult to exercise is an infringement of that right

The plurality objected to post-*Roe* cases that described the right protected in *Roe* as "a right to decide whether to have an abortion 'without interference from the State' "[89] because the cases overlooked the issue of impingement. "[N]ot every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right."[90] The plurality criticized the trimester framework as having

> led to the striking down of some abortion regulations which in no real sense deprived women of the ultimate decision. Those decisions went too far because the right recognized by *Roe* is a right "to be free from *unwarranted* governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[91]

The Court thus signaled that some interference would be permitted, and relied on the undue burden test to evaluate when the abortion right had merely been made more expensive or more difficult to obtain and when it had been unconstitutionally infringed.[92]

5. Impingement and justification: The interplay in the undue burden test

Judicial review of legislation affecting fundamental rights has three components: identifying the right, considering the degree of infringement of the right, and evaluating the state's justifications for its

87. *Id.*

88. *See id.* at 2804.

89. *Id.* at 2819 (quoting Planned Parenthood v. Danforth, 428 U.S. 52, 61 (1976)).

90. *Id.* at 2818 (noting, for example, that "not every ballot access limitation amounts to an infringement of the right to vote").

91. *Id.* at 2819 (emphasis added) (quoting Eisenstadt v. Baird, 405 U.S. 438, 453 (1972)).

92. *Id.* at 2825.

regulation.[93] Although the plurality affirmed a woman's right to choose abortion prior to viability,[94] the plurality's analysis of when that right has been infringed and when that infringement could be justified was not well defined.

The term "undue burden" sounds as if it measures only infringement.[95] The state's justification for interference with the right plays a role, however, in even the most straightforward statement of the undue burden standard: "A finding of an undue burden is a shorthand for the conclusion that a state regulation has the *purpose* or *effect* of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[96] The plurality did not, however, simply evaluate purpose and effect in isolation. In its review of the informed consent provision, the plurality noted that the state has a legitimate interest in ensuring a mature and informed abortion decision. The Court determined that the state can achieve that goal even by means which might persuade some women to forego abortion.[97]

Yet the plurality never explicitly articulated how purpose and effect are integrated. As Professor Brownstein notes, "we are left with the unenviable task of determining the standard's content by studying the way the joint opinion applies the test and inferring rules of decision from the plurality's reasoning and holdings."[98]

The *Casey* plurality may have intended that purpose and effect interplay in one of two ways. The state's purpose could be a mere threshold consideration; once the purpose is identified as valid, the court simply progresses to the effects of the statute. On the other hand, the legitimacy of the state's purpose may be central in balancing the statute's purpose against its effects.

Under the first approach, a court would look to purpose only to confirm that the justification for the regulation was legitimate. If the purpose was indeed legitimate, the court would move on to determine if the actual effect of the law—as demonstrated by the factual record before the court—was to impose a substantial obstacle on a significant

93. Alan Brownstein, *How Rights Are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine*, 45 HASTINGS L.J. 867, 867 (1994).

94. *See supra* part II.D.2.

95. Brownstein, *supra* note 93, at 881 (noting that opinions of Justices Scalia and Rehnquist at times "seem to read the undue burden standard as nothing more than a simplistic effects test").

96. *Casey*, 112 S. Ct. at 2820 (emphasis added).

97. *Id.* at 2824.

98. Brownstein, *supra* note 93, at 883.

percentage of women. Once the state's legitimate purpose was confirmed, purpose would play no further role in the analysis.

Although this theory is initially appealing, it fails to account for variations in how the *Casey* plurality applied the undue burden test to different provisions of the Pennsylvania law. Professor Brownstein explains that the effect of the parental *consent* requirement is probably to create a greater obstacle to obtaining an abortion than the spousal *notice* provision, yet the parental consent provision was upheld as constitutional while the spousal notice provision was invalidated.[99] "The implication of these contrasting evaluations is that the purposes of the two laws are different and that this difference is what accounts for the plurality's inapposite conclusions regarding these regulations."[100]

The Court's evaluation of the state's purpose apparently also affects the degree of deference it will give to a trial court's findings of fact. In *Casey* the district court made extensive factual findings as to the burdensome effects of both the spousal notice[101] and the waiting period provisions.[102] The plurality dismissed the district court's conclusion that the waiting period provision was particularly burdensome for some women, even though it found the findings "troubling."[103] In contrast, the plurality extensively quoted the district court's findings on spousal abuse, cited to sources not relied on by the trial court, and stated that the information supplemented common sense.[104] If the Court, having ascertained that both provisions had legitimate purposes, had next simply examined the provisions' effects in isolation, the difference between the Court's treatment of the factual findings for the waiting period and the factual findings for the spousal notice provision would have no principled explanation.

Although the Court failed to provide an explicit rationale for its behavior, the second approach—the one we believe is implicit in its

99. *Id.* at 887. Differences in the protections afforded the rights of children as compared to adults does not account for he differential treatment of these provisions. *See* Planned Parenthood v. Neely, 804 F. Supp. 1210, 1212 (D. Ariz. 1992) ("The young woman is not beyond the protection of the Constitution merely on account of her minority. Based on this analysis, it follows that it is a Constitutional liberty of the minor woman to have some freedom to terminate her pregnancy.").

100. Brownstein, *supra* note 93, at 888.

101. *Casey III*, 744 F. Supp. 1323, 1358-63 (E.D. Pa. 1990), *aff'd in part and rev'd in part by Casey IV*, 947 F.2d 682 (3d Cir. 1991), *aff'd in part and rev'd in part by Casey*, 112 S. Ct. 2791 (1992); *see infra* part II.E.3.

102. *Id.* at 1351-52; *see infra* part II.E.2.

103. *Casey*, 112 S. Ct. at 2825.

104. *Id.* at 2828.

decision—accounts for the Court's different application of the undue burden test in these two instances.

Under this second approach a court must engage in a more complex balancing of purpose *against* effect. "The right recognized by *Roe* is a right 'to be free from *unwarranted* governmental intrusion.' "[105] Therefore, the degree of impingement must be weighed against the state's justification to determine whether a particular impingement on the abortion right is too great in light of its specific justification. The degree of governmental intrusion permissible before the abortion right is held to be unconstitutionally infringed necessarily hinges upon whether that intrusion is warranted: in other words, whether the state interest is legitimate or compelling enough to justify the infringement.

> 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. 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.[106]

Furthermore, because the state is permitted to justify significant burdens on the abortion decision, so long as they do not amount to a substantial obstacle, the undue burden test is not a traditional strict scrutiny test either.[107]

Nor is *Casey*'s undue burden standard a mere threshold test to determine the appropriate level of judicial scrutiny.[108] In *City of Akron v. Akron Center for Reproductive Health*,[109] Justice O'Connor used undue burden as a threshold test that initially considered how severely the regulation affected the abortion right: "Laws that did not impose undue burdens would receive minimum rationality review;

105. *Id.* at 2819 (emphasis added) (quoting Eisenstadt v. Baird, 405 U.S. 438, 453 (1972)).

106. *Id.* at 2820.

107. Under strict scrutiny, the state must show both a compelling purpose and that the statute is narrowly tailored—that is, the least burdensome alternative to achieve that end. *See Casey IV*, 947 F.2d at 689. Undue burden analysis, in contrast, does not require that the statute impose the least burdensome mechanism for achieving the state's purpose. Rather, undue burden requires only that the statute be less than a substantial obstacle. *Casey*, 112 S. Ct. at 2821. It need not be the least burdensome alternative. *See supra* part II.D.

108. Brownstein, *supra* note 93, at 878-79.

109. 462 U.S. 416 (1983) (O'Connor, J., dissenting), *overruled by Casey*, 112 S. Ct. 2791 (1992).

laws that did impose undue burdens would be evaluated under strict scrutiny."[110] In marked contrast the *Casey* plurality utilized the undue burden test itself as an independent standard of review,[111] different from both traditional strict scrutiny and rational basis review.

Thus, in conducting the undue burden analysis, the initial critical step is classifying the state's purpose: The more legitimate the purpose, the more burdensome the state regulation can be. Courts must first determine whether the Supreme Court: (1) has specifically disapproved the state's purpose in enacting an abortion regulation; (2) has specifically approved the state's purpose; or (3) has not specifically passed on the state purpose or has determined that it is at least permissible. An illegitimate state purpose is as much a substantial obstacle to the right to decide as an absolute ban on previability abortions, and thus both will constitute an undue burden. Legitimate or permissible purposes, on the other hand, require the reviewing court to take the next step and balance that purpose against the severity of the law's infringement.

a. illegitimate state purposes

State purposes that strike directly at the right to choose abortion were identified by the Court as explicitly illegitimate:[112]

> A statute with [the] purpose [of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus] is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it.[113]

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110. Brownstein, *supra* note 93, at 879.

111. *Casey*, 112 S. Ct. at 2820 ("[A]n undue burden is an unconstitutional burden.").

112. *Id.* at 2819.

113. *Id.* at 2820.

It is unclear whether Justice O'Connor would approve of an inquiry into legislative history to determine if a given statute has an invalid purpose. In *Casey*, Justice O'Connor did not explain the basis for her conclusions about the legislative purposes of the provisions before the Court; it is conceivable that the Court inferred legislative intent from the content of the Pennsylvania provisions.

Inquiring into a statute's legislative history might establish that a statute that seems to have a legitimate purpose on its face was, in fact, enacted specifically to place a substantial obstacle in the path of a woman seeking an abortion. For example, the *Casey* plurality recognized that a mandatory 24-hour waiting period has the legitimate purpose of "attempting to ensure that a woman apprehend the full consequences of her decision." *Id.* at 2823. A state could enact a 24-hour waiting period, however, for the single, specific purpose of restricting previability abortions, and not to ensure thoughtful, informed decisions. If proven through the introduction of legislative history, the logic of the undue burden test should render that state's 24-hour waiting period unconstitutional.

The Court also specifically disapproved of at least one of the purposes behind Pennsylvania's spousal notice provision because it was based on an outdated view of a woman's role in the family as subordinate to her husband.[114] Had this purpose been the only one the Court recognized, the plurality would likely have found the spousal notice provision to be unduly burdensome without further analysis of the provision's effect on the woman's right.[115]

b. approved state purposes

The Court also identified unquestionably legitimate purposes: expressing concern for the life of the unborn; ensuring that the abortion decision is thoughtful and informed; and protecting the health of the pregnant woman.[116] When the plurality applied the undue burden test to the Pennsylvania provisions, it held that those with presumptively valid purposes imposed an undue burden only if the actual *effect* of the statute was to create a substantial obstacle to the woman seeking an abortion.[117] The twenty-four-hour waiting period, informed consent, and parental consent provisions—all upheld as constitutional—were based on the permissible purpose of ensuring an informed, thoughtful decision.[118]

Thus, if an abortion regulation has a Court-approved purpose, its effect on the right must be severe in order for it to constitute an undue burden. This conclusion can be drawn from the Court's application of the undue burden test to the twenty-four-hour waiting period requirement.[119] The district court made "troubling" findings of fact that the provision would lead to significantly increased costs and delays, particularly for financially disadvantaged women.[120] For some women, these effects would presumably be sufficient to prevent effective access to abortion, yet the Court found that the evidence did not demonstrate effects severe enough to amount to an undue burden.[121]

114. *Id.* at 2831 ("The husband's interest in the life of the child his wife is carrying does not permit the State to empower him with this troubling degree of authority over his wife. . . . A State may not give to a man the kind of dominion over his wife that parents exercise over their children."). For further discussion of the Court's analysis of the spousal notice provision, see *infra* part II.E.3.

115. *Casey*, 112 S. Ct. at 2831; *see infra* part II.D.5.c.

116. *See supra* part II.D.1.

117. Brownstein, *supra* note 93, at 885.

118. *Id.* at 886.

119. *Casey*, 112 S. Ct. at 2825-26; *see infra* part II.E.2.

120. *Casey*, 112 S. Ct. at 2825.

121. *Id.* at 2825; *see infra* part II.E.2.

c. less legitimate and unclassified state purposes

The Court recognized that "a husband has a 'deep and proper concern and interest . . . in his wife's pregnancy and in the growth and development of the fetus she is carrying,' " but this interest was not among those the Court explicitly identified as legitimate.[122] Other state purposes might also fall between the expressly illegitimate and the expressly legitimate. As to these purposes,

> the plurality will construe a less severe impact to be an undue burden if the purpose of the law creating that effect is of marginal legitimacy and importance, while a burden of greater magnitude will be held not to be undue if it is the result of a law that serves a particularly valid or compelling objective.[123]

Thus, for merely acceptable purposes, a lower court is to engage in ad hoc balancing of purpose and effect—the more valid the state's purpose in the eyes of the Court, the more of an obstacle the statute must create to be invalidated, and vice versa.

Although a court is to balance purpose and effect when the state's purpose is either expressly legitimate or when it is merely acceptable, the *effect* of the statute is more determinative in the latter situation because a lesser showing of impingement is required. The factual record before the court becomes a mechanism for establishing that effect.

In *Casey*, the Court looked to the factual record to determine the severity of the effects caused by the spousal notice provision and considered evidence that some women would anticipate being battered if forced to comply with the statute and the likelihood that they would therefore forego abortion supported the conclusion that the provision constituted an undue burden.[124]

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122. *Casey*, 112 S. Ct. at 2830 (quoting Planned Parenthood v. Danforth, 428 U.S. 52, 61 (1976)); *see also* Brownstein, *supra* note 93, at 889 ("[T]he state's objective of protecting the husband's 'concern and interest' in the fetus, while certainly not a presumptively valid purpose, would at least seem to be a barely permissible one.").

123. Brownstein, *supra* note 93, at 891 (emphasis omitted). Professor Brownstein observes that such a test is both hard to apply and amorphous: "It requires a threshold inquiry as to both means and ends into the state's purpose in adopting a challenged law, and then, depending on the nature of the state's purpose, an evaluation of the impact of the law to see if it constitutes an 'undue burden.' " *Id.* at 892. Indeed the test's very malleability may dismay lower courts seeking definitive guidance and certainty in this emotionally charged area of the law.

124. *Casey*, 112 S. Ct. at 2829.

The analysis, however, must be taken a step further. Because the degree of impingement on a right becomes pivotal to the constitutionality of the statute, demarcation of the sample against which this measurement is to be taken becomes crucial if the law is facially challenged. In fact, the facial challenge standard may effectively control the statute's constitutionality. If the effect is to be measured by its impact on *all* women—in all the potential applications of the statute[125]—the effect will necessarily be less severe for some women, and the statute will likely survive a facial challenge. If, however, the effect is to be measured based only upon its impact on the group "upon whom the statute operates,"[126] the effect will likely be far more substantial, and the statute is less likely to be upheld.

6. Facial challenge analysis

a. *the* Salerno *standard for facial challenges*

A statute may be held unconstitutional either on its face or as applied.[127] The distinction is significant both in terms of the showing that is required by the party bringing the action and the effect of a successful challenge.[128] The practical effect of holding a statute unconstitutional "on its face" is to render it completely inoperative.[129] In contrast, a successful "as applied" challenge prohibits the statute from being enforced in the particular situation; it may continue to be applied in other circumstances.[130]

The Supreme Court in *United States v. Salerno*[131] articulated the traditional facial challenge standard: "[T]he challenger must establish that *no set of circumstances exists* under which the Act would be valid."[132] Because the challenger must demonstrate that a statute is unconstitutional in all its applications, a facial challenge is the most

125. This, essentially, is the "no set of circumstances" standard for facial challenges set by the Supreme Court in United States v. Salerno, 481 U.S. 739, 745 (1987). *See infra* part II.D.6.a.

126. *Casey*, 112 S. Ct. at 2829 ("The analysis does not end with the one percent of women upon whom the statute operates; it begins there. Legislation is measured for consistency with the Constitution by its impact on those whose conduct it affects."); *see infra* part II.D.6.b.

127. Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 236 (1994).

128. *Id.*

129. *Id.*; *see* Ada v. Guam Soc'y of Obstetricians & Gynecologists, 113 S. Ct. 633, 633 (1992) (mem.) (Scalia, J., dissenting from denial of certiorari).

130. Dorf, *supra* note 127, at 236.

131. 481 U.S. 739 (1987).

132. *Id.* at 745 (emphasis added).

difficult challenge to mount successfully. Establishing that a statute "might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid."[133]

An exception has been carved out in the First Amendment area, based on concerns that the *Salerno* standard would have the effect of chilling speech.[134] Under the First Amendment substantial overbreadth doctrine, a litigant may argue that a statute should be invalidated not because it is unconstitutional as to that litigant, but because it would be unconstitutional to apply it to a third party not before the court.[135]

Professor Dorf argues, however, that the overbreadth doctrine has been applied in contexts other than the First Amendment.[136] "[A]n examination of First Amendment overbreadth doctrine reveals that its special standing component and concerns about the 'chilling' effects of overbroad laws have properly been applied in other fundamental rights cases."[137]

b. the facial challenge standard under Casey

In *Casey*, Justice O'Connor did not apply *Salerno*'s no set of circumstances standard, but neither did she expressly reject it. In striking down the spousal notification requirement of the Pennsylvania statute, Justice O'Connor rejected respondents' argument that, because some women would be able to notify their husbands without adverse consequences, the statute could not be invalid on its face.[138]

We disagree with respondents' basic method of analysis.

