NOTES & COMMENTS

THE FAILED PURPOSE PRONG: WOMEN'S RIGHT TO CHOOSE IN THEORY, NOT IN FACT, UNDER THE UNDUE BURDEN STANDARD

by
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In 1973, the Supreme Court legalized abortion with its controversial landmark decision in Roe v. Wade. *The right to choose whether or not to "bear or beget a child" was declared fundamental. While the government interests in potential fetal life and maternal health were recognized, the interests were limited by the infamous trimester framework and subjection of state regulation to strict scrutiny review. In 1992, the Supreme Court retreated from its decision in* Roe *when it decided* Planned Parenthood of Southeastern Pennsylvania v. Casey. *The right to choose was no longer fundamental, the trimester framework abandoned, and the interests of the state were held to apply to some extent throughout the pregnancy. Although no one opinion from* Casey *commanded a majority of the justices, it has been the law for the past 20 years.*

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INTRODUCTION

In 1973, the Supreme Court legalized abortion with its controversial landmark decision in *Roe v. Wade*.[1] The right to choose whether or not to "bear or beget a child" was declared fundamental.[2] While the government interests in potential fetal life and maternal health were recognized, the interests were limited by the infamous trimester framework and subjection of state regulation to strict scrutiny review. In 1992, the Supreme Court retreated from its decision in *Roe* when it decided *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[3] The right to choose was no longer fundamental, the trimester framework abandoned, and the interests of the state were held to apply to some extent throughout the pregnancy. Although no one opinion from *Casey* commanded a majority of the justices, it has been the law for the past 20 years.[4]

Casey purported to preserve the essential holding from *Roe*, but presented an entirely new test against which infringements upon women's right to choose would be analyzed. According to the plurality, the essential holding of *Roe* consists of three parts: recognition of a woman's right to choose abortion before viability and to obtain an abortion without undue interference from the state, confirmation of the state's right to restrict or forbid abortion after viability as long as an exception to save the life or health of the mother was provided, and the principle that the state's interests in protecting maternal health and the potential life within her are legitimate from the beginning of the pregnancy.[5] Rather than a trimester framework, the Court drew a supposedly bright line at the

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[1] 410 U.S. 113 (1973).

[2] *Id.* at 169–70 (quoting Eisenstadt v. Baird, 405 U.S. 438, 453 (1972)).

[3] 505 U.S. 833 (1992).

[4] *Id.* Justice O'Connor, Justice Kennedy, and Justice Souter authored the joint opinion of the Court. Justice Stevens filed an opinion concurring in part and dissenting in part. Justice Blackmun filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part. Chief Justice Rehnquist filed an opinion concurring in the judgment in part and dissenting in part, in which Justices White, Scalia, and Thomas joined. Justice Scalia filed an opinion concurring in the judgment in part and dissenting in part, in which Chief Justice Rehnquist and Justices White and Thomas joined.

[5] *Id.* at 846.

point of viability, a point prior to which a woman has the right to choose but after which she does not.[6] In reality, the bright line drawn by the Court is slightly blurred because of characteristics of individual pregnancies and ever advancing medical techniques and technology.[7]

Most significantly, the Court declared that the trimester framework and resulting strict scrutiny standard of review were inconsistent with recognition of the state's interest in potential fetal life from the beginning of the pregnancy because to do so misconceived the woman's interest and under valued the state's interest.[8] The state was granted the right to regulate abortion in support of its interests in potential fetal life and maternal health so long as it did not place an undue burden on a woman's right to choose.[9] The Court defined an undue burden as follows:

> a state regulation [that] has the *purpose or effect* of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. A statute with this purpose 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.[10]

The undue burden standard is a test of intermediate scrutiny, something below strict scrutiny, but above rational basis review. It is a two-part barrier beyond which the state's regulation must not go. However, one half of the barrier, the so-called purpose prong, has been effectively ignored or misapplied by the courts for the past 20 years. Due to the failure of courts to apply the purpose prong, the undue burden standard has failed to adequately protect women's right to choose from unwarranted state interference, leading to a right that is held in theory, but not in fact.[11]

When analyzing judicial decisions from throughout the 20 year reign of *Casey* it becomes clear that the undue burden standard has not proven to be a workable rule, capable of consistent application and able to protect women's right to choose. Its primary inadequacy is the failure of the purpose prong. The purpose prong fails as a workable standard in two ways. First, *Casey* embodies an inherent tension in which the state may discourage abortion, but may not actually take away the right to choose. This tension remains unresolved, leaving the courts disinclined to consider legislative purpose because the line between a permissible and impermissible purpose is not clear. Second, the state is explicitly permitted to regulate in the broad interests of protecting maternal health and pre-

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[6] *Id.* at 870.

[7] *Id.* at 860 (noting that when *Roe* was decided, viability typically occurred around week 28, but as of 1992 sometimes occurs as early as week 23 or 24, and may creep earlier into the pregnancy with further scientific advancements).

[8] *Id.* at 873.

[9] *Id.* at 874.

[10] *Id.* at 877 (emphasis added).

[11] *Id.* at 872.

natal life. Furthermore, the Supreme Court's recent decision in *Gonzales v. Carhart* may have expanded the interests of the state to include the morality and ethics of the medical profession, and potentially, morality and ethics in a more general sense.[12] The scope of the state interest under *Casey* is vast and its boundaries are unclear. Interpreted broadly, there is no impermissible legislative purpose and the purpose prong is either ignored completely as an unnecessary analysis or treated as a superficial question to which the answer is already known. Whether a court views the purpose prong as embodying an inherent unresolved tension or as unnecessary because there is no impermissible purpose, the result is the same. There is no effectively impermissible legislative purpose with regard to abortion. The purpose prong is not an effective test and the undue burden standard is not a workable standard. Without the purpose prong, the undue burden standard more closely resembles a standard of rational basis review than intermediate scrutiny. Therefore, under *Casey*, women's right to choose has only received minimal protection from unwarranted state interference. This clearly does not embody the essential nature of *Roe*, which *Casey* purported to reaffirm.

To demonstrate the failure of the purpose prong, this Comment will proceed in six parts. Part I will consist of background information regarding how the right to choose an abortion has developed as a constitutional right, beginning with *Roe* and ending with *Casey* and the undue burden standard. This section will explain the reasoning and standards of each case, most specifically *Casey*'s undue burden standard from which the rest of the analysis develops. Part II will outline the doctrinal background affecting the undue burden standard and the neglected nature of the purpose prong. A discussion of the standards of judicial review, strict scrutiny, intermediate scrutiny, and rational basis, will form the foundation for defining the undue burden standard. Next, is a discussion of some basic principles and theories regarding judicial review of legislative purpose and how this affects the purpose prong. Part III is a chronological treatment of how the Supreme Court has applied, and not applied, the purpose prong following *Casey*. Four cases are prominent: *Mazurek v. Armstrong*,[13] *Stenberg v. Carhart*,[14] *Ayotte v. Planned Parenthood of Northern New England*,[15] and *Gonzales v. Carhart*.[16] Part IV is a discussion of how the lower courts have analyzed the purpose prong, given the lack of clear guidance by the Supreme Court. The results have been largely inconsistent. Part V concludes the analysis by discussing the effects of the failed purpose prong as a protection of women's right to choose. These effects include the extreme difficulty in mounting a successful facial challenge, encouraging legislatures to challenge established constitutional doctrine

[12] *See* Gonzales v. Carhart, 550 U.S. 124, 157–60 (2007).

[13] 520 U.S. 968 (1997).

[14] 530 U.S. 914 (2000).

[15] 546 U.S. 320 (2006).

[16] 550 U.S. 127 (2007).

with little risk, and the restriction of women's individual liberty based on legislatively imposed, and judicially approved, moral norms and gender stereotypes. Part VI contains a brief conclusion.

In the 20 years since *Casey* issued, state regulation of abortion has proceeded at an alarming rate. According to Americans United For Life, a legal arm of the pro-life movement, there are only three states that have not passed some sort of abortion regulation since *Casey* was decided.[17] This demonstrates that the movement's incremental effort to over-turn the substance of *Roe* through state-by-state legislation has been making progress.[18] Unlike *Roe*, *Casey* "virtually invited states to cook up abortion regulations and dared abortion-rights proponents to argue that the burdens were substantial."[19]

In just the last few years, the number of regulations enacted, and the extent of their intrusion, has increased further still. The year 2011 was unprecedented for the proposal and enactment of abortion regulations. Legislators in the 50 states authored over 1,100 bills related to reproductive health and rights, of which 135 became law.[20] An alarming 68% of the laws passed restricted women's access to abortion services in some way.[21] This is a dramatic increase from the previous year in which only 26% of the enacted provisions restricted women's access.[22] The number of restrictive regulations passed in 2011, totaling 92, toppled the previous record of 34 in 2005.[23] Regulations enacted in 2011 included waiting periods between counseling and the procedure, mandatory ultrasounds, limitations on insurance coverage, clinic regulations, limitations on medicinal abortions (Mifepristone/RU-486), funding cuts for family planning services, and enhanced use of abstinence only education.[24] A Mississippi measure was proposed but rejected that would have defined an embryo as a person "from the moment of fertilization," opening the door to a blanket abortion ban and potentially creating issues for methods of hormonal contraceptives that prevent implantation of the fertilized egg rather than prevent fertilization.[25] Since 2011, legislatures have continued to enact restrictive legislation, with seven states, including Alabama, Arizona, Arkansas, Indiana, Louisiana, North Dakota, and Oklahoma, now

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[17] *AUL Presents Legal Experts Detailing the "Judicial Violence" of* Planned Parenthood v. Casey, AMERICANS UNITED FOR LIFE (May 31, 2012), http://www.aul.org/2012/05/aul-presents-legal-experts-detailing-the-"judicial-violence"-of-planned-parenthood-v-casey/.

[18] *Id.*

[19] Helena Silverstein & Wayne Fishman, *All Eyes on Kennedy*, 17 AM. PROSPECT 18 (2006).

[20] *States Enact Record Number of Abortion Restrictions in 2011*, GUTTMACHER INSTITUTE (Jan. 5, 2012) [hereinafter GUTTMACHER INSTITUTE 2012], http://www.guttmacher.org/media/inthenews/2012/01/05/endofyear.html.

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

joining Nebraska in enacting laws that ban abortions at or after 20 weeks (previability) based on new studies regarding when a fetus becomes capable of feeling pain.[26]

Some have claimed that safe and legal abortion is only as available as it was in the days before *Roe*.[27] In 1973, when *Roe* was decided, 83% of United States counties lacked an abortion provider.[28] As of 2008, 87% lacked a provider.[29] Before *Roe*, abortion was not universally illegal. As of 1973, some states had already begun to liberalize their abortion laws, with legal abortion available in 17 states for a variety of reasons beyond just the need to save the woman's life.[30] Four states, Washington, New York, Alaska, and Hawaii, had completely repealed their anti-abortion laws before *Roe*.[31] Thirteen states, Oregon, California, New Mexico, Colorado, Kansas, Arkansas, Florida, Georgia, South Carolina, North Carolina, Virginia, Maryland, and Delaware, had reformed their anti-abortion laws in some manner before *Roe*.[32] Without constitutional protection of the right to choose, abortion becomes an option only available to certain women in certain places. Most women without the financial means to travel in order to procure an abortion will not have the option. The system could resemble the situation prior to 1973 in which abortion was only a legitimate option for women of means, not poor women.[33]

It would be dishonest to assign blame for women's decreased access to abortion services exclusively to state regulations. There are other factors at play, including a lack of training related to abortion in American medical schools and extreme acts of violence against abortion clinics and providers.[34] A fairly recent study in the *American Journal of Obstetrics & Gynecology* reported that education and training in abortion services is deficient in American medical schools.[35] The survey found that 17% of schools provide no training during either the preclinical or clinic por-

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[26] *State Policies on Later Abortions*, GUTTMACHER INSTITUTE (Mar. 1, 2014) [hereinafter GUTTMACHER INSTITUTE 2013], *available at* http://www.guttmacher.org/statecenter/spibs/spib_PLTA.pdf; *see also infra* notes 287–305 and accompanying text.

[27] Amanda J. Crawford, *Laws Revive "World Before* Roe*" as Abortions Require Arduous Trek*, BLOOMBERG NEWS (Sept. 26, 2012), http://www.bloomberg.com/news/2012-09-27/laws-revive-world-before-roe-as-abortions-require-arduous-trek.html.

[28] *Id.*

[29] *Id.*

[30] Rachel Benson Gold, Special Analysis, *Lessons from Before* Roe: *Will Past be Prologue?*, GUTTMACHER REP. ON PUB. POLICY, Mar. 2003, at 8, 8 *available at* http://www.guttmacher.org/pubs/tgr/06/1/gr060108.pdf.

[31] *Id.* at 10.

[32] *Id.* at 9.

[33] *Id.* at 11.

[34] *See* Eve Espey et al., *Abortion Education in Medical Schools: A National* Survey, 192 AM. J. OBSTETRICS & GYNECOLOGY 640, 643 (2005); Mireille Jacobson & Heather Royer, *Aftershocks: The Impact of Clinic Violence on Abortion Services*, 3 AM. ECON. J. APPLIED ECON. 189, 190 (2011).

[35] Espey et al., *supra* note 34, at 643.

tions of schooling.[36] During the required third-year OB-GYN rotation, 23% of schools offer no formal abortion training, 32% only offer a lecture on the subject, and 45% offer a clinical training experience, but reported that participation is generally low.[37] These results are despite the fact that abortion is "one of the most common procedures women under go in the US," and an integral element of gynecological care, with approximately 43% of women undergoing the procedure during their fertile years.[38]

The Federal Bureau of Investigation reports that between 1973 and 2003 there were 300 total attacks on abortion clinics and providers in the United States, most typically arson, but also including bombing, murder, and butyric acid attacks.[39] The actual number of attacks may be higher due to reporting issues created by confusion as to whether or not to report violence against abortion providers and clinics as domestic terrorism.[40] Violence may affect women's access to abortion services by destroying clinics, killing physicians, deterring physicians from offering abortion services, and terrifying women seeking the procedure.

