THE ABORTION BURDEN
EXAMINING ABORTION ACCESS, UNDUE BURDEN AND SUPREME COURT RULINGS IN THE UNITED STATES

TYLER SLOAN
OBERLIN COLLEGE CLASS OF 2017
POLITICS DEPARTMENT HONORS THESIS
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**KEY TERMS**

**Declaratory Relief:** Declaratory relief refers to a judgment of a court that determines the rights of parties without ordering anything be done or awarding damages. By seeking a declaratory judgment, the party making the request is seeking for an official declaration of the status of a matter in controversy.

**Fifth Amendment:** “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

**First Amendment:** “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

**Fourteenth Amendment:** “All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

**In Loco Parentis:** Of a teacher or other adult responsible for children in the place of a parent.

**Injunctive Relief:** Also known as an “injunction,” this is a legal remedy that may be sought in a civil lawsuit, in addition to, or in place of, monetary damages. Rather than offering money as payment for a wrong in a civil action, injunctive relief is a court order for the defendant to stop a specified act or behavior.

**Ninth Amendment:** “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

**Quickening:** The moment in pregnancy when the pregnant person starts to feel or perceive fetal movements in the uterus.

**Undue Burden:** The purpose or effect of placing a substantial obstacle in the path of a person seeking an abortion of a fetus that is not yet viable.

**Fetal Viability:** The ability of a fetus to survive outside the uterus.
INTRODUCTION

Abortion remains one of the most controversial subjects in the United States despite its legalization in the 1973 landmark Supreme Court case *Roe v. Wade*. Donald Trump ran his 2016 presidential campaign in part on the platform that he would fill the Supreme Court’s vacancy with a justice who would overturn *Roe*. Many states continue to pass unconstitutional legislation that curtails abortion access despite public opinion polls indicating that approximately seven-in-ten Americans oppose *Roe* being completely overturned.¹ The extreme variance in interpretations of the undue burden standard, created in 1992 with the Court’s ruling in *Planned Parenthood v. Casey*, has also created widespread discrepancies in the accessibility of state-level abortion.

Abortion access is still very limited in certain regions of the United States despite increased public support over the last 40 years. In 2014, 90 percent of all counties did not have a single abortion clinic, with 39 percent of women of reproductive age living in those counties.² The number of clinics simply does not align with the high demand for abortion. Though there were no abortion clinics in most of the United States in 2011, that same year, approximately 1.06 million abortions were performed. The three most common reasons given by people receiving abortions, each cited by nearly 75 percent of patients, include: “concern for or responsibility to other individuals; the inability to afford a child; and the belief that having a baby would interfere with work, school or the ability to care for dependents. Half said they did not want to be a single parent or were having problems with their husband or partner.”³ These qualities are key to understanding why people choose abortion because they demonstrate the constraints of carrying an unwanted child to term.

This thesis examines the current state of abortion access in the United States by attempting to address several major questions: What did abortion access look like before 1973? How did the Supreme Court’s rulings before *Casey* pave the way for the creation of an undue burden standard? How does state-level legislation interpret an undue burden, and how do we account for such wide-ranging understandings of this standard? And ultimately, how has the Court’s increasing reliance on the undue burden test undermined abortion access?

To address these questions, this paper is divided into five sections. The first section contextualizes *Roe v. Wade* by briefly detailing the history of abortion in the United States from 1800 until 1973. This portion touches on issues such as the American Medical Association’s involvement in outlawing abortion in the mid-19th century and the building momentum leading up to the Court’s decision in *Roe*, among other notable points in history such as the forced sterilization of people of color. The second section includes analyses of five major abortion cases, beginning with *Roe v. Wade* in 1973 and ending with *Hodgson v. Minnesota* (1990). The language in cases between 1973 and 1992 offers insight into how the *Casey* ruling came to be.

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³ *Id.*
The third section hones in on the Court’s abortion rulings in the last 25 years, beginning with *Planned Parenthood v. Casey* (1992) and concluding with *Whole Women’s Health v. Hellerstedt* (2016). The Court’s interpretation of undue burden significantly evolves over this quarter-century period. Much of this evolution is in reaction to an increasing amount of state-based provisions. As state legislatures create new ways to manipulate the language around the undue burden standard, the Court continues to draw a line when it deems policies have gone too far in restricting abortion access. This is especially evident in the Court’s ruling in *Hellerstedt*. Conversely, the Supreme Court has also seen setbacks in abortion access in cases like *Harris v. McRae* (1980) and *Gonzalez v. Carhart, Planned Parenthood Federation of America* (2007).

State policies are highly indicative of the profoundly varying interpretations of undue burden. Oregon and South Dakota are ideal examples for examining this phenomenon, which is why the fourth section uses them as case studies. The Institute for Women’s Policy Research ranked Oregon as the best state for abortion access and South Dakota as the worst in 2016. By exploring the varying effects of limited to liberal abortion access, this section will demonstrate how state legislatures can wield the undue burden standard to create policies that align with their politics.

The guiding argument that strings through the entirety of this paper is that the Supreme Court should utilize strict scrutiny, the most stringent standard of judicial review, instead of the undue burden standard, which has ultimately undermined abortion access by allowing loopholes in state-level legislation. Strict scrutiny, explained in greater detail in Part II, is applied when the Court seeks to determine if the legislature passed a law to further a compelling government interest. Laws must be narrowly tailored to serve that specific government interest and cannot overreach. For the Court to use strict scrutiny, “the legislature must either have significantly abridged a fundamental right with the law’s enactment or have passed a law that involves a suspect classification.” Though abortion cases meet the strict scrutiny qualifications, a shift toward undue burden as a tool of analysis has undermined the stringency of strict scrutiny.

When the Court determined in *Roe* that “This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action . . . or . . . in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy,” it decided that abortion is a fundamental right. The question then also becomes: How does an undue burden get considered as an unconstitutional burden? The ways in which undue burden is currently used in some states would inevitably fail under strict scrutiny, yet the standard is not applied to a crucial condition of this implied fundamental right.

In considering the current state of abortion access in the United States, it is pivotal to examine the ways in which the Supreme Court assesses the constitutionality of undue burden and the real effects this has on the ground. The split approach to this thesis — with the first portion focusing on constitutional law analysis and the latter providing information about the lived experiences of people seeking abortions in different regions of the country — provides a holistic narrative about the legislative and physical barriers to abortion access in the United States in 2017.

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I. CONTEXTUALIZING ABORTION ACCESS AND ROE v. WADE

Adopting British common law, abortion until quickening was legal in the United States until the mid 1800s. Quickening, which typically occurs within 16 weeks of pregnancy, is often described as a “fluttering.” Many understood this as the first sign of life, and abortions before quickening were openly advertised and commonly performed. After quickening, abortion was punishable by fines and imprisonment. United States Supreme Court Justice Blackmun, discussing the history of abortion law and quickening, writes on behalf of the majority in Roe v. Wade (1973): “These disciplines variously approached the question in terms of the point at which the embryo or fetus became ‘formed’ or recognizably human, or in terms of when a ‘person’ came into being, that is, infused with a ‘soul’ or ‘animated.’ A loose consensus evolved in early English law that these events occurred at some point between conception and live birth.” The fetus before quickening was considered a part of the individual’s body, and abortions before this point were not considered homicide. Connecticut passed the first statutory abortion regulation in the United States in 1821, banning the use of poison to induce abortions after quickening. Abortion carried a stigma despite its legality for most of the 19th century. A report from the National Center for Biotechnology Information, part of the U.S. Library of Medicine, says of the time period: “From 1776 until the mid 1800s abortion was viewed as socially unacceptable; however, abortions were not illegal in most states.” Abortions were also extremely risky, like all surgical procedures at the time. Limited technology and hospitals allowed for high maternal and infant mortality rates, and as late as 1930, abortion accounted for the official cause of death for 2,700 women — nearly one-fifth of all maternal deaths that year. As science advanced and doctors grew increasingly familiar with the procedure, medical care became safer, “but by this time, the vast majority of women who needed abortions had no choice but to get them from illegal practitioners without these medical advances at their disposal. The ‘back alley’ abortion remained a dangerous, often deadly procedure, while areas of legally sanctioned medicine

improved dramatically." The difficulty in obtaining an abortion, especially safely, meant that the procedure was more available to white, upper-class women.

Moving into the mid 1800s, however, many states began to pass legislation outlawing abortion. Starting with Massachusetts, nearly all states passed laws banning abortion throughout pregnancy, some allowing exceptions when a woman’s life was in danger. Doctors led the anti-abortion movement at this time. With the formation of the American Medical Association, doctors united in an effort to prevent people other than themselves from providing abortions. Other sources for abortion at the time included “untrained” practitioners, apothecaries, midwives and homeopaths, but these alternatives detracted from the number of patients and revenue for doctors; but “rather than openly admitting to such motivations, the newly formed American Medical Association argued that abortion was both immoral and dangerous.”

Capitalistic motivation was a notable motive both for doctors attempting to streamline abortion access and those attempting to receive abortions during this time period. One historian notes, “Several observers saw the increase of abortion emanating from a growth of materialism and social striving, which seemingly was then largely confined to the Protestant population . . . maternity often came out second best to other more pleasurable activities which consumed time and money: ‘They [young couples] cannot give up their autumn excursions, they cannot give up the balls, and dresses and concerts and carriages.’” At the same time that Protestants comprised the majority of people seeking abortions in the 19th century, many urban areas saw significant influxes of Catholic, European immigrant populations. In the 1840s, almost half of immigrants arriving in the United States were from Ireland. Between 1820 and 1930, nearly 4.5-million Irish people immigrated to the United States, matched by approximately 5-million Germans. Many of these immigrants were attempting to evade dire situations like famine and poverty, and often remained impoverished after arriving.

As a result of abortion’s financial inaccessibility and Catholicism’s influence, there was a stark divide between upper- and middle-class Protestants and the booming immigrant population’s attitudes toward abortion and the rate at which they received them. In more modern times, religion seemingly plays a less pivotal role in who seeks an abortion, with 17 percent of abortion patients in 2014 identifying as mainline Protestant, 13 percent as evangelical Protestant, 24 percent as Catholic and 38 percent reporting no religious affiliation. Even so, religion has

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12 Id.
17 Id.
indisputably influenced attitude and discourse regarding abortion from its earliest days to the 21st century.

Discussing both Catholic and Protestant opposition to abortion in the 19th century, one historian observes: “Abortion was regarded as an unacceptable means of fertility limitation even by the founders of the American birth control movement. In fact, one of the selling points of the early ‘birth controllers’ was that contraception would minimize the use of abortion; as early as 1846 one birth control advocate was predicting that widespread contraceptive use would lead to the virtual disappearance of what he considered a revolting crime.”

Momentum against abortion continued building with an increasingly religious population and doctors admonishing people for receiving the procedure. In 1873, Congress enacted the Comstock Act, which banned access to information about abortion and birth control. The legislation, also known as the “Act of the Suppression of Trade in, and Circulation of, Obscene Literature and Articles of Immoral Use,” criminalized publication, distribution and possession of information about or devices or medications for “unlawful” abortion or contraception. The legislation followed a crusade by staunch anti-abortion activist Anthony Comstock, who firmly believed that abortion and contraceptives were deeply immoral.

Although the law was the first of its kind in the Western world, “at the time, the American public did not pay much attention to the new law. ... Soon after the federal law was on the books, 24 states enacted their own versions of Comstock laws to restrict the contraceptive trade on the state level.” Abortion remained widely illegal in the early 1900s, and by 1910, all but one state had criminalized abortion except if the pregnant individual’s life was at stake.

Despite abortion’s prevalence in the Northeast, especially in urban areas, the most stringent and punitive legislation existed in New England. Connecticut law banned people from using birth control at all, and married couples could be arrested and imprisoned for up to one year for using contraception even in the privacy of their own home. In Massachusetts, law enforcement could administer hefty fines or imprisonment to anyone disseminating contraceptives; although, “in actuality, law enforcement agents often looked the other way when it came to anti-birth control laws.”

These statutes remained widely unchallenged until 1916, when birth-control advocate Margaret Sanger fought the Comstock Act by opening America’s first birth control clinic in Brooklyn, New York. Sanger was originally indicted for nine violations of Comstock Law in 1914, but fled to England briefly to continue her work. When she returned two years later and opened the Brooklyn-based clinic, the charges were dropped, but her office was swiftly raided and shut

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22 Id.
23 Id.
24 Id.
down within 10 days. Sanger eventually went to trial in January 1917 and was convicted on obscenity charges. She served 30 days in the Queens County Penitentiary, but quickly moved to appeal her conviction.\textsuperscript{25}

Sanger’s case moved through the New York courts and was officially revisited in January 1918. Though the New York Court of Appeals upheld her conviction, Judge Frederick Crane — from whom the case earned the colloquial title of “the Crane decision” — included “a more liberal interpretation of New York State’s ‘Little Comstock’ law, enabling physicians for the first time to legally prescribe contraception for general health reasons rather than exclusively for venereal disease.”\textsuperscript{26}

Progress mostly remained stagnant for the years immediately following the Crane decision. Still, Crane ultimately opened the doors for the 1936 case \textit{United States v. One Package}, through which it became permissible for doctors to distribute contraceptives across state lines.\textsuperscript{27} Many historians credit Sanger for playing an instrumental role in maneuvering behind the scenes to bring the issue to the Court, and while “this decision did not eliminate the problem of the restrictive ‘chastity laws’ on the state level, it was a crucial ruling. Physicians could now legally mail birth control devices and information throughout the country, paving the way for the legitimatization of birth control by the medical industry and the general public.”\textsuperscript{28}

While movement was made toward legalizing birth control, abortion accessibility and legality significantly lagged behind. Even with the Cane decision, contraceptives were illegal for married couples until 1965 in the Supreme Court case \textit{Griswold v. Connecticut}. Not until 1972 in \textit{Eisenstadt v. Baird}, a case that arose from Massachusetts and went all the way to the Supreme Court, could unmarried couples legally use birth control devices.