> The analysis does not end with the one percent of women upon whom the statute operates; it begins there. Legislation is measured for consistency with the Constitution by its impact on those whose conduct it affects. . . . The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.[139]

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133. *Id.*

134. Dorf, *supra* note 127, at 261.

135. *Id.*

136. See *id.* for a comprehensive review of the facial challenge standard and argument that overbreadth analysis is the appropriate standard for fundamental rights cases.

137. *Id.* at 261.

138. *Casey*, 112 S. Ct. at 2829.

139. *Id.*

Justice O'Connor seemed to be suggesting that an overbreadth-type analysis was appropriate in the abortion context, but her opinion failed to explicitly articulate her reasoning and intention in relation to *Salerno*. Justice Scalia, joined by Chief Justice Rehnquist and Justice White, later disputed this suggestion in a dissent to a denial of certiorari in another case.[140] Justice Scalia acknowledged that the Court's opinion in *Roe* had seemingly employed an overbreadth approach.[141] However, he argued that that view had been rejected—by Justice O'Connor herself—in subsequent abortion cases and asserted that the Court had not purported to change the *Salerno* test in *Casey*.[142] Furthermore, in his view such an approach was inappropriate in the abortion context because it interfered with the state's ability to limit and refine its statutes.[143]

The Court's next pronouncement on the facial challenge issue came in Justice O'Connor's concurrence in *Fargo Women's Health Organization v. Schafer*.[144] Joined by Justice Souter, Justice O'Connor refuted the contention that a statute must be unconstitutional in all circumstances in order to be struck down on a facial challenge.[145] Moreover, she reiterated the Court's reliance on the factual record in determining whether a regulation created an undue burden for a significant number of women,[146] and indicated that the lower court "should have undertaken the same analysis."[147]

Two conclusions can thus be drawn from this decision. First, *Casey* intended that a statute need not be unconstitutional in *all* circumstances, but in only a " 'large fraction of the cases in which [it would] operate as a substantial obstacle.' "[148] Secondly, the court must review the record developed in the case in order to determine whether the statute constitutes an undue burden.[149]

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140. Ada v. Guam Soc'y of Obstetricians & Gynecologists, 113 S. Ct. 633, 633 (1992) (mem.) (Scalia, J., dissenting from denial of certiorari).

141. *Id.* at 634.

142. *Id.* (Scalia, J., dissenting from denial of certiorari); *see infra* part III.B.1.b.

143. *Ada*, 113 S. Ct. at 634 (Scalia, J., dissenting from denial of certiorari).

144. 113 S. Ct. 1668, 1668 (1993) (mem.) (O'Connor, J., concurring in denial of certiorari) [hereinafter *Fargo II*]. *Fargo II* originally was heard as Fargo Women's Health Organization v. Sinner, 819 F. Supp. 862 (D.N.D. 1993) [hereinafter *Fargo I*], in the district court. The Eighth Circuit affirmed *Fargo I* in Fargo Women's Health Organization v. Schafer, 18 F.3d 526 (8th Cir. 1994) [hereinafter *Fargo III*].

145. *See Fargo II*, 113 S. Ct. at 1669 (O'Connor, J., concurring in denial of certiorari).

146. *Id.* (O'Connor, J., concurring in denial of certiorari).

147. *Id.* (O'Connor, J., concurring in denial of certiorari).

148. *Id.* (O'Connor, J., concurring in denial of certiorari) (quoting *Casey*, 112 S. Ct. at 2830).

149. *See id.* (O'Connor, J., concurring in denial of certiorari).

The modified facial challenge standard thus represents the view of an uncertain complement of the court. Five Justices joined part V.C. of the plurality opinion in *Casey* in which the facial challenge standard was modified.[150] Justice O'Connor, the author of the plurality opinion in *Casey*, and Justice Souter clearly support the change.[151] Given the lack of support by other members of the Court, however, it appears that the facial challenge standard may have been modified in theory, but perhaps not in fact—at least not in application.

E. Applications of the Undue Burden Test to Pennsylvania's Abortion Statute in Casey

As amended in 1988 and 1989, Pennsylvania's Abortion Control Act of 1982[152] contained five contested provisions. The first defined the "medical emergency" exception, which permitted immediate abortions without compliance with the remainder of the statute.[153] Second, the statute required that, except in medical emergencies as defined, a doctor provide specified information to a woman seeking an abortion twenty-four hours before the procedure.[154] Third, the statute required that, except in medical emergencies or specified situations, a married woman provide a signed statement attesting to the fact that she had notified her husband of her intent to obtain an abortion.[155] Fourth, except in medical emergencies, a minor seeking an abortion was required to obtain either the consent of one parent or court authorization for the procedure.[156] Fifth, the statute required specified record keeping and reporting by every abortion facility.[157] Unfortunately, the Court's sometimes ambiguous or incomplete application of the undue burden test to these provisions compounded the problem of an ambiguously defined test.

1. The Court held the definition of a medical emergency to be constitutional

The medical emergency provision permitted immediate abortions without compliance with other provisions of the statute when, in the

150. Justices Blackmun, Stevens, O'Connor, Kennedy, and Souter.

151. *Fargo II*, 113 S. Ct. at 1668 (O'Connor, J., concurring in denial of certiorari, Souter J., joining).

152. 18 PA. CONS. STAT. ANN. §§ 3203-3220 (1983 & Supp. 1994).

153. 18 PA. CONS. STAT. ANN. § 3203 (1983).

154. 18 PA. CONS. STAT. ANN. § 3205 (1983 & Supp. 1994).

155. 18 PA. CONS. STAT. ANN. § 3209 (Supp. 1994); *see infra* part II.E.3.

156. 18 PA. CONS. STAT. ANN. § 3206 (1983 & Supp. 1994).

157. 18 PA. CONS. STAT. ANN. § 3207(b), 3214(a), (f).

doctor's good-faith judgment, an abortion was necessary to avert death or when delay would create a serious risk of "substantial and irreversible impairment of [a] major bodily function."[158] The court of appeals construed the statute so as to " 'not in any way pose a significant threat to the life or health of a woman.' "[159]

In a very brief discussion of this provision, a majority of the Court simply proclaimed that they normally defer to a lower court's interpretation of state law, and concluded that, "as construed by the Court of Appeals, the medical emergency definition impose[d] no undue burden on a woman's abortion right."[160] Elsewhere in the opinion, the Court had recognized the state's legitimate interest in " 'protecting the health of the pregnant woman.' "[161]

Furthermore, the Court did not analyze the effect of the provision on the exercise of the abortion right. Presumably the broadening construction of the medical emergency exception either: (1) prevented the statute from placing a substantial obstacle in the path of a woman seeking the abortion of a nonviable fetus given the state's legitimate interest;[162] or (2) simply confirmed the holding of *Roe*—reaffirmed by *Casey*—that the state could not regulate or proscribe abortion so as to jeopardize the mother's life or health.[163] In any event the constitutionality of the medical emergency definition so construed was "central to the operation"—and presumably the constitutionality—of the other requirements.[164]

2. The Court held the informed consent and mandatory waiting period provisions constitutional

The informed consent provisions required, except in medical emergencies or when the information would have a serious effect on the woman's physical or mental health, that a woman seeking an abortion be provided: (1) information about the procedure, health risks, and the fetus' probable gestational age by a doctor; and (2) state materials describing the fetus and information on assistance and social services by a doctor or other qualified person.[165] Once the informa-

158. 18 PA. CONS. STAT. ANN. § 3203 (1983).
159. *Casey*, 112 S. Ct. at 2822 (quoting *Casey IV*, 947 F.2d 682 (3d Cir. 1991), *aff'd in part and rev'd in part by Casey*, 112 S. Ct. 2791 (1992)).
160. *Id.*
161. *Id.* at 2820 (quoting *Roe*, 410 U.S. 113, 162 (1973)).
162. *See supra* part II.D.5.
163. *See Casey*, 112 S. Ct. at 2821.
164. *Id.* at 2822.
165. 18 PA. CONS. STAT. ANN. § 3205 (1983 & Supp. 1994).

tion was provided, the statute imposed a mandatory twenty-four-hour waiting period before the procedure could be performed.[166]

Justices O'Connor, Kennedy, and Souter found that "the giving of truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the 'probable gestational age'" served the state's legitimate interest in potential life.[167] In addition, the Court held that information about the impact of abortion on the fetus—even when those consequences were unrelated to the woman's health—served the legitimate purpose of ensuring thoughtful, informed decisions.[168] The Court's evaluation of the effect of this provision was limited, however, to merely noting that although it "might cause the woman to choose childbirth over abortion [it] cannot be considered a substantial obstacle to obtaining an abortion, and, it follows, there is no undue burden."[169] As to the twenty-four-hour waiting period, the Court decided that such a measure could serve the state's legitimate interest in ensuring an informed choice.[170]

The plurality, after classifying the purpose as legitimate, then asked "[w]hether the mandatory 24-hour waiting period is nonetheless invalid because in practice it is a substantial obstacle to a woman's choice to terminate her pregnancy."[171] The Court at this point redefined the facial challenge analysis. Instead of requiring the plaintiffs to establish that no circumstance existed in which the statute might be constitutional before rendering it facially invalid, the Court looked to

166. *Id.*

167. *Casey*, 112 S. Ct. at 2823.

168. *Id.* The plurality stated that, likewise, they "would think it constitutional for the State to require that in order for there to be informed consent to a kidney transplant operation the recipient must be supplied with information about risks to the donor as well as risks to himself or herself." *Id.*

169. *Id.* at 2824. The plurality also asked whether requiring that a physician provide some of the information, as opposed to a qualified assistant, "would amount in practical terms to a substantial obstacle." *Id.* Although City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983), *overruled by Casey*, 112 S. Ct. 2791 (1992), invalidated a similar provision, because the record contained no evidence as to whether this provision effectively erected a substantial obstacle to a woman seeking an abortion, the Court concluded that this part of the provision was not an undue burden. *Casey*, 112 S. Ct. at 2824. The plurality continued, observing that the states are given broad latitude to require that licensed professionals perform certain tasks, and thus upheld "the provision as a reasonable means to insure that the woman's consent is informed." *Id.* at 2824-25.

170. *Casey*, 112 S. Ct. at 2825.

171. *Id.*

specific findings of fact and, in evaluating the statute's effects, restricted its analysis to the group on whom the statute operated.[172]

The district court had made factual findings that the waiting period would have the practical effect of requiring two trips to the doctor and many Pennsylvania women would be required to travel great distances to reach an abortion provider.[173] Abortions would often be delayed for more than a day, and repeat trips would increase the woman's exposure to harassment and the hostility of anti-abortion demonstrators.[174] Finally, the burden of the waiting period would fall heaviest on poor women, women who must travel great distances, and women who would be unable to explain their absences to their husbands or employers.[175]

Even under a more lenient facial challenge standard, the Court held that the plaintiffs failed to demonstrate that the effects resulted in an undue burden. Although "[t]hese findings [were] troubling in some respects, . . . they [did] not demonstrate that the waiting period constitute[d] an undue burden."[176] The plurality did not doubt that "the waiting period ha[d] the effect of 'increasing the cost and risk of delay of abortions.' "[177] Even the "particularly burdensome" effects of the waiting period on some women did not, however, require its invalidation; the Court held that a "particular burden is not of necessity a substantial obstacle," despite the district court's conclusion about increased costs and possible delays.[178] The district court had not declared that the "waiting period [was] such an obstacle even for the women who are most burdened by it."[179] Perhaps disingenuously, the Court determined that, "on the record before us, and in the context of this facial challenge," the provision did not create an undue burden.[180]

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172. *See supra* part II.D.6.b.
173. *Casey*, 112 S. Ct. at 2825.
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.* (quoting *Casey III*, 744 F. Supp. 1323, 1378 (E.D. Pa. 1990), *aff'd in part and rev'd in part by Casey IV*, 947 F.2d 682 (3d Cir. 1991), *aff'd in part and rev'd in part by Casey V*, 112 S. Ct. 2791 (1992)). The plurality concluded that the waiting period did not constitute a health risk because of the lower court's construction of the medical emergency exception. *Id.*
178. *Id.* at 2825-26.
179. *Id.* In contrast to the waiting period provision, the spousal notice provision did *not* have an expressly legitimate purpose. There, the Court did not rely on trial court conclusions but instead reviewed the specific findings and additional studies and drew its own conclusions. *See id.* at 2826-29.
180. *Id.* at 2826.

The Court recognized the legitimacy of the state purpose—informed, thoughtful decision making—and determined that the impact of the regulation on the women who would be most affected by it did not outweigh its purpose. Therefore, the informed consent provision did not constitute an undue burden.

3. The Court held the spousal notification provision unconstitutional

The spousal notification provision required that, except in medical emergencies, a married woman provide a signed statement that (1) she had notified her husband of her intent to obtain an abortion; (2) she was impregnated by another man; (3) her husband could not be found; (4) the pregnancy was the result of a reported spousal sexual assault; or (5) the woman would be injured by her husband if she informed him.[181] A doctor performing an abortion without the woman's signed statement was subject to license revocation and liability to the husband for damages.[182]

The plurality identified two state purposes behind the spousal notice statute. First, although "a husband has a 'deep and proper concern and interest . . . in his wife's pregnancy and in the growth and development of the fetus she is carrying,' "[183] before birth "[i]t is an inescapable biological fact that state regulation with respect to the child a woman is carrying will have a far greater impact on the mother's liberty than on the father's."[184] And " '[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.' "[185] Therefore, the Constitution protects people from "unjustified state interference, even when that interference is enacted into law for the benefit of their spouses."[186]

Second, the state could not promote the common-law view of the woman's role in the family because the idea that a woman has no legal existence apart from her husband no longer comports with "our understanding of the family, the individual, or the Constitution."[187] The Court found this purpose to be expressly illegitimate and forbade "the

181. 18 PA. CONS. STAT. ANN. § 3209 (Supp. 1994).
182. *Id.*
183. *Casey*, 112 S. Ct. at 2830.
184. *Id.*
185. *Id.* (quoting Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (emphasis in original)).
186. *Id.*
187. *Id.* at 2831.

State to empower [a husband] with this troubling degree of authority over his wife."[188]

In a part of the opinion that commanded a majority of the Court,[189] the Court—as it had when considering the informed consent provisions—reviewed the district court's findings. This time, however, the Court drew its own conclusions about the district court's findings of fact, going so far as to use common sense and additional studies not apparently relied upon by the lower court.[190] This extended review was in marked contrast to the analysis afforded the informed consent and waiting period provisions.[191]

Among the findings relied upon by the Court to strike down the spousal notification requirement were conclusions that "the vast majority" of married women already consult their husbands before choosing abortion;[192] that the "bodily injury" exception was not available to a woman who had a reasonable belief that her husband would otherwise abuse or manipulate her;[193] that domestic violence touches the lives of millions of women;[194] that " '[m]ere notification of pregnancy is frequently a flashpoint for battering' ";[195] that the marital rape exception was unusable because it is rarely reported;[196] and that ultimately, the nature of battering relationships makes it unlikely that the women to whom the exceptions apply would ever use it.[197]

The Court supported the district court's findings with additional studies of domestic violence[198] and concluded that together they "reinforce what common sense would suggest":[199]

> The spousal notification requirement is thus likely to prevent a significant number of women from obtaining an abortion. It does not merely make abortions a little more difficult or expensive to obtain; for many women, it will impose a sub-

188. *Id.*
189. Justices Blackmun, Stevens, O'Connor, Kennedy, and Souter.
190. *Casey*, 112 S. Ct. at 2828.
191. *See supra* part II.E.2.
192. *Casey*, 112 S. Ct. at 2826.
193. *Id.* For example, an abusive husband could retaliate against his wife by publicizing her intent to have an abortion, by retaliating against her in future custody or divorce proceedings, or by using control over finances to deprive her of necessary monetary support for her or her children. *Id.*
194. *Id.*
195. *Id.* at 2827 (quoting *Casey III*, 744 F. Supp. at 1362).
196. *Id.*
197. *Id.*
198. *Id.* at 2827-28.
199. *Id.* at 2828.

> stantial obstacle . . . as surely as if the Commonwealth had outlawed abortion in all cases.[200]

This was the majority's conclusion, even though they conceded that this provision would affect only about one percent of the women who obtain abortions,[201] that is, "married women seeking abortions who do not wish to notify their husbands of their intentions and who do not qualify for one of the statutory exceptions to the notice requirement."[202]

Indeed, the majority's facial challenge analysis *insists* that "[t]he proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant."[203] Because the majority concluded—*on its own analysis of the factual record* and in light of the statute's purposes—that "in a large fraction of the cases" in which the provision is relevant "it will operate as a substantial obstacle to a woman's choice to undergo an abortion," the Court held the spousal notification provision invalid as an undue burden.[204]

4. The Court held the parental consent provision constitutional

The parental consent provision required that, except in medical emergencies, unemancipated women under the age of eighteen had to obtain one parent's informed consent, subject to a judicial-bypass mechanism.[205] The plurality condoned, in passing, the state's proffered justification for the regulation—thoughtful, informed decisions—because "the provisions regarding informed consent have particular force with respect to minors."[206] The Court did not, however, specifically analyze how burdensome the effects of the provision might be although they referenced the "arguments" made in opposition to the provision.[207]

200. *Id.* at 2829.