While the chilling effect caused by both deficiencies in medical education and violence against abortion providers is very real, it is beyond the scope of this Comment. Furthermore, the animus of all three factors, restrictive abortion regulation in the state, violence, and deficient training, is the same—deeply held views against abortion. I do not mean to insinuate that the same groups or individuals are necessarily involved in all three areas, particularly with regard to violence against abortion providers. The reason the abortion debate is such a contentious, and seemingly endless, debate is because the views of both sides, pro-life and pro-choice, are strong and largely incompatible. Because of this tension, any standard intended to protect women's right to choose must be equally strong or it will not be effective.

Consequently, a fresh look at the workability of the undue burden standard is both timely and necessary. While the abortion right and the undue burden standard has been covered by many authors since it was promulgated 20 years ago, specific analysis of the purpose prong has been less extensive. Much of the legal scholarship to date has focused on particular arguments for or against the abortion right, such as gender equality and fetal personhood, respectively, or on particular tactics used by legislatures to limit the right, such as informed consent provisions and Targeted Regulation of Abortion Providers (TRAP).[41] More importantly,

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[36] *Id.* at 641.

[37] *Id.*

[38] *Id.* at 640.

[39] Jacobson & Royer, *supra* note 34, at 189.

[40] *Id.* at 189 n.2.

[41] TRAP regulations are regulations directed at abortion providers rather than women seeking abortions. Typically, they involve specific requirements that the clinic, the physician, or both, must meet to be legally authorized to perform abortions in the

the bulk of the scholarship was completed in the mid-1990s, immediately following the *Casey* decision and before the Court's most recent decision in *Gonzalez* regarding so-called "partial-birth" abortion.[42] This Comment reviews decisions issued throughout the 20 year period during which the undue burden standard has been law, including judicial decisions issued as recently as 2012.

I. Evolution of the Right to Choose

Roe was a landmark decision in the sense that it was the first Supreme Court decision to address abortion directly and protect the right to this reproductive choice constitutionally, but it did so by expanding upon earlier decisions protecting reproductive choice as a right of privacy. In 1965, *Griswold v. Connecticut* held that married persons had the right to use contraception based upon their right of privacy within the home and the right of marital privacy.[43] The right to privacy was elucidated from the penumbra of additional rights emanating from those explicitly found in the Bill of Rights.[44] In 1972, *Eisenstadt v. Baird* expanded the right to use contraception to single persons based upon an equal protection analysis.[45] The Court held that "if 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."[46] While *Roe* did not specifically follow *Griswold*'s penumbra approach, it did conclude that the constitutional right of privacy, a liberty interest inherent in the Due Process Clause of the Fourteenth Amendment, "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[47]

The constitutional right of privacy, within which the abortion right was found, is a fundamental liberty interest, with state limitations thereof subject to strict scrutiny. A regulation limiting the right may only be justified by "compelling state interests"[48] and must be "narrowly drawn to ex-

state. Examples include requirements that the physician obtain admission privileges at a nearby hospital or that the clinic meet some arbitrary building standard. TRAP regulations have been a popular tactic of anti-abortion legislators because they can be seemingly innocuous on their face, but can potentially force a clinic to close, stopping abortions at their source. *See* Lisa M. Brown, *The TRAP: Targeted Regulation of Abortion Providers*, Nat'l Abortion Federation (2007), *available at* http://www.prochoice.org/pubs_research/publications/downloads/about_abortion/trap_laws.pdf.

[42] Gonzalez v. Carhart, 550 U.S. 124, 132, 135 (2007) (reviewing the Federal Partial-Birth Abortion Ban Act of 2003 which regulates a late-term abortion procedure known to the medical profession as an intact dilation and extraction).

[43] Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965).

[44] *Id.* at 484.

[45] Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

[46] *Id.* (emphasis in original).

[47] Roe v. Wade, 410 U.S. 113, 153 (1973).

[48] *Id.* at 155 (quoting Kramer v. Union Free Sch. Dist., 395 U.S. 621, 627 (1969)).

press only the legitimate state interests at stake."[49] But the right "is not absolute and is subject to some limitations."[50] The Court declared that "at some point the state interest as to protection of health, medical standards, and prenatal life, become dominant."[51]

Abortion necessarily involves a complex balancing of interests not encountered by other constitutional issues because it pits the rights of the woman against the interest of the fetus, a potential life. *Roe* found that a fetus is not a person with individual constitutional rights of its own under the Fourteenth Amendment.[52] Consequently, in our abortion jurisprudence, the interests of the fetus are represented by the state. To balance the rights of the woman and the state's interests, including maternal health and the protection of prenatal life, *Roe* developed the trimester framework based upon the familiar trimester system used by the medical profession to refer to different stages of the pregnancy.[53] Under the Court's trimester framework, the state's interest in maternal health does not become compelling until the second trimester, at which time it may enact regulations "reasonably related to maternal health."[54] Its interest in protecting prenatal life does not become compelling until viability, during the third trimester, at which point it may regulate and even proscribe abortion, unless necessary to save the life or health of the mother.[55] During the first trimester the decision is to be left entirely up to the woman and her physician, with reasonable regulation of the medical profession allowed, such as a requirement that a licensed medical professional perform the procedure.[56]

Following *Roe*, the Supreme Court held state abortion regulations to a heightened standard of scrutiny, overturning most regulations as an unconstitutional infringement on women's right to choose.[57] In *City of*

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[49] *Id.* (citing *Griswold*, 381 U.S. at 485).

[50] *Id.*

[51] *Id.*

[52] *Id.* at 157 ("The Constitution does not define 'person' in so many words," though it contains many references to "persons," but "[n]one indicate[], with any assurance, that it has any possible prenatal application.").

[53] *Id.* at 163 ("With respect to the State's important and legitimate interest in the health of the mother, the 'compelling' point, in the light of the present medical knowledge, is at approximately the end of the first trimester. This is so because of the now-established medical fact . . . that until the end of the first trimester mortality in abortion may be less than morality in normal childbirth.").

[54] *Id.* at 164.

[55] *Id.*

[56] *Id.* at 165 ("The State may define the term 'physician' . . . to mean only a physician currently licensed by the State, and may proscribe any abortion by a person who is not a physician as so defined.").

[57] *See* Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747 (1986); City of Akron v. Akron Ctr. for Reproductive Health, 462 U.S. 416 (1983). Justice O'Connor authored dissenting opinions in both *Akron* and *Thornburgh* which promoted a reevaluation of *Roe*, the abrogation of the trimester framework, and the implementation of an "unduly burdensome" standard, an early version of what would

Akron v. Akron Center for Reproductive Health, the Court reaffirmed its decision in *Roe* on the basis of stare decisis, noting that while "arguments continue to be made . . . that we erred in interpreting the Constitution . . . stare decisis . . . is a doctrine that demands respect in a society governed by the rule of law."[58] At issue in *Akron* were five Ohio abortion regulations, some of which were similar to abortion regulations held to be constitutional today.[59] The statute required that all abortions performed after the first trimester be performed in a hospital, that parental consent be required for an abortion performed on an unmarried minor, that a physician inform a woman of "facts concerning [her] pregnancy, fetal development, the complications of abortion, and agencies available to assist [her]," that a woman wait 24 hours between giving her informed consent based on the required disclosures and the actual procedure, and that fetal remains be disposed of in a "humane and sanitary manner."[60] All five regulations were deemed to be unconstitutional under *Roe*.[61]

The Court explained that although *Roe* was primarily based on the right to personal liberty concerning matters of family life, "the Court also has recognized, because abortion is a medical procedure, that the full vindication of the woman's fundamental right necessarily requires that her physician be given 'the room he needs to make his best medical judgment.'"[62] Consequently, regulation in the interest of maternal health, only compelling after the first trimester, does not permit the state to "adopt abortion regulations that depart from accepted medical practice."[63] The state may not put on a "parade of horribles"[64] under the guise of informed consent, particularly when "the information required is designed not to inform the woman's consent but rather to persuade her to withhold it all together."[65] In addition to seeing through the guise of informed consent, the Court carefully scrutinized each requirement of the regulation and its connection to a valid interest in maternal health.[66]

become the undue burden standard a few years later in *Casey*. *Thornburgh*, 476 U.S. at 828 (O'Connor, J., dissenting); *Akron*, 462 U.S. at 452–53 (O'Connor, J., dissenting).

[58] *Akron*, 462 U.S. at 419–20.

[59] *See* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 884–86, 895 (1992) (explicitly overruling both *Akron* and *Thornburgh* and upholding parental consent for abortions performed on minors, required physician statements for informed consent, and a mandatory 24 hour waiting period).

[60] *Akron*, 462 U.S. at 422–25.

[61] *Id.* at 426.

[62] *Id.* at 427 (quoting Doe v. Bolton, 410 U.S. 179, 192 (1973) (companion case decided with *Roe*)).

[63] *Id.* at 431.

[64] *Id.* at 445.

[65] *Id.* at 444.

[66] *Id.* at 433–42.

Each was deemed either inapposite to the protection of maternal health,[67] or not sufficiently tailored to promoting the valid state interest.[68]

A few years later, in *Thornburgh v. American College of Obstetricians & Gynecologists*, the Supreme Court again reviewed a state abortion regulation containing an informed consent provision, and again deemed the regulation unconstitutional.[69] Upon review of Pennsylvania's Abortion Control Act, passed in 1982 as an unrelated amendment to a bill regulating paramilitary training,[70] the Court once again saw through the legislature's stated intent, declaring that the "[s]tates are not free, under the guise of protecting maternal health or potential life, to intimidate women into continuing pregnancies."[71] As in *Akron*, the Court emphasized that abortion was not so different than other medical procedures that the state could drastically veer from established medical practice regarding informed consent, particularly when its true purpose was to suppress the abortion right.[72] Furthermore, the Court concluded that the informed consent provision did not offer sufficient flexibility for the woman's individual circumstances and her physician's judgment.[73] For example, the Pennsylvania statute would require a rape victim "to hear gratuitous advice that an unidentifiable perpetrator is liable for support if she continues the pregnancy to term."[74] Such advice is not only "gratuitous," but may also be detrimental to the woman's ability to make an informed choice with regard to her particular circumstances.

In 1992, the Supreme Court took its first major step away from the liberality of *Roe* with its plurality decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[75] The Court affirmed what it called *Roe*'s "essential holding," which it described as having three parts.[76] The first part is "recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the

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[67] For example, requiring second trimester abortions to take place in a hospital is not necessary for patient health and safety, but may force a woman to wait longer to obtain an abortion due to reduced availability of facilities, thereby actually endangering her health. *Id.* at 436–37. Additionally, without an effective procedure for judicial bypass of parental consent for minors, a young woman may be forced to carry a pregnancy to term against her will and without regard for her health. *Id.* at 439–40.

[68] *Id.* at 443–44 (explaining that while the state can require informed consent for a medical procedure, including abortion, it may not interfere in the relationship between physician and patient).

[69] Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 759 (1986).

[70] *Id.* at 751.

[71] *Id.* at 759.

[72] *Id.* at 764 ("That the Commonwealth does not, and surely would not, compel similar disclosure of every possible peril of necessary surgery or of simple vaccination, reveals the anti-abortion character of the statute and its real purpose.").

[73] *Id.* at 763.

[74] *Id.*

[75] 505 U.S. 833 (1992).

[76] *Id.* at 846.

state."[77] The second part is "a confirmation of the state's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health."[78] The third part is "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 that may become a child."[79]

The important difference between *Roe* and *Casey* is the way in which the Court balances the interests of the woman and the state. *Roe* acknowledged that the state has legitimate and important interests from the outset of the pregnancy, but under its trimester framework these interests were not compelling from the outset of the pregnancy.[80] Because the interests were not compelling from the outset, the state could not regulate abortion based upon these interests from the outset.[81] It was forced to wait until later in the pregnancy to regulate, leaving a window of time during which a woman could choose and obtain an abortion free from unwarranted regulation by the state.[82] *Casey* rejected the trimester framework in its entirety as not an essential holding of *Roe* and unnecessary to ensuring that the woman's interests do not become "so subordinate to the state's interest in promoting fetal life that her choice exists in theory but not in fact."[83]

According to the Court in *Casey*, post-*Roe* decisions subjecting abortion regulations to a strict scrutiny standard requiring a compelling interest were inconsistent with *Roe*'s assertion that the state has an "important and legitimate interest in protecting the potentiality of human life."[84] The implied result was that the right to choose abortion was no longer protected as a fundamental right because to hold so would misbalance the interests of the woman and the state.[85] However, the plurality rejected Chief Justice Rehnquist's suggestion that the Court replace the central holding of *Roe* with a rational basis test, indicating that what the Court created is a test of intermediate scrutiny.[86]

Under the undue burden standard, the states are "free to enact laws to provide a reasonable framework for a woman to make a decision that has a profound and lasting meaning."[87] State regulation does not "reach into the heart of the liberty protected by the Due Process Clause" unless the state regulation "imposes an undue burden" on a woman's right to

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[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] Roe v. Wade, 410 U.S. 113, 163 (1973).
[81] *Id.*
[82] *Id.* at 163–64.
[83] *Casey*, 505 U.S. at 872.
[84] *Id.* at 871 (quoting *Roe*, 410 U.S. at 162).
[85] *Id.* at 873.
[86] *Id.* at 944–46 (Rehnquist, C.J., concurring in the judgment and dissenting in part).
[87] *Id.* at 873.

choose.[88] An undue burden is defined by the Court as a state regulation that has "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. A statute with this purpose 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."[89] The Court did not define purpose directly, nor give an example of what an improper purpose might be. It only defined a valid purpose, but even then, the definition is given in negative terms: a valid purpose is "one not designed to strike at the right itself," regardless of it having the incidental effect of making the procedure "more difficult or more expensive to procure."[90]

II. Doctrinal Background: What Is the Undue Burden Standard?

The abortion choice is a right of substantive due process because it is secured by the protection of liberty found within the Due Process Clause of the Fourteenth Amendment. Issues of substantive due process are reviewed under the same standards of review as equal protection questions: strict scrutiny, intermediate scrutiny, and rational basis.

The standard of strict scrutiny is the highest level of judicial review and is reserved for state action that infringes upon fundamental rights and liberties.[91] A state action that infringes upon a fundamental right will be held unconstitutional unless the government can show that the action is narrowly tailored to a compelling state interest.[92] This is an exacting standard which most legislation does not overcome.[93] The government has the burden of proving that that it cannot achieve its objective through any less restrictive means.[94]

Under the rational basis test, the lowest level of judicial review, the government must only show that the legislation is rationally related to a legitimate government interest.[95] "The government's objective need not be compelling or important, but just something that the government legitimately may do."[96] The stated purpose need not be the actual purpose of the law either, so long as it is rationally related in any way.[97] Rational basis review is applied to any regulation that is not subject to either strict

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[88] *Id.* at 874.