Abortion remained illegal in most states for the better half of the 1900s, but it became increasingly socially acceptable as birth control legalization continued moving forward. Slowly, states began amending legislation to make exceptions in certain cases for abortion. Between 1962 and 1973, 17 states amended their laws to allow abortions in cases such as rape, health risks and fetal damage. Four states — Alaska, Hawaii, New York and Washington — allowed the procedure whenever a woman and her doctor deemed it necessary. Only Pennsylvania failed to lift its total ban on the procedure before \textit{Roe}. These amendments helped bring the issue of abortion to the Supreme Court for the first time in 1973.

\textsuperscript{28} \textit{Id.}
Historical memory in the United States often recalls Roe v. Wade as a crowning moment for abortion access advocates. The Court’s 1973 decision established abortion as an implied fundamental right for the first time, legalizing the procedure in all 50 states and invalidating state legislation across the country. Though considered a success in the history of reproductive justice today, some were initially skeptical of the decision due to the government’s heavy involvement in the forced sterilization of people of color in the 20th century. The Nixon administration “widely offer[ed] sterilization of low-income Americans, primarily women of color,” with the passage of the Family Planning Services and Population Research Act of 1970. Independent reports later confirmed that many physicians violated consent procedures and deemed the sterilizations as involuntary as a matter of practice. Perceived as giving doctors too much agency, Roe did little to alleviate fears for many communities of color.

Concerns regarding the forced sterilization of vulnerable communities were further validated by legislation under the auspices of eugenics. Reports show that “Used as a means of controlling ‘undesirable’ populations — immigrants, people of color, poor people, unmarried mothers, the disabled, the mentally ill — federally-funded sterilization programs took place in 32 states throughout the 20th century.” California accounted for the vast majority of these sterilizations, although the practice was certainly widespread in the United States. Many scholars have argued that “laws governing these matters were central to the maintenance and extension of the slavery regime,” and that current law, which will be discussed in greater detail in Part IV, continues to perpetuate this phenomenon. While this section only offers a limited history of forced sterilization in the United States, it is pivotal to note that the Roe ruling was not well received by all, even those who were fighting for pregnant people’s bodily autonomy, as government involvement in reproductive healthcare had developed a reputation for these shameful practices with strong racial implications.

This thesis seeks to complicate the popular narrative that Supreme Court rulings paved the way for abortion access at the same rate for all demographics. By analyzing the language that the Court uses in its abortion rulings and then examining these effects on the ground, this paper argues that the same communities that were sterilized against their will are often the ones that still face the most significant barriers to abortion access — which has particularly egregious effects since the abortion rate for Black women is nearly five times that of white women. Both state-level and federal legislation frequently corners poor and working-class women of color, continuing to make abortion access and reproductive healthcare a privilege for some, not a right for all.

30 Id.
II.

Roe v. Wade (1973)

Few other modern Supreme Court cases carry the same cultural weight as Roe. Those unfamiliar with most of the Court’s decisions still colloquially recognize it as the “case that made abortion legal.” While this is true, the most interesting part of the case is not what the ruling was, but rather how seven Supreme Court justices use logical acrobatics to legalize abortion.

It was these very logical acrobatics that upset constitutional originalists — who generally believe that “interpretation of the Constitution requires discovery of the Constitution’s meaning, which was fixed at the time the Constitution was adopted” 34 — in part for the decision’s perceived lack of textual foundation. Many thought that the language used in the case took a sharp departure from any historical application of the Constitution. Specifically, the question of fundamental rights versus implied fundamental rights under the Ninth and Fourteenth Amendments took center stage in Roe, building off of prior cases regarding contraceptive use that also considered questions about the right to privacy in reproductive healthcare decision but applying the principle to abortion instead. In Roe, the Court interpreted the Ninth Amendment in such a way that originalists found fundamentally wrong, arguing that the Founding Fathers created the amendment to specifically argue that not all rights will be enumerated in the Constitution though the state must respect due process when new issues such as abortion come into conflict.

“The Court nonetheless held that the due process clause protected some fundamental rights that on occasion overlapped with rights protected by the bill of rights,” wrote one constitutional scholar, explaining the development of implied fundamental rights under the Ninth Amendment in the Court. “As the Court phrased the point in Twining, ‘[i]t is possible that some of the personal rights safeguarded by the first eight amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of the first eight Amendments. [I]f this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law.’ The Court used this technique to hold that persons enjoyed the rights to freedom of speech, press, assembly, religion, and counsel, against state infringement.” 35

We see this logic from the 1908 case Twining v. New Jersey replicated and expanded in Roe. In this landmark case, a state statute barred a single woman from Texas from terminating her pregnancy via abortion. Her class-action lawsuit challenged the constitutionality of the Texas criminal abortion laws, which proscribed procuring or attempting an abortion except on medical advice for the purpose of saving the mother’s life. 36 Roe’s suit was conjoined with two other parties: Hallford, a licensed physician who had two state abortion prosecutions pending against

35 Id. Page 739.
him, and the Does. The Does, “a childless married couple . . . the wife not being pregnant, separately attacked the laws, basing alleged injury on the future possibilities of contraceptive failure, pregnancy, unpreparedness for parenthood, and impairment of the wife's health.” While a three-judge District Court granted all three parties certiorari after consolidating the actions, it declared the Does’ complaint not justiciable, meaning not subject to trial in a court of law. On behalf of Roe, the state court ruled that the abortion statutes were void, vague and infringing on the plaintiffs’ Ninth and Fourteenth Amendment rights.

The pressing question that the Supreme Court was subsequently forced to answer was does the Constitution embrace a woman’s right to terminate her pregnancy by abortion? In answering this, the Court had to examine the application of implied fundamental rights to ultimately argue that yes, the Constitution does embrace the right to choose whether to carry a pregnancy to term. It is by this logic that the Court legalized first-trimester, elective abortions and more limitedly, late-term abortions, in a 7–2 ruling.

In its decision, the Court held: “State criminal abortion laws, like those involved here, that except from criminality only a life-saving procedure on the mother's behalf without regard to the stage of her pregnancy and other interests involved violate the Due Process Clause of the Fourteenth Amendment, which protects against state action the right to privacy, including a woman's qualified right to terminate her pregnancy.” The right to privacy that this language invokes is not written anywhere in the Constitution; there is no amendment that guarantees privacy as a fundamental right to United States citizens. Still, the Court established in Griswold v. Connecticut (1965) that the right to privacy is implied in the language of the Ninth Amendment and the due process clause of the Fourteenth Amendment, the implications of which have a clear presence Roe. “[My] conclusion that the concept of liberty [embraces] the right of marital privacy though that right is not mentioned explicitly in the Constitution is supported both by numerous decisions of this Court, referred to in the Court’s opinion, and by the language and history of the Ninth Amendment [which] reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement,” Justice Goldberg writes in the concurring opinion in Griswold.

Though originalists might find the Court’s interpretation of the Ninth Amendment in Roe extreme in its assumptions, parts of the opinion actually air on the side of originalist interpretations. For example, the opinion dedicates a significant amount of writing to examining the history of abortion in the United States. But, as noted by Justice Blackmun writing for the majority, “at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect. Phrasing it another way, a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today.” This paradox of heavy reliance on historic understandings of abortion and the creative application of the Ninth

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37 Id.
38 Id.
Amendment demonstrate how even within a single opinion, justices can analyze a case through multiple lenses of analysis — adding to Roe’s status as a landmark case.

The concurring justices in Griswold also take ample time to explain how the Ninth Amendment bears significant weight in the case, despite not playing a major role in precedent — the crux of many people’s frustration with both this decision and Roe. On behalf of the 7–2 majority, Justice Goldberg writes in Griswold, “While this Court has had little occasion to interpret the Ninth Amendment, ‘[i]t cannot be presumed that any clause in the constitution is intended to be without effect.’ [To] hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever.”

This interpretation was especially controversial because of competing perspectives on the scope of the Ninth Amendment. While some argue that, “the Amendment is what it appears to be: a meaningful check on federal power and a significant guarantee of individual liberty,” there is also popular consensus on a competing viewpoint, which argues “when the Constitution sought to protect private rights it specified them; that it explicitly protects some elements of privacy, but not others, suggests that it did not mean to protect those not mentioned.” Here is where we see sharply differing understandings of the same principle, which the Court acknowledges in Roe, as well: “[The Constitution] is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.”

Griswold’s interpretation of the Ninth Amendment is used to justify the decision to legalize abortion in Roe, and from Roe and onward, this application of the Ninth Amendment is repeatedly employed to justify the legalization of abortion. The Roe opinion reads, “This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.”

Many took issue with this implied right, arguing that precedent did not generally establish a right of privacy, let alone reach broadly enough to include abortion. Though this section primarily focuses on Griswold as Roe’s main precedent, cases such as Meyer v. Nebraska (1923), Pierce v. Society of Sisters (1925) and Eisenstadt v. Baird (1972) also made the Roe ruling possible. “Taken together, the Meyer/Pierce/Griswold/Eisenstadt line of cases delineates a sphere of

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44 Meyer found that a Nebraska prohibition on teaching a modern foreign language violated the Fourteenth Amendment’s Due Process clause. Pierce held that states could not force children to attend public school, and Eisenstadt found that contraceptives can be administered to single people.
interests — which the Court now groups and denominates ‘privacy’ — implicit in the ‘liberty’ protected by the Fourteenth Amendment,’’ writes a defender of Roe. “At the core of this sphere is the right of the individual to make for himself [the] fundamental decisions that shape family life: whom to marry; whether and when to have children; and with what values to rear those children. [Plainly] the right [to an abortion] falls within [this] class of [interests]. The question of constitutionality [in Roe] is a more difficult one than that involved in Griswold and Eisenstadt only because the asserted state interest is more important, not because of any difference in the individual interests involved.”

The effects of this ruling are manifold, but we can draw some key inferences from empirical evidence regarding the rates of legal abortion prior to and after Roe. Though mostly illegal before the 1973 decision, abortion rates began increasing in the late 1960s and continued climbing post Roe. Though correlation does not necessarily reflect causation, many scholars have suggested that the growing number of abortions in the United States influenced the Court’s decision to grant the case certiorari. But within the sphere of abortion activists, there were also conflicting opinions about whether it was too soon for the Court to take on the case. Counter to her progressive politics, even current Supreme Court Justice Ruth Bader Ginsberg has criticized the Burger Court for going “too far, too fast,” arguing that “the court prevented the states from working out on their own how best to regulate abortion, short-circuiting the democratic process and provoking an angry ‘backlash’ among conservatives and resistance to Roe that continues to this day.”

Though this essay rejects the narrative of “social backlash,” as it often negates nuance and implies a universal experience across different identity groups, Ginsberg’s perspective is not unique. Still, a survey conducted between 1965 and 1967 found that 8 in 10 low-income women in New York City who had an abortion attempted a dangerous self-induced procedure; thus arguing that the case happened “too fast” tends to negate the urgency many of these women felt and the unsafe extremes that they went to terminate a pregnancy. Additionally, public opinion on abortion has fluctuated

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so much that to cite Roe as the cause of social backlash ignores the many waves that society has gone through in response to abortion and the Court.

As time went on, however, it became increasingly clear that Roe was far from the answer to all questions on the legality of abortion. Questions continue to arise over the issue that Ginsberg inadvertently poses, which is the states’ role in legalizing abortion. This question will be answered in Section IV, but Ginsberg’s perspective should come to mind when revisiting it. In terms of the trajectory of cases that the Supreme Court continued to hear, in no uncertain terms did the justices plan to put the issue of abortion access to rest with Roe. Just three years later in Planned Parenthood of Central Missouri v. Danforth (1976), state pushback against Roe is visible in legislation passed to undermine the legality of abortion.