201. *Id.*

202. *Id.* at 2829-30.

203. *Id.* at 2829 (analogizing to First Amendment overbreadth analysis and citing Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974)).

204. *Id.* at 2830.

205. *Id.* at 2832.

206. *Id.*

207. *Id.*; *see supra* part II.E.2. Professor Brownstein notes that, compared to the spousal notification provision, the parental consent provision "probably creates a more substantial obstacle to the exercise of abortion rights." Brownstein, *supra* note 93, at 887. The difference in constitutionality between the provisions can be attributed to the higher degree of legitimacy the Court assigned to the purpose of the parental consent provision: promoting informed consent. *Id.* at 891-92.

5. The Court held the record keeping and reporting provisions constitutional

The Pennsylvania statute also required that every abortion facility file a variety of reports.[208] The Court upheld all of the record keeping and reporting requirements except those related to spousal notification. These were excepted because they "place[ ] an undue burden on a woman's choice" for the same reasons as the notification provision itself.[209]

The plurality concluded that the remaining record keeping and reporting requirements related to the state's interest in the preservation of maternal health,[210] a justification the Court specifically legitimized.[211] Because such medical information assists in research, the Court concluded that "it cannot be said that the requirements serve no purpose other than to make abortions more difficult."[212] Having acknowledged a legitimate and approved purpose, the likelihood that the requirements might "increase the cost of some abortions by a slight amount" did not, on the record before the Court, render the effect of the requirements so burdensome as to create a substantial obstacle to a woman's choice.[213]

III. IN THE AFTERMATH OF *CASEY*: JUDICIAL RESPONSES

A. Introduction

In the two-and-a-half years since the Supreme Court handed down its decision in *Casey*, state and federal courts have rendered some twenty-four opinions attempting to apply its precepts. *Casey*'s undue burden and facial challenge standards have arisen in cases involving everything from state abortion regulations to state initiatives to other privacy interests.[214]

208. *Casey*, 112 S. Ct. at 2832. Clinics had to file reports regarding: the clinic's name and address and those of related entities; quarterly reports indicating the number of abortions performed by trimester; and specific information about each abortion performed, the doctor performing the procedure, and the patient's medical history. *Id.* The woman's identity was not to be revealed. *Id.*

209. *Id.* at 2832-33.

210. *Id.* at 2832.

211. *See supra* part II.D.1.

212. *Casey*, 112 S. Ct. at 2833.

213. *Id.*

214. *See infra* part III.B-C.

Furthermore, as of May 1994, the Supreme Court had declined to review fourteen different abortion cases.[215] State restrictions on abortion have exploded.[216] The undue burden analysis has been extended to other privacy arenas: Courts have applied the undue burden analysis to right to assisted suicide, grandparent rights, and drug testing cases.[217]

The courts, however, have been far from consistent in applying the holdings of *Casey*. Some courts seem to obfuscate the undue burden analysis by mixing the language of rational basis and strict scrutiny with that of undue burden. Others frankly admit they are uncertain how to conduct the analysis and thus consider the challenged regulations under a variety of standards.[218] Some simply escape to their state constitutions to conduct a less ambiguous analysis.[219]

If any generalization can be made about the cases that purport to apply *Casey*'s undue burden standard to abortion regulations, it is this: They don't. When faced with an abortion regulation substantially similar to those at issue in *Casey*, most courts simply rely on the fact that since the Supreme Court upheld a similar provision in *Casey*, the one at issue must likewise be constitutional; what we term the "*looks like* Casey, *smells like* Casey, *must be constitutional*" approach. With only rare exceptions, the lower courts have failed to review either: (1) the specific purpose of the legislation *as enacted by that state*; or (2) the effect of the law as evidenced by factual findings documenting the degree of burden imposed. In fact, the only court to engage in a full *Casey* undue burden analysis did so in the context of an assisted suicide ban.[220]

Some courts have followed *Casey* so far as necessary to conclude that outright previability abortion bans are unconstitutional undue burdens because *Casey* deemed statutes with such an effect to be presumptively invalid.[221] Other courts have made clear that they are uncertain *how* the undue burden analysis harmonizes with the facial

215. Nancy E. Roman, *Breyer's Record Mixed on Abortion-Rights Issue*, WASH. TIMES, May 23, 1994, at A1.

216. For a comprehensive review of state abortion regulations, see THE NARAL FOUNDATION, WHO DECIDES? A STATE-BY-STATE REVIEW OF ABORTION RIGHTS (4th ed. 1993).

217. *See infra* part III.C.

218. *See infra* part III.B.

219. *See infra* part III.D.

220. *See* Compassion in Dying v. Washington, 850 F. Supp. 1454 (W.D. Wash. 1994).

221. *Casey*, 112 S. Ct. at 2820.

challenge standard. Still others have ignored Justice O'Connor's clear—and reiterated[222]—entreaty to consider the factual context of the regulation to determine whether it constitutes an undue burden. In spite of the simplicity of the aphorism, it is true that "Mississippi [or North Dakota or Utah] ain't Pennsylvania,"[223] and the impact of a restriction on the abortion right may be significantly different in each state.

In this section, we review how the lower courts have interpreted and applied *Casey* in the abortion context, how *Casey* relates to other privacy rights, and how the decision affects state constitutional analysis.

B. The Abortion Cases

Predictably, state abortion regulations have generated most of the post-*Casey* decisions interpreting and applying the undue burden and facial challenge standards. Three recurring themes have emerged: (1) controversy as to the applicable facial challenge standard; (2) the appropriate balancing of purpose and effect in undue burden analysis; and (3) the role of factual evidence. Most courts have resolved facial challenges to these regulations by applying the *Salerno* no set of circumstances standard and determining that possible constitutional applications of the law defeated the challenge.[224] Similarly, the courts have disputed how, and to what extent, factual evidence is relevant.[225] Few courts have engaged in the balancing of purpose and effect implicit in *Casey*.[226]

1. The facial challenge standard

a. confusion in the lower courts

Most post-*Casey* cases have been brought as facial challenges to state statutes. Traditionally, a successful facial challenge must demonstrate that a statute is unconstitutional in all its applications—no set of circumstances exists wherein the statute may be constitutionally ap-

222. *See Fargo II*, 113 S. Ct. 1668, 1669 (1993) (mem.) (O'Connor, J., concurring in denial of certiorari).

223. Barnes v. Moore, 970 F.2d 12, 15 n.5 (5th Cir.) (per curiam) (paraphrasing plaintiff's argument that conditions in one state may be sufficiently different from conditions in another to warrant different result), *cert. denied*, 113 S. Ct. 656 (1992).

224. *See infra* part III.B.1.a.i.

225. *See infra* part III.B.2.

226. *See infra* part III.B.3.

plied.[227] *Casey* applied a very different standard: If the regulation operated to impose a substantial obstacle on the right to abortion in a large fraction of the cases in which the statute was relevant, the statute could not survive a facial challenge.[228]

The real question in the facial challenge debate is *how* the group upon whom the statute operates is defined. *Salerno* defines the group broadly: If a statute can be constitutionally applied—to anyone—then it is not vulnerable to facial challenge.[229] If the group is narrowly defined—as the group upon whom the statute operates—the statute is more likely to be successfully challenged. Furthermore, if the threshold is set at "significant percentage" as opposed to "any application," the standard becomes even more relaxed.[230]

The lower courts have been reluctant, even unwilling, to accept Justice O'Connor's apparent modification of the facial challenge standard in *Casey*.[231] *Salerno*'s no set of circumstances standard for facial challenges[232] is a longstanding one,[233] and the courts' reluctance may be, at least in part, a reaction to Justice O'Connor's failure to explicitly reject *Salerno* in the *Casey* opinion.

In concurring to a denial of certiorari in *Fargo II*,[234] Justice O'Connor made clear that she had, in fact, intended to modify the standard, but her concurrence was joined only by Justice Souter.[235] Because Justice O'Connor was unable to muster even members of the *Casey* plurality to support an explicit statement of the facial challenge standard used in *Casey*, the prevailing standard remains uncertain. Thus, the lower courts have been free to pursue either the *Salerno* standard or the modified standard set forth by Justice O'Connor.

Some lower courts have ignored the controversy; some have commented on the ambiguity of the applicable standard after *Casey* and opted to apply one standard or the other.[236] One court made an effort

227. United States v. Salerno, 481 U.S. 739 (1987); *see supra* part II.D.6.a.

228. *Casey*, 112 S. Ct. at 2829; *see supra* part II.D.6.b.

229. *Salerno*, 481 U.S. at 745.

230. *See infra* note 300 and accompanying text.

231. *See supra* part II.D.6.b.

232. *Salerno*, 481 U.S. at 745.

233. Although *Salerno* is generally cited as authority for the no set of circumstances standard for facial challenges, the Court articulated the standard in other cases. *See* Rust v. Sullivan, 500 U.S. 173, 183 (1991); Chicago & Northwest Ry. v. United Transp. Union, 402 U.S. 570, 582 (1971).

234. *Fargo II*, 113 S. Ct. 1668 (1993) (mem.) (O'Connor, J., concurring in denial of certiorari).

235. *Id.* at 1669.

236. *See infra* part III.B.1.a.i-ii.

to justify its opinion under both standards.[237] Another seemed to meld the purpose prong of undue burden analysis into the selection of a standard; a more compelling state interest justified application of the *Salerno* standard, while less compelling purposes were analyzed under Justice O'Connor's more liberal analysis.[238] Most courts, however, in the absence of a clear directive from the Supreme Court have retreated to the familiar safety of *Salerno*.[239]

i. courts adhering to the *Salerno* line of cases

The Fifth Circuit in *Barnes v. Moore*[240] was the first to squarely address whether *Casey* modified the *Salerno* standard for facial challenges. The court acknowledged that Justice O'Connor seemed to have applied a somewhat different facial challenge standard when the Court struck down the spousal notification provision of the Pennsylvania statute, but concluded that *Casey* had not, in fact, abandoned *Salerno*.[241] "[W]e do not interpret *Casey* as having overruled, *sub silentio*, longstanding Supreme Court precedent governing challenges to the facial constitutionality of statutes."[242] Having acknowledged that *Casey* applied a different test than *Salerno*, the Fifth Circuit nonetheless insisted that the plaintiffs "must 'establish that no set of circumstances exist[ed] under which the Act would be valid.'"[243] Because the Mississippi provisions at issue were substantially similar to the Pennsylvania act upheld in *Casey*,[244] the court concluded that the plaintiffs could not satisfy the "heavy burden" of *Salerno* and upheld the provisions.[245]

237. *See, e.g.*, Utah Women's Clinic v. Leavitt, 844 F. Supp. 1482 (D. Utah 1994).

238. *See* Jane L. v. Bangerter, 809 F. Supp. 865 (D. Utah 1992).

239. *See infra* part III.B.1.a.i.

240. 970 F.2d 12 (5th Cir.) (per curiam), *cert. denied*, 113 S. Ct. 656 (1992). At issue was a facial challenge to a 1991 Mississippi law that mandated that doctors or their agents provide specified information to women seeking abortions and imposed a 24-hour waiting period after receipt of that information. *Id.* at 13. The district court had granted a preliminary injunction enjoining enforcement of the provisions; this order was on appeal to the Fifth Circuit when *Casey* was decided. *Id.*

241. *Id.* at 14 n.2.

242. *Id.* (citations omitted).

243. *Id.* at 14 (quoting *Salerno*, 481 U.S. at 745).

244. *Id.*

245. *Id.*

A month later a different panel of the Fifth Circuit[246] struck down a Louisiana statute[247] that banned abortions except in very limited circumstances.[248] This panel did not comment on the uncertainty of the facial challenge standard. *Salerno* clearly would not have justified striking down the statute because *some* circumstances existed in which the statute could be constitutionally applied—to ban postviability abortions for example.[249] But the nature of the provisions—in that they amounted to a near-ban on nontherapeutic previability abortions—was clearly contrary to the essential holding of both *Roe* and *Casey*.[250] Thus, the court may have found it unnecessary to reach the facial challenge question.

The Fifth Circuit revisited the facial challenge controversy for the third time in *Barnes v. Mississippi*.[251] At issue was a statute requiring that minors, subject to a judicial-bypass mechanism, obtain the consent of both parents before having an abortion.[252] The court reiterated its conviction that plaintiffs must show there was no set of circumstances under which the statute was constitutional.[253] The majority concluded that "the law [was] constitutional as to all minors in

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246. Sojourner T v. Edwards, 974 F.2d 27 (5th Cir. 1992) (striking down Louisiana statute banning abortions except in very limited circumstances), *cert. denied*, 113 S. Ct. 1414 (1993). Circuit Judges Reynaldo G. Garza, Davis, and Barksdale comprised the *Sojourner T* panel. *Id.* at 28. Circuit Judges Emilio M. Garza and Jolly, and District Judge Shaw comprised the *Barnes v. Moore* panel. *Barnes v. Moore*, 970 F.2d at 13.

247. 1991 LA. ACTS No. 26, § 87 (doctor who administered drugs or performed procedure with specific intent to perform abortion charged with criminal conduct). *Id.* § 87E.(1). The statute allowed for exceptions when: (1) the pregnancy was terminated to preserve the life or health of an unborn child, or to remove a dead unborn child; (2) the pregnancy was terminated to preserve the life of the mother; or (3) the pregnancy was the result of rape or incest, was reported to law enforcement, and provided the abortion was performed within the first 13 weeks of pregnancy. *Id.* § 87B.(3).

248. *Sojourner T*, 974 F.2d at 28. The distinction between the court's treatment of the statutes struck down in this case and those upheld in *Barnes v. Moore* may rest in the nature of the provisions—a relative ban as opposed to informed consent and waiting period requirements. Both decisions were consistent with the *Casey* decision, and in fact both Fifth Circuit panels relied on similarities between the statutes before them and those at issue in *Casey*. *See Sojourner T*, 974 F.2d at 31; *Barnes v. Moore*, 970 F.2d at 13.

249. *See, e.g.*, Ada v. Guam Soc'y of Obstetricians & Gynecologists, 113 S. Ct. 633, 634 (1992) (mem.) (Scalia, J., dissenting from denial of certiorari) (dissenting because challenged Guam statute banning abortions except in medical emergency "would . . . be constitutional at least in its application to abortions conducted after the point at which the child may live outside the womb").

250. *See Casey*, 112 S. Ct. at 2804 ("Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure.").

251. 992 F.2d 1335 (5th Cir.), *cert. denied*, 114 S. Ct. 468 (1993).

252. *Id.* at 1337.

253. *Id.* at 1342.

Mississippi. There [would] be no 'unconstitutional impact upon a small percentage of the minors seeking to obtain judicial consent for an abortion.' "[254]

The dissent did not dispute the majority's invocation of the no set of circumstances standard, but disagreed with how the majority defined the group upon whom the statute operated.[255] The *Casey* court looked to the burden imposed on those women for whom the statute was relevant in order to invalidate Pennsylvania's spousal notification provision.[256] If the identified group included *all* Mississippi minors, and the statute operated unconstitutionally only on those minors who, although they could show that an abortion was in their best interests could not show that notification was *not* in their best interests, then the statute would be constitutional except when applied to this small subset of Mississippi minors.[257] In contrast, if the group was drawn to include only those minors within that small subset, the law would be unconstitutional as to that group in all cases.[258]

Had the court narrowly defined the group as Justice O'Connor had in striking down the spousal notification provision in *Casey*, the court might have struck the statute. Instead, the court defined the group broadly and, relying on *Salerno*'s strict standard, upheld the statute.

In contrast the North Dakota District Court in *Fargo I*[259] failed to even reach the issue. The court recited the "heavy burden" imposed by *Salerno*,[260] but ultimately relied on similarities between the challenged statutes and those upheld in *Casey*. The court concluded that any differences between the statutes were insufficient to render the North Dakota law facially invalid.[261]

254. *Id.* at 1342 n.5 (quoting *id.* at 1347 n.10 (Johnson, J., dissenting)).

255. *Id.* at 1347 n.10 (Johnson, J., dissenting).

256. *Casey*, 112 S. Ct. at 2829.

257. *Barnes v. Mississippi*, 992 F.2d at 1342 n.5.

258. *Id.* at 1347 n.10 (Johnson, J., dissenting).

259. 819 F. Supp. 862 (D.N.D. 1993). The challenged statute imposed a 24-hour waiting period after specified information was provided. *Id.* at 863.

260. *Id.* (citing *Salerno*, 481 U.S. at 745).

261. *Id.* at 864. ("In light of the *Casey* Court's holding that statutory provisions nearly identical to those in the instant case were facially constitutional, the plaintiffs cannot satisfy the heavy burden required for a successful facial challenge.").