[89] *Id.* at 877.

[90] *Id.* at 874, 895.

[91] Milton R. Konvitz, Fundamental Rights: History of a Constitutional Doctrine 151 (2001).

[92] *Id.* at 153.

[93] *Id.* at 17.

[94] Erwin Chemerinsky, Constitutional Law: Principle and Policies 687 (4th ed. 2011).

[95] Konvitz, *supra* note 91, at 17.

[96] Chemerinsky, *supra* note 94, at 688.

[97] *Id.*

or intermediate scrutiny.[98] The burden of proof rests on the challenger of the regulation, making the standard very deferential to the government.[99] Most regulations reviewed under rational basis are upheld.[100]

Under a standard of intermediate scrutiny, the government action must be substantially related to an important government interest.[101] The means need not be absolutely necessary to the desired end, but must be substantially related.[102] The burden of proof rests on the government.[103]

By replacing the strict scrutiny standard under *Roe* with the undue burden standard, *Casey* implied that the right to choose abortion is not fundamental. By also rejecting a rational basis review, *Casey* promulgated a test of intermediate scrutiny.[104] However, without adequate application of the purpose prong, the standard dips lower to rational basis review because the purpose of the law is presumed legitimate. According to Erwin Chemerinsky, there are four questions before a court reviewing an infringement of individual liberties: "Is there a fundamental right; is the right infringed; is the infringement justified by a sufficient purpose; are the means sufficiently related to the end sought?"[105] He argues that the undue burden standard is inherently confusing and difficult to apply because it combines the last three questions into one analysis.[106] Furthermore, he points out that the test embodies an internal tension: the state cannot act with the purpose of placing an obstacle between the woman and the abortion choice but may act for the purpose of discouraging abortion and promoting childbirth.[107] The tension is that every law enacted for the purpose of obscuring the abortion right is also encouraging childbirth and preventing abortion. The rule itself is circular.[108]

The undue burden standard is a two-part test. The first part, the effects prong, consists of an evaluation of the specific segment of the population impacted by the regulation to see if the regulation presents a substantial obstacle to a significant fraction of those particular women.[109] If

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[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *Id.* at 687.

[102] *Id.*

[103] *Id.*

[104] *See supra* text accompanying notes 84–86.

[105] CHEMERINSKY, *supra* note 94, at 849.

[106] *Id.*

[107] *Id.* at 850.

[108] *Id.*

[109] Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 894 (1992) ("The analysis does not end with the one percent of women upon whom the statute operates; it begins there."). *But see id.* at 975–76 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) ("The spousal notice provision will admittedly be unnecessary in some circumstances, and possibly harmful in others, but 'the existence of particular cases in which a feature of a statute performs no function (or is even counter productive) ordinarily does not render the statute

so, the regulation creates an undue burden.[110] The purpose prong asks the court to look at the purpose behind the legislation, the legislative intent.[111] If the purpose of the legislation was to place a substantial obstacle in the path of the woman seeking an abortion it is an undue burden because its purpose is impermissible.[112]

A. *Judicial Review of Legislative Purpose*

The undue burden standard is not the first judicial test to require analysis of legislative purpose. A court reviews legislative purpose any time it reviews legislation for constitutionality, under any of the three standards of review. The difference is the extent to which the court reviews legislative purpose. Under a strict scrutiny standard, the legislation must be narrowly tailored to a compelling state interest, indicating that the court will undertake a more in depth analysis of legislative purpose. Under rational basis review the court's review of purpose is minimal but still valid because the legislation must be rationally related to a legitimate government interest. The legislative purpose must at least be plausible. Under a standard of intermediate scrutiny the court's review of legislative purpose will similarly be of intermediate depth. The legislative purpose must be substantially related to an important government interest.

Casey explicitly affirmed that the state may regulate in the interest of protecting maternal health and showing its respect for prenatal life. These interests are predetermined to be of important government interest. However, given the breadth of permissible purposes for the regulation of abortion—protecting maternal health and respect for prenatal life—a court can nearly always interpret the regulation to have a constitutional purpose if it so chooses. For example, the ultimate protection of prenatal life would be a ban on all abortions, but the Supreme Court has explicitly said that the legislature may not go this far.[113] The line between protecting prenatal life and preventing women from exercising their right to choose is not a bright line. *Casey* did not explicitly define a point at which legislation with the purpose of protecting prenatal life crosses the line to legislation with the purpose of preventing abortions in general. As Justice Scalia said in his dissent in *Casey*, "the joint opinion permits the State to pursue [its interest in potential human life] so long as it is not too successful."[114]

Courts are capable of and willing to review purpose in other contexts, such as racial discrimination by government actors, establishment

unconstitutional or even constitutionally suspect.'" (quoting Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 800 (1986) (White, J., dissenting))).

[110] *Id.* at 895.

[111] *Id.* at 877.

[112] *Id.*

[113] *Id.* at 846.

[114] *Id.* at 992 (Scalia, J., concurring in the judgment in part and dissenting in part).

clause cases, and free speech and free exercise restrictions.[115] But in the context of abortion regulations, legislative purpose is ignored, glossed over without any depth, or conflated with the analysis of legislative effect, despite purpose being an explicit part of the undue burden standard. The result in many cases has been a demotion of the purpose prong to a rational basis review so deferential to the legislature that only the most blatantly improper purpose will be acknowledged. Given how frequently a possible improper legislative purpose is discussed at length by a dissenting opinion but not by the majority opinion, it seems clear that the courts are not oblivious to purpose.[116] While the court is required to show some deference to the legislatures' proffered purpose, it need not accept it if it is a "mere 'sham.'"[117] Furthermore, in abortion cases the Court has acknowledged that it may look to legislative evidence in the same manner as it does in other contexts, including "the language of the challenged act, its legislative history, the social and historical context of the legislation, or other legislation concerning the same subject matter as the challenged statute."[118]

While judicial review of legislative purpose is common within constitutional doctrine, its very nature leads to some difficulties, including discerning the difference between the intent of the legislature as a whole and the motivations of one individual legislator, the difficulty in proving purpose more generally, and the potential futility when a court may overrule a law based on an impermissible purpose only to see the same law passed again for a potentially permissible one.[119] The first two difficulties can be described as the problem of ascertainability, and the third, the problem of futility.[120] When the Supreme Court in *United States v.*

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[115] *See* Calvin Massey, *The Role of Governmental Purpose in Constitutional Judicial Review*, 59 S.C. L. REV. 1, 6–10 (2007) (arguing that the analysis of legislative purpose is inherent within constitutional adjudication and discussing the particular areas within which it has been most relevant, including issues of racial discrimination by government actors, establishment clause cases, and free speech and free exercise restrictions).

[116] *See infra* notes 264–305 and accompanying text.

[117] Okpalobi v. Foster, 190 F.3d 337, 354 (5th Cir. 1999) (quoting Edwards v. Aguillard, 482 U.S. 578, 586–87 (1987)). When reviewing a facially neutral law for evidence of racial discrimination the court looks at the law on its face, but may also look to the history surrounding the government action, as well as the relevant legislative or administrative history. If an impermissible purpose is discernable, the court no longer owes deference to the legislature and reviews under a heightened level of scrutiny. *See* CHEMERINSKY, *supra* note 94, at 733–34.

[118] *See, e.g.*, *Okpalobi*, 190 F.3d at 354 (summarizing Supreme Court precedent regarding inquiries into legislative evidence).

[119] *See* Gordon G. Young, *Justifying Motive Analysis in Judicial Review*, 17 WM. & MARY BILL RTS. J. 191, 196 (2008) (arguing that in addition to the traditionally recognized issues of ascertainability and futility, purpose analysis presents philosophical and moral concerns regarding the proper role of the courts and the legislature, and justifying the analysis of purpose on a theory of consequentialism).

[120] Paul Brest, Palmer v. Thompson*: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 119, 125; John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L. J. 1205, 1275, 1279 (1970).

O'Brien[121] quotably described "inquiries into congressional motives or purposes [as] a hazardous matter," it was referring to problems of both ascertainability and futility.[122] The Court also described, as a "familiar principle of constitutional law," that it would "not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."[123] However, this strong assertion by the Court goes too far. The Supreme Court had struck down otherwise constitutional legislation before *O'Brien*[124] and other courts have done so since.[125] Furthermore, the Court continues to review legislative purpose with regard to the three levels of judicial review and has since developed explicit tests of purpose in the constitutional arena, such as the undue burden standard and its purpose prong. While it may not necessarily be true that courts never invalidate a statute based on impermissible purpose, it is true that purpose inquiries enter into potentially hazardous territory because of problems of ascertainability and futility.

The problem of ascertainability is essentially an evidentiary issue. First, a court may have difficulty determining whether the improper purpose was the "sole or dominant" motivation.[126] Furthermore, it is not clear whether a "subordinate" impermissible motive is enough to trigger a finding of unconstitutionality.[127] Paul Brest, however, argues that such questions should not prevent a court from conducting an inquiry of purpose because "an illicit motive may have been 'subordinate' and yet determined the outcome of the decision," which the court will not know without first conducting the inquiry.[128] Second, because analysis of purpose inherently involves an inquiry into mental states, whether of a particular legislator or the "collective" mental state of the entire legislature,

[121] 391 U.S. 367, 383 (1968) (Defendant challenged his conviction for burning his selective service (draft) card as a violation of his right to "symbolic" free speech, arguing that Congress enacted the law with the purpose of restricting free speech.).

[122] *Id.* at 383–84. ("What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork. We decline to void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a 'wiser' speech about it." (internal quotation marks for emphasis in original)).

[123] *Id.* at 383.

[124] *See* Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960) (overturning otherwise constitutional legislation for its impermissible purpose of racial discrimination based on the logical inference drawn from a redrawing of the city boundary from a four sided figure to a twenty-eight sided figure that effectively eliminated all black voters).

[125] *See* Jane L. v. Bangerter, 102 F.3d 1112, 1113 (10th Cir. 1996) (finding that a Utah abortion regulation was passed for an impermissible purpose because it was passed as an explicit test of *Roe* as demonstrated by the creation of a state abortion litigation fund).

[126] Brest, *supra* note 120, at 119.

[127] *Id.*

[128] *Id.*

conclusive evidence may be elusive.[129] Though elusive, and potentially hazardous, the purpose inquiry is not impossible, and difficulty should not be a justification for its abrogation. There will likely be both circumstantial evidence and direct evidence that a court can weigh in making its determination.[130]

The most likely direct evidence of an impermissible purpose are the statements of individual legislators, either during the judicial proceeding or during the lawmaking process.[131] While it is plausible that a legislator may concede to an impermissible motive during the course of litigation, it is also plausible that a legislator may overtly lie about his motive or conceal it in some way.[132] This may be in an effort to protect the law or an act of self-preservation. An accusation of improper motive questions the integrity of the legislator and may be viewed as "tantamount to an accusation that the decision maker has violated his constitutional oath of office."[133] Furthermore, a member of the legislature may refuse to testify based on the privilege afforded by the Speech and Debate Clause.[134] More commonly considered, and of more practical significance, are statements made during the legislative process, or the legislative history.[135] Courts commonly review legislative history when analyzing an issue of statutory interpretation, but the use of legislative history in the context of a purpose inquiry presents a potential issue: whether a court may infer the purpose of the entire legislative body from the stated motives of individuals within that body.[136] It is necessary to legislative efficiency that some members will be more closely involved with some bills than others. A legislator who sponsors a bill or who worked on drafting a bill may be more likely to speak regarding the bill, as evidenced by the legislative history.[137] This form of delegation is inherent in the lawmaking process.

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[129] *Id.* at 120; *see also* Young, *supra* note 119, at 193 (analogizing the legislative purpose analysis to an inquiry into mental state under tort and criminal law).

[130] Brest, *supra* note 120, at 130 (arguing that a court should weigh the evidence available and make its ruling based on a clear and convincing standard).

[131] *Id.* at 124.

[132] *Id.*; *see also* Mathilde Cohen, *Sincerity and Reason-Giving: When May Decision Makers Lie?*, 59 DEPAUL L. REV. 1091, 1093 (2010) (arguing that decision maker insincerity is common and in some cases expected, such as when a legislator need not provide a reason but volunteers one, or when the decision given is "attributed to a metaphorical 'it' that is really a 'they'").

[133] Brest, *supra* note 120, at 129.

[134] CHEMERINSKY, *supra* note 94, at 734.

[135] Brest, *supra* note 120, at 124.

[136] *See* United States v. O'Brien, 39 U.S. 367, 383–84 (1968) ("When the issue is simply the interpretation of legislation, the Court will look to statements made by legislators for guidance" because there is less risk. In the context of a possible invalidation, the Court is concerned that "[w]hat motivates one legislator . . . is not necessarily what motivates scores of others.").

[137] Brest, *supra* note 120, at 124 (describing the theory that only certain legislators have the authority to speak on certain issues, unofficially at least, as a

However, other legislators cannot be assumed to have adopted the views of the speaking legislator by their silence.[138] Nonetheless, legislative history may be the most direct evidence of legislative purpose available and should not be discredited because of issues of collective purpose versus individual motives. Rather, a court should compromise and view the statements of individual legislators as supportive but not dispositive.[139]

Circumstantial evidence that may be available includes the actual content of the law and the context in which it was passed. The content of the law includes its text, excluding any statement of purpose that would be considered direct evidence, and inferences that can be drawn from that text. For example, in *Gomillion v. Lightfoot*, the Alabama legislature had redrawn the city boundary of Tuskegee, Alabama from a simple square into a complex 28-sided figure, effectively excluding all but four or five of the cities' black residents from voting in city elections, but none of the white residents, by placing them outside the city boundary.[140] There could be no other explanation for such exclusion through such a complex redrawing than racially motivated discrimination. The Supreme Court did not need to know how the law actually worked in practice, because it inferred from its text a "statistical pattern that [could] be explained only by discriminatory purpose."[141]

The context of the law includes the "juxtaposition of a decision with some prior event or sequence of events that [may] bear on the inference of illicit motivation."[142] This includes the situation in which a legislature passes a law with an impermissible purpose and the court overturns the law based on such purpose, only to have the legislature subsequently pass an effectively identical law with evidence of a proper purpose.[143] This situation presents the problem of futility; the idea that striking a law based on an impermissible purpose still allows the legislature to pass the law with new evidence, creating the same effect and making the efforts of the court futile.[144] The problem of futility may be a real dilemma, but it need not prevent a court from engaging in a purpose inquiry. As Paul Brest explains, a situation invoking the problem of futility may be used as contextual evidence if the new law is also challenged.[145] Courts can compare

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fiction, indicating that a legislator does not adopt the views of another by silence because he or she has authority to speak).