**Planned Parenthood of Central Missouri v. Danforth (1976)**

The Supreme Court took on Planned Parenthood of Central Missouri v. Danforth because it “raises issues secondary to those that were then before the Court [in Roe and Doe]. Indeed, some of the questions now presented were forecast and reserved in Roe and Doe.” The Court’s ruling in this case essentially shuts down major state-initiated attempts to prohibit legal measures for abortion. The case, brought to the Court by two Missouri-licensed physicians who worked for Planned Parenthood, called into question the state provisions put in place by Missouri Governor Christopher Bond in H.C.S. House Bill No. 1211. The challenged provisions in this Act that the Supreme Court addresses are as follows:

§ 2(2) Defining “viability” as that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life supportive systems; § 3(2) requiring that, before submitting to an abortion during the first 12 weeks of pregnancy, a woman must consent in writing to the procedure and certify that “her consent is informed and freely given, and is not the result of coercion”; § 3(3) requiring, for the same period, the written consent of the spouse of a woman seeking an abortion unless a licensed physician certifies that the abortion is necessary to preserve the mother’s life; § 3(4) requiring, for the same period, and with the same proviso, the written consent of a parent or person in loco parentis to the abortion of an unmarried woman under age 18; § 6(1) requiring the physician to exercise professional care to preserve the fetus’ life and health, failing which he is deemed guilty of manslaughter and is liable in an action for damages; § 7 declaring an infant who survives an attempted abortion not performed to save the mother’s life or health an abandoned ward of the State, and depriving the mother and a consenting father of parental rights; § 9 prohibiting, after the first 12 weeks of pregnancy, the abortion procedure of saline amniocentesis as “deleterious to maternal health”; and §§ 10 and 11 prescribing reporting and recordkeeping requirements for health facilities and physicians performing abortions. The district Court ruled that the two physicians had “obvious standing” to maintain the suit, and that it was therefore unnecessary to determine if Planned Parenthood also had standing. On the merits, the court upheld the foregoing provisions with the exception of § 6(1)’s professional skill requirement, which was held to be “unconstitutionally overbroad” because it failed to exclude the pregnancy stage prior to viability.

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These provisions exemplify the obscure, and not-so-obscure, ways that state legislatures attempt to undermine abortion access despite the legality of the procedure, as decided in Roe. For example, despite Roe’s ruling that the decision to have an abortion should be made between a pregnant person and their physician, one of the challenged provisions in this case requires spouses or parents to be consulted before the procedure. The language of the Court’s holdings in Danforth suggest that the justices see through at least some of these transparent attempts at building legislative barriers to abortion access. We also see the first reference to undue burden in this case, though the concept is only mentioned in passing.

In Justice Blackmun’s majority opinion, written on behalf of the six concurring judges, the Court holds that a number of these provisions are unconstitutional and does not weigh in on terms otherwise defined in Roe. For example, the Court holds that § 2(2) “maintains the flexibility of the term ‘viability’ recognized in Roe. It is not a proper legislative or judicial function to fix viability, which is essentially for the judgment of the responsible attending physician, at a specific point in the gestation period.”

Still, the Court finds other provisions constitutional, upholding § 3(2) requiring a woman to consent to abortion in writing. Other consent provisions in §§ 3(3) and 3(4), requiring spousal or parental or in loco parentis consent, the Court declares unconstitutional: “The State may not constitutionally impose a blanket parental consent requirements . . . as a condition for an unmarried minor’s abortion during the first 12 weeks of her pregnancy for substantially the same reasons as in the case of the spousal consent provision, there being no significant state interests, whether to safeguard the family unit and parental authority or other vise, in condition an abortion on the consent of a parent with respect to the under-18-year-old minor. As stressed in Roe, ‘the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman’s attending physician.’”

The matter of “significant state interest,” to reiterate, is a direct reference to the level of scrutiny applied in this case. Strict scrutiny was used in this case because Roe determined abortion access is an implied fundamental right. When the Court writes that there is no significant state interest in creating these kinds of consent provisions it is invoking the strict scrutiny standard. The history of implied fundamental rights under the Ninth Amendment in privacy cases has long been debated in the Supreme Court, and Danforth continues this debate.

The line between express and implied rights often requires the Court to revisit the history of these distinctions. “Although conventionally drawn, the line between express and implied rights is hardly a clear one,” several scholars explain, providing other examples that might help clarify the distinctions when it comes to abortion access. “The right to equal protection of the laws is an express right. But what about the right to be free from racial segregation? The right to free speech is express. But what about the right to spend large sums of money on political campaigns? In disputed cases, the general express right does not answer the question whether the particular right at issue is entitled to protection. For this reason, there is a sense in which most

controversial Supreme Court decisions involve the implication of rights.”

Understanding why implied fundamental rights are highly controversial also lends itself to further understanding why originalists took such issue with many of the Court’s abortion decisions, including but certainly not limited to Roe and Danforth. Though not inscribed in the Constitution, the Court insists throughout these cases that abortion access is an implied fundamental right. This will become increasingly clear as we move through abortion cases in this essay.

The Court also holds § 9 of the challenged Missouri provisions unconstitutional. This provision is perhaps the most conspicuous attempt to ban safe abortion practices with no impetus other than preventing more abortions from occurring. Recall the provision prohibits the abortion procedure of saline amniocentesis after the first 12 weeks of pregnancy. Saline amniocentesis, the most common method of abortion at the time and sometimes referred to as “salting out,” is the technique typically used after 16 weeks of pregnancy when enough fluid has accumulated in the amniotic fluid sac surrounding the fetus. The procedure is performed by injecting the chemical into the sac after dilating the cervix, and the still fetus is delivered. In the Danforth decision, Blackmun thus writes, “Through § 9, the State would prohibit the most commonly used abortion procedure in the country and one that is safer, with respect to maternal mortality, than even the continuation of pregnancy until normal childbirth, and would force pregnancy terminations by methods more dangerous to the woman’s health than the method outlawed. As so viewed (particularly since another safe technique, prostaglandin, is not yet available) the outright legislative proscription of saline amniocentesis falls as a reasonable protect of maternal health. As an arbitrary regulation designed to prevent the vast majority of abortions after the first 12 weeks, it is plainly unconstitutional.”

Provision § 6(1) is also entirely dismissed by the Court in Danforth, deeming the requirement for a physician to preserve the fetus’ life and health entirely invalid because “the second sentence, which provides from criminal and civil liability where a physician fails ‘to take such measures to encourage or to sustain the life of the child, and the death of the child results,’ does not alter the duty imposed by the first sentence or limit that duty to pregnancies that have reached the stage of viability.”

Finally, the Court provides a sneak peak at what’s to come in future rulings, hinting at the creation of an undue burden standard for the first time when it addresses the reporting and recordkeeping requirements put forth in §§ 10 and 11. Blackmun writes, “The reporting and recordkeeping requirements, which can be useful to the State’s interest in protecting the health of its female citizens and which may be of medical value, are not constitutionally offensive in themselves, particularly in view of reasonable confidentiality and retention provisions. They thus do not interfere with the abortion decision or the physician-patient relationship. It is assumed that the provisions will not be administered in an unduly burdensome way, and that patients will not

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be required to execute spousal or parental consent forms in accordance with invalid provisions of the Act.\footnote{55}

From this point forward in Supreme Court abortion rulings, undue burden plays a much more significant role. \textit{Harris v. McRae} (1980) revisits this concept more deeply, but first it is imperative to further examine the language used in \textit{Danforth} to understand how each step in abortion rulings heavily relied on the preceding landmark case.

In \textit{Danforth}, the Court reiterates the three-trimester barometer in relationship to state interest by turning to \textit{Roe}, reaffirming the rejection of the argument that “the woman’s right is absolute, and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason, she alone chooses.”\footnote{56} The Court argues, “Instead, this right ‘must be considered against important state interests in regulation,’”\footnote{57} and that after the first trimester, “the State may regulate an abortion to protect the life of the fetus and even may proscribe abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.”\footnote{58}

The Court frequently invokes language pertaining to the life and health of the mother when assessing the constitutionality of a provision, but its understanding of these terms is often clinical and devoid of the lived experiences of someone forced to carry an unwanted fetus to term. Particularly, the Court’s arbitrary understanding of preserving life and health seems to pay no mind to life or health after the child is delivered. For instance, if a poor mother was forced by state legislation to deliver a child though she wished to have an abortion and was subsequently unable to provide nourishment for said child, would exceptions to stringent abortion legislation take “preserving the life or health” of a mother, in this sense, into consideration? We know that the answer is no, it does not. The Court approaches abortion with a limited scope, often stopping short of considering life after a child is born or otherwise assuming that any child under these circumstances would be put up for adoption. It is in this clinical understanding of abortion that the most problematic rulings come into being. And as is the case with every abortion ruling, there remained many intentionally unanswered questions in \textit{Danforth} that later rulings address.

The next case, \textit{Harris v. McRae} (1980), handles the infamous Hyde Amendment, when the Court tackles the issue of using federal funds to reimburse the cost of abortions under Medicaid. We then begin to see more clearly how states start to become more creative in the ways that they limit abortion access — especially for people of color. In this sense, marginalized communities’ initial hesitations about \textit{Roe} come full circle as abortion access again becomes increasingly limited to wealthy, white populations. The Hyde Amendment is particularly important to understanding the modern ways in which reproductive healthcare is leveraged against poor and minority women.

\footnote{55}{Planned Parenthood of Central Missouri v. Danforth, 428 US 52 (1976).}
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\footnote{58}{Planned Parenthood of Central Missouri v. Danforth, 428 US 52 (1976).}
Harris v. McRae (1980)

After the Court moved forward with legalizing abortion, state legislatures responded by creating policies that placed significant barriers to abortion access. Most notably, this backlash included several states writing versions of the Hyde Amendment into law. The Hyde Amendment, in short, “severely limit[s] the use of any federal funds to reimburse the cost of abortions under the Medicaid program.”

Lyndon B. Johnson created the Medicaid program in 1965 as part of the Social Security Act, intended “to provide federal financial assistance to States that choose to reimburse certain costs of medical treatment for needy persons.” But beginning in 1976, just three years after Roe, states sought to undermine the Act, exacerbating poor people’s difficulties in obtaining or affording abortions. Versions of the Hyde Amendment are still in place in variations across the country. A report from the American Civil Liberties Union reads:

For forty years, politicians have used the Hyde Amendment to withhold Medicaid coverage for abortion from eligible women. Medicaid coverage can mean the difference between getting abortion care and being denied. The Hyde Amendment forces many women to divert money meant for living expenses — like food, rent, utilities and bills — to pay for an abortion. It makes it less possible for a low-income woman to access her health care options and exercise her constitutionally protected right to an abortion. The federal ban is not permanent law. Every year, Congress has the chance to lift the Hyde Amendment or Congress could support the Each Woman Act to provide equal access to abortion care coverage. Despite the federal ban in 17 states qualified women can use Medicaid to cover the cost of an abortion.

This report underscores the deleterious effects that Harris v. McRae still has today. In the 1980 case, a class-action suit — filed on behalf of all pregnant or potentially pregnant women in the State of New York eligible for Medicaid and who decide to have an abortion within the first 24 weeks of pregnancy, and of all authorized providers of abortion services to such women — attempted to have the legislation overruled. Several groups representing women sought to ban the Hyde Amendment’s enforcement because it violated the Fifth Amendment’s Due Process Clause and the First Amendment’s Religion Clause. Further, appellees argued that despite the Hyde Amendment, a participating State remains obligated under Title XIX to fund all medically necessary abortions. The District Court held that “the Hyde Amendment had substantively amended Title XIX to relieve a State of any obligation to fund those medically necessary abortions for which federal reimbursement is unavailable, but that the Amendment violates the equal protection component of the Fifth Amendment’s Due Process Clause and the Free Exercise Clause of the First Amendment.” This decision was ultimately reversed and remanded at the Supreme Court.

59 Harris v. McRae, 448 US 297 (1980)
60 Harris v. McRae, 448 US 297 (1980)
61 American Civil Liberties Union, “Public Funding for Abortion,”
In a contentious 5–4 decision, the Supreme Court decided against the appellees’ claims, holding that participating states are not required to pay for medically necessary abortions under Title XIX when the Hyde Amendment bars federal reimbursement. In part, the Court justified this through the logic that “the Hyde Amendment’s legislative history [does not] contain any indication that Congress intended to shift the entire cost of some medically necessary abortions to the participating States, but rather suggests that Congress has always assumed that a participating State would not be required to fund such abortions once federal funding was withdrawn pursuant to the Hyde Amendment.”

The Court also held that the Hyde Amendment does not impinge on the liberty protected by the Due Process Clause of the Fifth Amendment; that the Amendment does not violate the equal protection component of the Due Process Clause of the Fifth Amendment; and that the Amendment does not violate the Establishment Clause of the First Amendment.

Arguing that the Hyde Amendment does not violate the Fifth Amendment’s Due Process Clause, Justice Stewart writes that in addition to the Hyde Amendment placing “no governmental obstacle” in path of a woman who chooses to terminate her pregnancy, the Amendment instead “encourages alternative activity deemed in the public interest.” He continues: “Regardless of whether the freedom of a woman to choose to terminate her pregnancy for health reasons lies at the core or the periphery of the due process liberty recognized in Wade . . . it does not follow that a woman’s freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices. Although government may not place obstacles in the path of a woman’s exercise of her freedom of choice, it need not remove those not of its own creation, and indigency falls within the latter category.”

Still perhaps the most egregious part of this holding argues that an indigent woman has “at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have if Congress had chosen to subsidize healthcare costs at all.” It is in this final sentence in this determination that the Court fails to acknowledge the direct correlation between accessibility and socioeconomic status, and even takes a step back from the progress made in Roe. It begs the question, what good is the right to choose if the choice to have an abortion renders it no greater a realistic possibility? Further, the language in this section of the ruling is contradictory to precedents’ principle underpinnings, which involve the understanding that the decision to have an abortion may not be medically necessary, but necessary for some nonetheless—a decision, the Court also determined, to be made by a woman in consultation with her physician, and no one else. That the Hyde Amendment could be understood as anything but a governmental impediment to abortion access is outlandish at best. It is, in its truest sense, an undue burden. If abortion was already legalized in Roe then the Hyde Amendment does little but retroactively ensure that fewer women, namely poor minority women, have fair access.