When *Fargo* reached the Supreme Court on an application for stay and injunction pending appeal,[262] Justice O'Connor objected to the facial challenge standard applied by the district court.[263]

> In my view, the approach taken by the lower courts is inconsistent with *Casey*. In striking down Pennsylvania's spousal-notice provision, we did not require petitioners to show that the provision would be invalid in *all* circumstances. Rather, we made clear that a law restricting abortions constitutes an undue burden, and hence is invalid, if, "in a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion."[264]

When *Fargo* reached the Eighth Circuit on appeal from the district court's grant of summary judgment in favor of defendants,[265] the court rejected Justice O'Connor's contention that *Casey* had conclusively modified the facial challenge standard.[266] The court therefore analyzed the challenged provisions under both *Salerno* and *Casey*.[267] The court concluded that similarities between the challenged provisions and those upheld in *Casey* clearly established that situations existed wherein the law would be constitutional under *Salerno*.[268]

The Eighth Circuit proceeded, in the alternative, to examine whether the statute was constitutional under *Casey*. The court first construed the regulations narrowly, thereby limiting their impact.[269] It then considered whether the narrowed provisions imposed an undue burden. The court noted the "close similarity" between North

262. *Fargo II*, 113 S. Ct. 1668, 1668 (1993) (mem.) (O'Connor, J., concurring in denial of certiorari).

263. *Id.* (O'Connor, J., concurring in denial of certiorari) ("While I express no view as to whether the particular provisions at issue in this case constitute an undue burden, I believe the lower courts should have undertaken the same analysis.").

264. *Id.* (O'Connor, J., concurring in denial of certiorari) (quoting *Casey*, 112 S. Ct. at 2830).

265. *Fargo III*, 18 F.3d 526 (8th Cir. 1994).

266. *Id.* at 529 ("[T]he continuing vitality of *Salerno* is at least an open question.").

267. *See id.* at 530-34.

268. *Id.* at 530.

269. For example, the plaintiffs had argued that the waiting period after receipt of specified information would result in two or three visits to a medical facility to obtain an abortion. *Id.* The court construed the statute as not requiring the woman to receive the information during a personal visit; there was "no language in the statute that prevents a physician or agent from giving this information over the telephone." *Id.* at 531. The court noted that if, however, the statute were interpreted to require two visits, "the facial validity analysis [would] be entirely different." *Id.* at 532.

Dakota's law and the Pennsylvania statute at issue in *Casey*.[270] Relying on these similarities and the court's narrowing construction, the court determined that the provisions could not constitute an undue burden.[271] Thus, under either the old facial challenge standard or *Casey*'s undue burden standard, the law was constitutional.

ii. courts adopting the *Casey* framework

A few courts have made an effort to apply *Casey*'s facial challenge standard. In *Utah Women's Clinic v. Leavitt*,[272] the Utah District Court abandoned the *Salerno* facial challenge analysis and purported to apply the *Casey* standard to a Utah statute intentionally modeled after the Pennsylvania provisions upheld in *Casey*.[273] The court relied on narrowing constructions of the statute[274] and similarities to the Pennsylvania statute to uphold both the waiting period and informed consent provisions.[275].

The court observed that *Salerno* was the traditional standard for facial challenges, and noted the "high standard of proof" required in such cases.[276] The court acknowledged, however, that the Supreme Court "seem[ed] to have altered the traditional standard for facial challenges in the abortion context."[277] The Utah District Court recognized that the *Casey* court struck down Pennsylvania's spousal notification provision "not because it was unconstitutional in all circumstances, but rather because it was unconstitutional 'in a large fraction of the cases in which [it was] relevant.' "[278] The district court

270. *Id.*

271. *Id.* at 533.

272. 844 F. Supp. 1482 (D. Utah 1994).

273. *Id.* at 1485-86.

274. A magistrate judge had interpreted the statute to favor its constitutionality, and as interpreted—to permit telephonic communication to satisfy informed consent requirements, for example—most of the plaintiffs' objections were cured. *Id.* at 1487. Nonetheless, the plaintiffs were concerned that future courts would not, in fact, adhere to the magistrate's interpretation and therefore urged the court to reach the same conclusions. *Id.* at 1489. The court flatly rejected this approach:

> [O]nce it appeared from the Magistrate Judge's virtually unassailable Report and Recommendation that no finding of unconstitutionality was possible, the plaintiffs' tactic became one of obtaining a favorable advisory opinion as to how [the statute] should be interpreted and enforced, rather than a good faith facial challenge to its constitutionality.

Id. at 1488.

275. *Id.* at 1487-88.

276. *Id.* at 1488.

277. *Id.*

278. *Id.* at 1488 n.8 (quoting *Casey*, 112 S. Ct. at 2830).

observed that this language left "little guidance as to whether, and how, the *Salerno* facial challenge analysis [had] been altered."[279]

The Utah court opted to apply *Casey*. Thus, a statute was an undue burden, and hence was unconstitutional, if " 'in a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion.' "[280] The court acknowledged that this new standard changed the focus as to whom the law affected.[281] But the court held that, in order to bring a facial challenge in good faith, "one must reasonably believe that the statute is incapable of being applied constitutionally in a large fraction of the cases in which it is relevant."[282] The court rejected the possibility that the plaintiffs could have entertained such a belief.[283]

> An assumption of possible unconstitutional enforcement does not justify bringing a facial challenge. A worst-case interpretation may not be used to strike down a statute which has another plausible constitutional interpretation. Furthermore, as discussed earlier in this opinion, the plaintiffs could not in any event have argued in good faith that the Utah law had to allow for telephone communication in order to be constitutional in light of *Casey's* constitutional validation of two face-to-face visits.[284]

If the plaintiff feared unconstitutional enforcement, the remedy, according to the court, was to wait and see if the statute was, in fact, enforced in an unconstitutional manner and then raise an as applied challenge.[285]

Relying on the similarities between the Utah and Pennsylvania statutes, the court then reached a remarkable conclusion, at least given *Casey*'s reliance on the factual record:[286] "Under the broad scope of *Casey*, it would be extremely difficult, if not impossible, to

279. *Id.* at 1488. The court also observed that the dispute extended to members of the Supreme Court. *Id.* at 1488 n.8.

280. *Id.* at 1489 n.8 (quoting *Fargo II*, 113 S. Ct. at 1669 (citation omitted in original)).

281. *Id.* at 1489.

282. *Id.*

283. In fact, the court imposed sanctions totaling more than $73,000 in attorney's fees and court costs, which it has refused to reconsider. *See Utah: Judge Refuses to Reconsider Fees in "Groundless" Suit*, AM. POL. NETWORK, June 24, 1994, *available in* WL, APN-AB database.

284. *Leavitt*, 844 F. Supp. at 1489.

285. *Id.* at 1490.

286. *See infra* part III.B.2.

bring a good faith facial challenge to the constitutionality of Utah's 24 hour waiting period/informed consent requirements."[287]

iii. courts making their own rules

The ambiguity of the facial challenge standard after *Casey* led the Utah District Court to adopt a novel approach in *Jane L. v. Bangerter*:[288] injecting the purpose prong of undue burden analysis[289] to determine whether *Casey* or *Salerno* set the applicable facial challenge standard.[290] In the Court's view, because the state's purposes become even more compelling closer to viability, application of the more stringent *Salerno* standard was justified.[291] Less compelling purposes at earlier stages of the pregnancy could presumably be analyzed under Justice O'Connor's broader facial challenge standard.

The court observed that *Salerno* was the "well-established rule of the Supreme Court,"[292] but noted that the Court had not applied the rule as such in *Casey*.[293] In some contexts the Utah court observed that the *Casey* majority had "abandoned the traditional facial challenge approach in favor of an undue burden standard."[294] In other contexts, however, the *Casey* court had not required that the provision be unconstitutional in all of its applications as required by *Salerno*.[295] Thus, the district court concluded that it was unclear whether the majority would apply traditional facial challenge analysis to all previability, nontherapeutic abortions.[296]

The question for the Utah court was *when*—that is, in reference to which restrictions—Justice O'Connor's modified analysis was applicable. The district court concluded that the traditional *Salerno* analysis had "forceful application in late abortions at or near the viability

287. *Leavitt*, 844 F. Supp. at 1491.
288. 809 F. Supp. 865 (D. Utah 1992).
289. *See infra* notes 422-34 and accompanying text.
290. *See Jane L.*, 809 F. Supp. at 871-72.
291. *Id.* at 872.
292. *Id.* at 871.
293. *Id.*
294. *Id.* The court noted that, in evaluating Pennsylvania's 24-hour waiting period, the Supreme Court apparently combined facial challenge analysis with the undue burden standard. The Supreme Court did not consider whether the spousal notification statute had *any* constitutional applications; rather, the Court focused its inquiry on the narrower group for whom the law constituted a restriction. *Id.* at 871 n.10; *see also id.* at 876 n.27 (recognizing *Casey*'s limit of inquiry only to group affected by spousal notification statute rather than *Salerno*'s any set of circumstances approach).
295. *Id.* at 871 & n.10.
296. *Id.* at 872.

line."[297] Thus, the court upheld a provision requiring that medical procedures used in a postviability abortion be calculated "to give the unborn child the 'best chance of survival.' "[298] The court noted that *Casey* granted states "much greater leeway to pass regulations that impinge to some degree upon the woman's right to nontherapeutic, pre-viability abortions."[299] The court concluded that the devaluation of the woman's right to choose is further diminished when "the State's interest in fetal life becomes compelling."[300] In the court's analysis, the provisions were facially valid under *Salerno*.[301]

The district court also purported to apply the more stringent *Salerno* standard to uphold the ban on abortions after twenty-one-weeks gestation—presumably postviability[302]—because the provision could be "applied constitutionally in the vast majority of cases."[303] The court concluded that in order to strike the statute, the court would have to resort to the doctrine of overbreadth, an approach that the Supreme Court has consistently rejected outside of the First Amendment context.[304]

The Utah court also applied *Salerno* to measure whether the "serious medical emergency" exception was unconstitutional on vagueness grounds.[305] The court rejected the challenge, holding that the plaintiffs were required to prove that the law was " 'impermissibly vague in all of its applications.' "[306]

297. *Id.*

298. *Id.* at 874 (quoting UTAH CODE ANN. §§ 76-7-307 to -308 (Supp. 1991)).

299. *Id.* at 875.

300. *Id.* The district court's reasoning was somewhat anachronistic. *Casey* held that the state's interest in protecting fetal life was compelling throughout pregnancy, *Casey*, 112 S. Ct. at 2816, whereas *Roe* held that the state's interest became compelling only at viability, Roe v. Wade, 410 U.S. 113, 163 (1972).

301. *Jane L.*, 809 F. Supp. at 875-76.

302. *Id.* at 873 (citing Webster v. Reproductive Health Servs., 492 U.S. 490, 515 (1989)).

303. *Id.* at 872. It is notable that the court, while professing to apply the *Salerno* approach, applied neither *Salerno* nor Justice O'Connor's modified standard. The court did not require the plaintiff to prove that no set of circumstances existed in which the statute could be constitutionally applied. In addition, rather than drawing the group narrowly to reflect the "group upon whom the statute operates," the court relied on a "vast majority of cases" standard. *Id.*

304. *Id.*

305. *Id.* at 878. Ultimately, however, the court relied on judicial and legislative actions construing the statute and Supreme Court decisions upholding similar language. *Id.* at 878-80 (citing Doe v. Bolton, 410 U.S. 179 (1973); United States v. Vuitch, 402 U.S. 62 (1971); *Casey IV*, 947 F.2d 682 (3d Cir. 1991), *aff'd in part and rev'd in part by Casey*, 112 S. Ct. 2791 (1992)).

306. *Id.* at 878 (citations omitted) (quoting Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 497 (1982)).

On the other hand, the Utah court seemed to apply Justice O'Connor's modified facial challenge standard to determine the constitutionality of the regulation that fixed the point of viability at twenty weeks.[307] The *Jane L.* court upheld the provision after concluding that locating viability at twenty weeks would neither prevent a significant number of women from obtaining an abortion nor impose a substantial obstacle for most women.[308] After thus defining the group upon whom the statute would operate, and determining how the regulation would operate upon that group, the court upheld the provision.[309]

Justice O'Connor had applied a modified standard to the spousal notification provisions in *Casey*, and the Utah court adhered to her analysis and conclusions in evaluating the analogous Utah provision.[310] "The majority of the Supreme Court . . . adopted what appears to be an unequivocal position on the unconstitutionality of spousal notification statutes."[311] Consequently, the district court struck down the Utah provision even though it probably would have survived under the more rigorous *Salerno* approach.[312]

An Ohio appellate court, in *Preterm Cleveland v. Voinovich*,[313] commented only briefly on the facial challenge standard after *Casey*. In a footnote the court described its understanding of the new analysis: "The new undue-burden test appears to be somewhat similar to that used by courts in determining the constitutionality of a law in its application to a particular person under special circumstances as opposed to determining facial constitutionality of the same law."[314]

The Supreme Court of Wyoming, in *Wyoming NARAL v. Karpan*,[315] utilized a *Salerno*-type analysis to justify including an anti-abortion initiative on the ballot despite its potential unconstitutional-

307. *See id.* at 872-73.

308. *Id.* at 873 (citing *Casey*, 112 S. Ct. at 2829).

309. *Id.* at 873-74.

310. *Id.* at 876-77. "The Supreme Court in *Casey* approached the facial challenge of the Pennsylvania spousal notification statute in a way that seems to avoid the well-established requirement that the plaintiff "show that no set of circumstances exists under which the [provision] would be valid." ' *Id.* at 876 n.27 (quoting *Casey*, 112 S. Ct. at 2870 (alteration in original) (citation omitted)).

311. *Id.* at 876-77.

312. *See supra* part II.D.6.a.

313. 627 N.E.2d 570 (Ohio Ct. App. 1993).

314. *Id.* at 576 n.8. The court did not, however, proceed along this route; instead it reverted to comparing the Ohio statutes at issue to those the Supreme Court upheld in *Casey*. *Id.* at 578.

315. 881 P.2d 281 (Wyo. 1994).

ity.[316] "We hold that an initiative, attacked as facially unconstitutional, must be unconstitutional in *toto* before we could foreclose its inclusion in the ballot for a vote of the people."[317] Because some aspects of the initiative would be constitutional under both the Wyoming and federal constitutions,[318] the court concluded it could not, in a pre-enactment ruling, declare the initiative unconstitutional.[319]

b. confusion in the Supreme Court

The confusion evidenced in the lower courts was also played out in the Supreme Court. In *Ada v. Guam Society of Obstetricians & Gynecologists*,[320] Justice Scalia expressed concern that lower courts had misunderstood the intent and effect of Justice O'Connor's opinion in *Casey*,[321] and denied that Justice O'Connor intended to modify the standard for facial challenges.[322] Arguing that *Salerno* was still the rule for facial challenges, Justice Scalia dissented from the majority's denial of certiorari.[323] Justice Scalia maintained that a Guam statute that outlawed all abortions, except in cases of medical emergencies, was not unconstitutional on its face because the statute was perfectly constitutional when applied to postviability abortions.[324]

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316. *Id.* at 283.

> It is clear, and the pro-life faction does not substantially disagree, that the proposed initiative . . . is partially unconstitutional under federal standards. In Section 35-6-102 of the proposed initiative, abortion is prohibited and, in conjunction with provisions of existing law, it would be criminalized. This without regard to the doctrine of *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*. The provisions directly contravene the rule of those cases.

Id. at 287 (citation omitted).

317. *Id.* at 289. Compare the statement in the text with *Salerno*, 481 U.S. at 745 ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.").

318. *Wyoming NARAL*, 881 P.2d at 288.

319. *Id.* at 289. *But see In re* Initiative Petition No. 349, 838 P.2d 1, 7 (Okla. 1992) (rejecting inclusion of manifestly unconstitutional initiative on ballot), *cert. denied*, 113 S. Ct. 1028 (1993).

320. 113 S. Ct. 633, 633 (1992) (mem.).

321. *Id.* at 634 (Scalia, J., dissenting from denial of certiorari). Justice Scalia noted that the course followed by the Ninth Circuit in striking down Guam's statute, even though it would be constitutional in at least some applications, had also been followed by the Fifth Circuit in affirming the facial invalidation of Louisiana's abortion statute in *Sojourner T. Id.* (Scalia, J., dissenting from denial of certiorari) (citing *Sojourner T*, 974 F.2d 27 (1992)).

322. *Id.* (Scalia, J., dissenting from denial of certiorari).

323. *Id.* at 633-34. Justice Scalia was joined by Chief Justice Rehnquist and Justice White. *Id.* at 633.

324. *Id.* at 633-34 (Scalia, J., dissenting from denial of certiorari). The *Casey* plurality also found it constitutionally permissible for states to proscribe postviability abortions except where the life or health of the mother was jeopardized. *Casey*, 112 S. Ct. at 2821.

Justice Scalia cited *Salerno* as the Court's "traditional rule,"[325] and insisted that "[t]he Court did not purport to change this well-established rule last Term, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*."[326] The only exception to *Salerno* that he acknowledged was in First Amendment free-speech cases where the Court has "applied to statutes restricting speech a so-called 'overbreadth' doctrine, rendering such a statute invalid in all its applications (*i.e.*, facially invalid) if it is invalid in any of them."[327]

Justice Scalia observed that the Court's opinion in *Roe v. Wade* had "seemingly employed an 'overbreadth' approach—though without mentioning the term and without analysis"[328] but argued that this perspective was rejected—by Justice O'Connor herself—in subsequent abortion cases.[329]

Furthermore, Justice Scalia argued that an overbreadth analysis was inappropriate in the abortion context:

> Facial invalidation based on overbreadth impermissibly interferes with the state process of refining and limiting—through judicial decision or enforcement discretion—statutes that cannot be constitutionally applied in all cases covered by their language. And it prevents the State (or territory) from punishing people who violate a prohibition that is, in the context in which it is applied, entirely constitutional.[330]

Justice Scalia's opinion may in fact have been the catalyst that led Justice O'Connor in her concurrence in *Fargo II*[331] to rebut Justice Scalia's contention that *Salerno* remained the prevailing standard. In the process, however, she also revealed the weakness of her position.