[138] *Id.*

[139] *Id.*

[140] Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960).

[141] CHEMERINSKY, *supra* note 94, at 733.

[142] Brest, *supra* note 120, at 122.

[143] *Id.*

[144] *Id.* at 125 ("There is an element of futility in a judicial attempt to invalidate a law because of the bad motives of its supporters. If the law is struck down for this reason, rather than because of its facial content of effect, it would presumably be valid as soon as the legislature or other relevant governing board repassed it for different reasons." (quoting Palmer v. Thomson, 403 U.S. 217, 225 (1971))).

[145] *Id.* at 123.

the two very similar laws and decide whether the "sequence of events may thus support the inference that the decision maker's objective was to do covertly that which he was forbidden to do overtly."[146] After having the law invalidated for an impermissible purpose, the decision maker may be encouraged to lie or otherwise conceal his motives, but a court could confront such a situation with the assumption that the legislature maintained the same general purpose as it did previously.[147] The court could then shift the burden onto the legislature to rebut the presumption with evidence of "a material change of circumstances, or the passage of time accompanied by a change of community attitudes," or other evidence that "will be persuasive of the decision maker's good faith."[148]

While the practical problems of purpose analysis are potentially present in all cases involving the judicial review of legislative purpose, purpose analysis under the undue burden standard presents an additional issue. In cases regarding discrimination, such as racial or gender discrimination, the improper legislative purpose is often clear. The legislature may not discriminate against a protected class of persons without a compelling justification. The undue burden standard, on the other hand, does not clearly define what an improper purpose might be if one existed. Instead, abortion jurisprudence proceeds by enunciating various proper legislative purposes, such as protecting maternal health or the respect for prenatal life. This Comment does not seek to solve the practical issues of purpose analysis, or even make a pronouncement of whether purpose analysis is an effective judicial tool in a more general sense. It takes the problems inherent in legislative purpose analysis as they are. Rather, it argues that in the particular context of abortion jurisprudence and the undue burden standard, judicial inquiry into legislative purpose has been an ineffective tool for protecting women's right to choose because the permissible purposes enunciated by the Supreme Court have become so all-encompassing that a proper legislative purpose is practically assumed.

III. Analysis of the Purpose Prong by the Supreme Court

The first opportunity the Supreme Court took to assess the purpose prong was its 1997 decision in *Mazurek v. Armstrong*.[149] However, the decision was limited to the evidence required for a preliminary injunction and offered little practical guidance.[150] In *Mazurek*, a group of physicians and a physician's assistant challenged a Montana law restricting performance of abortions to physicians only.[151] Respondent Susan Cahill, the

[146] *Id.*
[147] *Id.* at 126.
[148] *Id.*
[149] 520 U.S. 967 (1997).
[150] *Id.* at 969–71.
[151] *Id.*

lone physician's assistant challenging the law, was also the only non-physician licensed to perform abortions in the state.[152]

In denying the preliminary injunction, the lower court cited *Casey*'s holding that the Pennsylvania law requiring that certain information be provided by a doctor would not prevent a woman from obtaining an abortion and was therefore not an undue burden on the right to choose.[153] The lower court had taken *Casey* on its face, declaring that the law must be constitutional because the Court in *Casey* had declared a facially similar law constitutional, rather than actually applying the undue burden analysis to the law at issue.[154] The court of appeals vacated and remanded the decision, finding that a determination of purpose requires an "assessment of the totality of the circumstances."[155] The Supreme Court disagreed with the possibility of an impermissible purpose when there had been no impermissible effect, explaining that it would "not assume unconstitutional legislative intent even when statutes produce harmful results; much less . . . when the results are harmless."[156] The Court rejected the respondent's arguments that lack of a proven health benefit indicates an illicit purpose and that an anti-abortion group's involvement in the drafting of the legislation showed that the law's purpose must have been improper.[157] Furthermore, the Court held that targeting a specific provider is not an impermissible purpose because loss of one provider will not affect women's access in a more general sense.[158] The Court did not, and has not since, addressed how it would interpret a situation in which a piece of legislation targeted a single provider when that provider is the only provider in the given area. For example, the Mississippi legislature recently enacted legislation that could potentially close the only remaining abortion clinic within the state.[159] Litigation of the issue is ongoing.[160]

The dissent in *Mazurek* evaluated the purpose prong in a more detailed manner than the majority.[161] According to the dissent, it was clear that because only one person was affected by the legislation, and as she

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[152] *Id.*

[153] Armstrong v. Mazurek, 906 F. Supp. 561, 567 (1995) (citing Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 885 (1992)).

[154] *Id.*

[155] Armstrong v. Mazurek, 94 F.3d 566, 567–68 (9th Cir. 1996).

[156] *Mazurek*, 520 U.S. at 972.

[157] *Id.* at 973.

[158] *Id.*

[159] *Judge Stops Closure of Mississippi's Only Abortion Clinic for Now*, NEW YORK DAILY NEWS (July 2, 2012), *available at* http://www.nydailynews.com/news/national/judge-stops-closure-mississippi-abortion-clinic-article-1.1106196.

[160] Jackson Women's Health Org. v. Currier, No. 3:12cv436–DPJ–FKB, 2013 WL 1624365 (S.D. Miss. Apr. 15, 2013) (allowing clinic to remain open by granting temporary injunction to prevent implementation of HB 1390).

[161] *Mazurek*, 520 U.S. at 977 (Stevens, J., joined by Ginsburg, J., and Breyer, J., dissenting).

was mentioned in the legislative hearings by name, the legislation was directed at her personally.[162] Furthermore, the other two provisions of the bill, a requirement that abortion providers have hospital admissions privileges and a ban on clinic advertising, were just re-enactments of earlier legislation already deemed unconstitutional. Their unconstitutionality was actually conceded during the litigation.[163] By re-enacting legislative provisions already deemed unconstitutional, the legislature was clearly disregarding the earlier ruling and testing the Court, but also hiding its intent to enact legislation that stripped a particular individual of the right to practice her profession within that state.[164] The dissent concluded that "[w]hen one looks to the totality of the circumstances surrounding the legislation, there is evidence from which one could conclude that the legislature's predominant motive was to make abortion more difficult."[165]

However, under *Casey*, legislation which has the effect of making an abortion more difficult to obtain, such as through a cost increase, does not amount to a substantial obstacle and is therefore not unconstitutionally restrictive.[166] A legislature may not enact legislation with the purpose of creating an undue burden on women's right to choose, but *Casey* provided that the state may enact legislation to ensure that a woman's choice is well informed and may go so far as to try and persuade the woman to choose childbirth over abortion.[167] But, must it act with the purpose of one of the predetermined interests, respect for prenatal life and protecting maternal health, including through the regulation of the medical profession, or may it also act in another interest? Or may the legislature also act with the purpose of making abortions more difficult to obtain, or in this case, eliminating a particular provider, so long as the resulting difficulty does not amount to a substantial obstacle?

In this early opinion, the Court ties the purpose prong and the effects prong together by holding that it will be even less likely to find unconstitutional legislative intent when the results are harmless than when they are not so.[168] The Court does not say that a finding of impermissible purpose *requires* harm, but rather, that a finding of harm will make a finding of impermissible purpose far more likely. In other words, a statute that has the effect of imposing an undue burden is far more likely to have had the purpose of imposing an undue burden. Consequently, a legislature may act with the purpose of making abortions more difficult to obtain, an arguably impermissible purpose, so long as the difficulty does not arise to the level of a substantial obstacle, and the court will be far less likely to find an impermissible purpose because there is no im-

[162] *Id.* at 978.
[163] *Id.* at 978–79.
[164] *Id.*
[165] *Id.* at 980.
[166] Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 874 (1992).
[167] *Id.* at 878.
[168] *Mazurek*, 520 U.S. at 972.

permissible effect. This makes the purpose prong effectively useless as a protection of women's right to choose. This could have been the end of the purpose prong, but this has not been the only interpretation of the Supreme Court's holding; some lower courts have attempted to limit *Mazurek* to its facts.[169]

The Supreme Court did not offer additional guidance regarding the purpose prong until *Stenberg v. Carhart*,[170] three years later. In *Stenberg*, the Court reviewed the Nebraska ban of the so-called "partial-birth" abortion procedure medically known as a dilation and extraction (D&E).[171] This case was unique because the legislation actually banned an entire method of abortion, rather than just regulating the procedure in a more general manner.[172] The Court found the ban unconstitutional for its failure to differentiate between the traditional D&E procedure and intact D&E.[173] This placed an undue burden on a woman's right to choose because her doctor may not know exactly which procedure is criminalized by the Act, making it unconstitutionally vague. Furthermore, the regulation lacked an exception for the health of the mother post-viability, as is required under both *Roe* and *Casey*.[174]

Discussion of the purpose prong was not a primary component of the Court's ruling but played heavily into the concurring opinion of Justice Ginsburg and the dissenting opinion of Justice Thomas.[175]

Justice Ginsburg characterized the law as one designed to "chip away at the private choice shielded by *Roe v. Wade*."[176] She argued that the illicit purpose of the law was clear because the law did not actually protect fetal life or maternal health.[177] It "does not save any fetus from destruction, for it targets only 'a method of performing abortion.' Nor does the statute seek to protect the lives or health of pregnant women."[178]

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[169] *See* Okpalobi v. Foster, 244 F.3d 405 (5th Cir. 2001) (discussed *infra* notes 247–262 and accompanying text).

[170] 530 U.S. 914 (2000).

[171] The D&E procedure is used for abortions that take place later in the pregnancy. They are not as common as early term abortions and are frequently pursued due to a medical issue regarding either the mother or fetus. During a traditional D&E procedure the physician removes the fetal tissue in portions. It may take many passes to ensure that no tissue remains. There is an increased risk of scarring, puncture, hemorrhage, and infection. During an intact D&E the physician removes the fetus in one pass, either terminating it before removal or during removal. It may pose fewer risks to a woman's health. *Id.* at 924–30.

[172] *Id.* at 923.

[173] *Id.* at 940.

[174] *Id.* at 937. *See* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 879 (1992); Roe v. Wade, 410 U.S. 113, 163–64 (1973).

[175] *Stenberg*, 530 U.S. at 951 (Ginsburg, J., concurring); *id.* at 980 (Thomas, J., dissenting).

[176] *Id.* at 952 (Ginsburg, J., concurring).

[177] *Id.*

[178] *Id.* at 951 (quoting majority opinion).

In his dissent, Justice Thomas characterized the law as expressing the state's "profound respect for the life of the unborn" by prohibiting a procedure that by consensus is considered gruesome.[179] His opinion recounts a nurse's testimony regarding the gruesome nature of the procedure and then plainly states that "[t]he question whether States have a legitimate interest in banning the procedure does not require additional authority. In a civilized society, the answer is too obvious, and the contrary arguments too offensive, to merit further discussion."[180] Justice Thomas does not adequately explain how banning the safer of two alternative procedures available for a late-term abortion shows respect for fetal life when the end result will be the same with either procedure, the termination of the pregnancy. He attempted to refute Justice Ginsburg's claim that the law was drafted for an impermissible purpose by noting that 30 other states have enacted similar legislation and that the measure was approved with almost no contest by the Nebraska Legislature.[181] However, it does not require additional authority to show that many legislatures enacting the same impermissible legislation does not necessarily make it permissible legislation. This argument misconstrues the purpose prong as a test for national consensus. If a law is passed for the explicit purpose of placing a substantial obstacle in the path of the woman seeking an abortion, it is still passed for an impermissible purpose, creating an undue burden, even if no legislator contested the law and the majority of other state legislatures have passed similar laws. The result of consensus is not that the purpose becomes permissible. First, the purpose analysis is based upon the reason the law was passed, not specifically what the law does. The analysis is unique to each piece of legislation. Second, an unconstitutional law does not become constitutional just because the majority of states enact a version of it. This only means that the majority of states have enacted an unconstitutional law.

Six years later, in *Ayotte v. Planned Parenthood of Northern New England*,[182] the Court disarmed the purpose prong further by indicating its hostility toward facial invalidations of abortion regulations.[183] The Court was reviewing a statute that required a physician performing an abortion on a minor to wait 48 hours after delivery of a notice to the parents before performing the procedure.[184] The statute did not contain an exception for cases of health or life threatening emergencies.[185] The Supreme Court agreed with the lower court that applying the statute in cases of emergency would be unconstitutional, but reversed the lower court rul-

[179] *Id.* at 982 (Thomas, J., dissenting) (quoting *Casey*, 505 U.S. at 877) (internal quotation marks omitted).

[180] *Id.* at 1007–08.

[181] *Id.* at 1009 n.19.

[182] 546 U.S. 320 (2006).

[183] *Id.* at 323.

[184] *Id.* at 323–24.

[185] *Id.* at 324.

ing overturning the entire statute, instead explaining that the "normal rule" is for a partial invalidation rather than facial invalidation.[186] There did not appear to be any question regarding the permissibility of the statute's purpose, but by encouraging partial rather than facial invalidations, the Court indicated that effect rather than purpose is the more important factor. If a statute was enacted for an impermissible purpose it cannot be saved; it must be invalidated on its face.[187] Contrary to facial challenges, as-applied challenges avoid analysis of legislative purpose entirely because the court assumes that the statute is generally valid, just not as applied. Furthermore, this holding is contrary to the holding just six years prior in *Stenberg v. Carhart*, in which the Court refused to re-write the statute for the legislature in order to differentiate between the two methods of D&E.[188]

If the courts are supposed to dismantle as little of an unconstitutional statute as possible to make it constitutional, the legislatures enacting such legislation face less risk when enacting legislation contrary to established precedent or explicitly to test established precedent.[189] Rather than having the entire law invalidated, the legislature gets the benefit of the court editing it for them without penalty. A preference for partial invalidation, particularly in the context of something as contested as abortion, encourages legislatures to push beyond the boundaries delineated by the Court, perpetuating the battle and chipping away at the boundaries of women's right to choose.