Stewart counters this argument in his opinion by turning to the precedent Maher v. Roe (1977), a case that challenged the Connecticut Welfare Department’s regulations limiting state Medicaid

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64 Harris v. McRae, 448 US 297 (1980)
65 Harris v. McRae, 448 US 297 (1980)
benefits for first-trimester abortions to those that were medically necessary. This case also sheds light on the development of undue burden. Stewart writes for *Harris v. McRae*, “The doctrine of *Roe v. Wade*, the Court held in Maher, ‘protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy . . . but the constitutional freedom recognized in Wade and its progeny, the Maher Court explained, did not prevent Connecticut from making ‘a value judgment favoring childbirth over abortion, and . . . implement[ing] that judgment by the allocation of public funds.’” The conflict before states’ morality judgment and the accessibility of abortion will continue to come into play as this paper examines a variety of cases. Visualized in the map below, the Hyde Amendment continues to limit abortion access funds in most states.

![Map showing states with abortion access restrictions](source)

As for the alleged violations of the Fifth Amendment’s Equal Protection Clause, the Court resists the urge to qualify class as a suspect classification. Recall the level of scrutiny applied to cases depends on the nature of the issue and under what auspices the claims are presented. For example, race is a suspect classification, thus when cases alleging racial discrimination arise they are reviewed under strict scrutiny. Gender and class, however, are not suspect classifications and do not warrant strict scrutiny in the Court. The reason that abortion cases are reviewed under strict scrutiny is a result of the Court’s establishment of abortion as an implied fundamental right in *Roe*. We therefore see the following determination in rejecting the appellees argument that Hyde violates the Equal Protection Clause in the Fifth Amendment: “Although the impact of the Amendment falls on the indigent, that fact does not itself render the funding restrictions

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66 Harris v. McRae, 448 US 297 (1980)
constitutionally invalid, for poverty, standing alone, is not a suspect classification."\(^{67}\) Taking it one step further, Stewart elaborates, “Congress has neither invaded a substantive constitutional right or freedom nor enacted legislation that purposefully operates to the detriment of a suspect class, the only requirement of equal protection is that congressional action be rationally related to a legitimate government interest. The Hyde Amendment satisfies this standard, since, by encouraging childbirth except in the most urgent circumstances, it is rationally related to the legitimate governmental objective of preserving potential life.”\(^{68}\)

Here we see how the Court so frequently fails to draw the implicit connection between race and class, and subsequently how Congress manages to pass policies that disproportionately disenfranchise and harm communities of color, specifically women in these communities. By attacking Medicaid and positing it as a class issue, Congress evades strict scrutiny review even though it is widely recognized that due to structural inequalities that link racism, sexism, and economic inequality, women of color disproportionately comprise the majority of Medicaid enrollees: 30 percent of Black women and 24 percent of Hispanic women are enrolled in Medicaid, compared to 14 percent of white women.\(^{69}\) Regardless, Stewart writes “In a sense, every denial of welfare to an indigent creates a wealth classification as compared to nonindigents who are able to pay for the desired goods or services. But this Court has never held that financial need alone identifies a suspect class.”\(^{70}\) Thus we see the Court reject appellees claims of Fifth Amendment violations by arguing that the State has a vested interest in preserving potential life and that class is not a suspect classification.

In addition to the Court rejecting claims of Fifth Amendment violations, it wastes little time in dismissing First Amendment claims. Off the bat, the Court writes that it “need not address the merits of the appellees’ arguments concerning the Free Exercise Clause, because the appellees lack standing to raise a free exercise challenge to the Hyde Amendment.”\(^{71}\) Stewart gives more time to explain the Court’s rejection of the appellees’ claims that the Hyde Amendment violates the Establishment Clause. Appellees argued “the Hyde Amendment violates the Establishment Clause because it incorporates into law the doctrines of the Roman Catholic Church concerning the sinfulness of abortion and the time at which life commences. Moreover, insofar as a woman’s decision to seek a medically necessary abortion may be a product of her religious beliefs under certain Protestant and Jewish tenets, the appellees assert that the funding limitations of the Hyde Amendment impinge on the freedom of religion guaranteed by the Free Exercise Clause.”\(^{72}\) The Court denounces this argument by writing that just because a law happens to coincide with religious tenets does not by nature make it a violation of the Establishment Clause. From these decisions it is also increasingly evident how deeply intertwined religion is in the debate surrounding abortion.

\(^{67}\) Gender is a quasi-suspect classification, so the Court uses intermediate scrutiny to assess cases on the matter.

\(^{68}\) Harris v. McRae, 448 US 297 (1980)


\(^{70}\) Harris v. McRae, 448 US 297 (1980)

\(^{71}\) Harris v. McRae, 448 US 297 (1980)

\(^{72}\) Harris v. McRae, 448 US 297 (1980)
Justice Brennan’s dissent in *Harris* ultimately brings to light the burdensome nature of this ruling by arguing that it violates the Due Process Clause of the Fifth Amendment. He writes: “When viewed in the context of the Medicaid program to which it is appended, it is obvious that the Hyde Amendment is nothing less than an attempt by Congress to circumvent the dictates of the Constitution and achieve indirectly what *Roe v. Wade* said it could not do directly. . . . Under the Hyde Amendment, the Government will fund only those procedures incidental to childbirth. By thus injecting coercive financial incentives favoring childbirth into a decision that is constitutionally guaranteed to be free from governmental intrusion, the Hyde Amendment deprives the indigent woman of her freedom to choose abortion over maternity.”

Brennan also does a masterful job communicating the discriminatory effects that the majority chooses to ignore, writing, “The reality of the situation is that the Hyde Amendment has effectively removed this choice from the indigent woman’s hands. By funding all of the expenses associated with childbirth and none of the expenses incurred in terminating pregnancy, the Government literally makes an offer that the indigent woman cannot afford to refuse. . . . The fundamental flaw in the Court’s due process analysis, then, is its failure to acknowledge that the discriminatory distribution of the benefits of governmental largesse can discourage the exercise of fundamental liberties just as effectively as can an outright denial of those rights through criminal and regulatory sanctions.” In essence, Brennan captures the devastating consequences of the *Harris* ruling and the wildly unconstitutional nature of both the Amendment and the decision. But by barely disguising the Amendment as states’ interest in preserving the potential life of a fetus and the Court recognizing curtailing Medicaid’s benefits as an issue of class, legislators successfully evade the obligation to amend their versions of the Hyde Amendment. Brennan’s references to placing an undue burden on women seeking an abortion in his dissent will continue to play a more central role in future cases.

**Akron v. Akron Center for Reproductive Health (1983)**

The Hyde Amendment’s legacy manifested in a number of states creating additional barriers to abortion. In Ohio in 1978 this took the form of an ordinance that, among other things, required all abortions performed after the first trimester to be done in hospitals, parental consent before the procedure could be performed on an unmarried minor under the age of 15, doctors to counsel prospective patients, a 24-hour waiting period, and that fetal remains be disposed of in a humane and sanitary manner. Again, this legislation forced the Court to address the issue of state efforts to undermine the rights provided in *Roe*, and whether these provisions violated the right-to-privacy doctrine as implied by the Fourteenth Amendment. In a step forward from *Harris*, the 6–3 ruling rejected the ordinance as unconstitutional, namely for placing an undue burden on women seeking an abortion, and reaffirmed *Roe*.

The Court held that the part of the ordinance that required abortions be performed in a hospital after the first trimester of pregnancy was unconstitutional because the state must have a reasonably designed interest in health regulation, which was absent in the challenged legislation.

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Instead, Justice Powell on behalf of the majority, writes “the State is obligated to make a reasonable effort to limit the effect of its regulations to the period in the trimester during which its health interest may be furthered. . . By preventing the performance of dilatation-and-evacuation abortions in an appropriate nonhospital setting, Akron has imposed a heavy and unnecessary burden on women’s access to a relatively inexpensive, otherwise accessible, and safe abortion procedure.” This quote demonstrates the Court beginning to increasingly incorporate unnecessary or undue burden in its rhetoric.

Powell also rejects the ordinance’s insistence that physicians inform their patients of “the particular risks associated with her pregnancy and the abortion technique to be employed” for a relatively similar reason: “Section § 1807.06(B) goes far beyond merely describing the general subject matter relevant to informed consent. By insisting upon recitation of a lengthy and inflexible list of information, the section unreasonably has placed obstacles in the path of the physician.” This ordinance reflects a scare tactic commonly used by states, which pushed for physicians to give incredibly detailed and often misleading information about, for example, fetuses’ ability to feel pain. Legislation of this nature is still pushed for in many states, as demonstrated in this thesis’s later section on South Dakota.

In this same vein, the Court determined that states cannot adopt regulations “designed to influence the woman’s choice between abortion or childbirth” and that attending physicians are the only people competent enough to provide information and counseling relevant to informed consent. This section of the ordinance directly pertains to another part the Court struck down, which prohibits a physician from performing an abortion until 24 hours after the pregnant person signs a consent form. Powell dismisses this swiftly, writing that this section “violates the Due Process Clause by failing to give a physician fair notice that his contemplated conduct is forbidden.”

Parts of the Akron ordinance, though declared unconstitutional in this case, are still pervasive in today’s abortion access landscape. Though Powell argues that Akron “failed to demonstrate that any legitimate state interest is furthered by an arbitrary and inflexible waiting period,” there are currently 27 states that still require waiting periods before abortion, South Dakota accounting for one of them. Waiting periods require people seeking abortions to visit clinics or hospitals at least twice, and places where there are an extremely limited number clinics can require driving lengthy distances and arranging pricey accommodations.

Finally, the Court rejects Section 1870.05(B) prohibiting a physician from performing an abortion on an unmarried minor under the age of 15 unless “he obtains the consent of one of her parents or unless the minor obtains an order from a court having jurisdiction over her that the

abortion be performed.” Arguing that the blanket determination that all minors under 15 are too immature to make the decision for themselves or that an abortion is never in the minor’s best interest, the Court holds, “Under circumstances where the Ohio statute governing juvenile proceedings does not mention minors’ abortions nor suggest that the Ohio Juvenile Court has authority to inquire into a minor’s maturity or emancipation . . . as applied in juvenile proceedings, is not reasonable susceptible of being construed to create an opportunity for case-by-case evaluations of the maturity of pregnant minors.”

This ruling reiterates the significant variations between certain interpretative approaches to the Constitution. Relying on stare decisis, the legal principle of determining points in litigation according to precedent, the Court addresses how originalists might still take issue with Roe as precedent for abortion cases. Justice Powell acknowledges that though some still argue “that we erred in interpreting the Constitution. Nonetheless, the doctrine of stare decisis, while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law. We respect it today and reaffirm Roe v. Wade.” He again invokes this doctrine by returning to Danforth as an example when state provisions were upheld because Missouri met its burden of demonstrating that “these regulations furthered important health-related state concerns.” Still Powell seemingly departs from some of the logic employed in Harris.

When the concept of placing an undue burden on those seeking an abortion comes into play in Akron, Powell writes that the hospitalization requirement for a second-trimester abortion creates a significant obstacle in the path of abortion access because of the cost this legislation necessitates: “A second trimester hospitalization requirement may force women to travel to find available facilities, resulting in both financial expense and additional health risk. It therefore is apparent that a second trimester hospitalization requirement may significantly limit a woman’s ability to obtain an abortion.” This part of the ruling is so fascinating because Powell specifically acknowledges that a financial burden is a significant factor in determining whether a woman may obtain an abortion without undue state interference. His majority ruling in this case reads closer to Brennan’s dissent in Harris rather than the majority opinion that he concurred with, as do his frequent references to undue burden. In the same section of the Akron ruling, Powell again argues, “By preventing the performance of [dilatation-and-evacuation] abortions in an appropriate nonhospital setting, Akron has imposed a heavy, and unnecessary, burden on women’s access to a relatively inexpensive, otherwise accessible, and safe abortion procedure.” Note that this increasing reference to an undue or unnecessary burden is laying the groundwork for Planned Parenthood of Southeastern Pennsylvania v. Casey, the first case in Part III.

One of the most interesting parts of the Akron ruling is that many of the legislative initiatives the city took are still commonplace in most of the United States today. Consider the provision that

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doctors must inform women of the particular risks associated with her pregnancy and the abortion technique to be employed, on which the Court ruled, “it is fair to say that much of the information required is designed not to inform the woman’s consent, but rather to persuade her to withhold it altogether.” For example, there is currently legislation moving through Texas’s state legislature that would allow doctors to feasibly lie to women, making it the attending physician’s decision whether to inform someone if their child has any disabilities or poor health conditions while in the womb. This mirrors some of the challenged provisions in Akron but is still being seriously in the state legislature now, and if passed, people obtaining abortions in Texas would be prohibited from suing doctors for intentionally withholding this information. Explaining the bill’s implications, one critic writes in the San Antonio Current:

The bill, as currently drafted, would not only empower doctors to keep secrets from their patients about their own bodies, but would also entrust the government to make one of the most personal, private, and life-altering decisions for Texan woman: whether they should have an abortion. For many low-income women, the alternative — raising a severely disabled child in a state with few affordable health insurance options — would force them into poverty. This outcome, the bill’s opponents argue, would only worsen the child’s health outcomes. And the majority of the bill’s sponsors voted against state Medicaid expansion, a policy that would have made health insurance far more affordable for low-income families. This legislation, drafted more than 40 years after Roe and 34 years after the Akron decision, underscores how states continue drafting bills to undermine the fundamental right to abortion access. This bill directly attacks the holding in Akron that states may not impose legislation that directly attempts to persuade women from not having an abortion, but also speaks to the critical downfall of the Harris decision. Had the Court not made a grave mistake in allowing the Hyde Amendment to stand, Medicaid provisions would at the very least allow low-income people more flexibility in determining whether to have an abortion. Instead, we see states leveraging class-based policies to enforce draconian abortion regulations.