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325. *Ada*, 113 S. Ct. at 633-34 (Scalia, J., dissenting from denial of certiorari) (citing *Salerno*, 481 U.S. at 745).

326. *Id.* at 634 (Scalia, J., dissenting from denial of certiorari).

327. *Id.* (Scalia, J., dissenting from denial of certiorari).

328. *Id.* (Scalia, J., dissenting from denial of certiorari); *see supra* part II.D.6.b.

329. *Ada*, 113 S. Ct. at 634 (Scalia, J., dissenting from denial of certiorari) (citing Webster v. Reproductive Health Servs., 492 U.S. 490, 524 (1989) (O'Connor, J., concurring in part and concurring in judgment)). "'[S]ome quite straightforward applications of the Missouri ban on the use of public facilities for performing abortions would be constitutional and that is enough to defeat appellees' assertion that the ban is facially unconstitutional.'" *Id.* (Scalia, J., dissenting from denial of certiorari) (quoting *Webster*, 492 U.S. at 524 (O'Connor, J., concurring in part and concurring in judgment)).

330. *Id.* (Scalia, J., dissenting from denial of certiorari).

331. 113 S. Ct. 1668, 1669 (1993) (mem.) (O'Connor, J., concurring in denial of certiorari) ("In striking down Pennsylvania's spousal-notice provision, we did not require petitioners to show that the provision would be invalidated in *all* circumstances."); *see supra* part III.B.1.b.

Only Justice Souter joined in Justice O'Connor's *Fargo II* concurrence; the other members of the *Casey* plurality did not.[332]

The Court's opinion in *Casey* was far from unambiguous. The modified facial challenge was articulated in the limited context of the spousal notification provisions, and was not explicitly applied to other regulations. Justice Scalia has made clear that he—and presumably Chief Justice Rehnquist and Justice White—consider *Salerno* to be the appropriate standard.[333]

However, the makeup of the Court has changed since 1992.[334] The best that can be said is that at least two of the sitting Justices[335] favor a relaxed facial challenge analysis in the abortion context, while two[336] favor the more stringent *Salerno* approach. The question is thus far from settled, and the confusion essentially allows the lower courts to find support for almost any position they care to assume. In most cases this has proved to be the rigorous *Salerno* standard.[337]

2. The undue burden standard and the role of factual evidence

The role of factual evidence is closely intertwined with both facial challenge and undue burden analyses, and the extent and nature of the factual evidence received and considered by the court can be dispositive.[338] The lower courts have struggled to determine when, how, and to what extent factual findings should be utilized. *Casey*'s undue burden test looks both to the purpose of an abortion regulation and its impact on the exercise of the abortion right.[339] The district court in *Casey III*[340] compiled some 387 findings of fact,[341] and the Supreme Court relied heavily on this factual record—and its own factfinding—to strike down the spousal notification provision.[342] Justice O'Connor subsequently made clear that her intent in *Casey* was that a factual

332. *Fargo II*, 113 S. Ct. at 1669 (O'Connor, J., concurring in denial of certiorari).

333. *Ada*, 113 S. Ct. at 633-34 (Scalia, J., dissenting from denial of certiorari, Rehnquist, C.J. & White, J., joining).

334. Justice Ginsburg replaced Justice White in 1993. Justice Breyer replaced Justice Blackmun in 1994. WANT'S FEDERAL-STATE DIRECTORY: 1995 EDITION app. at 214 (Robert S. Want ed., 1994).

335. Justices O'Connor and Souter.

336. Chief Justice Rehnquist and Justice Scalia.

337. *See supra* part III.B.1.a.

338. *See supra* part II.D.5.c.

339. *See supra* part II.D.5.

340. 744 F. Supp. 1323 (E.D. Pa. 1990), *aff'd in part and rev'd in part by Casey IV*, 947 F.2d 682 (3d Cir. 1991), *aff'd in part and rev'd in part by Casey V*, 112 S. Ct. 2791 (1992).

341. *Id.* at 1329-72.

342. *Casey*, 112 S. Ct. at 2827-28; *see supra* part II.E.3.

record be developed and considered in evaluating the impact of a particular regulation.[343]

In *Casey VIII*,[344] the District Court for the Eastern District of Pennsylvania concluded that it was appropriate to reopen the record to receive evidence as to the burden imposed in fact by the abortion regulations upheld by the Supreme Court.[345] The district court rejected defendant's argument that additional evidence was unnecessary in a facial challenge.[346] Rather, the court observed that the *Casey* analysis had been very fact specific,[347] and concluded that "further evidence could be helpful if it showed that the challenged provisions placed an undue burden on the women to whom the law is relevant."[348]

The Third Circuit reversed the district court's decision.[349] The court held that the Supreme Court had acted on the merits of the provisions before it, and that reopening the record on those issues was therefore inappropriate.[350]

In *Fargo I*[351] the North Dakota District Court refused to engage in " 'a factual assessment of the degree of burden imposed by restrictions on the right to choose abortion,' "[352] and rejected the assertion that *Casey* set forth a new, fact-intensive standard for facial challenges:[353] "Although the temptation is to embark on an analysis of the new 'undue burden' standard set forth in *Casey*, the court should not be asked in a facial challenge to invalidate a legislative act 'based upon a worst-case analysis that may never occur.' "[354] The court claimed to be "not unsympathetic to the burdens a woman may face when seeking to have an abortion in North Dakota,"[355] but concluded that the " 'differences between the [North Dakota] and Pennsylvania

343. *See Fargo II*, 113 S. Ct. at 1669 (O'Connor, J., concurring in denial of certiorari).

344. 822 F. Supp. 227 (E.D. Pa. 1993).

345. *Id.* at 235-36.

346. *Id.* at 235.

347. *Id.*

348. *Id.*

349. *Casey IX*, 14 F.3d 848, 863 (3d Cir. 1994), *stay denied by Casey X*, 114 S. Ct. 909, 909 (1994) (Souter, J., as Circuit Justice).

350. *Id.*

351. *Fargo I*, 819 F. Supp. 862 (D.N.D. 1993), *aff'd*, 18 F.3d 526 (8th Cir. 1994).

352. *Id.* at 865 (quoting Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment at 28).

353. *Id.* at 864 n.2; *see supra* part II.D.6.b.

354. *Fargo I*, 819 F. Supp. at 865 (footnote omitted) (quoting Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 514 (1990)).

355. *Id.*

Acts [were] not sufficient to render the former unconstitutional on its face.' "[356]

When the case was appealed to the Supreme Court, Justice O'Connor contested the Third Circuit's conclusion that a factual inquiry into the burden an abortion regulation imposed was inappropriate in a facial challenge.[357] Justice O'Connor concurred in the denial of certiorari, but disapproved of the lower court's analysis.[358] She noted that the joint opinion in *Casey* had "specifically examined the record developed in the district court in determining that Pennsylvania's informed-consent provision did not create an undue burden."[359] Although she expressed no view as to whether the particular provisions of the North Dakota statute constituted an undue burden, she indicated that "the lower courts should have undertaken the same analysis."[360]

When the district court opinion finally reached the Eighth Circuit on appeal,[361] the court resisted Justice O'Connor's suggestion that it conduct a factual inquiry into whether North Dakota's provisions constituted an undue burden.[362] The court asserted that the "continuing vitality of *Salerno* [was] at least an open question."[363] Assuming that *Salerno* remained the applicable law, factual review was unnecessary and the facial challenge failed.[364]

Nevertheless, the court considered how *Casey*'s undue burden test—with its requirement that the specific factual record be reviewed—modified the analysis.[365] The district court made no factual findings,[366] and the Eighth Circuit rejected a request that the case be remanded for development of the factual record.[367] Plaintiffs had, however, submitted affidavits and deposition testimony in opposition to the defendant's motion for summary judgment.[368] The court con-

356. *Id.* (first alteration in original) (quoting *Barnes v. Moore*, 970 F.2d at 15 (footnote omitted in original)).

357. *Fargo II*, 113 S. Ct. at 1669 (O'Connor, J., concurring in denial of certiorari).

358. *Id.* (O'Connor, J., concurring in denial of certiorari).

359. *Id.* (O'Connor, J., concurring in denial of certiorari) (citing *Casey*, 112 S. Ct. at 2825-31).

360. *Id.*

361. *Fargo III*, 18 F.3d 526 (1994).

362. *Id.* at 528-29.

363. *Id.* at 529.

364. *Id.* at 530.

365. *Id.*

366. *Id.*

367. *Id.* at 535.

368. *Id.*

sidered this evidence, but ultimately concluded that the provisions of the statute did not constitute an undue burden for women in North Dakota.[369]

Despite statements in *Casey* and Justice O'Connor's concurrence in *Fargo II*, the lower courts have been less than enthusiastic in their willingness to admit and consider factual evidence in abortion cases. The majority of courts that have considered the role of factual evidence have concluded, consistent with *Salerno*, that factual evidence is inappropriate in the context of a facial challenge.[370] One court seemed doubtful that the factual record could ever justify different conclusions than those reached by the *Casey* court.[371]

The Fifth Circuit in *Barnes v. Moore*[372] rejected evidence that would have distinguished provisions of the Mississippi Act from those upheld in *Casey*.[373] The court refused to remand for further evidentiary proceedings to allow plaintiffs "to prove that, on its face, the Mississippi Act pose[d] an 'undue burden' on women seeking abortions in *Mississippi*."[374] The court recognized the *Casey* plurality's reliance on the record before it, but concluded that the plurality's intent to " 'set forth a standard of general application' " essentially resolved the constitutionality of all abortion regulations substantially similar to those in *Casey*.[375] The court asserted that plaintiffs' argument was essentially reducible "to the aphorism 'Mississippi ain't Pennsylvania' "[376] and dismissed it, stating: "This speaks volumes about the invalidity of [the plaintiffs'] challenge to the Mississippi Act on its face; in fact, no more really need be said."[377]

Likewise, in *Barnes v. Mississippi*,[378] the Fifth Circuit rejected the plaintiffs' argument that the case should be remanded to the district court for an evidentiary hearing on whether the regulation imposed an undue burden on minors in Mississippi.[379] " 'Mississippi ain't Pennsylvania,' the plaintiffs said. . . . [But a] *facial* challenge to a statute

369. *Id.* at 533.
370. *See supra* part III.B.1.
371. *Leavitt*, 844 F. Supp. at 1495.
372. 970 F.2d 12 (5th Cir.) (per curiam), *cert. denied*, 113 S. Ct. 656 (1992).
373. *Id.* at 14-15.
374. *Id.* at 15 (emphasis added).
375. *Id.* (quoting *Casey*, 112 S. Ct. at 2820).
376. *Id.* at 15 n.5.
377. *Id.*
378. 992 F.2d 1335 (5th Cir.), *cert. denied*, 114 S. Ct. 468 (1993).
379. *Id.* at 1343.

require[s] more than a derogatory remark and brief about conditions in Mississippi."[380]

The district court in *Utah Women's Clinic, Inc. v. Leavitt*[381] rejected outright the plaintiffs' contention that conditions in Utah could be so different as to merit a different conclusion on regulations patterned after the Pennsylvania statute contested in *Casey*.[382] The court considered the role of factual findings, but concluded that the factual allegations were not materially different than those already considered by the Supreme Court in *Casey*.[383]

Under *Casey*, however, it was a question for the court to determine whether the plaintiffs demonstrated that conditions in Utah were sufficiently different to render the regulation significantly more burdensome. But, more revealing is the court's suggestion that *no* showing was likely to suffice: "Under the broad scope of *Casey*, it would be extremely difficult, if not impossible, to bring a good faith facial challenge to the constitutionality of Utah's 24 hour waiting period/informed consent requirements."[384] The court went so far as to suggest that the action had been brought in bad faith,[385] and imposed sanctions on the plaintiffs.[386]

The reluctance of lower courts to conduct a fact-specific analysis, however, ignores the fact that in many states—Utah,[387] North Dakota,[388] and Mississippi[389] among them—abortion providers may be few and access limited. Geographic distances are great and travel difficult. Furthermore, as states accept the invitation to impose increasingly more restrictive regulations in the name of "revaluing the state's interests," the burden on abortion rights becomes increasingly more fact specific. The burdens *can* be different even when the statutes are identical. Only a review of the factual record will reveal the actual impact. After all, "Mississippi *ain't* Pennsylvania!"

380. *Id.*

381. 844 F. Supp. 1482 (D. Utah 1994).

382. *Id.* at 1490-91.

383. *Id.* at 1490. "There is nothing significantly different between Utah's [statute] and the Pennsylvania statute, and there is nothing significantly different in the way in which the statutes will affect women in Utah as compared to women in Pennsylvania." *Id.* at 1491.

384. *Id.*

385. The case had initially been referred to a magistrate judge. *See supra* note 274 and accompanying text.

386. *See supra* note 283.

387. *See* THE NARAL FOUNDATION, *supra* note 216, at 122-24.

388. *Id.* at 94-96.

389. *Id.* at 68-69.

3. Applications of the undue burden standard

As discussed below, many courts have contested *Casey*'s apparent modification of the facial challenge standard, and few have been willing to accept factual evidence. Similarly, few courts have made the effort to apply the admittedly ambiguous undue burden test. Under *Casey*'s reformulated undue burden test, a regulation is unconstitutional if it creates a substantial obstacle to the exercise of the abortion right.[390] "A finding of an undue burden is a shorthand for the conclusion that a state regulation has the *purpose* or *effect* of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[391] The Court's tolerance of negative effects increases with the legitimacy of the state's purpose.[392] Conversely, its tolerance decreases with suspect or illegitimate purposes.[393]

Casey, properly applied, requires that a court determine the state's purpose in enacting the statute, identify the group upon whom it operates, consider factual evidence as to the statute's actual impact, and conclude whether it imposes an undue burden. Courts considering post-*Casey* cases seem to have rarely undertaken this kind of comprehensive analysis. Few have actually attempted to balance the purpose and the effect as few have been willing to consider factual evidence. For the most part, the lower courts have looked to textual similarities between the statute at issue and provisions of the Pennsylvania Act upheld in *Casey*; if the provisions were substantially similar, the regulation was upheld.[394]

Barnes v. Moore[395] is representative of this more limited analysis. The Fifth Circuit skipped over all evaluation of purpose and effect and instead relied on similarities between the statute at issue and the Pennsylvania statute upheld in *Casey*.[396] In this respect, *Barnes v. Moore* began a tradition followed by courts in other cases:[397] *Casey* look-alike statutes that are upheld with minimal review by a lower

390. *Casey*, 112 S. Ct. at 2820.
391. *Id.* (emphasis added).
392. *See supra* part II.D.5.a.
393. *See supra* part II.D.6.b.
394. *See supra* part III.B.2.
395. 970 F.2d 12 (5th Cir.) (per curiam), *cert. denied*, 113 S. Ct. 656 (1992).
396. *Id.* at 14.
397. *See supra* part III.B.2.

federal or state court—a practice that appears contrary to the analysis suggested by the plurality opinion.[398]

Utah Women's Clinic, Inc. v. Leavitt,[399] is another such case. The federal district court considered the validity of the Utah Abortion Act Revision,[400] a statute intentionally modeled after the Pennsylvania provisions upheld in *Casey*.[401] The court saw no need to inquire whether Utah's law was an undue burden, concluding that "[t]he Utah and Pennsylvania laws are nearly identical. . . . In those instances where the laws differ, the Utah law is less restrictive, and places less of a burden on a woman's right to an abortion."[402]

The court considered the factual evidence, but concluded that it was not materially different from that already considered by the Supreme Court in *Casey*.[403] Thus, each of plaintiffs' allegations had been considered and rejected under the undue burden standard already articulated by the Supreme Court.[404] "There is nothing significantly different between Utah's [statute] and the Pennsylvania statute, and there is nothing significantly different in the way in which the statutes will affect women in Utah as compared to women in Pennsylvania."[405] Thus, in the court's view, the plaintiffs had no case:

> Where a state passes abortion legislation which is less than or equal to the restrictions imposed by the Pennsylvania law, and where the plaintiffs are unable to allege any impact from the legislation which is more burdensome than was found by the district court in *Casey*, there is no viable legal cause of action.[406]

Similarly, in *Planned Parenthood, Sioux Falls Clinic v. Miller*,[407] a South Dakota court purported to apply *Casey*, but, rather than engaging in an undue burden analysis, actually decided the case based on its similarity to other statutes. Plaintiffs challenged a South Dakota law requiring a minor seeking an abortion to provide written notice to one

398. *See Casey*, 112 S. Ct. at 2826 ("Hence, on the record before us, and in the context of this facial challenge, we are not convinced that the 24-hour waiting period constitutes an undue burden.").

399. 844 F. Supp. 1482 (D. Utah 1994).

400. UTAH CODE ANN. § 76-7-305 (1990).

401. *Leavitt*, 844 F. Supp. at 1485-86.