In 2006, the Court reviewed a case in which a legislature did exactly this. When Congress passed the Partial-Birth Abortion Ban Act of 2003, it mimicked the Nebraska law declared unconstitutional only a few years before in *Stenberg v. Carhart*.[190] The Court had invalidated the Nebraska law in *Stenberg* for unconstitutional vagueness and failure to include an exception for the life and health of the mother, not because the law enacted a ban on a particular procedure previability.[191] Congress made an effort to alleviate the vagueness problems found in the Nebraska law by differentiating between a traditional D&E and an intact D&E based on

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[186] *Id.* at 331.

[187] *See* Note, *After* Ayotte: *The Need to Defend Abortion Rights with Renewed "Purpose,"* 119 HARV. L. REV. 2552, 2565 (2006) (explaining that the purpose prong "justifies invalidating abortion restrictions in their entirety when they even partially run counter to clearly established precedent"); *see also* CHEMERINSKY, *supra* note 94, at 727.

[188] Stenberg v. Carhart, 530 U.S. 914, 944–45 (2000).

[189] Partial invalidation remedies entice the legislature to draft legislation with little regard for constitutional limits, imposing costs on the people for personal or political reasons with little or no regulatory benefit. *See* Note, *After* Ayotte, *supra* note 187, at 2573.

[190] The Federal Partial-Birth Abortion Ban Act of 2003 directly referred to the Supreme Court's decision in *Stenberg* in the "recitations preceding its operative provisions," and although Congress made additional legislative findings, the Act was functionally similar. *See* Gonzales v. Carhart, 550 U.S. 124, 132–34 (2007).

[191] *Stenberg*, 530 U.S. at 931, 938, 944–45.

"anatomical landmarks."[192] However, like the Nebraska legislature, Congress did not include an exception for the life or health of the mother, as was required by *Stenberg*.[193] Congress acted in disregard of the Court's recent holding, but the Court nonetheless found the law to be constitutional.[194] The purpose of the Act, as described by Congress and the Court, was to express "respect for the dignity of human life" and to protect the integrity and ethics of the medical profession.[195] Although *Casey* did not explicitly conclude that the state has as an interest in protecting the integrity and ethics of the medical profession, only regulation of the profession of medicine more generally, the Court did not question whether ethical regulation was within a permissible regulatory interest.[196]

The federal act differs from the Nebraska law at issue in *Stenberg* in that it differentiates between the two D&E procedures by including specific anatomical landmarks, which if passed indicate an intact D&E, protecting the physician from fear of prosecution by including a scienter requirement, thereby alleviating the issue of unconstitutional vagueness.[197] The Court concluded that a health exception is not necessary because the traditional D&E procedure is still available and, according to congressional findings, the intact D&E is never medically necessary.[198] Most importantly, the Court held that when reviewing issues of medical uncertainty, such as whether the intact D&E is ever medically necessary, it will defer to the findings of the legislature.[199]

The dissent, written by Justice Ginsburg and joined by Justices Stevens, Souter, and Breyer, recognizes the exceptional leap made by the majority opinion:

> Today's decision is alarming. It refuses to take *Casey* and *Stenberg* seriously. It tolerates, indeed applauds, federal intervention to ban a nationwide procedure found necessary and proper in certain cases by the American College of Obstetricians and Gynecologists. It blurs the line, firmly drawn in *Casey*, between previability and postviability abortions. And, for the first time since *Roe*, the Court blesses a prohibition with no exception safeguarding a woman's health.[200]

[192] *Gonzales*, 550 U.S. at 148, 158 (internal quotation marks omitted); *Stenberg*, 530 U.S. at 930.

[193] *Stenberg*, 530 U.S. at 931; Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 (2006).

[194] *Gonzales*, 550 U.S. at 147–48.

[195] *Id.* at 157.

[196] Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 884–85 (1992) ("[T]he Constitution gives the States broad latitude to decide that particular functions may be performed only by licensed professionals."); *see also Gonzales*, 550 U.S. at 157.

[197] *Gonzales*, 550 U.S. at 154–56.

[198] *Id.* at 165–67.

[199] *Id.*

[200] *Id.* at 170–71 (Ginsburg, J., dissenting).

With regard to the purpose of the Act, the dissent shows that the congressional medical findings were one-sided and based on a moral conclusion, not the protection of women's health.[201] This opens the door for regulation far beyond what is necessary to inform a woman's choice because the Court upheld an actual previability *ban* for the first time, with near complete deference to the legislature.

Gonzales yanked out what teeth remained in the purpose prong by allowing for regulation in the interest of morality based upon information that the Court will not question. Justice Kennedy accepted Congress' concern that intact D&E resembles infanticide and will therefore "further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life" as an acceptable reason for legislation.[202] The Court found that Congress was reasonable in its choice to ban intact D&E procedures and not traditional D&E procedures because the intact D&E "undermines the public's perception of the appropriate role of a physician during the delivery process, and perverts a process during which life is brought into the world."[203] Furthermore, the medical profession may "find different and less shocking methods to abort the fetus in the second trimester, thereby accommodating legislative demand."[204] This final statement is particularly telling because it demonstrates that the Supreme Court is in fact approving moral disgust as a proper basis for regulation of abortion because a "less shocking method" would be acceptable. In its simplest form, the decision allows the state to regulate abortion, and even ban a particular procedure, by simply asserting that it is morally wrong, or simply repulsive, and getting a doctor to support their opinion with scientific "facts." The state may now regulate in the interest of showing its respect for prenatal life, protecting maternal health, regulating the medical profession (including with regard to medical ethics), and imposing its own version of morality. After *Gonzales*, one will be hard-pressed to articulate an impermissible legislative purpose, except possibly the explicit purpose of banning all abortions.

Gonzales further weakened the ability of the undue burden standard to protect the right to choose by advocating judicial deference to legislative findings, blurring the line of viability, and placing respect for prenatal life before the protection of maternal health. But the decision also weakened the undue burden standard by taking the stated intent of Congress at face value, declining to investigate what was arguably an unconstitutionally impermissible purpose. First, the Act was passed in blatant disregard of the Court's holding in *Stenberg*, as noted by Justice Ginsburg's dissent, but not the majority opinion.[205] Second, the legislative history behind the Act demonstrates that its purpose was not to protect pre-

[201] *Id.* at 180.
[202] *Id.* at 157.
[203] *Id.* at 160 (internal quotation marks and citation omitted).
[204] *Id.*
[205] *Id.* at 173–75 (Ginsburg J., dissenting).

natal life or women's health, but rather, part of "the anti-abortion movement's long-term strategy of instrumentalism, restricting abortion step by step as part of the larger battle to turn the public opinion against *Roe*."[206]

Shortly after *Gonzales* was decided, author Caroline Burnett conducted an analysis of the unconstitutional purpose behind the Federal Partial-Birth Abortion Ban Act of 2003.[207] Looking at the legislative history and language of the Act she concluded that the stated purposes of the Act were insincere and unconstitutional.[208]

First, the statement of Ken Connor, then president of the socially conservative Family Research Council indicates that the bill was in line with its goal of incremental destruction of *Roe*.[209] He said, "[w]ith this bill . . . we are beginning to dismantle, brick by brick, the deadly edifice created by *Roe v. Wade*."[210]

Second, the statement of sponsoring senator Rick Santorum indicates that the bill was intentionally written without a health exception, because the health exception would prevent the rule from having any effect.[211] Typically, women pursue late-term abortions, the only time during which either version of the D&E procedure is used, when faced with a health concern, either their own or their fetus's.[212] A health exception would allow most women who would normally seek an intact D&E procedure to procure one. As Senator Santorum said, "health is an exception that swallows the rule. . . . bars the bill, . . . stops the bill from having any effect."[213] From the perspective of the bill's sponsor, the purpose of the bill was to prevent women from being able to procure an intact D&E procedure. This intent can be described no other way than a substantial obstacle as envisioned by *Casey*. The only difference is that the obstacle is between a woman and her ability to choose a particular procedure, not her ability to choose abortion in the more general sense. This is an important difference when a particular procedure, such as intact D&E as opposed to traditional D&E, may pose fewer risks to the woman's life and health.

Third, the statement of then President, George W. Bush, who signed the bill into law after the former President, Bill Clinton, refused, indicates that the purpose of the bill was simply to reduce the number of

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[206] Caroline Burnett, *Dismantling* Roe *Brick by Brick–The Unconstitutional Purpose Behind the Federal Partial-Birth Abortion Act of 2003*, 42 U.S.F. L. REV. 227, 251 (2007).

[207] *Id.*

[208] *Id.*

[209] *Id.*

[210] *Id.* (alternation in original) (quoting Ruth Marcus, *'Partial-birth,' Partial Truths*, WASH. POST, June 4, 2003, at A27).

[211] *Id.* at 252.

[212] *Id.* at 227–29.

[213] *Id.* at 252 (quoting 149 CONG. REC. S12,942 (daily ed. Oct. 21, 2003) (statement of Sen. Santorum)).

abortions.[214] President Bush said that "[w]e need to ban partial-birth abortions . . . [and doing so] would be a positive step toward reducing the number of abortions in America."[215]

Fourth, an amendment to the bill that would have explicitly reaffirmed *Roe* was quickly rejected, demonstrating that the intent of the bill was to undermine rather than abide by the principles of *Roe*.[216] Senator Santorum echoed this contention when explaining his support for the ban by stating, "*Roe v. Wade* is, according to the Court, how they will decide abortion cases. I vehemently disagree with them and will continue to fight on this floor [until the decision is overturned]."[217]

Fifth, the language of the federal ban very closely resembles the language of the Nebraska ban declared unconstitutional. The differences in language and findings of fact are superficial. Both laws intend the same result; to outlaw intact D&E procedures. Despite Supreme Court precedent to the contrary, all that Congress did was "adopt its own conflicting legislative findings" in order to ignore a judicial decision that it disagreed with.[218] Furthermore, the language used in support of the legislative goal was needlessly emotional and gruesome, an attempt to garner support for its view. To quote Burnett's analysis, "You can't win an argument [in which one side is] talking about puncturing a hole in a baby's head."[219]

In *Gonzales*, the Court made no substantial mention of legislative history, regardless of its obvious existence and implications. We cannot know whether these statements of individual lawmakers and politicians would have been considered sufficient evidence of an impermissible purpose because the Court did not discuss them. If we knew that the

[214] President Clinton vetoed the bill twice, claiming that he could not "look at a woman . . . and tell her that I'm signing a law which will prevent her from ever having another child." Clinton was presumably referring to the greater health risks, including uterine puncture and subsequent infertility, during a traditional D&E procedure. *Id.* at 251 (alteration in original) (citation omitted).

[215] *Id.* at 252 (alteration in original) (quoting *The 2000 Campaign: Transcript of Debate Between Vice President Gore and Governor Bush*, N.Y. TIMES, Oct. 4, 2000, at A31). To be clear, like President Bush and others, I believe that reducing the number of abortions is a positive goal. However, this goal should not be pursued by limiting women's access to abortion or limiting the freedom to choose a particular method of abortion, as President Bush suggested. Rather, we should work to reduce the number of abortions by reducing the number of unintended pregnancies. This can be accomplished with methods that do not limit women's reproductive liberty, such as improving access to contraceptives and encouraging comprehensive sex education.

[216] The language of the proposed amendment was as follows: "It is the sense of the Senate that– (1) the decision of the Supreme Court in *Roe v. Wade* was appropriate and secures an important constitutional right; and (2) such decision should not be overturned." *Id.* 253 (quoting 149 CONG. REC. S11,604 (daily ed. Sep. 17, 2003) (statement of Sen. Feinstein)).

[217] *Id.* at 254 (quoting 149 CONG. REC. S12,943 (daily ed. Oct. 21, 2003) (statement of Sen. Santorum)).

[218] *Id.* at 257 (citing United States v. Morrison, 529 U.S. 598, 616 (2000)).

[219] *Id.* at 255 (quoting Roy Rivenburg, *Partial Truths*, L.A. TIMES, Apr. 2, 1997, at E8 (quoting interviewee)).

Court was aware of each statement it could be implied that they were not sufficient evidence by the lack of analysis. Furthermore, while the evidence from Caroline Burnett's analysis may be telling from a layperson's perspective, for purposes of judicial review it raises an additional issue of its own. Each statement offered as evidence of impermissible purpose is the statement of an individual not the entire legislature. To find that a statement of an individual is representative of the entire legislature conflates the motivation of one with general legislative intent, raising the issue of ascertainability.[220] The Federal Partial-Birth Abortion Act of 2003 did contain an official statement of congressional purpose, which the Court reviewed and approved.[221] Purpose statements may not always be accurate, but they may avoid problems of ascertainability because they represent direct evidence of intent, whether truthful or not. Furthermore, it may be irrelevant whether the stated congressional purpose was permissible or not because the Court approved a new regulatory interest—morality.

Another author suggests that the principle problem in *Gonzales*, and the analysis of purpose under the undue burden standard, is that it begins with the presumption that prenatal life is inherently valuable from a moral perspective.[222] Although the Court has explicitly declined to answer the question of when life begins,[223] it based its decision in *Gonzales* at least in part upon a moral conclusion regarding the relationship between a mother and child. The Court recognized the ultimate expression of "respect for human life" within the bond between mother and child.[224] It felt the need, although patriarchal, to protect women from themselves because "it seems unexceptional to conclude some women come to regret their choice to abort the infant life they once created and sustained."[225] Because prenatal life is presumed to have a moral value, the Court justifies its unsupported conclusion that abortion harms women.[226] But if the purpose prong "presupposes the existence of a valuable fetal 'life,' it is likely that any legislation aimed at protecting that 'life' will pass constitu-

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[220] *See supra* notes 126–148 and accompanying text.

[221] Gonzales v. Carhart, 550 U.S. 124, 156–57 (2007) (noting congressional purposes included promoting "respect for the dignity of human life" and promoting the "medical, legal and ethical duties of the medical profession").

[222] Khiara M. Bridges, *Capturing the Judiciary:* Carhart *and the Undue Burden Standard*, 67 WASH. & LEE L. REV. 915, 919 (2010).

[223] Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 850 (1992) ("Our obligation is to define the liberty of all, not mandate our own moral code."); Roe v. Wade, 410 U.S. 113, 159 (1973) ("We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.").