It is important to understand how all of these cases collectively paved the way for the creation of an official undue burden standard, but also that the loopholes the Court produces intentionally leave room for more major decisions down the line. This paper only addresses the most important cases for understanding the development of the undue burden standard and the most flawed interpretations of abortion access as anything less than an issue with deep implications about our understanding of intersecting identities of gender, race, class and regional values. These issues remain pertinent to how the Court has expanded abortion rights for certain communities over others, validating concerns laid out by communities of color, for example, in the introduction.

Justice O’Connor’s dissent in *Akron* is also a pivotal point of constitutional analysis. She argues that the Court’s decision in *Roe* sets itself up for an unending conflict because of the somewhat arbitrarily created trimester framework. O’Connor writes, “Just as improvements in medical technology inevitably will move forward the point at which the State may regulate for reasons of maternal health, different technological improvements will move backward the point of viability at which the State may proscribe abortions except when necessary to preserve the life and health of the mother;” and ultimately calls it “a completely unworkable method of accommodating the conflicting personal rights and compelling state interests that are involved in the abortion context.”

O’Connor highlights yet another loophole that lends itself to certain states’ unfettering efforts to undermine abortion access. With advancing technology and deep partisan divisions over abortion access it becomes increasingly easier for each side to pick a point in pregnancy to argue for or against viability. Ultimately, O’Connor does not question whether abortion is a fundamental right in her dissent, rather that the *Roe* framework is “clearly on a collision course with itself.” Instead, she makes the point that an “undue burden” test should be applied when considering the ways in which state legislation undermines access.

O’Connor’s analysis is problematic at times. That the first-ever female Supreme Court justice dissented in *Akron*, arguing that the “State’s interest in protecting potential human life exists throughout the pregnancy,” is ironic at best since men have governed women’s bodies and their choices for all of U.S. history, so the “State’s interest” is reflective of a very specific “representative” governing body that has historically excluded women. Regardless, O’Connor actually plays a pivotal role in developing the undue burden test:

Although the Court does not use the expression ‘undue burden,’ the Court recognizes that even a ‘significant obstacle’ can be justified by a ‘reasonable’ regulation. The ‘undue burden’ required in the abortion cases represents the required threshold inquiry that must be conducted before this Court can require a State to justify its legislative actions under the exacting ‘compelling state interest’ [read strict scrutiny] standard. The ‘unduly burdensome’ standard is particularly appropriate in the abortion context because of the nature and scope of the right that is involved. . . . We must be mindful that the Constitution does not compel a state to fine-tune its statutes so as to encourage or facilitate abortions. To the contrary, state action ‘encouraging childbirth except in the most urgent circumstances’ is ‘rationally related to the legitimate governmental objective of protecting potential life.’

Here lies the simultaneously conservative and progressive nature of O’Connor’s dissent. The progressive part of this dissent allows for a more formalized, stringent test for abortion legislation, requesting that the Court determine whether an undue burden is placed on someone seeking an abortion before applying strict scrutiny. She argues that the legislature is the ideal medium for resolving extremely sensitive issues, but that the Court does not necessarily defer to its judgments. Instead of the trimester framework, O’Connor instead offers the “unduly burdensome” test as an appropriate way to determine the legislation’s constitutionality.

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The conservative nature of this dissent is underlined by what O’Connor understands to be unduly burdensome. She writes, “The hospitalization requirement does not impose an undue burden on [the decision to have an abortion]. The Court’s reliance on increased abortion costs and decreased availability is misplaced. As the city of Akron points out, there is no evidence in this case to show that the two Akron hospitals that performed second trimester abortions denied an abortion to any woman, or that they would not permit abortion by the D&E procedure. . . . A health regulation, such as the hospitalization requirement, simply does not rise to the level of ‘official interference’ with the abortion decision.”93 In this statement and in the remainder of her dissent, O’Connor neglects the central role that class plays in what may be an undue burden.

Instead of the ways that O’Connor applies the test, undue burden should be understood as what would substantially interfere with the right to abortion for the most vulnerable populations in the United States. If the laws do not protect the most vulnerable communities, what use are the laws at all? O’Connor fails to grapple with this concept, instead arguing that provisions such as waiting periods, though they might increase the cost, do not constitute an undue burden: “The waiting period is surely a small cost to impose to ensure that the woman’s decision is well considered in light of its certain and irreparable consequences on fetal life, and the possible effects on her own.”94 Her argument undermines the thought process that inevitably factored into a person’s ultimate decision to have an abortion.

That someone would arrive at a clinic and make an on-the-spot, rash decision to abort a fetus is no more logical than someone arriving at the clinic, waiting 24 hours and changing their mind. Further, this extends beyond the state’s purview in regulating abortion access. The state cannot police the thought process leading up to the decision to have an abortion nor can it attempt to undermine that right once the decision is made. The Court recognized this in Akron when it ruled that physicians could not give women information that deliberately attempted to convince them to not get an abortion. O’Connor chooses to ignore this, taking a narrow approach to what she understands as worthy of the classification of an undue burden.

Still O’Connor provides the Court with the ever-important undue burden test in her controversial dissent. Thus, the undue burden test slowly but surely entered the consciousness of the Court, continuing to play an increasingly important role in these decisions. This test gets incorporated more over time, ultimately leading to its firm establishment in Casey. How the Court got there, however, is just as important as the end result because of the imperative role that precedent plays in creating a pathway toward this type of legislation.

**Hodgson v. Minnesota (1990)**

_Hodgson v. Minnesota_ perpetuated the stark divisions on the Court on whether state provisions regarding minors’ access to abortion are constitutional. This case is not as significant as the others covered in this section, but its pertinence to minors’ rights makes it relevant for understanding the use of waiting periods and parental-notification requirements. Appellees challenged Minnesota provision, among claims of Due Process and Equal Protection Fourteenth Amendment violations, on the basis of imposing a significant burden on a minor’s abortion rights.

The challenged provisions in this case required that both parents of a minor under 18-years old be notified before the adolescent gets an abortion. Further, the provision included a mandate that minors had to wait 48 hours after parental notification before the abortion could be performed. In a 5–4 decision with multiple concurring opinions, the Supreme Court upheld the 48-hour waiting period but opted for the notification of only one parent instead of two. The Court also upheld the challenged provision requiring “if a court enjoins the enforcement of subdivision 2 [that no abortion shall be performed on a woman under 18 years of age until at least 48 hours after both of her parents have been notified, the same two-parent notice requirement is effective unless a court of competent jurisdiction orders the abortion to proceed without notice upon proof by the minor that she is "mature and capable of giving informed consent" or that an abortion without notice to both parents would be in her best interest.

Brought to the Court by a group consisting of doctors, clinics, pregnant minors, and the mother of a pregnant minor, the District Court originally found the entirety of these provisions unconstitutional. The Appeals Court generally affirmed the ruling, and rejected the argument that the 48-hour waiting period imposed a significant burden on the minor's abortion right, finding that the waiting period could run concurrently with the scheduling of an appointment for the procedure. 95 Addressing nearly each challenged provision, the Court writes:

> We think it is clear that a requirement that a minor wait 48 hours after notifying a single parent of her intention to get an abortion would reasonably further the legitimate state interest in ensuring that the minor's decision is knowing and intelligent. We have held that when a parent or another person has assumed ‘primary responsibility’ for a minor's wellbeing, the State may properly enact ‘laws designed to aid discharge of that responsibility.’ To the extent that subdivision 2 of the Minnesota statute requires notification of only one parent, it does just that. The brief waiting period provides the parent the opportunity to consult with his or her spouse and a family physician, and it permits the parent to inquire into the competency of the doctor performing the abortion, discuss the religious or moral implications of the abortion decision, and provide the daughter needed guidance and counsel in evaluating the impact of the decision on her future. 96

This paragraph best represents the logic underpinning the Court’s majority decision. To the extent that this case moved forward or set back abortion access, its role is not extremely significant. Rather the Court’s understanding of undue burden here offers an opportunity to interject analysis. The ruling says that a 48-hour delay imposes only a minimal burden on the right of a minor, indicating that the “undue burden test” was being employed at least in some variation. As explained in the section on *Harris*, this delay is interpreted on too superficial of a level to account for the class-based ways in which these waiting periods affect patients. Still O’Connor’s *Hodgson* opinion argues that the two-parent consent provision *does* place an undue burden on the minor seeking an abortion. O’Connor again provides a contradictory viewpoint on what constitutes an undue burden, in a sense allowing for further clarification in *Casey*.

From *Hodgson v. Minnesota* (1990), *Akron v. Akron Center for Reproductive Health* (1983), *Harris v. McRae* (1980), *Planned Parenthood v. Danforth* (1976) and *Roe v. Wade* (1973), there is a clear path to the creation of an undue burden standard. In this section, it is apparent in the rulings’ language how this test slowly but surely entered the rhetoric and legal landscape surrounding reproductive healthcare cases in the Supreme Court. Yet we can reach no conclusive opinions in light of the increasing incorporation of the test in 1990. What constitutes an undue burden? How can this somewhat arbitrary and extremely subjective test manifest itself into law? How does it get applied in future abortion access rulings? These are some of the questions that Section III will tackle by examining landmark Supreme Court rulings on abortion from 1992 until 2016; beginning with *Planned Parenthood v. Casey* (1992), assessing major rulings in *Stenberg v. Carhart* (2000) and *Gonzalez v. Carhart, Planned Parenthood Federation of America* (2007), and ending with the pivotal case *Whole Women’s Health v. Hellerstedt* (2016).
III.
HOW CASEY SHAPED MODERN ABORTION ACCESS: LANDMARK RULINGS
FROM 1992–2016


The Pennsylvania Abortion Control Act of 1982, challenged in Planned Parenthood v. Casey, created several new provisions that curtailed or limited abortion access. In making amendments to the Act in 1988 and 1989, the Pennsylvania legislature reiterated existing provisions and added new ones, including: § 3205 “which requires that a woman seeking an abortion give her informed consent prior to the procedure, and specifies that she be provided with certain information at least 24 hours before the abortion is performed; § 3206, which mandates the informed consent of one parent for a minor to obtain an abortion, but provides a judicial bypass procedure; § 3209, which commands that, unless certain exceptions apply, a married woman seeking an abortion must sign a statement indicating that she has notified her husband; § 3203, which defines a ‘medical emergency’ that will excuse compliance with the foregoing requirements and §§ 3207 (b), 3214 (a), and 3214(f), which impose certain reporting requirements on facilities providing abortion services.”97 In addressing these provisions in a controversial 5–4 decision written by Justice Sandra Day O’Connor, the Court imposes a formalized “undue burden” standard in a majority opinion for the very first time. O’Connor’s authorship is particularly fitting since her dissents in previous landmark cases argued in favor of this standard over a trimester framework.

Five abortion clinics and one physician representing others in similar positions brought the case to the Supreme Court in pursuit of injunctive and declaratory relief, both of which were granted at the District Court level with each provision declared facially unconstitutional. The Supreme Court reversed in part, reiterating Roe’s central findings and clarifying its reach. O’Connor, writing for the Court, separates Roe’s findings into three principle tenets: the recognition of the right to have an abortion before viability without undue interference from the State, which does not have a strong enough interest to prohibit abortion or impose significant obstacles to this right before viability; the State maintains the right to restrict abortion after viability excluding exceptions for health endangerment; and the State has a legitimate interest in protecting the “health of the woman and the life of the fetus that may become a child” from the onset of pregnancy.98

O’Connor elaborates on the Court’s interpretation of the Due Process Clause of the Fourteenth Amendment, writing a narrative history about Supreme Court rulings that justify the current justices tackling the abortion issue at all. She writes, “The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to

exercise that same capacity which by tradition courts always have exercised: reasoned judgment. Its boundaries are not susceptible of expression as a simple rule. That does not mean we are free to invalidate state policy choices with which we disagree; yet neither does it permit us to shrink from the duties of our office.” This idea of “reasoned judgment” is inescapable on the Court, since its very function is to logically apply law to legislation; yet O’Connor’s logic in these few sentences is pivotal to understanding the subjective manner in which undue burden is created and applied.

“No reasonable judgment” is an inherently subjective barometer, since reasonability and rationality manifest differently for every individual person — a concept played out in each case this paper analyzes. For as many reasons that the Court found to justify abortion access, it likely could have found constitutionally sound logic to argue against legalizing abortion, especially from an originalist vantage point. The idea of reasoned judgment is then especially important when reviewing how the Court establishes undue burden in Casey and in later cases, how it applies the test to balance state interests and personal liberty. O’Connor writes, “Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage. Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code. . . . Thus, while some people might disagree about whether or not the flag should be saluted, or disagree about the proposition that it may not be defiled, we have ruled that a State may not compel or enforce one view or the other.” By identifying some of the implicit contradictions in having a “reasonable” judicial branch make decisions about deeply subjective matters, this paper does not attempt to undermine the legitimacy of the Court. There is no better alternative than the Supreme Court given the United States’ governmental structure.