402. *Id.* at 1486. As an example, the court cited the Utah statute which did not require a physician to provide initial abortion information as did the Pennsylvania statute. *Id.*

403. *Id.* at 1490.

404. *Id.* at 1490-91.

405. *Id.* at 1491.

406. *Id.*

407. 860 F. Supp. 1409 (D.S.D. 1994).

parent forty-eight hours in advance of the procedure. The law also imposed a twenty-four-hour waiting period after the minor received the specified information from a doctor.[408] The law did not include a judicial-bypass mechanism.[409]

The district court made findings of "undisputed" fact that (1) the plaintiff doctor was the only abortion provider in South Dakota; (2) the plaintiff doctor was the only abortion provider in any state within a 235-mile radius of Sioux Falls; (3) seventeen percent of South Dakotan women receiving abortions travel at least 300 miles, one way; (4) twenty-five percent of the plaintiff doctor's patients were below the federal poverty level; (5) two days' absence to obtain an abortion causes a loss of wages and an increase in expenses; and (6) a telephone interview to provide required information would take between three and fifteen minutes per patient.[410] Despite this record, the court ultimately relied entirely on determinations of constitutionality made by other courts rather than its own application of the undue burden test to the factual record before it.[411]

The court also relied on precedent when it rejected the one-parent notification requirement without a judicial bypass.[412] Rather than weighing the state's purpose against the provision's effects based on the factual record, the court simply concluded that pre-*Casey* authority required any parental notice provision to have a bypass mechanism, ensuring that "parental notice does not amount in fact to a parental veto."[413] Because the South Dakota law did not include such a mechanism, the "omission constitute[d] an undue burden on the minor's privacy right to make the abortion decision."[414]

The informed consent and twenty-four-hour waiting period provisions were likewise upheld without any real analysis under the undue burden test. The court noted that informed consent was required for medical procedures under common law,[415] and that cases after *Casey* had found informed consent provisions like South Dakota's to be con-

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408. *Id.* at 1411 n.1, 1412 n.2. Both provisions contained a medical emergency exception and an additional provision provided for a civil penalty against any doctor who performed an abortion without informed consent. *Id.* at 1413 & n.6.

409. *Id.*

410. *Id.* at 1413-14.

411. *See id.* at 1415.

412. *Id.*

413. *Id.* (citing Bellotti v. Baird, 443 U.S. 622 (1979)).

414. *Miller*, 860 F. Supp. at 1416.

415. *Id.* at 1418.

stitutional.[416] With no analysis of the factual record, the court also concluded that the effect of South Dakota's provision was "substantially similar to the impact found by the district court in *Casey*."[417]

The requirement that doctors provide telephonic or in-person information prior to consent provides the most striking example of how applying the undue burden test to specific factual circumstances could lead to a different result. While the regulation enacted in South Dakota might result in a constitutional application in a state with more doctors who perform abortions, its application in South Dakota could have resulted in an undue burden because South Dakota had only one abortion doctor. Plaintiffs contended that requiring that doctor to provide the specified information would take seven hours a week and result in an increased cost of $60 per abortion, even if the information was to be provided by telephone.[418] The district court nevertheless relied on *Casey*'s determination that requiring a doctor to provide such information was not an undue burden.[419]

In *Jane L. v. Bangerter*,[420] the Utah District Court also relied on constitutional determinations made in *Casey* to strike down an unconditional previability ban on abortions, noting that "[m]anifestly, the outright ban . . . on abortions by demand prior to the 21 week gestation age would constitute departure from 'the essence of Roe's original decision,' affirmed by the dicta of the majority in *Casey*."[421] The court also struck down Utah's spousal notification provision despite the defendants' efforts to distinguish the statute from that in *Casey*. However, the court rejected the contention that *Casey* might require the undue burden test to be applied anew in Utah; concluding that "[t]he majority of the Supreme Court . . . adopted what appears to be an unequivocal position on the unconstitutionality of spousal notification statutes."[422]

The district court did, however, consider whether statutorily locating the viability line at twenty weeks might constitute an "undue burden."[423] Looking to the record before it, the court considered the

416. *Id.* at 1419 (citing *Casey*, 112 S. Ct. at 2826; *Fargo III*, 18 F.3d at 530; Barnes v. Moore, 970 F.2d 12, 15 (5th Cir.) (per curiam), *cert. denied*, 113 S. Ct. 656 (1992)).

417. *Miller*, 860 F. Supp. at 1419.

418. *Id.* at 1420.

419. *Id.* at 1421.

420. 809 F. Supp. 865 (D. Utah 1992).

421. *Id.* at 870.

422. *Id.* at 876-77.

423. *Id.* at 873.

impact of the statute on the exercise of the right to abortion.[424] Because the record demonstrated a lack of impact, the court concluded that the statutory provision was "not 'likely to prevent a significant number of women from obtaining an abortion,' nor [could] it be found that 'for many women, it [would] impose a substantial obstacle.' "[425] Furthermore, the court noted that *Casey* had "fixed the point of viability as a fair and appropriate line of demarcation wherein the interest of the State in unborn children exceeds the liberty interest of a woman in the abortion choice."[426] Thus, in the court's view, the provision was consistent with the language of *Casey*, did not constitute an undue burden, and was constitutional regardless of whether the fetus was viable at twenty weeks or not.[427]

The *Jane L.* court then considered the facial validity of a provision that required a doctor to use medical procedures and skills in a postviability abortion that would give the fetus the best chance of survival.[428] The court asserted that *Casey* granted states "much greater leeway to pass regulations that impinge to some degree upon the woman's right to non-therapeutic, previability abortions."[429] Consequently, the "decreased weight given to the woman's right to abortion, extend[ed] with even more force into the area of postviability abortions where the State's interest in fetal life becomes compelling."[430] The court thus concluded that the postviability provision was facially valid and bore a "rational relationship to the legitimate state interest in preservation of viable fetal life."[431] The court's conclusion may in fact be valid under *Casey* since the plurality only applied the undue burden analysis to weigh the constitutionality of previability abortions.[432]

In contrast, in *Planned Parenthood v. Neely*,[433] a district court actually attempted to apply the undue burden test to determine whether the judicial-bypass mechanism of Arizona's parental consent provision

424. *Id.* The record reflected that nontherapeutic abortions were not performed after 20 weeks; the submitted evidence did not indicate that women wanted such late, nontherapeutic abortions. *Id.*

425. *Id.* (citations omitted).

426. *Id.* at 872.

427. *Id.* at 873-74.

428. *Id.* at 874 (citing UTAH CODE ANN. §§ 76-7-307 to -308 (Supp. 1991)).

429. *Id.* at 875.

430. *Id.*

431. *Id.* at 875-76.

432. *Casey*, 112 S. Ct. at 2820-21.

433. 804 F. Supp. 1210 (D. Ariz. 1992).

was constitutionally sufficient.[434] In *Casey* the constitutionality of Pennsylvania's parental consent statute was "based on the reasonable assumption that minors will benefit from consultation with their parents."[435] The *Neely* court did not dispute the legitimacy of that interest. However, the court held that the state's interests "will not outweigh the privacy interests of minors to the extent that the State will be given unfettered discretion."[436] The court concluded that the undue burden standard was an appropriate mechanism to reconcile the minor's constitutionally protected liberty with the state's interest.[437]

Although the court found the statute unconstitutional on other grounds, it pressed on to express its opinion on the constitutionality of the judicial-bypass provision under an undue burden analysis "[i]n an effort to avoid future litigation."[438] The court carried forward *Casey*'s determination that the state had a legitimate interest in ensuring that minors make an informed choice regarding abortion.[439] It then considered the negative impact of the statute.[440] The court concluded that the appeal requirement amounted to an undue burden based on plaintiffs' common sense argument that the procedural requirements imposed substantial obstacles.[441] Likewise, the court determined that the statute's requirement that the minor request the appointment of an attorney was more restrictive than the parallel *Casey* provision, which allowed the court to appoint a guardian ad litem to advise the minor of her right to appointed counsel.[442] As a result, the district court determined that the judicial-bypass provision was also unconstitutional.[443]

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434. *Id.* at 1211. The statute required the minor to obtain the consent of one parent before undergoing an abortion except in medical emergencies and subject to a judicial-bypass mechanism. ARIZ. REV. STAT. ANN. §§ 36-2152 to -2153 (1993).

435. *Neely*, 804 F. Supp. at 1212 (citing *Casey*, 112 S. Ct. at 2830).

436. *Id.*

437. *Id.*

438. *Id.* at 1216.

439. *See id.* at 1212.

440. The Arizona law required a minor to file a notice of appeal with the clerk of the court within 24 hours of receiving the trial court's denial of her judicial-bypass petition. ARIZ. REV. STAT. ANN. § 36-2153(C).

441. The court did not refer to any findings of fact or evidence presented. *Neely*, 804 F. Supp. at 1217. Plaintiffs claimed that, in addition to the difficulty of notifying a minor attempting to obtain an abortion without her parent's knowledge of an adverse decision, an unrepresented minor is unlikely to be able to decipher her appeal rights and correctly prepare and file the notice within 24 hours. *Id.*

442. *Id.*

443. *Id.* at 1216.

Neely represented one of the few lower court opinions that considered the relationship between purpose and effect. The court recognized that the state had a legitimate interest in encouraging minors to consult with their parents, but looked beyond that purpose to the impact the statute imposed on the affected minors.[444] Under this analysis, the statute would have also failed.

Justice Stevens also recognized that the undue burden test implicitly requires a balancing of purpose and effect. Dissenting in *Benten v. Kessler*,[445] Justice Stevens also suggested that the undue burden analysis extends beyond the traditional "abortion regulation" context.[446] *Benten* involved the importation of RU486, an abortifacient banned by the Food and Drug Administration (FDA).[447] The FDA seized the drug when one plaintiff attempted to import it for personal use.[448] The district court entered a preliminary injunction ordering the FDA to release the drug to her, but the Second Circuit granted a stay.[449]

Justice Stevens's two-paragraph dissent to the denial of an application to vacate the stay contended that the government's seizure of RU486 constituted an undue burden on the right to choose abortion.[450] Justice Stevens described the balancing required under the undue burden analysis: "Whether an undue burden has been imposed on the exercise of a constitutional right depends on the relative significance of the burden, on the one hand, and the governmental interest at stake, on the other."[451] He noted that the government action involved in banning and seizing RU486 did not obstruct the woman's right to terminate her pregnancy, only her choice of the method for doing so.[452]

Referring to the FDA manual which set the relevant policy, Justice Stevens identified the relevant governmental interest as avoiding

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444. *See id.* at 1212, 1216-17.

445. 112 S. Ct. 2929, 2930 (1992) (per curiam) (Stevens, J., dissenting from denial of application to vacate stay).

446. *Id.* (Stevens, J., dissenting from denial of application to vacate stay).

447. *Id.* at 2930. An abortifacient is "a drug or other agent that induces abortion." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 5 (1976).

448. *Id.*

449. *Id.* Plaintiffs contended that "the administrative document instructing enforcement officials to seize the drug was promulgated without notice-and-comment procedures . . . required under both the Administrative Procedure Act and FDA regulations." *Id.*

450. *Id.* at 2930-31 (Stevens, J., dissenting from denial of application to vacate stay).

451. *Id.* at 2930 (Stevens, J., dissenting from denial of application to vacate stay).

452. *Id.* (Stevens, J., dissenting from denial of application to vacate stay).

drugs that present known serious health risks.[453] He noted the personal use exception, and categorized that purpose as legitimate.[454] He further noted that there was no evidence on the record that the woman faced a significant health risk from RU486, and was "persuaded that the relevant legitimate federal interest [was] not sufficient to justify the burdensome consequence of this seizure."[455]

C. *A Standard of General Application—Nonabortion Applications of* Casey

When the *Casey* plurality announced the undue burden test, it declared: "[W]e set forth a standard of general application to which we intend to adhere."[456] Although the Court made this statement in reviewing the undue burden concept in other abortion cases,[457] it is unclear whether the plurality intended the "standard of general application" to apply outside the abortion context. The scope of the undue burden test is broad enough to encompass a regulation affecting the right to privacy, or even any fundamental right.

Whatever its intended scope, a few later cases have applied the undue burden test in nonabortion right of privacy cases.[458] Several courts have addressed the applicability of *Casey*'s undue burden test in challenges to the constitutionality of legislation regulating assisted suicide. The District Court for the Western District of Washington undertook one of the more complete applications in just such a case.[459] Two other courts also recognized that regulations affecting the privacy right of family association may implicate the undue burden test. However, *Casey* was tangential to the primary analysis in each of those cases. Whether other lower courts will continue to expand the scope of cases to which the undue burden test applies, and whether the Supreme Court will approve of such applications, remains to be seen.

453. *Id.* at 2930-31 & n.* (Stevens, J., dissenting from denial of application to vacate stay).

454. *Id.* at 2930-31 (Stevens, J., dissenting from denial of application to vacate stay).

455. *Id.* at 2931 (Stevens, J., dissenting from denial of application to vacate stay).

456. *Casey*, 112 S. Ct. at 2820.

457. *Id.*

458. *See infra* part III.C.1-2.

459. *See* Compassion in Dying v. Washington, 850 F. Supp. 1454 (W.D. Wash. 1994); *infra* part III.C.1.

1. Right to assisted suicide cases

In *Compassion in Dying v. Washington*,[460] patients, doctors, and a nonprofit organization which provided information and counseling to terminally ill patients considering suicide challenged the constitutionality of a Washington statute that criminalized physician-assisted suicide. In reviewing the parties' motions for summary judgment, the district court applied a full *Casey* undue burden analysis once it determined that a due process right to assisted suicide existed.[461]

The court first addressed the question of whether mentally competent, terminally ill adults had a constitutionally protected interest in assisted suicide under the Due Process Clause of the Fourteenth Amendment.[462] *Casey* was "highly instructive and almost prescriptive" to the court on this question.[463] First, *Casey* was one of a long line of cases recognizing constitutional protection for personal decisions such as those involving marriage, procreation, contraception, family relationships, child rearing, and education.[464] Second, a terminally ill patient's decision to commit suicide, like the right reaffirmed in *Casey*, implicated matters

> "involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy [which] are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[465]

The court concluded that "the suffering of a terminally ill person cannot be deemed any less intimate or personal, or any less deserving of protection from unwarranted governmental interference, than that of a pregnant woman."[466] Thus, the decision fell within the liberties protected by the Due Process Clause.[467]

Next, the district court decided what standard was applicable in a facial challenge to a statute regulating assisted suicide.[468] Defendants

460. 850 F. Supp. 1454 (W.D. Wash. 1994).
461. *Id.* at 1459-61.
462. *Id.* at 1459.
463. *Id.*
464. *Id.*
465. *Id.* (quoting *Casey*, 112 S. Ct. at 2807).
466. *Id.* at 1460. Cruzan v. Director, Missouri Department of Health, 497 U.S. 261 (1990), provided additional authority for the court's decision. *Compassion in Dying*, 850 F. Supp. at 1461-62.
467. *Compassion in Dying*, 850 F. Supp. at 1460.
468. *Id.* at 1462-64.

asserted that *Salerno*'s no set of circumstances test controlled,[469] but "[t]he court conclude[d] that the *Casey* 'undue burden' standard, set forth by the Supreme Court five years after *Salerno*, control[led] in this case."[470] The court reviewed the Fifth Circuit decision in *Barnes v. Moore*,[471] the Third Circuit decision in *Casey IX*,[472] Justice Souter's denial of the application for a stay of that decision,[473] Justice O'Connor's denial of application for a stay and injunction pending appeal in *Fargo II*,[474] and the Eighth Circuit's subsequent decision in *Fargo III*.[475] The court concluded that *Casey* set the appropriate standard for facial challenges and was intended to be a standard of general application, and proceeded to apply the undue burden analysis.[476]

In a uniquely intelligible application of the undue burden test, the district court first identified and classified the relevant state interests.[477] Next it confronted whether the Washington statute had the purpose or effect of substantially blocking the exercise of the right to choose suicide.[478]

Defendants argued that the statute prevented suicide and protected those at risk of suicide from undue influence.[479] The court acknowledged only that the state had a "strong, legitimate interest in deterring suicide by young people and others with a significant natural life span ahead of them."[480] However, the court decided that this legitimate interest was "not abrogated by allowing mentally competent, terminally ill patients to freely and voluntarily commit physician-assisted suicide."[481] As to protecting those susceptible to suicide from undue influence, the court found it to be an unquestionably legitimate purpose.[482] But again the court found the legitimate purpose inapplicable in this context because those "who make knowing and voluntary

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469. *Id.* at 1462 (citing United States v. Salerno, 481 U.S. 739, 745 (1987)).

470. *Id.*

471. 970 F.2d 12 (5th Cir.) (per curiam), *cert. denied*, 113 S. Ct. 656 (1992).

472. 14 F.3d 848 (3d Cir. 1994), *stay denied by Casey X*, 114 S. Ct. 909, 909 (1994) (Souter, J., as Circuit Justice).

473. *Casey X*, 114 S. Ct. 909, 912 (1994) (Souter, J., as Circuit Justice).

474. *Fargo II*, 113 S. Ct. 1668, 1669 (1993) (mem.) (O'Connor, J., concurring in denial of certiorari).