[224] *Gonzales*, 550 U.S. at 159.

[225] *Id.*

[226] Bridges, *supra* note 222, at 920.

tional muster."[227] The author suggests that the Court implement a new "agnostic" version of the undue burden standard, which assumes that the moral value of prenatal life is not known, as a way of revitalizing the undue burden standard and protecting women's right to choose from incremental deterioration.[228] The state would not be allowed to impose its own version of morality upon women, a novel and refreshing idea, given the current state of affairs. Unfortunately, a standard labeled "agnostic" toward prenatal life would likely cause extreme backlash from pro-life oriented groups, individuals, and legislators who view their position as stemming from religious principles.[229] Without using the label "agnostic," the substance of the suggestion may have more merit. When prenatal life is presumed to have a specific moral value and its interests are represented by the legislature, the very group making the restrictive laws, women's interests are subordinated. If it was presumed that prenatal life had an unknown moral value, the interests of the state and the interests of women, who have a known moral value as currently living beings, would be better balanced. To a certain extent, the law already acknowledges that the women's interest and the known moral value of a woman's life, compared to prenatal life, must succeed at some point. For example, a woman whose very life is endangered by her pregnancy is not expected to carry the fetus to term, even late into the pregnancy.

IV. Analysis of the Purpose Prong by the Lower Courts

Given the lack of clear guidance from the Supreme Court regarding proper application of the purpose prong, it is not surprising that its application in the lower courts over the past 20 years has been sporadic and with inconsistent results.

The purpose prong was implemented most frequently in the years immediately following *Casey* as the courts attempted to define the undue burden standard and its application. The first case to implement the purpose prong was *Jane L. v. Bangerter*,[230] which was originally held over pending the Court's decision in *Casey*.[231] At issue was a law in Utah that would have effectively banned all abortions after 20 weeks, clearly before the line of viability.[232] The district court found that the law had been passed for an impermissible purpose because it was explicitly passed as a

[227] *Id.* at 921.

[228] *Id.*

[229] *See* Carol Sanger, *Infant Safe Haven Laws: Legislating in the Culture of Life*, 106 Colum. L. Rev. 753, 800–08 (2006) (discussing the shift in anti-abortion political rhetoric from "right to life" to "culture of life," a phrase which has clear religious undertones, and according to the author, originated in a speech given by Pope John Paul II at the Vatican in 1995, but has since been embraced as a "plank" within the Republican Party platform).

[230] Jane L. v. Bangerter, 102 F.3d 1112 (10th Cir. 1996).

[231] Jane L. v. Bangerter, 809 F. Supp. 865, 867 (D. Utah 1992).

[232] *Jane L.*, 102 F.3d at 1113.

test of *Roe*.[233] The legislature had even created an abortion litigation fund in anticipation of the challenge.[234] Such an explicit improper purpose is not the norm. For example, in *Planned Parenthood of Greater Iowa v. Atchison*, the court affirmed an injunction preventing the state from continuing to pursue a certificate of need review for a proposed new women's health clinic.[235] The appellate court agreed with the district court that review for social need was discretionary according to the statute and had only been sought in this case because the clinic intended to offer abortion services.[236] The clinic fit within an exception for clinics not requiring mandatory review, and similar clinics that did not offer abortion services were not reviewed.[237] The court could have proceeded with a discrimination analysis, but according to the court, the only conclusion could be that the review was intended to make abortions more difficult to provide, and therefore obtain, which constituted an undue burden on women's right to choose.[238]

After the Supreme Court's decision in *Mazurek*, some courts chose to cling to the only guidance offered, even if that guidance was less than clear. In *Karlin v. Foust*, the Seventh Circuit reviewed a number of facial challenges to Wisconsin's informed consent statute, which argued that the statute was both unconstitutionally vague and placed an undue burden on women's right to choose.[239] The court declared that purpose challenges will rarely be successful absent "some sort of explicit indication from the state that it was acting in furtherance of an improper purpose."[240] According to the Seventh Circuit's reading of *Mazurek*:

> [A] state abortion regulation will survive an impermissible purpose challenge if it is a reasonable measure designed to further the state's legitimate interest in protecting either the life of the fetus or the health of the mother; provided that it cannot be shown that the legislature deliberately intended the regulation to operate as a substantial obstacle to women seeking abortions.[241]

Without evidence indicating that the stated purpose is pretextual, the court saw its "inquiry into legislative purpose [as] necessarily deferential and limited."[242] According to the court, a situation such as that in *Jane*

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[233] *Id.* at 1116.

[234] *Id.*

[235] Planned Parenthood of Greater Iowa v. Atchison, 126 F.3d 1042, 1043 (8th Cir. 1997).

[236] *Id.* at 1045, 1049.

[237] *Id.* at 1049.

[238] *Id.*

[239] Karlin v. Foust, 188 F.3d 446, 453 (7th Cir. 1999).

[240] *Id.* at 493.

[241] *Id.* at 494.

[242] *Id.* at 496 (citing Michael M. v. Superior Court of Sonoma County, 450 U.S. 464, 469–70 (1981) (plurality opinion) ("This Court has long recognized that [i]nquiries into Congressional motives or purposes are a hazardous matter, and the

L. would suffice for a finding of impermissible purpose because the law was openly passed in disregard of standing judicial precedent.[243]

The court in *Karlin* also looked to the application of the purpose prong in *Casey* for guidance. However, *Casey* devoted little attention to the purpose prong. But according to the circuit court it is reasonable to conclude that the lack of analysis indicates that the "nature and structure of the statute's provisions coupled with the express indication of the Pennsylvania legislature contained in the Pennsylvania statute's purpose section were more than sufficient to show that the statute was passed with proper purposes in mind."[244] *Casey* did appear to take the state's claim to have enacted the 24-hour waiting period and informed consent provisions in the interest of maternal health at face value because the Court neglected to discuss their purpose.[245] But *Casey* also indicated that it was presented with a limited record.[246] Furthermore, to interpret *Casey*'s application of the purpose prong as an indication that legislative purpose should be taken as stated leaves the purpose prong purposeless. There would be no reason to analyze purpose in a case if one party could stipulate it.

Not every lower court interpreted *Mazurek*, or *Jane L.*, to mean that a finding of impermissible purpose requires an explicit indication of improper purpose from the legislature. In *Okpalobi v. Foster*, the Fifth Circuit found an improper purpose behind the Louisiana legislature's enactment of Act 825, a statute holding abortion providers liable in tort for damages to their patients, both physical and mental, up to 10 years after the abortion, removing the issue from the realm of medical malpractice.[247] The legislature contended that the purpose of the statue was to encourage physicians to inform women of the potential risks associated with abortion, as outlined in the Louisiana Women's Right to Know Act.[248] However, a physician's liability under the Act was not actually con-

search for the actual or primary purpose of a statute is likely to be elusive.") (alteration in original)).

[243] *Id.*

[244] *Id.* at 493 (citation omitted).

[245] Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 881–87 (1992).

[246] *Id.* at 885–86; *Id.* at 926 (Blackmun, J., concurring in the judgment and dissenting in part) ("The joint opinion makes clear that its specific holdings are based on the insufficiency of the record before it.").

[247] Okpalobi v. Foster, 190 F.3d. 337, 343–44 (5th Cir. 1999); *see* Act 825, LA. REV. STAT. ANN. § 9:2800.12 (1997). The court noted that if it were confronted with merely a challenge of impermissible purpose in this case the decision would be close. Because it was not confronted with such a limited challenge the court chose not to answer the question definitively. The ultimate decision was based on a finding of both impermissible purpose and effect. In the "converse situation" of that in *Mazurek*, "there [was] significant evidence that the legislature intended the law to do exactly what it would do if it were to go into effect." *Okpalobi*, 190 F. 3d at 357.

[248] *Okpalobi*, 190 F.3d. at 356; *see* Louisiana Women's Right to Know Act, LA. REV. STAT. ANN. § 40:1299.35.6 (1999).

tingent on the patient giving informed consent.[249] A patient's informed consent merely reduced the physician's liability, not eliminated it.[250] The Act gave no indication regarding how a physician might avoid the extensive liability imposed other than to stop performing abortions.[251] Were the Act to go into effect, physicians would be forced to close their abortion clinics in order to avoid liability, substantially burdening women's access to abortion services in Louisiana.[252]

In *Okpalobi* the court did what most other courts have not—looked to the judicial review of purpose in contexts other than abortion.[253] The court recognized the undue burden standard as a disjunctive test, but noted that the Supreme Court had provided little instruction regarding the application of the purpose prong.[254] However, it was not without any guidance because "abortion law is not the only realm of jurisprudence in which courts are required to question whether a measure has been adopted for an impermissible purpose."[255] The court explained that in both voting rights and establishment clause cases the court must review legislative purpose.[256] While it is required to show deference to the legislature's proffered purpose, it need not accept it if it is a "mere 'sham.'"[257] In conducting its analysis, the court may look to "various types of evidence, including the language of the challenged act, its legislative history, the social and historical context of the legislation, or other legislation concerning the same subject matter as the challenged statute."[258] The court concluded that, when read together, *Mazurek* and *Jane L.* merely indicate types of evidence that are clearly insufficient and clearly sufficient.[259] Under *Mazurek*, the parties must offer more than "medical data indicating that nonphysicians are capable of performing abortions safely and the involvement of certain lobbying groups in the legislative process."[260] *Jane L.* confirms the obvious, that an admission of improper purpose is sufficient to support a finding of improper purpose.[261] The cases read together do not create a bright line that only an admission is sufficient; they create a continuum of sufficient and insufficient evidence. *Okpalobi* may have been the beginning of a reasonable and structured fu-

[249] *Okpalobi*, 190 F.3d at 356.
[250] *Id.*
[251] *Id.*
[252] *Id.* at 357.
[253] *Id.* at 354.
[254] *Id.*
[255] *Id.*
[256] *Id.*
[257] *Id.* (quoting Edwards v. Aguillard, 482 U.S. 578, 586–87 (1987)).
[258] *Id.*
[259] *Id.* at 356.
[260] *Id.* at 355.
[261] *Id.* at 356.

ture for the purpose prong, but unfortunately, the case was reversed based upon the court's lack of jurisdiction.[262]

Thus far, the two cases to carefully apply the purpose prong, *Okpalobi* and *Atchison*, have involved new issues within abortion jurisprudence, tort liability and a certificate of need requirement. Confronting a new issue, specifically one without an analogue in *Casey*, requires the court to view the purpose prong objectively, rather than simply applying the holdings of *Casey* without conducting the process of analysis.[263] A fresh issue may be what encourages courts to view purpose analytically, but this should not be the only case. Legislative purpose is by definition unique to each case because purpose is intertwined with the specific law and its enactment.

As is common in the Supreme Court's abortion jurisprudence,[264] the dissent in lower court decisions often gives more credence to the purpose prong than the majority. This demonstrates that the court is aware and capable of reviewing the evidence with regard to legislative purpose; judges and justices just disagree about how to conduct such an inquiry and the proper weight to afford the evidence.

For example, in *Greenville Women's Clinic v. Bryant*,[265] the Fourth Circuit found that a typical TRAP regulation, specifying a number of requirements that abortion clinics must meet, including admission privileges at a local hospital, did not constitute an undue burden.[266] The majority determined that for a plaintiff to succeed in its showing of an undue burden it would need to demonstrate more than a simple cost in-

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[262] Okpalobi v. Foster, 244 F.3d 405, 411, 417 (5th Cir. 2001) (en banc) (holding that the plaintiffs did not have standing to sue the Louisiana Governor and Attorney General, and therefore the court did not have jurisdiction, because the controversy did not meet the exception to Eleventh Amendment sovereign state immunity outlined in *Ex Parte Young*, 209 U.S. 123 (1908), which requires the state actor to have the ability to enforce the unconstitutional statute, based on the fiction that because a state cannot commit an unconstitutional act, in enforcing an unconstitutional statute the state actor is not acting for the state and is therefore not immune).

[263] *See* Linda J. Wharton et al., *Preserving the Core of* Roe: *Reflections on* Planned Parenthood v. Casey, 18 YALE J.L. & FEMINISM 317, 384–85 (2006).

[264] *See* Gonzales v. Carhart, 550 U.S. 124, 186–87 (2007) (Ginsburg, J., dissenting) ("The Court refers to Congress' purpose to differentiate 'abortion and infanticide'" then throughout the opinion "refers to obstetricians, gynecologists and surgeons who perform abortions not by the titles of their medical specialties, but by the pejorative label 'abortion doctor.' A fetus is described as an 'unborn child' and as a 'baby,'" indicating that the true purpose is one of antagonism towards the right. (citations omitted)); Mazurek v. Armstrong, 520 U.S. 968, 979–80 (1997) (Stevens, J., dissenting) ("Today the court ignores [*Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 901 (1992) (requiring that the court look to 'whether the requirements serve no purpose other than to make abortions more difficult')], but concludes that the record is barren of evidence of any improper motive. . . . [T]his is not quite accurate; there is substantial evidence indicating that the sole purpose of the statute was to target a particular licensed professional.").

[265] 222 F.3d 157 (4th Cir. 2000).

[266] *Id.* at 159, 161.

crease.[267] Additionally, it concluded that state legislatures have a valid reason to regulate abortion providers in ways that they do not regulate other medical providers because abortion is inherently different, "if for no other reason than the particular gravitas of the moral, psychological, and familial aspects of the abortion decision."[268] The majority did not pursue an examination of the regulation's purpose, but did emphasize that it viewed the proper inquiry as whether the regulation is "*rationally related* to a valid government purpose."[269] The court was reviewing the issue under a rational basis standard rather than as a standard of intermediate scrutiny, as indicated by *Casey*, because it did not find an undue burden on the right to choose. [270] Based on the presumption that abortion is inherently different than other medical practices, the legislature's proper regulatory purpose was essentially assumed.