Still these theoretical contradictions add another layer of complexity to how we interpret the Court’s rulings, contributing to an already multilayered analysis of how the judicial branch functions. While some viewed Roe and subsequent decisions regarding abortion as judicial overreach, the Court takes careful time to underscore its legitimacy for doubtful onlookers. O’Connor writes, “The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make. Thus, the Court’s legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.” So while the Court does not necessarily mobilize society toward tackling a specific civil rights interest, it has an obligation to weigh in on legislative action, which consistently and increasingly included abortion access from the mid-20th century and onward.

Despite misguided and limited rulings in the Court’s history, e.g. *Harris v. McRae*, there is forward and liberal progress on abortion overall, as evidenced even in the progress made between *Roe* and *Casey*, though the undue burden test set back progress. This progressive trend reflects the reactive nature of both the Court and state legislatures. On the issue of abortion, this frequently appears as a tug of war between legislatures and the Supreme Court. It is difficult to exaggerate just how unique a legal subject abortion is in the eyes of the Court given both the moral disputes about the procedure and the scope of state power. O’Connor best explains the particular nature of abortion rulings in the *Casey* opinion:

The abortion decision may originate within the zone of conscience and belief, it is more than a philosophic exercise. ... It is an act fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family, and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life; and, depending on one's beliefs, for the life or potential life that is aborted. ... It does not follow that the State is entitled to proscribe [abortion] in all instances. That is because the liberty of the woman is at stake ... unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. That these sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the State to insist she make the sacrifice. Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture.102

O’Connor’s opinion, more than any case up to this point, thoroughly explains the Court’s jurisdiction regarding abortion access. Between an elaborate history about the application of the Fourteenth Amendment’s Due Process Clause, a strong affirmation of *stare decisis*, and placing *Casey* in the ranks of *Brown v. Board of Education* — the case that overruled the separate-but-equal doctrine in 1964 — and *Roe*, O’Connor seemingly puts any efforts to overrule *Roe* to rest.

Yet O’Connor does not simply focus on the more progressive nature of *Roe*, which is legalizing abortion. She also adds emphasis to the State’s interest in potential life, writing that later cases such as *Akron* tend to prioritize the former over the latter: “It must be remembered that *Roe v. Wade* speaks with clarity in establishing not only the woman's liberty but also the State's ‘important and legitimate interest in potential life.’ That portion of the decision in *Roe* has been given too little acknowledgment and implementation by the Court in its subsequent cases.”103 At this point in the opinion, O’Connor transitions to dismantling the trimester framework and subsequently replaces it with what we have come to know as the undue burden test, concluding

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that the trimester framework “misconceives the nature of the pregnant woman's interest; and in practice it undervalues the State's interest in potential life, as recognized in Roe.” 

The undue burden test, depending on how it is interpreted, can either create easier access to abortion or severely limit it. This is the crux of the issue that simultaneously reflects how the Court applies “reasoned judgment,” how states create legislation within the realm of what they consider an undue burden, and how the standard disproportionately affects low-income people and communities of color, demonstrated in rulings like Harris with the implementation of the Hyde Amendment. In Casey, O’Connor writes that undue burden is the Court’s shorthand for “the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.” Under this test, legislation that places a significant barrier to abortion access fails since it cannot seek to hinder abortion access; rather it must demonstrate that the provision or provisions further State interest in potential life: “A statute which, while further the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman’s choice cannot be considered a permissible means of serving its legitimate ends.”

But O’Connor also recognizes the open-ended nature of this standard and addresses how it should be applied in future rulings. Fundamentally, she argues, the test concludes that a law designed to further the State’s interest in potential life that concurrently imposes an undue burden on a woman’s decision before viability is unconstitutional. Thus, an undue burden is an unconstitutional burden. Still this standard gives states leeway to strongly encourage childbirth over abortion: “Unless it has that effect on her right of choice, a state measure designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal. Regulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden.” In a sense, O’Connor gives legislatures an out for policies like waiting periods, allowing doctors to provide dissuasive and misguiding information, and other, more inconspicuous barriers to abortion access.

The Court also expresses concern over the flexibility the standard may allow justices according to personal prerogatives — and by acknowledging it in this language, recognizes the subjective nature of reasonable judgment. Wary of this future possibility, the Court creates several principles through which undue burden should be applied:

(a) To protect the central right recognized by Roe v. Wade while at the same time accommodating the State's profound interest in potential life, we will employ the undue burden analysis as explained in this opinion. An undue burden exists, and therefore a

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provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.

(b) We reject the rigid trimester framework of Roe v. Wade. To promote the State's profound interest in potential life, throughout pregnancy the State may take measures to ensure that the woman's choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion. These measures must not be an undue burden on the right.

(c) As with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion. Unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.

(d) Our adoption of the undue burden analysis does not disturb the central holding of Roe v. Wade, and we reaffirm that holding. Regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.

(e) We also reaffirm Roe's holding that ‘subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.’

Using these principles, the Court then rules on the challenged Pennsylvania provisions, setting off a long line of future abortion rulings. Petitioners challenged the “medical emergency” provision in § 3203, arguing that the scope was too narrow. The Court of Appeals rejected this argument, writing that the broadness of the term “medical emergency” appropriately addressed situations that would pose serious medical risks to women and upholding the provision. The Supreme Court — defaulting to precedent that holds district courts best understand the implications of state laws and that the Supreme Court should not interfere except when a “plain error” occurs — held this ruling.

The Court next determined that the provision requiring informed consent is constitutional. The statute defines informed consent as the following: “At least 24 hours before performing an abortion a physician [must] inform the woman of the nature of the procedure, the health risks of the abortion and of childbirth, and the ‘probable gestational age of the unborn child.’ The physician or a qualified nonphysician must inform the woman of the availability of printed materials published by the State describing the fetus and providing information about medical assistance for childbirth, information about child support from the father, and a list of agencies which provide adoption and other services as alternatives to abortion. An abortion may not be performed unless the woman certifies in writing that she has been informed of the availability of

these printed materials and has been provided them if she chooses to view them.”109 By determining this provision constitutional under the undue burden standard, the Court overrules parts of Danforth and Akron.

The extent of permissibly discernable information broadens when the Court overrules these two cases, instead determining that if the information is truthful it is legally permissible since it furthers the state’s interest in “protecting the life of the unborn.” O’Connor, explaining this decision, writes, “In short, requiring that the woman be informed of the availability of information relating to fetal development and the assistance available should she decide to carry the pregnancy to full term is a reasonable measure to ensure an informed choice, one which might cause the woman to choose childbirth over abortion. This requirement cannot be considered a substantial obstacle to obtaining an abortion, and, it follows, there is no undue burden.”110 In this same vein, the Court determines that other provisions in the challenged legislation requiring that doctors discern particular information to those seeking an abortion do not violate the physician-patient relationship.

The Court also upholds the Pennsylvania provision requiring a licensed doctor be the person who provides that information to someone seeking an abortion: “Since there is no evidence on this record that requiring a doctor to give the information as provided by the statute would amount in practical terms to a substantial obstacle to a woman seeking an abortion, we conclude that it is not an undue burden. Our cases reflect the fact that the Constitution gives the States broad latitude to decide that particular functions may be performed only by licensed professionals, even if an objective assessment might suggest that those same tasks could be performed by others.”111

This is a flawed application of undue burden, as this paper will further argue in Part IV, since it more often than not does place a significant obstacle in the path of those attempting to have an abortion. Moreover, this standard is one that widely varies on a state-by-state basis, with more liberal states allowing qualified nonphysicians to provide this information. Nevertheless, the Court finds it to be a reasonable measure to ensure informed consent.

One of the most problematic aspects of the Casey ruling replicates the erroneous decision to uphold the Hyde Amendment in Harris because of the Court’s inability to understand class as an irrefutable aspect of what constitutes an undue burden. The Court rules in this case that a 24-hour waiting period does not impose significant hurdles to abortion access, rejecting the District Court’s analysis “that for those women who have the fewest financial resources, those who must travel long distances, and those who have difficulty explaining their whereabouts to husbands, employers, or others, the 24-hour waiting period will be ‘particularly burdensome.’”112

This part of the *Casey* ruling is troublesome because it gives states relatively unbridled access to a variety of channels in an attempt to persuade women to not have an abortion, exploiting an already extremely vulnerable situation. That the Court allows this to persist under the undue burden standard indicates a flaw with the test, and accounts for why statewide abortion policies vary so profoundly, since “under the undue burden standard a State is permitted to enact persuasive measures which favor childbirth over abortion, even if those measures do not further a health interest.” The undue burden test thus erases the preexisting standard that states must have a compelling interest in protecting the life or health of the mother when enacting abortion legislation. The map below shows how many states have opted to employ waiting periods, some reaching up to 72 hours, in light of this decision.

![Map showing waiting periods between mandated counseling and when abortion can be performed](image)

In essence, the Court divides the right to abortion into two separate categories: the fundamentally protected right to actually have an abortion and the barriers the state may constitutionally place between a person and that access. The former is reviewed under strict scrutiny because it is a

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fundamental right whereas the latter is subjected to a lesser standard, also known as the undue burden standard. Herein lies the fundamental issue with the undue burden test. By artificially creating a distinction between the right in and of itself and unhindered access to that right, the Court undermines the right and makes it far more accessible to those who can afford to surmount those hurdles. Abortion access is then inevitably made increasingly difficult for the most vulnerable populations — arguably those who need access to the service the most since the cost of supporting a child is far more burdensome on low-income individuals — because waiting periods and other legislative hurdles toward abortion have disproportionate effects on those, as the Court recognizes, who have the fewest financial resources.

This split approach to abortion access is exemplified in the Court’s ruling on the informed consent provision of the challenged legislation. O’Connor writes, “The right protected by Roe is a right to decide to terminate a pregnancy free of undue interference by the State. Because the informed consent requirement facilitates the wise exercise of that right, it cannot be classified as an interference with the right Roe protects. The informed consent requirement is not an undue burden on that right.”¹¹⁴ For its shortcomings, however, the undue burden standard does allow for the rejection of other draconian provisions like the spousal notification legislation.

Citing a lengthy list of research that indicates women are highly likely to experience spousal or other forms of abuse at some point in their lives, and that the spousal notification requirement exacerbates this possibility, the Court rejected this provision as unconstitutional because it does more than inconvenience those seeking an abortion under undue burden — it puts women at genuine risk. The Court defers to its logic in Danforth to justify this point: “Whether the prospect of notification itself deters such women from seeking abortions, or whether the husband, through physical force or psychological pressure or economic coercion, prevents his wife from obtaining an abortion until it is too late, the notice requirement will often be tantamount to the veto found unconstitutional in Danforth. The women most affected by this law-those who most reasonably fear the consequences of notifying their husbands that they are pregnant-are in the gravest danger.”¹¹⁵ Departing from this logic, the Court finds that unlike adult women, minors benefit from the parental notification requirement and that the state has a legitimate interest in this requirement — logic that would inevitably fail if strict scrutiny were applied instead of weighty reliance on undue burden. The Court thus upholds the parent consent requirement and judicial bypass procedure, which allows a minor to take an alternate course of action when a parent cannot be reached or other exigent circumstances are present and that minor wishes to obtain an abortion.

Finally, Casey allows the state to keep extensive records on women obtaining an abortion. The information required by the Pennsylvania provisions includes the following: “the physician (and the second physician where required); the facility; the referring physician or agency; the woman’s age; the number of prior pregnancies and prior abortions she has had; gestational age; the type of abortion procedure; the date of the abortion; whether there were any pre-existing

medical conditions which would complicate pregnancy; medical complications with the abortion; where applicable, the basis for the determination that the abortion was medically necessary; the weight of the aborted fetus; and whether the woman was married, and if so, whether notice was provided or the basis for the failure to give notice. Every abortion facility must also file quarterly reports showing the number of abortions performed broken down by trimester. The identity of the person receiving an abortion is kept confidential in accordance with this provision. The Court argues this sort of record keeping, though irrelevant to the state’s interest in informing the person’s choice, relates to health and therefore finds it constitutional. Further, the Court acknowledges that these record-keeping services might make the procedure more expensive for women, but that does not constitute an undue burden. The section of this provision that requires a married woman to report a reason for failure to provide notice to her husband is ruled unconstitutional, however, for the same reasons that the Court finds the spousal notification requirement illegal.

Ultimately, Planned Parenthood v. Casey opens a new chapter for the Supreme Court in determining how it assesses the barriers placed in the path to abortion access. The justices opted to substitute the rigid trimester framework for a test that gives much more leeway to the Court, and by doing so, forever changed the landscape of abortion rulings. Wary of open-ended guidelines, O’Connor outlines qualities that constitute an undue burden for future justices, but just as rhetoric shifted in rulings from Roe to Casey, this test rapidly evolves. The undue burden test looks different from Casey to Hellerstedt, with plenty of room for interpretation between the two cases. Perhaps the most damaging aspect of the test is that it permits states to implement policies that are inherently designed to dissuade women from choosing an abortion over childbirth. The loopholes that the undue burden test allows states claiming to enact legislation with the broad intention of protecting the health of the mother are contradictory to the principle underlying Roe, despite O’Connor’s argument. Though O’Connor revisits precedent because she believes there is unequal weight given to the fundamental right to abortion over the state’s interest in protecting a fetus after viability, she creates an artificial distinction between the right to abortion and accessing abortion.