475. *Fargo III*, 18 F.3d 526 (8th Cir. 1994).

476. *Compassion in Dying*, 850 F. Supp. at 1463-64.

477. *Id.* at 1464-65.

478. *Id.* at 1464-66.

479. *Id.* at 1464.

480. *Id.*

481. *Id.*

482. *Id.* at 1465.

choices to commit physician-assisted suicide by definition fall outside the realm of the State's concern."[483]

Given the questionable legitimacy of the state's purposes when applied to those for whom the right to choose assisted suicide exists—terminally ill, mentally competent patients—the court then reviewed the effect of the Washington *ban* on physician-assisted suicide. In that the exercise of the right was absolutely prohibited, the court easily concluded that it was unduly burdensome.[484] The court left open the possibility that the state could constitutionally further its stated purposes through regulation of assisted suicide, so long as those regulations did not pose an undue burden.[485]

On March 9, 1995, the Ninth Circuit reversed because it held that there was no liberty interest in assisted suicide under the Fourteenth Amendment.[486] The court rejected the idea that *Casey*'s language regarding "personal dignity and autonomy" and "the right to define one's own concept of existence" could be used, as the district court had used it, to identify other, non-abortion liberty interests protected by the Fourteenth Amendment.[487] The dissent contended that *Casey* did define the scope of liberty interests, and stated that the above language was not limited to the abortion context.[488]

The Ninth Circuit also rejected the district court's application of *Casey*'s facial challenge standard and stated that the traditional *Salerno* standard was the applicable measure.[489] The court further criticized the lower court, stating that even under the *Casey* facial challenge standard the statute would be constitutional because it "conceded that there were circumstances in which the statute could operate constitutionally" and did not attempt to calculate the fraction of cases in which it would operate unconstitutionally.[490] The court also faulted the lower court for failing to adequately consider the state's interest in preventing suicide and elaborated on those interests in detail.[491]

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483. *Id.*

484. *Id.*

485. *Id.* at 1466.

486. Compassion in Dying v. Washington, No. 94-35534, 1995 WL 94679, at *3 (9th Cir. Mar. 9, 1995).

487. *Id.* (quoting *Casey*, 112 S. Ct. at 2807).

488. *Id.* at *9 (Wright, J., dissenting).

489. *Id.* at *5.

490. *Id.*

491. *Id.* at *5-7.

The dissent would have recognized the right as fundamental, and reviewed the assisted suicide ban under a strict scrutiny standard.[492] Though the dissent recognized it was confronting a facial challenge, it would have only invalidated the statute as applied to "terminally ill, mentally competent adults."[493]

State courts in Michigan also grappled with the applicability of *Casey*'s undue burden standard. However, the district court's approach in the first *Compassion in Dying* case was not ultimately accepted by the Supreme Court of Michigan. The state trial court in *Hobbins v. Attorney General*[494] first dealt with Michigan's law criminalizing assisted suicide. The court granted a preliminary injunction, finding that two terminally ill patients had met their "burden of demonstrating a substantial likelihood of success on the merits on their claim of a liberty interest in the ending of their own lives."[495] The court first reviewed cases regarding the existence of a constitutionally protected right to die, and seemed to conclude that such a right exists without specifically classifying it as fundamental.[496]

The court's discussion of *Casey* was neither extensive nor particularly coherent. The court did state, however, that "[i]f one finds the right to bodily integrity to be a fundemental [sic] right then the test as to any infringement on that right is articulated in Planned Parenthood-V-Casey."[497] Furthermore, the court recognized the state's interest in preserving life, but noted that "states [cannot] place an undue burden on the right holder in furtherance of societal goals."[498]

Finally, the court concluded that, having found a right to die, it was "left to consider whether the statute places an undue burden or restriction on that right."[499] However, "without the full development of a record on such issues as what means are available to the handicapped to effectuate this right without assistance," the court could not

492. *Id.* at *10 (Wright, J., dissenting).

493. *Id.* at *11 (Wright, J., dissenting).

494. No. 93-306-178 C2, 1993 WL 276833 (Mich. Cir. Ct. May 20, 1993), *aff'd in part and rev'd in part by* 518 N.W.2d 487 (Mich. Ct. App. 1994), *aff'd in part and rev'd in part sub nom.* People v. Kevorkian, Nos. 99591, 99674, 99752, 99758 & 99759, 1994 WL 700448 (Mich. Dec. 13, 1994) (mem.).

495. *Id.* at *7.

496. *Id.* at *8-9.

497. *Id.* at *9.

498. *Id.*

499. *Id.*

make a conclusive determination.[500] The court granted the injunction to allow the development of such a factual record.[501]

The constitutionality of the same Michigan statute was again addressed six months later in *People v. Kevorkian*.[502] This court found a right to suicide, and to some extent applied *Casey*'s undue burden test after a criminal defendant challenged the statute when he was prosecuted for its violation.[503] The court found the right to commit "rational" suicide to be similar to the right in *Casey* in that it also involved an intimate and personal choice that "ranks among the most important that a person may make concerning one's own being."[504]

The court classified the state's interest in protecting life as "recognizable,"[505] and applying *Casey*'s undue burden standard, considered "whether the blanket proscription [on assisted suicides] unduly burdens a person's right to commit rational suicide."[506] The court found the statute unconstitutional.[507] The court examined the effect of the Michigan ban on the right to rational suicide, and found that on the basis of negligible evidence "[i]t [was] hard to imagine a state action that would have a greater intrusive effect upon a person's quest to make personal decisions based upon their personal moral beliefs" than the ban in question.[508]

The Michigan Court of Appeals reviewed both of these decisions in one opinion and held that the ban violated a provision of the Michi-

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500. *Id.*

501. *Id.*

502. No. 93-11482, 1993 WL 603212 (Mich. Cir. Ct. Dec. 13, 1993), *aff'd in part and rev'd in part sub nom.* Hobbins v. Attorney Gen., 518 N.W.2d 487 (Mich. Ct. App. 1994), *aff'd in part and rev'd in part sub nom.* People v. Kevorkian, Nos. 99591, 99674, 99752, 99758 & 99759, 1994 WL 700448 (Mich. Dec. 13, 1994) (mem.).

503. *Id.* at *19.

504. *Id.* at *14. The court specifically found a constitutionally protected right

> when a person's quality of life is significantly impaired by a medical condition and the medical condition is extremely unlikely to improve, and that person's decision to commit suicide is a reasonable response to the condition causing the quality of life to be significantly impaired, and the decision to end one's life is freely made without undue influence, such a person has a constitutionally protected right to commit suicide.

Id. at *19 (footnote omitted).

505. *Id.* at *14.

506. *Id.* at *19.

507. *Id.*

508. *Id.* The court's conclusion that many doctors believe that the decision is for the patient to make, not the state, was based entirely on a doctor's testimony that "many, if not most" doctors accept that suicide may be the best option for a given patient. *Id.* The court declared, in marked contrast to the *Casey* plurality's sometimes detailed examination of the factual record, that a "litany of the impact upon a person and their family [if the ban is permitted] is, probably, both obvious and unnecessary." *Id.*

gan Constitution.[509] Though the court recognized that it need not address whether Michigan's assisted suicide ban also violated the federal constitution,[510] it concluded that no due process privacy right existed in the right to commit suicide or assisted suicide.[511] One judge dissented from this latter part of the majority's decision and concluded that the *Compassion in Dying* court was correct in that Justice O'Connor's description of liberty in *Casey* was as applicable to the right to die as it was to the right to choose abortion.[512] Furthermore, this dissent concluded that some state regulation of the right would be permissible under *Casey*, but that an absolute ban was impermissible.[513]

Finally, the Michigan Supreme Court issued a memorandum opinion with the bare conclusion that Michigan's assisted suicide ban did not violate either the Michigan Constitution or the federal constitution.[514] Two dissenting justices concluded that the assisted suicide ban would violate the federal Due Process Clause.[515] One dissenting justice identified the right of competent, terminally ill patients to commit assisted suicide using the "reasoned judgment" approach to the identification of due process rights suggested by *Casey*,[516] and agreed that restrictions on this right "should be evaluated according to the undue burden standard enunciated in Casey."[517] The other dissenting justice concluded that "[a]s in Casey, an infringement of a fundamental right by the state that completely bars the exercise of that right cannot pass constitutional muster."[518]

2. Right of family association cases

Another nonabortion setting in which *Casey* was employed involved the right to family association. In *Griffin v. Strong*,[519] the court presided over a mother's civil rights action against a police officer and

509. Hobbins v. Attorney Gen., 518 N.W.2d 487, 491 (Mich. Ct. App. 1994), *aff'd in part and rev'd in part sub nom.* People v. Kevorkian, Nos. 99591, 99674, 99752, 99758 & 99759, 1994 WL 700448 (Mich. Dec. 13, 1994) (mem.).

510. *Id.* at 492.

511. *Id.* at 493-94.

512. *Id.* at 495-98 (Sheldon, J., dissenting).

513. *Id.* at 499 (Sheldon, J., dissenting).

514. People v. Kevorkian, Nos. 99591, 99674, 99752, 99758 & 99759, 1994 WL 700448 (Mich. Dec. 13, 1994) (mem.).

515. *Id.* at *27 (Levin, J., dissenting), *32 (Mallett, J., dissenting).

516. *Id.* at *29-30 (Levin, J., dissenting).

517. *Id.* at *32 (Levin, J., dissenting).

518. *Id.* at *36 (Mallett, J., dissenting).

519. 983 F.2d 1544 (10th Cir. 1993).

a social worker. The mother brought suit for violation of her due process right to familial association after her husband was investigated on allegations of child abuse.[520] The court stated that "classic fourteenth amendment liberty analysis" required it to balance "the state's interests in investigating reports of child abuse" against the plaintiff's interest in the familial right of association.[521] The court stated that it weighed these interests "in light of the facts of this particular case"[522] to determine if the government's conduct unduly burdened the plaintiff's right.[523] Though the *Griffin* court referenced *Casey* regarding the undue burden determination, it was a "*see also*" citation tacked onto the end of three other cases in a string cite,[524] and the court did not actually apply *Casey*'s undue burden test.[525]

In a case that focused on infringement, *Herndon v. Tuhey*,[526] the Supreme Court of Missouri affirmed the constitutionality of a state law that permitted a court to give grandparents visitation rights with their grandchildren. The court cited Justice O'Connor's dissent in *Akron* for the proposition that state interference must heavily burden a right before strict scrutiny will be applied.[527] Applying the *Akron* framework, the court found that because the magnitude of the infringement of the parents' rights was not severe, the law was not an unreasonable attempt to strengthen the family.[528] *Herndon* was surprising in that while the court realized that *Casey* altered the *Akron* framework[529]—it apparently did not recognize that the undue burden tests in the two opinions are significantly different. The application of *Casey*'s undue burden test was not well developed as to the right of family association. If the *Casey* plurality truly set out a standard of general application, later courts may yet address such regulations in full under the undue burden test.

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520. *Id.* at 1545.
521. *Id.* at 1547.
522. *Id.*
523. *Id.*
524. *Id.* at 1547-48.
525. *Id.* at 1548-49.
526. 857 S.W.2d 203 (Mo. 1993).
527. *Id.* at 208-09 (citing Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 461-63 (1983), *overruled by Casey*, 112 S. Ct. 2791 (1992)).
528. *Id.* at 210.
529. *Id.* at 212 (citing *Akron*'s subsequent history in footnote).

D. *Cases Decided on State Constitutional Grounds*

Some courts have refused to rely on the undue burden standard of *Casey*, looking instead to their state constitutions to resolve the constitutionality of abortion regulations and reaching disparate conclusions. Because a state can grant greater individual rights under its state constitution than are recognized under the federal constitution, it is possible for a state to afford greater protection to the woman's freedom in the abortion decision.[530]

In *Preterm Cleveland v. Voinovich*,[531] an Ohio appellate court applied *Casey* in determining whether Ohio abortion regulations were constitutional under the Ohio Constitution.[532] As an initial matter, the court observed that it was free, under the Ohio Constitution, to grant greater rights to individuals than provided by the U.S. Constitution.[533] The court further noted that the Ohio Constitution had been interpreted to grant "broader" protection to individual liberties in that it appeared to recognize so-called natural law.[534] Nevertheless, the court determined that the Ohio Constitution granted no greater rights in this situation and thus was bound by the undue burden standard of *Casey*.[535] The court compared the Ohio statutes at issue to those upheld in *Casey*:[536] "We are unable to distinguish the Ohio statutes from the Pennsylvania statutes involved in [*Casey*] and find no basis for determining [that the Ohio Constitution] imposes greater restrictions upon the state than are imposed by the U.S. Constitution as construed by the plurality opinion in [*Casey*]."[537]

In contrast, a Michigan circuit court determined that *Casey* was not controlling in *Mahaffey v. Attorney General*.[538] The court reviewed the Michigan Constitution and Michigan case law and concluded that, "Without hesitation, this Court is of the opinion that under our state constitution the right of privacy is 'fundamental.' "[539] The court determined that the appropriate standard of review for fun-

530. *See, e.g.*, Hope v. Perales, 595 N.Y.S.2d 948, 952 (App. Div. 1993).

531. 627 N.E.2d 570 (Ohio Ct. App. 1993).

532. *Id.* at 573.

533. *Id.* at 573-74.

534. *Id.* at 574.

535. *Id.* at 577. *But see* Mahaffey v. Attorney Gen., No. 94-406793 AZ, 1994 WL 394970 (Mich. Cir. Ct. July 15, 1994) (holding anti-abortion statute constitutional under Michigan Constitution).

536. *Preterm Cleveland*, 627 N.E.2d at 578.

537. *Id.*

538. No. 94-406793 AZ, 1994 WL 394970 (Mich. Cir. Ct. July 15, 1994).

539. *Id.* at *4.

damental rights under the state constitution was "strict scrutiny," rather than *Casey*'s undue burden analysis.[540] Consequently, the court rejected defendant's argument that a statutory provision that imposed informed consent and a twenty-four-hour waiting period prior to performance of an abortion was supported by compelling state interests.[541]

State courts have also considered how *Casey* impacts state initiative proposals restricting abortion rights. In *In re Initiative Petition No. 349*,[542] a divided Oklahoma Supreme Court considered whether an initiative petition restricting abortion should be permitted to appear on the ballot when it was manifestly evident that the provisions, if enacted, would be unconstitutional.[543] The court held that *Casey* was controlling.[544] The court observed that a state could *grant* greater rights under its state constitution, but that it could not *curtail* rights granted under the U.S. Constitution.[545]

In a juxtaposition of the usual argument, the initiative's proponents argued that the provisions were *different* from those in *Casey*, and thus *Casey* was not controlling.[546] The court agreed: It was so much more restrictive than *Casey*, it could not survive constitutional muster.[547]

In *Hope v. Perales*,[548] the New York court looked to its state constitution, rather than to *Casey* to evaluate a statute that funded prenatal and postpartum care for low-income women, but did not provide funding for abortions even if medically necessary.[549] The court relied on an "independent and expansive construction of the state constitu-

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540. *Id.* at *5.

541. *Id.* at *4-7.

542. 838 P.2d 1 (Okla. 1992), *cert. denied,* 113 S. Ct. 1028 (1993).

543. *Id.* at 2-3. The initiative absolutely prohibited abortions except in four narrow circumstances: (1) grave impairment of the female's physical or mental health; (2) rape; (3) incest; or (4) grave physical or mental defect of the fetus. *Id.* at 6 (citing *Initiative Petition No. 349*, § 5).

544. *Id.* at 12.

545. *Id.*

546. *Id.* at 11.

547. *Id.* The court also refused to sever the unconstitutional provisions, maintaining that severance would render the remainder of the initiative meaningless. *Id.* at 7. It would essentially amount to "an expensive, non-binding public opinion poll," and the court refused to permit a "costly, fruitless, and useless election." *Id. But see* Wyoming NARAL v. Karpan, 881 P.2d 281, 293 (Wyo. 1994) (upholding inclusion of initiative on ballot despite admittedly unconstitutional provisions.).

548. 595 N.Y.S.2d 948 (App. Div. 1993).

549. Prenatal Care Assistance Program (PCAP), N.Y. PUB. HEALTH LAW §§ 2520-2529 (McKinney 1993 & Supp. 1995).

tion,"[550] and determined that although the law did not prohibit a woman from obtaining an abortion "the fact is that poor women have more circumscribed options . . . and the effect is certainly to pressure women in the direction of giving birth, thereby limiting the reproductive freedom of those women."[551] The court found that the state's interest in health, mothers, and babies had no reasonable relationship to the exclusion of abortion in the funding law.[552] Funding provisions were not at issue in *Casey*, but the court's increased valuation of the state's interest in fetal rights[553] would likely have led the Court to uphold the New York provisions at issue in *Hope*. By relying on its state constitution, the New York court was able to strike the statute.

Hill v. National Collegiate Athletic Ass'n[554] was not an abortion case; at issue was a drug testing program imposed on college athletes.[555] The challenge, however, was based on the privacy provision of the California Constitution,[556] and the opinion represents the California Supreme Court's most current pronouncement on the state of privacy rights in California.[557]

As an initial matter, the court noted that the "murky character of federal constitutional privacy analysis"[558] lacks "any coherent legal definition or standard."[559] Citing *Casey* for the observation that the U.S. Supreme Court "has not endorsed strict scrutiny for all privacy-based interests at all conceivable levels of intrusion,"[560] the court rejected the contention that every assertion of a privacy interest must be overcome by a "compelling" state interest.[561] Instead, the nature of

550. *Hope*, 595 N.Y.S.2d at 952.