However, according to the dissent of Senior Circuit Judge Hamilton, it is clear from the context of the law that it was passed for the purpose of making abortion more difficult to obtain.[271] First, abortion providers are the only type of medical clinic subjected to state licensing of the individual clinic, making it more difficult for an abortion clinic to open and operate than any other type of medical clinic.[272] Second, the construction and design requirements imposed upon abortion clinics, such as sheltered entryways and special janitor's closets, have no rational connection to maternal health.[273] Third, allowing the state to enter the clinic and copy patient records violates patient confidentiality and is not an accepted medical practice.[274] Judge Hamilton declined to determine whether strict scrutiny or the rational basis test should apply because the regulation was "constitutionally infirm", even under the rational basis test.[275] Interestingly, the court seems to completely disregard the use of an intermediate standard of scrutiny. Judge Hamilton concludes by accusing the majority of manipulating the law in their personal favor:

> When considering the majority's analysis based on its chosen and carefully selected facts, ignoring the findings of fact by the district court, it can only be concluded that the majority's opinion is based on its view of the law as it would like to see it and perhaps more significantly, on not what the current law would dictate, but only what the majority prophecies the law will be if and when this case reaches

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[267] *Id.* at 171.

[268] *Id.* at 173.

[269] *Id.* (emphasis in original).

[270] *See supra* note 86 and accompanying text (noting that the plurality rejected the Chief Justice's suggestion that *Roe* be replaced by a rational basis test, indicating that the Court was adopting a standard of intermediate scrutiny).

[271] *Greenville Women's Clinic*, 222 F.3d at 200 (Hamilton, J., dissenting).

[272] *Id.* at 178, 198–99.

[273] *Id.* at 198.

[274] *Id.* at 199.

[275] *Id.* at 204.

> the Supreme Court. This is unacceptable; cases are to be decided on what the law is. It's just that simple.[276]

As the inconsistency of abortion jurisprudence shows, the undue burden standard as it stands may be so flexible that it too allows for judicial decision making based on personal opinion of what the law should be, just as Judge Hamilton suggests. For example, in *Planned Parenthood of Minnesota, North Dakota, South Dakota v. Rounds*,[277] the Eighth Circuit upheld a regulation based upon the findings of the South Dakota Task Force to Study Abortion that required physicians providing abortion services to tell their patients that by having an abortion they would be subject to an "increased risk of suicide ideation and suicide."[278] The challenge was brought by a group of physicians claiming that the required advisory violated their First Amendment right against compelled speech.[279] The court applied *Casey* to a First Amendment issue, concluding that in order to succeed on either its undue burden or compelled speech claims the plaintiff must prove that the information is "either untruthful, misleading, or not relevant to the patient's decision to have an abortion."[280] Because the court defers to legislative findings on questions of medical uncertainty under *Gonzales*, this standard is an insurmountable evidentiary burden. Legislation for the purpose of protecting maternal health is presumed to be for a legitimate purpose and with legislative deference regarding questions of medical uncertainty, the legislature's conclusion of what is necessary to maternal health is also presumed to be legitimate. The purpose inquiry becomes unnecessary.

In *Texas Medical Providers Performing Abortion Services v. Lakey*,[281] the juxtaposition occurs in the lower court judge's response to the Fifth Circuit's remand.[282] The case involved the Texas Women's Right to Know Act, which placed numerous requirements upon women seeking an abortion, including a sonogram, fetal heartbeat monitor, and disclosure of information linking abortion to breast cancer, which is scientifically questionable.[283] The Fifth Circuit did not specifically conduct a purpose inquiry, but concluded that discouraging abortion is an acceptable effect of abortion regulation by the state.[284] On remand, Judge Sparks followed the

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[276] *Id.* 207.

[277] 686 F.3d 889 (8th Cir. 2012).

[278] *Id.* at 891 (citation and internal quotation marks omitted).

[279] *Id.*

[280] *Id.* at 893 (citation and internal quotation marks omitted).

[281] 677 F.3d 570 (5th Cir. 2012).

[282] Tex. Med. Providers Providing Abortion Servs. v. Lakey, 2012 WL 373132 (W.D. Tex. 2012), *on remand from* 677 F.3d 570.

[283] Texas Women's Right to Know Act, §§ 171.001–171.018 (2012); *see Fact Sheet: Abortion, Miscarriage, and Breast Cancer Risk*, NAT'L CANCER INST. (Jan. 12, 2010), http://www.cancer.gov/cancertopics/factsheet/Risk/abortion-miscarriage (concluding that having an abortion or miscarriage does not increase a woman's subsequent risk of developing breast cancer).

[284] *Tex. Med. Providers Performing Abortion Servs.*, 677 F.3d at 579.

instructions of the appellate court in judgment, but pointed out that the Act is really a barely disguised attempt to limit access to abortion in Texas by making it more difficult and emotionally traumatizing for a woman to obtain.[285] Such contradicting opinions between the majority and dissent, or in this case, two levels of the court system, make it clear that there is not a consensus as to how the purpose prong is be applied or what constitutes an impermissible purpose. The majority often ignores facts that make an improper legislative intent seem obvious while the dissent points those very facts out, bringing the majority opinion into question. Such differing interpretations of the same facts under the same standard does not lend itself to certainty of the law upon which individuals may rely.[286]

A very recent case, *Isaacson v. Horne*, involved controversial Arizona House Bill 2036.[287] Like in *Karlin v. Foust*, the district court took the stated legislative purpose of preventing fetal pain on its face and denied an injunction request regarding a law banning abortions after 20 weeks; the point at which the legislature determined a fetus begins to feel pain.[288] Regardless of the stated purpose for the law, its effect is to ban elective abortions between 20 weeks and viability, which currently occurs around 24 weeks with medical intervention.[289] One of the reasons for the finding of impermissible purpose in *Jane L.* was the fact that the law was enacted in direct contradiction to established constitutional precedent.[290] *Casey* maintained the line of viability, established by *Roe*, as the line beyond which a state may prohibit abortion, but before which it may not.[291] So far, the Supreme Court has not explicitly abrogated its line of viability holding. *Gonzales* marked the first time that the Court allowed for a blanket ban prior to viability, but the ban was only of one type of abortion, not all types of abortion.[292] However, *Gonzales* also held that it would defer to the legislature regarding questions of medical uncertainty, such as the point at which a fetus begins to feel pain, and appears to accept regulation purely in the interest of the state's moral conscious.[293] In *Issacson v.*

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[285] *Tex. Med. Providers Providing Abortion Servs.*, 2012 WL 373132, at *5.

[286] *See* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 856 (1992) ("[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.").

[287] 884 F. Supp. 2d 961 (D. Ariz. 2012).

[288] *Id.* at 971.

[289] *See supra* note 7.

[290] Jane L. v. Bangerter, 102 F.3d 1112, 1116 (10th Cir. 1996).

[291] *Casey*, 505 U.S. at 860; Roe v. Wade, 410 U.S. 113, 163 (1973).

[292] Gonzales v. Carhart, 550 U.S. 124, 147 (2007) ("The Act does apply both previability and postviability because, by common understanding and scientific terminology, a fetus is a living organism while within the womb, whether or not it is viable outside the womb.").

[293] *Id.* at 163 ("The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty."); *Id.* at 158 ("[T]he type of abortion proscribed by the Act requires specific regulation

Horne, the parties disputed, and the court declined to answer, exactly what impact *Gonzales* had on *Casey*'s holding that "before viability, the State's interests are not strong enough to support a prohibition of abortion."[294] In a twist of language, the court instead concluded that the holding is "inapposite" because the law is only a regulation of previability abortions, not a ban.[295] According to the court, it is a regulation of some previability abortions and not a prohibition because the statute allows for abortions to "avert a pregnant woman's death or to avoid a serious risk of substantial and irreversible impairment of major bodily function."[296] This is merely the required postviability health exception restated.

The court did not delve into one particularly controversial element of the law or the purpose behind it. The law defined "gestational age" as "the age of the unborn child as calculated from the first day of the last menstrual period of the pregnant woman."[297] This definition effectively moves the point of "viability" two weeks earlier because, according to the new law, a woman may be deemed legally pregnant two weeks before she has actually conceived a fetus.[298] In effect, the law would ban abortions after 18 weeks, earlier than any other law on record.[299] Medical professionals often calculate a woman's due date by dating the pregnancy from the first day of her last menstrual period. Although most women cannot identify the precise date of fertilization, they can pinpoint the date of their last menstrual period, making it an easier number to for medical professionals to use. Actual fertilization, however, typically takes place two weeks after the first day of a women's last menstrual period, the time during which she is ovulating.[300] Therefore, typical gestation is considered to last 40 weeks from a woman's last menstrual period, or 38 weeks from fertilization.[301] Although dating pregnancy from the first day of a woman's last menstrual period is practical from a medical perspective, simplifying the calculation for both the woman and her medical provider, it may be deceptive when used within legislation.

First, the definition goes beyond the deference required by *Gonzales* because the basic process of human reproduction is not a question of medical uncertainty. Second, the definition brings the true purpose of the law into question because it covertly bans more abortions than the law appears to on its face. Although the lower court denied the injunction, it was later granted by a higher court, pending the outcome of an

because it implicates additional ethical and moral concerns that justify a special prohibition.").

[294] Isaacson v. Horne, 884 F. Supp. 2d 961, 967 (D. Ariz. 2012) (quoting *Casey*, 505 U.S. at 846).

[295] *Id.*

[296] *Id.*

[297] *Id.* at 963 (citation omitted).

[298] GUTTMACHER INSTITUTE 2013, *supra* note 26.

[299] *See id.*

[300] *Id.*

[301] *Id.*

appeal.[302] On appeal the Ninth Circuit found in favor of the physicians challenging the law, holding that the law violated a woman's ultimate right to choose prior to fetal viability.[303] The court also held that the inclusion of an exception for medical emergencies did not transform what was effectively an impermissible prohibition on abortion into a mere regulation of the abortion procedure.[304] Currently, seven other states, including Alabama, Arkansas, Indiana, Louisiana, Nebraska, North Dakota, and Oklahoma, have passed laws banning abortion after 20 weeks based on the proposition that a fetus can feel pain by that point.[305] The outcome of litigation in these cases, as well as others regarding similar fetal pain laws, will be instrumental in defining *Gonzales*'s impact on the validity of the line of viability.

V. Effects of the Failed Purpose Prong

Since *Casey* established the undue burden standard as the standard of review for abortion regulations, the purpose prong has received an inconsistent level of review. Because the permissible purposes outlined by the Supreme Court are so broad, a permissible purpose is effectively presumed. Without judicial application of the purpose prong, the undue burden standard is not an effective protection of women's constitutional right to choose as indicated by three effects of the failed purpose prong. First, facial challenges to abortion regulations have become exceptionally difficult, if not impossible. Second, legislatures are encouraged to challenge established precedent with little risk. And third, women's individual liberty has been restricted by legislatively imposed, and judicially approved, moral norms and gender stereotypes.

A. Facial Challenges to Abortion Regulations Have Become Exceptionally Difficult, if Not Impossible.

In theory, the undue burden standard should accommodate both facial and as-applied challenges. In general, an as-applied challenge asserts that a particular law is unconstitutional as applied in a certain situation or to a certain group of people. A facial challenge asserts that a law is unconstitutional on its face, based on its text as construed using the applicable constitutional doctrine, rather than with regard to a set of facts or circumstances.[306] While the distinction between facial and as-applied chal-

[302] Isaacson v. Horne, 884 F. Supp. 2d 961 (9th Cir. 2012).

[303] Isaacson v. Horne, 716 F.3d 1213, 1225 (9th Cir. 2013).

[304] *Id.* at 1228–29.

[305] Guttmacher Institute, *supra* note 26. Similar laws have also been passed in Georgia and Idaho but are not currently enforced as written. The law in Georgia is only being enforced against post-viability abortions and the law in Idaho is enjoined pending the outcome of ongoing litigation. *Id.*

[306] Catherine Gage O'Grady, *The Role of Speculation in Facial Challenges*, 53 Ariz. L. Rev. 867, 871 (2012).

lenges traditionally relates to the challenge itself, the Supreme Court has also applied the distinction in the context of remedies. For example, in *Ayotte v. Planned Parenthood of Northern New England*, the Court partially invalidated a law for lacking a health exception as required by *Stenberg v. Carhart*, even though the challenge itself was a facial challenge.[307] In response to the facial challenge, the Court created an as-applied remedy.[308] Consequently, the distinction between facial and as-applied challenges is not always clear.

Nonetheless, the two prongs of the undue burden standard each seem to be particularly well suited to a particular type of challenge. The effects prong lends itself to the analysis of as-applied challenges because when looking at a law's effect the court looks to the "group for whom the law is a restriction, not the group for whom the law is irrelevant."[309] Analogous to an as-applied challenge, "the analysis does not end with the one percent of women upon whom the statute operates; it begins there."[310] The purpose prong, on the other hand, seems particularly suited to facial challenges, or at a minimum, facial remedies. If a law has an impermissible purpose it is invalid in its entirety because the legislative purpose permeates the entirety of the law, regardless of any specific application. Consequently, if the purpose prong is not judiciously applied, either because a permissible purpose is assumed or because the court has hesitations regarding the analysis of legislative intent, a facial challenge is less likely to be successful.[311]

The inability to bring a successful facial challenge may create a number of issues for women, including a requirement that harm actually occur before an unconstitutional law can be successfully overturned. One of the practical benefits of facial challenges is that they allow the court to "identify and invalidate those laws that are nearly certain to deliver unconstitutional effects without waiting to observe those effects and the concomitant injuries."[312] This is particularly relevant in the context of abortion, where the effect may be that a woman is denied the choice of whether or not to become a parent, a choice that will dramatically affect the rest of her life and cannot be undone. The undue burden standard specifically established that a law having either the purpose *or* effect of creating a substantial obstacle to a woman's free choice would be invali-

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[307] *See* Note, *After* Ayotte, *supra* note 187, at 2557–58.

[308] *Id.*

[309] Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 894 (1992).

[310] *Id.*

[311] *See* Massey, *supra* note 115, at 54 ("Because the general rule is that a facial challenger 'must establish that no set of circumstances exists under which the Act would be valid,' a requirement that purpose be limited to the face of the statute, the stated purposes, or inferred only from the effects, would sharply circumscribe facial challenges. Only the most ineptly drafted measures would be likely to succumb . . . ." (citations omitted)).