The arbitrary line drawn between the right to have an abortion and having fair access to that service is a manifestation of intense and relentless political pushback from state legislatures. As similarly posited in this paper’s analysis of the Harris decision that permitted implementation of the Hyde Amendment, the false distinction created in Casey begs the question: What good is the right to choose if that choice renders having an abortion no greater a possibility? The explanations provided in Casey for allowing waiting periods and other obstructive provisions seem to understand these hurdles as surmountable, so long as the person who wants an abortion is willing to pay enough and work hard enough for it. But these barriers are not easily overcome by those with few resources, cornering women into having children that they would otherwise choose not to conceive for any number of valid reasons. These issues continue to arise in the Court, as we will see next in Stenberg v. Carhart (2000), as petitioners also begin appealing on the basis of legislation creating undue burdens.


In the 2000 case Stenberg v. Carhart, the undue burden test is used to judge a provision that bans partial-birth abortions and imposes criminal penalties on physicians who perform these procedures is unconstitutional. The Nebraska law banned partial-birth abortions, defining the procedure as a physician “‘partially deliver[ing] vaginally a living unborn child before killing the ... child,’” and defines the latter phrase to mean ‘‘intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the [abortionist] knows will kill the ... child and does kill the ... child.”’117 A Nebraska physician, respondent Carhart, challenged the provision, seeking declaratory relief since the provision also provided for automatic revocation of a convicted doctor’s medical license. The District Court and Eighth Circuit Court both held the statute as unconstitutional for violating the Due Process Clause of the Fourteenth Amendment, as held in Roe and Casey.

The partial-birth abortion ban essentially outlawed dilation-and-evacuation (D&E) and dilation-and-extraction abortions (D&X). Recall that the ability to perform D&E abortions in appropriate nonhospital settings was challenged in Akron, when the Court ruled that state legislation banning the method in appropriate settings did not meet the requirements of protecting the life and health of the mother, since the procedure in question is widely accepted as the safest way to perform an abortion at certain stages in the pregnancy. As Casey determined, the undue burden standard allows states to impose legislation and even procure abortions in certain circumstances post viability so long as that legislation is designed with the intention to protect the life and health of the mother; before that point, however, the state may not impose legislation that places significant barriers in the path to abortion access. The challenged Nebraska provisions in this case made physicians highly susceptible to criminal penalties for performing either of these procedures. D&X abortions, which the Nebraska legislature covertly calls partial-birth abortions, involve “removing the fetus from the uterus through the cervix ‘intact,’ i.e., in one pass rather than several passes. The intact D&E [or D&X] proceeds in one of two ways, depending on whether the fetus presents head first or feet first. The feet-first method is known as ‘dilation and extraction.’”118 Medical research strongly backed arguments on behalf of Carhart that D&X procedures are far safer when the fetus presents feet first.

In attempting to support the provision, Nebraska relied on several arguments in favor of its legislation — all of which the Court rejects. First, the state argues that D&X procedures are performed so rarely that banning the procedure has a relatively moot effect. Justice Stephen Breyer writes on behalf of the Court’s 5–4 majority that a state “cannot prohibit a person from obtaining treatment simply by pointing out that most people do not need it. And the fact that only a ‘handful’ of doctors use the procedure ... may reflect the comparative rarity of late second term abortions, the procedure's recent development, the controversy surrounding it, or, as Nebraska suggests, the procedure's lack of utility.”119 In other explanations from the state attempting to argue in favor of a health exemption, the Court finds no legitimate state interests in protecting the life and health of the mother by banning the procedure.

The Court also finds that this legislation places an undue burden on women seeking an abortion. Though Nebraska’s Attorney General argues that there is a distinction between D&E and D&X procedures in the legislation, and that the state is only opposing use of the latter, the Court finds no meaningful separation between the two procedures under the challenged provisions. Breyer writes, “Nebraska does not deny that the statute imposes an ‘undue burden’ if it applies to the more commonly used D&E procedure as well as to D&X. ... [And] because all those who perform abortion procedures using the D&E method must fear prosecution, conviction, and imprisonment, the Nebraska law imposes an undue burden upon a woman's right to make an abortion decision.”

The Court in this case, unlike Casey, does not spend ample time explaining why it has jurisdiction in determining a person’s fundamental right to an abortion. Rather, the majority opinion focuses on reaffirming the undue burden test.

Breyer argues that the undue burden test can be separated into three established principles: that before viability, a woman has a right to terminate her pregnancy; that a law which places an undue burden on someone seeking an abortion before the fetus reaches viability is unconstitutional; and that the state may regulate or proscribe abortion except when appropriately judged to be medically necessary for the health or life of the mother. Under these tenets, the Court finds that the Nebraska legislation fails. In the opinion, Breyer writes a lengthy and detailed description of various abortion procedures. Reviewing this section at length would be irrelevant to the purpose of this paper because it does not add to the understanding of how undue burden develops in the Court. “Although much ink is spilled today describing the gruesome nature of late-term abortion procedures, that rhetoric does not provide me a reason to believe that the procedure Nebraska here claims it seeks to ban is more brutal, more gruesome, or less respectful of ‘potential life’ than the equally gruesome procedure Nebraska claims it still allows,” Breyer explains. The conclusion we can draw from this section of the decision, however, is that D&X abortions are the safest option for preserving the life and health of the mother in the circumstances that Carhart presents, and outlawing them does nothing to advance the state’s interest in these protections.

In assessing whether criminalizing partial-birth abortions violates the Constitution, Breyer defaults to Roe and Casey to answer the question with a resounding yes. First, he argues that the law is without any appropriate exception for the preservation of the mother’s health. The opinion reads, “The Nebraska law, of course, does not directly further an interest ‘in the potentiality of human life’ by saving the fetus in question from destruction, as it regulates only a method of performing abortion. ... [Nebraska] ... says the law ‘show[s] concern for the life of the unborn,’ ‘prevent[s] cruelty to partially born children,’ and ‘preserv[es] the integrity of the medical profession.’ But we cannot see how the interest-related differences could make any difference to the question at hand, namely, the application of the ‘health’ requirement.” Breyer’s opinion in this case, which O’Connor joins, warrants analysis in that it seemingly departs from the distinction made in Casey between the right to abortion and impediments to that right. Again, this brings the issue of reasonable judgment to the forefront of the Court’s decision.

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120 Stenberg v. Carhart, 530 U.S. 914 (2000)
While the Court determines that banning D&E and D&X abortions creates an undue burden, it also addresses the idea that this legislation does not further the state’s interest in preserving the health of the mother. Arguably 24-hour waiting periods do not further the interest of the mother’s health, either, yet the Court finds this restriction permissible under the undue burden test. But when it comes to methodology for abortion access, the Court draws a bright line according to its reasonable judgment: “Our cases have repeatedly invalidated statutes that in the process of regulating the methods of abortion, imposed significant health risks. They make clear that a risk to a women's health is the same whether it happens to arise from regulating a particular method of abortion, or from barring abortion entirely. Our holding does not go beyond those cases, as ratified in Casey.”

Thus the Court in Casey interprets an undue burden as an impediment that interferes with the actual abortion procedure rather than just obtaining access to those services, effectively sending the Nebraska state legislature back to the drawing board.

The Court holds that the challenged provisions were unconstitutional also because they “[impose] an undue burden on a woman’s ability’ to choose a D&E abortion, thereby unduly burdening the right to choose abortion itself.” The arguments put forth by the state in Stenberg, according to Breyer, insufficiently demonstrate that Nebraska's law does not require a health exception. But this logic seems inconsistent with other provisions the Court holds constitutional. The Court affirms the Eighth Circuit’s holding that “the Nebraska statute [is] unconstitutional because, in Casey's words, it has the ‘effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.’” Yet using this logic, the test could easily be expanded to barring provisions like waiting periods and record-keeping requirements that might significantly hike the price of an abortion. Still, much like the original findings in Roe were later expanded, the Court leaves the application of undue burden fairly open ended in this opinion.

Despite the Court ruling Nebraska’s partial-birth abortion provision unconstitutional, President George W. Bush’s Congress signed the Partial-Birth Abortion Ban Act in 2003. The legislation almost precisely matched the facts in Stenberg v. Carhart, prohibiting anyone from knowingly performing a partial-birth abortion except when necessary to save the life of the mother. The bill defines partial-birth abortions as, “an abortion in which the person performing the abortion: (1) deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the mother's body, or, in the case of a breech presentation, any part of the fetal trunk past the navel is outside the mother's body; and (2) performs the overt act, other than completion of delivery, that kills the partially delivered living fetus.” As was the case with the challenged legislation in Carhart, this provision essentially outlawed D&X abortions, citing the procedure as immoral and always unnecessary. The next case, Gonzales v. Carhart, Planned Parenthood Federation of America, is the Supreme Court’s decision on the constitutionality of the 2003 Partial-Birth Abortion Ban Act. Many of the issues that were touched on in this case are expanded in Gonzales, when the Court upholds the legislation.

125 S.3 - Partial-Birth Abortion Ban Act of 2003
In light of the Court’s decision to ban partial-birth abortion regulations in Nebraska, Congress took action into its own hands and passed legislation outlawing the procedure with the 2003 Partial-Birth Abortion Ban Act. With a shift in personnel, including Justice Sandra Day O’Connor’s retirement, the more conservative Court that ruled on Gonzales overruled Stenberg and upheld the Act in a contentious 5–4 decision. In enacting the legislation, Congress responded to Stenberg in two ways, first finding that “unlike this Court in Stenberg, it was not required to accept the District Court’s factual findings, and that there was a moral, medical and ethical consensus that partial-birth abortion is a gruesome and inhumane procedure that is never medically necessary and should be prohibited.” Second, the Court found that the language in the Act differed substantially enough from that of the provisions in Stenberg. Notably, the lower courts in Gonzales found that this legislation unduly burdened someone’s right to choose, was too vague and lacked the necessary health exception established in Stenberg. The Supreme Court reversed and remanded though, finding, “Respondents have not demonstrated that the Act, as a facial matter, is void for vagueness, or that it imposes an undue burden on a woman’s right to abortion based on its overbreadth or lack of a health exception.” The Court places particular emphasis on explaining why the procedure does not place an undue burden on someone seeking an abortion, underscoring how the test’s application can vary a great deal depending on its interpretation — or, rather, who is interpreting it.

The Court’s language in this ruling clearly indicates a conservative approach to abortion access in its qualification of a fetus as a human life. Writing for the majority, Justice Anthony Kennedy says, “The Act’s stated purposes are protecting innocent human life from a brutal and inhumane procedure and protecting the medical community’s ethics and reputation. ... Casey reaffirmed that the government may use its voice and its regulatory authority to show its profound respect for the life within the woman. The Act’s ban . . . furthers the Government’s objectives.” This language reflects how the emphasis given to different facets of precedent can lend itself to expanding or retracting abortion access. For example, when O’Connor created the undue burden test, she revisited and gave more weight to the holding in Roe that allowed states to take further action in protecting the fetus. Recall her opinion read, “It must be remembered that Roe v. Wade speaks with clarity in establishing not only the woman's liberty but also the State's ‘important and legitimate interest in potential life.’ That portion of the decision in Roe has been given too little acknowledgment and implementation by the Court in its subsequent cases.” The Court takes a similar approach in Gonzales in the sense that it revisits the government’s compelling interest in protecting “potential life,” giving more weight to this priority than the creation of burdensome impediments to abortion access.

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Addressing the issue of the Act’s vagueness and its potential to impose an undue burden, the Court finds that the language is specific enough to be constitutional. Relying on the undue burden test, as established in *Casey*, the Court argues the following:

An undue burden on the previability abortion right exists if a regulation’s ‘purpose or effect is to place a substantial obstacle in the [woman’s] path,’ but that ‘[r]egulations which do no more than create a structural mechanism by which the State . . . may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman’s exercise of the right to choose.’ *Casey* struck a balance that was central to its holding, and the Court applies *Casey*’s standard here. A central premise of *Casey*’s joint opinion — that the government has a legitimate, substantial interest in preserving and promoting fetal life — would be repudiated were the Court now to affirm the judgments below.130

As in *Stenberg*, however, banning the D&X procedure because some parts of the medical community have not formed a consensus on its necessity is illogical, since differing opinions on the procedure do not undermine the procedure’s medical value. Though doctors, including Carhart, who perform late-term abortions argue otherwise, the Court rules in favor of those who state the procedure is unnecessary. In overruling *Stenberg*, the Court also decides in this case that the health exception need not apply since Congress deemed the procedure always unnecessary. Further, though *Stenberg* found that banning the procedure discourages people from having an abortion, unduly burdening the right to choose abortion itself, Kennedy disagrees. He writes, “That many doctors begin every D&E with the objective of removing the fetus as intact as possible based on their belief that this is safer does not prove, as respondents suggest, that every D&E procedure might violate the Act, thereby imposing an undue burden. . . . Respondents have not shown that requiring doctors to intend dismemberment before such a delivery will prohibit the vast majority of D&E abortions.”131 This explanation is reiterated throughout the entire opinion as the Court excuses this legislation because it was enacted with the spirit of protecting life, not curtailing abortion access.