551. *Id.* at 951.

552. *Id.* at 952-53.

553. *See Casey*, 112 S. Ct. at 2816.

554. 7 Cal. 4th 1, 865 P.2d 633, 26 Cal. Rptr. 2d 834 (1994).

555. *Id.* at 9, 865 P.2d at 637, 26 Cal. Rptr. 2d at 838.

556. *Id.* Article I, Section 1 of the California Constitution provides: " 'All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, *and privacy*.' " *Id.* at 15, 865 P.2d at 641, 26 Cal. Rptr. 2d at 842 (alteration in original) (quoting CAL. CONST. art. 1, § 1). The final two words, "and privacy," were added pursuant to a voter initiative in 1972. *Id.*

557. For a comprehensive review of privacy rights in California under both the common law and the California Constitution, see *id.* at 20-35, 865 P.2d at 644-54, 26 Cal. Rptr. 2d at 845-56.

558. *Id.* at 31, 865 P.2d at 651, 26 Cal. Rptr. 2d at 853.

559. *Id.* at 30, 865 P.2d at 651, 26 Cal. Rptr. 2d at 852.

560. *Id.* at 31, 865 P.2d at 651, 26 Cal. Rptr. 2d at 853.

561. *Id.* at 34-35, 865 P.2d at 654, 26 Cal. Rptr. 2d at 855-56. It is beyond the scope of this Comment to analyze the history of California's privacy jurisprudence. It should be noted, however, that when the court suggests that an infringement of a privacy interest

the privacy interest involved, the nature and seriousness of the invasion, and any countervailing interests must be properly considered.[562]

> Where the case involves an obvious invasion of an interest fundamental to personal autonomy, e.g., freedom from involuntary sterilization or the freedom to pursue consensual familial relationships, a "compelling interest" must be present to overcome the vital privacy interest. If, in contrast, the privacy interest is less central, or in bona fide dispute, general balancing tests are employed.[563]

The court thereby rejected the compelling interest test of its prior privacy jurisprudence in favor of a new legal framework. In order to make out a prima facie case of invasion of privacy, the plaintiff must show a legally protected privacy interest, a reasonable expectation of privacy, and a serious invasion of that right.[564] Once the plaintiff makes this showing, the court balances the plaintiff's interest against any competing or countervailing interests.[565] Finally, the plaintiff may prove that other alternatives would minimize the intrusion.[566]

As a balancing test, the general structure of the *Hill* court's analysis is at least reminiscent of the undue burden standard of *Casey*. The Supreme Court balanced the woman's right to privacy—her right to choose abortion—against the state's competing interests in fetal health, informed choice, and the health of the mother.[567] The California and U.S. Supreme Courts have divergent viewpoints from which they conduct their analyses. The California Supreme Court starts from the privacy interest and proceeds to the state purpose. The undue burden standard of *Casey*, on the other hand, starts with the state purpose and balances that against the impact on the privacy inter-

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must be justified by a "compelling" state interest, it is not suggesting that simple articulation of that interest is sufficient to justify the infringement. Thus, even a compelling interest must be balanced against the intrusion it imposes.

562. *Id.* at 34, 865 P.2d at 653, 26 Cal. Rptr. 2d at 855.

563. *Id.*

564. *Id.* at 35-37, 865 P.2d at 654-55, 26 Cal. Rptr. 2d at 856-57. The dissenting opinions criticize the new framework as undermining privacy interests by elevating the considerations embodied in the second and third elements: reasonable expectation of privacy and "serious" invasion of the plaintiff's right. *Id.* at 66, 865 P.2d at 675, 26 Cal. Rptr. 2d at 877. By so doing, a defendant can thus defeat the plaintiff's reasonable expectation by giving notice of such intent. *Id.* Under the third element, the defendant does not need to justify its conduct unless the plaintiff establishes that the defendant has infringed upon constitutionally protected interests and the invasion is sufficiently serious in nature, scope, or impact. *Id.* at 68, 865 P.2d at 676, 26 Cal. Rptr. 2d at 878.

565. *Id.* at 37, 865 P.2d at 655, 26 Cal. Rptr. 2d at 857.

566. *Id.* at 38, 865 P.2d at 656, 26 Cal. Rptr. 2d at 857.

567. *See supra* part II.D.1.

est.[568] The context of the decision, however, was quite different and involved nongovernmental action;[569] thus, the application of the California analysis in the abortion context is unclear.

American Academy of Pediatrics v. Lungren[570] came to the California Court of Appeal for review after the California Supreme Court's decision in *Hill* and after the U.S. Supreme Court's decision in *Casey*. The court revisited the constitutionality of a statute that prohibited an unemancipated minor from obtaining—subject to a judicial bypass—an abortion without first having obtained the written consent of one of her parents or a legal guardian.[571]

In the original case, *Academy I*,[572] the court of appeal affirmed the order granting a preliminary injunction.[573] It held that even if the federal right of privacy would not invalidate California's parental consent statute, it must be tested against the right of privacy guaranteed under the California Constitution.[574]

568. *See supra* part II.D.

569. *Hill*, 7 Cal. 4th at 15-16, 865 P.2d at 641, 26 Cal. Rptr. 2d at 842.

570. 26 Cal. App. 4th 479, 32 Cal. Rptr. 2d 546, *review granted*, 882 P.2d 247, 34 Cal. Rptr. 2d 556 (1994) [hereinafter *Academy II*].

571. *Id.* at 486-87, 32 Cal. Rptr. 2d at 548 (citing A.B. 2274 (Act of Sept. 27, 1987, ch. 1237, § 2, 1987 Cal. Stat. 122,510 (codified at CAL. CIV. CODE § 34.5 (West 1982), repealed and recodified at CAL. FAM. CODE §§ 6920, 6921, 6925 (West 1994)) and Act of Sept. 27, 1987, ch. 1237, § 3, 1987 Cal. Stat. 122,510 (codified at CAL. HEALTH & SAFETY CODE § 25958 (West Supp. 1995)))).

572. American Academy of Pediatrics v. Van de Kamp, 214 Cal. App. 3d 831, 263 Cal. Rptr. 46 (1989). The original case was heard pre-*Hill* and pre-*Casey*.

573. *Academy II*, 26 Cal. App. 4th at 489, 32 Cal. Rptr. 2d at 550.

574. *Id.* at 488, 32 Cal. Rptr. 2d at 549. The court found that

> the right of privacy is a fundamental right [under the California Constitution], and the ability to choose whether or not to give birth and whether or not to undergo procedures relevant to that choice are among the most fundamental and intimate aspects of that right. [The court] concluded that the right of privacy, including the right to choose whether to give birth or to terminate a pregnancy, therefore, may not be burdened absent a compelling state interest.

Id., 32 Cal. Rptr. 2d at 550. The court thus concluded that it was the state's burden to show

> (1) that the invasion of privacy rights was justified by some compelling state interest . . . , (2) that the statute's disparate treatment of like-situated minors, *id.* at 488-89, 32 Cal. Rptr. 2d at 549 (noting that the statute did not purport to regulate minors making other medical choices, including decision to carry pregnancy to term), was necessary to the furtherance of that interest, and (3) that the interest could not be furthered by other means less harmful to the fundamental right.

Id. The court remanded to the superior court for resolution of the issues that depended, at least in part, upon factual determinations. *Id.* at 490, 32 Cal. Rptr. 2d at 550.

On remand the superior court determined that the legislation *did* burden the right to privacy, and that the state had failed to show that the state's interest justified the burden—even though the court recognized the state interests at issue as "compelling." *Id.* The court identified compelling state interests as follows: (1) the state's interest in the medical, emotional, and psychological welfare of minors; (2) the state's interest in reducing the teenage pregnancy rate; and (3) the state's interest in preserving and fostering the parent-

In *Academy II*, on its own review of the evidence, the court affirmed the superior court's conclusion that the legislation burdened the right to privacy and the state had failed to show that the burden was justified by the state's interests.[575] "The evidence not only supports the superior court's conclusion, it mandates it."[576]

The court rejected the state's invitation to review the case under *Hill's* reformulated privacy analysis and contended it would not affect its conclusions.[577] The court recognized the right to choose abortion as an "exceedingly fundamental privacy interest,"[578] one in which minors have a reasonable expectation of privacy—even if the expectation is slightly less than an adult's expectation.[579] The intrusion, in the court's view was substantial; "a serious invasion of the right to make that choice [to have an abortion] in private."[580]

The court held that the state might have defended against plaintiff's prima facie case by showing that (1) the conditions imposed related to the purposes of the legislation; (2) the utility of the conditions outweighed the impairment of constitutional rights; and (3) there were no less offensive alternatives available to achieve the state's objective.[581] The court held that the burden on those issues had been correctly placed on the state, and that the state had failed to meet that burden.[582]

The state also argued that it was improper—and unnecessary—for the lower court to consider factual evidence in a facial challenge context.[583] The state maintained that, in a facial challenge, it need only show that the statute was *designed* to further a compelling state interest, that the legislature could *rationally believe* that the law furthered a compelling interest, and that evidence on this point was inap-

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child relationship. *Id.* "The evidence was nothing less than overwhelming that the legislation would not protect these interests, and would in fact *injure* the asserted interests of the health of minors and the parent-child relationship." *Id.*

575. *Id.* at 490, 32 Cal. Rptr. 2d at 550-51.

576. *Id.*, 32 Cal. Rptr. 2d at 550.

577. Under California's "rule of law" doctrine, the rule of law necessary to a decision " ' "conclusively establishes that rule and makes it determinative of the rights of the same parties in any subsequent retrial or appeal in the same case." ' " *Id.* at 491, 32 Cal. Rptr. 2d at 551 (quoting Nally v. Grace Community Church, 47 Cal. 3d 278, 301-02, 763 P.2d 948, 962, 253 Cal. Rptr. 97, 111 (1988), *cert. denied*, 490 U.S. 1007 (1989) (quoting 9 B.E. WITKIN, CALIFORNIA PROCEDURE § 737, at 705-07 (3d ed. 1985))).

578. *Id.* at 496, 32 Cal. Rptr. 2d at 554.

579. *Id.* at 496-97, 32 Cal. Rptr. 2d at 555.

580. *Id.* at 497, 32 Cal. Rptr. 2d at 555.

581. *Id.* at 498, 32 Cal. Rptr. 2d at 556.

582. *Id.*

583. *Id.* at 499, 32 Cal. Rptr. 2d at 556-57.

propriate.[584] The court rejected this contention: "When legislation invades a fundamental right, the courts have the duty to look behind any legislative finding and independently determine whether the particular invasion is justified."[585]

At this point, the court's analysis paralleled the undue burden standard as articulated in *Casey*. Referring to *Casey*, but relying largely on California case law, the court articulated the analysis:

> [The court] must first consider the character and magnitude of the asserted injury to the rights . . . that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. *Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.*[586]

In some circumstances, the court need only consider the face of the statute; in others, the court must engage in factual analysis on the question of whether the legislation justifies the burden.[587] The California court thus articulated a very similar—albeit somewhat more structured—standard of review under the California Constitution, but reached a different conclusion, striking down a parental consent provision very similar to that upheld by the *Casey* Court.[588]

The court identified the state interests at issue: the health and welfare of minors and the interest of the state in fostering parent-child relationships. The court also required a further showing by the state that the legislation would in fact further the proffered interest—a showing the state failed to make on this record.[589] The court then balanced the interest of the state against the privacy interests of the child and the impact of the intrusion, and concluded that the state constitution protects a child's liberty interests.[590] The court concluded

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584. *Id.*

585. *Id.* at 500, 32 Cal. Rptr. 2d at 557.

586. *Id.* (citations omitted) (emphasis added).

587. *Id.* (citing *Casey*, 112 S. Ct. at 2826-27).

588. *See supra* part II.E.4.

589. *Academy II*, 26 Cal. App. 4th at 501-02, 32 Cal. Rptr. 2d at 558.

590. *Id.* at 502-03, 32 Cal. Rptr. 2d at 558-59. The court suggests that the federal constitution concludes that a child's right to privacy exceeds a parent's right to be involved in the abortion decision. *Id.* at 502, 32 Cal. Rptr. 2d at 559. Consequently, federal law may be

that, under the lower intrusion threshold of the California Constitution, the state purposes did not justify the burdens imposed.[591]

The most notable feature of the California decision is the court's effort to "fill out" the boundaries of the undue burden standard, albeit in the context of California law. The court's logic and analysis are instructive; it articulated the ingredients in analyzing the state's interests and it clarified the process of assessing impact. Even if the threshold determination for "undue burden" is different under the federal and state constitutions, the analysis conducted by the California court may be a useful option in defining the boundaries of the undue burden test.

IV. CONCLUSION

In *Planned Parenthood v. Casey*, a plurality of the Supreme Court presented a new standard by which to measure restrictions on a woman's right to choose abortion. The *Casey* undue burden test requires a fluid weighing of purpose and effect—a clear departure from *Roe*'s trimester hierarchy which struck down virtually all regulations restricting abortion imposed during the first two trimesters. In addition, the plurality impliedly overthrew the facial challenge standard, at least in abortion cases, by reviewing the facts on the record to determine if the law was unconstitutional in a large fraction of the cases in which the law was relevant. The Court's analysis represents a clear departure from the *Salerno* test under which there must be no set of circumstances where the law can be constitutionally applied.

As such, *Casey* demands much more from the lower federal and state courts. For example, a court faced with an abortion restriction may no longer simply look to the Supreme Court's *Roe* decision and invalidate a regulation if it restricts the abortion right in the first two trimesters. Instead the court must look at the state purpose and confirm that it is a legitimate one. Then, in accordance with the legitimacy of the purpose, it is required to look at the facts on the record before it, perhaps adding its own commonsense understanding, and determine if the regulation would be a substantial obstacle to the women for whom the law is most relevant.

The *Casey* test, of course, raises the possibility that similar abortion provisions will be invalidated in State *X* and yet be held constitu-

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upheld only if it affords a mechanism which allows the minor to obtain an abortion without parental notice or consent. *Id.* (citations omitted).

591. *Id.* at 502-03, 32 Cal. Rptr. 2d at 559.

tional in State *Y*, based on the legislative purpose or circumstances particular to State *X* which may make application of the provision more burdensome there. *Casey* further removes the safety net from state judges, most of whom are accountable to the electorate. No longer can they maintain that Supreme Court precedent compels a given ruling on the statute before them.

The facial challenge standard has, of course, become the primary issue for the courts interpreting *Casey*. Most courts have recognized that what the *Casey* plurality did was not consistent with *Salerno*. But in the absence of *any* explicit direction as to whether the Court intentionally altered the test or whether it was a one-time, do-as-we-say-not-as-we-do exercise, the state and lower federal courts have generally refused to recognize that any change has occurred. This reticence has perhaps been best borne out in the exchange between Justices Scalia and O'Connor in the memorandum opinions filed in *Ada* and *Fargo II*, respectively. Justice Scalia brought the facial challenge standard issue directly into question in *Ada*. Only Justice Souter joined Justice O'Connor in responding, in *Fargo II*, that *Casey* had, in fact, intended to alter the facial challenge test.

Only a few courts have taken the Supreme Court at face value and addressed whether the undue burden test is truly a test of general application. Though the one lower court to have engaged in a full undue burden analysis for a nonabortion right of privacy case was overruled, the possibility remains that *Casey* could broadly apply to all privacy rights cases.

In the end, though, perhaps the clearest lesson of *Casey* is that what the Supreme Court declares the law is, and what the law is in practice, are two different things. Many lower courts, faced with the ambiguous undue burden test and an unspecified facial challenge standard have run for the safety of the old hard-and-fast *Salerno* standard for facial challenges, a standard which invariably results in upholding the statute. Others resort to state constitutional tests, thereby avoiding *Casey* entirely.

The future of *Casey*'s undue burden and facial challenge standards is uncertain. Abortion remains a hot-button topic, and some states are already experimenting with increasingly restrictive abortion regulations, testing the limits of *Casey*'s undue burden standard. Yet the undue burden test theoretically allows each court to engage in a fact-specific analysis and more freedom to come to different conclusions about the constitutionality of identical abortion restrictions—different even than the Court's conclusions in *Casey*. And even with

the confusion in the lower courts as to how *Casey*'s undue burden and facial challenge standards work, the Supreme Court may simply decide that it is politically expedient to refuse to grant certiorari on another abortion case anytime soon—particularly if no viewpoint can muster the votes needed to hand down a clearer statement of the law. In the meantime, lower courts might continue to expand the application of *Casey* to other nonabortion privacy rights cases. Other courts may continue to ignore *Casey*'s facial challenge standard in favor of *Salerno* because the *Casey* Court set forth its new standards in such a splintered opinion. And, in the end, con law is as con law does.

*Sandra Lynne Tholen**
*and Lisa Baird***

* I would like to thank my husband, John, and children, Ben and Daniel, for their love, support, and understanding, and for helping me to keep it all in perspective. I dedicate this Comment to my mother, a woman whose courage and strength continues to inspire me.

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