[312] *Id.*

dated. The purpose prong and the related use of facial challenges are necessary as a preventative.[313]

However, the Supreme Court's decisions regarding abortion reflect a preference for as-applied challenges and remedies,[314] as well as a preference that impermissible effect be demonstrated before it will consider an impermissible purpose.[315] It has been suggested that the Court's preference for as-applied challenges and remedies is not unique to the abortion context and may be a feature of the Roberts Court's jurisprudence more generally,[316] so there may not be a clear cause and effect relationship between the failed purpose prong and the Court's rejection of facial challenges. But the effect of the Court's preference for as-applied challenges might have a particularly pronounced and detrimental in the abortion context, where the laws have a "broad social impact" so long as they are in effect.[317] This impact includes the potential "chilling effects [of the law] and the burdens imposed on other women and abortion providers subject to the laws."[318] As one author notes, insisting on a case-by-case analysis also reduces the precedential value of each decision, wasting judicial resources, and impinging upon the individual's ability to exercise their rights with confidence.[319] Furthermore, as previously noted, the result of the restrictive law may be that some women are forced to carry and give birth to a child against their personal choice. Because litigation typically takes longer than pregnancy, an as-applied challenge cannot help these women. Requiring actual harm in the context of abortion is also morally questionable because such a life-altering decision is at stake.[320]

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[313] *See id.* at 54–55 (explaining that there is "room for the courts to treat facial challenges as a form of constitutional prophylaxis").

[314] Ayotte v. Planned Parenthood of N. New England, 546 U.S. 320, 329–31 (2006) (explaining that the "normal rule" is for a partial invalidation rather than a facial invalidation).

[315] Mazurek v. Armstrong, 520 U.S. 967, 972 (1997) ("[W]e do not assume unconstitutional legislative intent even when statutes produce harmful results; must less do we assume it when the results are harmless." (citation omitted)).

[316] *See* Caitlin E. Borgmann, *Holding Legislatures Constitutionally Accountable Through Facial Challenges*, 36 HASTINGS CONST. L.Q. 563, 564 (2012) (arguing that the "Roberts Court's intolerance for facial challenges does more than perpetuate the Court's longstanding confusion over the standard by which to assess challenges; it permits the Court to withdraw from its critical role in safeguarding individual rights"); O'Grady, *supra* note 306, at 870 ("Recent decisions from the Roberts Court suggest that the Supreme Court is not inclined to respond favorably to facial challenges to a state statute's constitutionality.").

[317] Borgmann, *supra* note 316, at 598.

[318] *Id.*

[319] *Id.*

[320] *Id.* at 592–93.

B. Legislatures Are Encouraged to Challenge Established Precedent with Little Risk.

Immediately following *Casey*, the law at issue in *Jane L.* was found unconstitutional because it had been passed as an explicit test of *Roe*, as clearly demonstrated by the state legislature's establishment of a *Roe* litigation fund.[321] The Utah law had banned all abortions after 20 weeks, a cut-off point which is prior to the point of viability; the line established in *Roe* and affirmed by *Casey*.[322] The law at issue in *Ayotte* was similarly flawed for its lack of a health exception, as required by both *Roe* and *Casey*, but rather than invalidate the entire law, the court applied a partial remedy and invalidated the law as applied to situations in which the health exception would be necessary.[323] In 2003, Congress passed the Partial-Birth Abortion Ban Act, banning the intact D&E procedure without a health exception as had been required under *Roe*, affirmed by *Casey*, and deemed necessary even in the specific context of a procedural ban by *Stenberg*.[324] Yet the Partial-Birth Abortion Ban Act was declared constitutional without the health exception.[325]

Current state legislatures may not actually establish abortion litigation funds, as in *Jane L.*,[326] but the weakened state of the purpose prong has allowed them to chip away at the right to choose with little risk. The court is unlikely to thoroughly evaluate the legislature's intent, and if it does find a flaw within the law it is more likely to implement a partial remedy rather than a facial invalidation. And occasionally, the court may reward the legislature's defiance and allow a law contravening precedent to stand as written.[327] While there may be some theoretical benefit to this "dialogue" between state legislatures and the courts in the manner of proper checks and balances,[328] the legislature is not truly held accountable for its actions without the purpose prong. The purpose prong is a check on the legislature built into the undue burden standard. It ensures that the legislature acts in the name of one of its important interests. While the state's interests may be broad enough to encompass nearly any

[321] Jane L. v. Bangerter, 102 F.3d 1112, 1116 (10th Cir. 1996).

[322] *Id.* at 1113; *see also* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 860 ("Whenever it may occur, the attainment of viability may continue to serve as the critical fact, just as it has done since *Roe* was decided."); Roe v. Wade, 410 U.S. 113, 163 ("With respect to the State's important and legitimate interest in potential life, the 'compelling point' is at viability.").

[323] Ayotte v. Planned Parenthood of N. New England, 546 U.S. 320, 331 (2006).

[324] Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 (2006); Stenberg v. Carhart, 530 U.S. 914, 931 (2000); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 879 (1992); Roe v. Wade, 410 U.S. 113, 164 (1973).

[325] Gonzales v. Carhart, 550 U.S. 124, 165 (2007).

[326] *Jane L.*, 102 F.3d at 1116.

[327] *See Gonzales*, 550 U.S. at 170–74 (Ginsburg, J., dissenting); *see also* Borgmann, *supra* note 316, at 599–600 (acknowledging that upholding the Partial-Birth Abortion Ban Act of 2003 after its decision in *Stenberg* was effectively rewarding Congress for its defiance).

[328] Borgmann, *supra* note 316, at 601.

regulation it might draft, its interests do not include systematically eradicating the right to choose. If purpose is ignored or glossed over, possibly because a proper purpose is assumed, the court is allowing this systematic eradication. When the normal rule is a partial remedy,[329] the legislature does so with only minimal risk rather than the "risk that its law will only be a symbolic gesture [of its views regarding abortion] and will be quickly invalidated."[330]

As a result, the state of the abortion right has been destabilized because it is in a constant state of flux based on the "dialogue" between the judicial and legislative branches. Women cannot be assured that they will be able to exercise their right to choose if they either wish to or need to at some future date or in some unknown situation. Furthermore, the voice of the courts may seem less authoritative on the issue of abortion because of the decisions have not created an environment of stability. Ironically, *Casey* emphasized that the Supreme Court's decision to affirm the "essential holdings" of *Roe* was at least partially based on adherence to the doctrine of stare decisis.[331]

C. Women's Individual Liberty Has Become Restricted by Legislatively Imposed, and Judicially Approved, Moral Norms and Gender Stereotypes.

Once *Gonzales* identified morality as an important state interest and a permissible purpose for abortion regulation, the purpose prong was effectively rendered purposeless.[332] The judicially defined interests of the state are now so broad that the only impermissible purpose left is the complete abrogation of *Roe*, a law with the purpose of actually eliminating the right to choose. Laws that merely restrict the right are not impermissible. Consequently, women's right to choose an abortion has become limited by legislative conclusions of morality and gender stereotypes.

So-called "partial-birth" abortion bans are based on a legislative conclusion of morality, that the intact D&E procedure is more morally wrong than a traditional D&E because the fetus more closely resembles a full-term infant.[333] The fact that both procedures result in a termination is deemed irrelevant to the moral conclusion. Following a similar line of

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[329] Ayotte v. Planned Parenthood of N. New England, 546 U.S. 320, 329 (2006).

[330] Borgmann, *supra* note 316, at 601.

[331] Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 845–46 (1992) ("After considering the fundamental constitutional questions resolved by *Roe*, principles of institutional integrity, and the rule of *stare decisis*, we are led conclude this: the essential holding of *Roe v. Wade* should be retained and once again reaffirmed.").

[332] *See Gonzales*, 550 U.S. at 158 ("[T]he type of abortion proscribed by the Act requires specific regulation because it implicates additional ethical and moral concerns that justify a special prohibition.").

[333] *Id.* at 158 ("Congress determined that the abortion methods it proscribed had a 'disturbing similarity to the killing of a newborn infant.'" (quoting Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, 117 Stat. 1201, § 2(L))).

reasoning are laws that ban abortions after a certain point based on when the legislature has determined a fetus begins to feel pain. Fetal pain laws are premised upon a moral conclusion similar to the line of viability. The line of viability signifies the point at which the fetus may reasonably be considered a separate moral entity from its mother based on its ability to exist outside of the womb, albeit with significant medical intervention. Fetal pain laws use similar logic to draw the line at a different point, usually 20 weeks.[334] Because a fetus can feel pain, it should be considered a separate moral entity from its mother. However, the Court has chosen where and how to draw the line and adhered to the line of viability, at least with regard to a complete prohibition, ever since *Roe*.[335] Consequently, fetal pain laws should be deemed unconstitutional for disregarding that line. On the other hand, fetal pain laws may not be unconstitutional for their impermissible purpose. After *Gonzales*, legislation in the interest of morality is permissible. Women's right to choose may not be protected from restrictive fetal pain laws under the undue burden standard due to the failed purpose prong. Protection in this context may depend upon continued adherence to the line of viability, hence the importance of determining the precise impact *Gonzales* had upon the continued validity of the line of viability.[336]

In another conclusion of morality, the South Dakota Legislature requires a physician to present a woman pursuing an abortion with a written statement that includes the following notification:

> [T]he abortion will terminate the life of a whole, separate, unique, living human being; . . . [t]hat the pregnant woman has an existing relationship with that unborn human being and that the relationship enjoys protection under the United States Constitution and under the laws of South Dakota; . . . [and] [t]hat by having an abortion, her existing relationship and her existing constitutional rights with regards to that relationship will be terminated.[337]

The notification goes beyond indicating the state's preference for childbirth over abortion by asserting that the fetus is a "living human being."[338] Furthermore, the notification may lead a woman to think that a fetus has a certain status under the Constitution by way of their "relationship," when the Supreme Court has actually avoided assigning constitutional rights to the unborn.[339] Most importantly, the notification empha-

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[334] *See generally* Annie Murphy Paul, *The First Ache*, N.Y TIMES MAG., Feb. 10, 2008, at 45.

[335] *See supra* note 291.

[336] *See supra* notes 287–305 and accompanying text.

[337] S.D. CODIFIED LAWS §§ 34-23A-10.1 (1)(b)–(d) (2005); *see also* Borgmann, *supra* note 316, at 601 (describing the findings of the task force that helped to draft the law as "highly controversial, outcome-driven, and politically motivated").

[338] S.D. CODIFIED LAWS § 34-23A-10.1 (1)(b).

[339] *See* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 913 (1992) (Stevens, J., concurring in part and dissenting in part) ("[A]n abortion is not 'the termination of life entitled to Fourteenth Amendment protection.' From this

sizes the woman's role as a mother and describes this relationship as "existing" rather than one the woman chooses. The South Dakota Legislature has come to two moral conclusions. First, that life begins at conception, as indicated by the phrase "living human being," and second, that motherhood begins at conception, as indicated by the "existing relationship." Essential within the right to choose abortion is the right to choose motherhood. By describing the relationship of mother and child as pre-existing the legislature psychologically undermines the woman's choice. Furthermore, the same required notification must also include a statement informing the woman that by undergoing an abortion she will be at increased risk of depression and suicide.[340] Essentially, the state is telling the women of South Dakota that they will regret their decision and may suffer severe personal consequences. Legislatures present such disclosures as necessary to informed consent, but in reality, they "morally Mirandize the woman in an effort to arouse in her feelings of sin, guilt and shame."[341]

These assumptions of guilt and regret,[342] and extensive informed consent requirements unheard of for other medical procedures,[343] presuppose and support a gender stereotype of the maternal woman. The maternal woman stereotype assumes that all women want to be mothers. Because all women want to be mothers they will regret their abortion and feel guilt. Because all women want to be mothers a woman who pursues an abortion must be mistaken or confused. She must be shown images of the life inside her, told of every possible risk and outcome, and every possible alternative. She must then be given ample time to reconsider her decision. But even then, she will feel guilt and regret. However, the stereotype of the maternal woman is false. Not all women want to be mothers. And those that do deserve to do so on their own terms.

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holding, there is no dissent, indeed, no Member of the Court has ever questioned its fundamental proposition. Thus, as a matter of federal constitutional law, a developing organism that is not yet a 'person' does not have what is sometimes described as a 'right to life.'" (quoting Roe v. Wade, 410 U.S. 113, 159 (1973)); *Roe*, 410 U.S. at 157 (holding that the Constitution's reference to "persons" does not include the unborn).

[340] S.D. CODIFIED LAWS § 34-23A-10.1 (1)(e)(i)–(ii).

[341] Jeffery A. Van Detta, *Constitutionalizing* Roe, Casey *and* Carhart*: A Legislative Due-Process Anti-Discrimination Principle that Gives Constitutional Content to the "Undue Burden" Standard of Review Applied to Abortion Control Legislation*, 10 S. CAL. REV. L. & WOMEN'S STUD. 211, 258 (2001) (internal quotation marks omitted).

[342] *See* Gonzales v. Carhart, 550 U.S. 127, 159 (2007) ("While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained.").

[343] *See* Sarah E. Weber, *An Attempt to Legislate Morality: Forced Ultrasounds as the Newest Tactic in Anti-Abortion Legislation*, 45 TULSA L. REV. 359, 368 (2009) (arguing that state legislatures treat informed consent to abortion differently than informed consent for other medical procedures, which are generally based on professional medical standards, not the personal views of non-physician legislators, and comparing some informed consent provisions to a form of "government-approved psychological coercion" which is not medically necessary).

Conclusion

Abortion raises unusual questions of law and ethics because the life and liberty of a woman is pitted directly against the potential life she carries. The choice is a deeply personal one, but also represents important notions of gender equality. But the judicial standards used to analyze the issue are not unique; they have analogues in other areas of law. The courts, however, have tended to treat abortion as if it exists in a legal vacuum. The analysis is infused with emotion and the undue burden standard has become deteriorated and confused. Most specifically, the purpose prong has lost its purpose and any effectiveness it may have had as a protection of women's right to choose. The scope of permissible legislative purposes is vast, and frequently, such validity is assumed without much questioning. Without the purpose prong as a realistic avenue to check legislative impropriety and over-reaching, the undue burden standard is also ineffective. All that remains is the effects prong, which requires extensive evidence and has proven an ineffective avenue for facial invalidation. The undue burden standard as it stands provides so much deference to the legislatures that it is hardly a standard at all.

For women's reproductive liberty to be adequately protected, the courts must remove abortion from its analytical bubble. Purpose tests may not be inherently ineffective, but they require a structured application. As the Supreme Court has offered little guidance on how the purpose prong should be applied, the courts should look to the analysis of purpose in other legal contexts for guidance. With structure and guidance, the purpose prong could have more force and bring new life to the undue burden standard. Alternatively, the Supreme Court should reevaluate the undue burden standard's continued ability to protect women's right to choose.