However, as is the case with all legislation enacted in the name of protecting potential life, this legislation impedes on people’s right to choose abortion and thus prioritizes possible fetus life over the rights ensured to women by the Court and thereby the Constitution in past cases. Kennedy also writes, “Interpreting *Stenberg* as leaving no margin for legislative error in the face of medical uncertainty is too exacting a standard. Marginal safety considerations, including the balance of risks, are within the legislative competence where, as here, the regulation is rational and pursues legitimate ends, and standard, safe medical options are available.”132 But the departures from *Stenberg* are problematic and limit abortion access in ways that would seemingly violate the undue burden standard already set forth. Despite the measured opinions taken in past cases in respect to *stare decisis*, the Court here makes its distaste for progressive precedent obvious. It is also difficult to not interpret this case as Congress politically

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showing on a controversial issue since it outlaws means to an end that can technically be accomplished otherwise.

Much of the language in this decision is focused on the perception that D&E procedures are especially cruel, arguing that they border on infanticide, and, further, the Court and Congress have the authority to protect or enact provisions that seek to preserve the medical community’s reputation. This paper does not contest that reading detailed methodology about certain abortion procedures can be disturbing. The language used in these cases teeters into graphic, gruesome and often uncomfortable descriptions about removing the fetus — but such is the nature of an abortion and cannot be used to undermine the rights established by *stare decisis*. The Court decided in *Roe* that women have a right to safe and fair access to abortion. There is little scientific evidence supporting the Court’s decision in this case; thus, it translates to a conspicuous display of partisanship. Still while focusing on the physical process of extracting a fetus limb by limb from a uterus, the Court neglects the principles that propelled *Roe* into being. Primarily, that the life and health of a pregnant, living, feeling person supersedes that of an unfeeling, unborn fetus. Justice Ginsburg tears into this faulty logic in her dissent, which Justices Stevens, Souter and Breyer join. She writes, “Today’s decision is alarming. It refuses to take *Casey* and *Stenberg* seriously. It tolerates, indeed applauds, federal intervention to ban nationwide a procedure found necessary and proper in certain cases by the American College of Obstetricians and Gynecologists (ACOG). 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.”

Ginsburg’s dissent continues, parsing out the problematic aspects of the majority opinion. Ginsburg first notes the contradictory theorizing the majority uses to justify its ruling, namely that *Stenberg* requires a health exception that the Court neglects in *Gonzales*. Further, she identifies several factual inaccuracies that the Court relies on in its decision: “Many of the Act’s recitations are incorrect. . . . For example, Congress determined that no medical schools provide instruction on intact D&E. . . . But in fact, numerous leading medical schools teach the procedure.” This faulty logic underscores the hyper-political nature of both the Act and the subsequent Court ruling with little emphasis on established fact and precedent and heavy reliance on controversial information and misguided evaluations about women’s health. Ginsburg elaborates, “Despite the District Courts’ appraisal of the weight of the evidence, and in undisguised conflict with *Stenberg*, the Court asserts that the Partial-Birth Abortion Ban Act can survive ‘when . . . medical uncertainty persists.’ This assertion is bewildering. Not only does it defy the Court’s longstanding precedent affirming the necessity of a health exception . . . it gives short shrift to the records before us, carefully canvassed by the District Courts.” Ginsburg’s entire dissent should be required reading before any legislation regarding abortion access gets drafted; it is unfortunate that this essay cannot reproduce the dissent in its entirety, but the excerpt below embodies some of the strongest parts of her argument:

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The Court offers flimsy and transparent justifications for upholding a nationwide ban on intact D&E \textit{sans} any exception to safeguard a women’s health. . . . In sum, the notion that the Partial-Birth Abortion Ban Act furthers any legitimate governmental interest is, quite simply, irrational. The Court’s defense of the statute provides no saving explanation. In candor, the Act, and the Court’s defense of it, cannot be understood as anything other than an effort to chip away at a right declared again and again by this Court — and with increasing comprehension of its centrality to women’s lives. . . . When ‘a statute burdens constitutional rights and all that can be said on its behalf is that it is the vehicle that legislators have chosen for expressing their hostility to those rights, the burden is undue.’\textsuperscript{136}

Indeed, Ginsburg tactfully undermines the Court’s misconstrued and misplaced concern for women’s health. Her conclusion reiterates the notion that the undue burden standard is open and subjective enough that legislation like the Partial-Birth Abortion Ban Act can become the law of the land. The Act still exists today despite its direct attack on abortion access, though as Ginsburg indicates, the only redeeming part of the majority opinion was the Court’s decision to allow future challenges to the Act should health concerns become relevant in its eyes.

What occurred in \textit{Gonzales} is partially replicated in the next case, \textit{Whole Woman’s Health v. Hellerstedt} (2016), and will likely continue to occur so long as abortion is a hotly contested issue. State legislatures, depending on subjective political motivations, pass legislation under the guise of protecting women’s health, and even less covertly sometimes, in the name of personal understanding of morality. But the highly partisan nature of abortion access means that more conservative states enact legislation that seeks to undermine this right. This is why it is so crucial that the Court operates according to precedent, and cases like \textit{Gonzales} do so much damage to its legitimacy. Justices have reiterated time and time again throughout these cases that despite abortion being an emotional and difficult subject to rule on, that Court is not necessarily the country’s moral compass. But the Court’s obligation to interpreting the constitutional principles that protect individuals’ rights is permanent and timeless. \textit{Roe} stands, \textit{Casey} stands, and \textit{Gonzales} weakened the Court’s legitimacy by undermining these landmark precedents. This back and forth between legislatures is further examined in \textit{Hellerstedt}, when the Court makes some forward progress in protecting abortion access and analyzes what it calls a substantial burden.

\textsuperscript{136} Gonzales v. Carhart, Planned Parenthood Federation of America, 550 U.S. 124 (2007)
Whole Woman’s Health v. Hellersted (2016)

Whole Woman’s Health v. Hellersted (2016) is the most recent landmark Supreme Court case on abortion access. Born from two challenged provision in Texas, the case assesses the constitutionality of a bill that the state legislature enacted in 2014. One of the provisions included an admitting-privileges requirement, which provides “that a ‘physician performing or inducing an abortion . . .  must, on the date [of service], have active admitting privileges at a hospital . . . located not further than 30 miles from the’ abortion facility.”137 The second challenged provision created a surgical-center requirement, which required facilities that provided abortions to meet the “‘minimum standards . . .  for ambulatory surgical centers’ under Texas law.” Petitioners, abortion providers, sought injunctive relief enjoining the enforcement of these provisions under the Fourteenth Amendment as interpreted in Casey. The District Court supported petitioners’ claims, ruling both of the provisions unconstitutional for creating an undue burden given its fact-finding, which produced the following information:

As the admitting-privileges requirement began to be enforced, the number of facilities providing abortions dropped in half, from about 40 to about 20; this decrease in geographical distribution means that the number of women of reproductive age living more than 50 miles away has increased by 150%, the number living more than 150 miles away by more than 350%, and the number living more than 200 miles away by about 2,800%; the number of facilities would drop to seven or eight if the surgical-center provision took effect, and those remaining facilities would see a significant increase in patient traffic; facilities would remain only in five metropolitan areas; before H. B. 2’s passage, abortion was an extremely safe procedure with very low rates of complications and virtually no deaths; it was also safer than many more common procedures not subject to the same level of regulation; and the cost of compliance with the surgical-center requirement would most likely exceed $1.5 million to $3 million per clinic.138

These statistics alone blatantly underscore the burdensome effect that these provisions had on those seeking abortions in Texas, but the Fifth Circuit reversed in “significant part” on the District Court’s decision in compliance with Gonzales and res judicata, which is when a matter has been adjudicated by a competent court and may not be pursued further by the same parties. The Circuit Court’s decision, which the Supreme Court reversed and remanded 5–3, found that since a law is “constitutional if (1) it does not have the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus and (2) it is reasonably related to . . . a legitimate state interest,”139 the provisions were constitutional.

137 Whole Woman’s Health v. Hellerstedt, 579 US _ (2016)
139 Whole Woman’s Health v. Hellerstedt, 579 US _ (2016)
This interpretation of undue burden undermines the very values that the created the test in the first place. There was no accurate or factual information leading the Texas legislature to enact these provisions nor did it further the state’s interest in protecting potential life or the life or health of the mother. The Supreme Court correctly explains why this departure goes a step too far in its transparent attempts to hinder abortion access. The distance of abortion clinics from any given point in the United States is visualized in the map below. This physical representation, updated as of 2016, shows how dire the situation in Texas was when the case reached the Supreme Court.

In the Court’s *Hellerstedt* decision, we see a much deeper understanding of undue burden than was present in the Fifth Circuit’s decision or in *Gonzales*. Justice Breyer delivers the opinion, in it concluding that “neither of these provisions offers medical benefits sufficient to justify the burdens upon access that each imposes. Each places a substantial obstacle in the path of women seeking a previability abortion, each constitutes an undue burden on abortion access, *Casey*, . . . and each violates the Federal Constitution.” In further, the Court divides part of its opinion into four undue burden sections. The first section explains and reiterates the legal standard of undue burden, as established in *Casey*, also arguing that the lower court misinterpreted and therefore misapplied the undue burden test. While the Court of Appeals insinuated that the Court does not have a responsibility to individually assess the factual and medical benefits that legislation might impose on people, Breyer corrects this assumption: “The first part of the Court of Appeals’ test may be read to imply that a district court should not consider the existence or nonexistence of

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medical benefits when considering whether a regulation of abortion constitutes an undue burden. . . The Court of Appeal’s approach simply does not match the standard that this Court laid out in *Casey*, which asks courts to consider whether any burden imposed on abortion access is ‘undue.’” Breyers uses this definition to argue that the Court has a responsibility to measure the burdens against the law’s intended purpose, which he says the lower court does incorrectly by not recognizing the undue burden imposed by the Texas provisions.

With this understanding of undue burden in mind, Breyers then assesses the constitutionality of the admitting-privileges and surgical-center requirements. Unlike the Court’s ruling in *Gonzales*, the Court does not let legislators escape with thinly veiled attempts at curtailing abortion access for no particular reason. Breyers scorches legislators in the opinion about the admitting-privileges requirement for this reason, writing, “Nothing in Texas’s record evidence shows that . . . the new law advanced Texas’ legitimate interest in protecting women’s health. We add that, when directly asked at oral argument whether Texas knew of a single instance in which the new requirement would have helped even one woman obtain better treatment, Texas admitted that there was no such evidence in the record of such a case.” Similar logic allowed the Court to reject the surgical-center requirement since it so obviously attempted to create a more difficult pathway to abortion access. Among other arbitrary requirements, this provision necessitated the following standards in places that administered abortions:

The nursing staff must comprise at least ‘an adequate number of [registered nurses] on duty to meet the following minimum staff requirements: director of the department (or designee), and supervisory and staff personnel for each service area to assure the immediate availability of [a registered nurse] for emergency care or for any patient when needed,’ . . . as well as ‘a second individual on duty on the premises who is trained and currently certified in basic cardiac life support. . . Facilities must include a full surgical suite with an operating room that has ‘a clear floor area of at least 240 square feet’ in which “[t]he minimum clear dimension between built-in cabinets, counters, and shelves shall be 14 feet.” . . . There must be a preoperative patient holding room and a postoperative recovery suite. The former ‘shall be provided and arranged in a one-way traffic pattern so that patients entering from outside the surgical suite can change, gown, and move directly into the restricted corridor of the surgical suite,’ . . . and the latter ‘shall be arranged to provide a one-way traffic pattern from the restricted surgical corridor to the postoperative recovery suite, and then to the extended observation rooms or discharge,’ . . . Surgical centers must meet numerous other spatial requirements . . . including specific corridor widths . . . Surgical centers must also have an advanced heating, ventilation, and air conditioning system . . . and must satisfy particular piping system and plumbing requirements.”

If the Court had a breaking point for when it considers a burden undue, this was it. Breyer’s and the concurring justices do not go on at length about the absurdity of these provisions, as they clearly violated the undue burden standard as established in *Casey*. Concluding House Bill 2 had

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141 Whole Woman’s Health v. Hellerstedt, 579 US _ (2016)
142 Whole Woman’s Health v. Hellerstedt, 579 US _ (2016)
143 Whole Woman’s Health v. Hellerstedt, 579 US _ (2016)
no intention but to impede this access, Breyers writes, “We agree with the District Court that the surgical-center requirement, like the admitting-privileges requirement, provides few, if any, health benefits for women, poses a substantial obstacle to women seeking abortions, and constitutes an ‘undue burden’ on their constitutional right to do so.”\(^{144}\)

It is just as important, however, to consider a hypothetical in which the Court did not rule in favor of striking down House Bill 2. Those who could afford to take time off work, own a car and drive to a clinic far away, or have the means to pay for abortion services in hospitals instead of a less expensive clinic, are not the same people who would have been so deeply affected by this ruling had it gone the other way. The undue burden standard is inherently and deeply tied to class, since affluent families and/or individuals would have likely been able to surmount these challenges. That is not to say that wealth should be a barometer of access to fundamental rights, rather the opposite. The Court must consider how its rulings will affect the most vulnerable populations when it uses its rationale approach to measure burdens against evidence supposedly in favor of protecting women’s health. If the barometer does not reach the poorest corners of the United States, then the right to abortion is not equal — it becomes a right that one can afford to purchase or not. This phenomenon manifests itself in states in different ways, as the next section will examine. From liberal to limited abortion access, the next portion of this thesis examines what these Supreme Court cases actually look like on the ground and how the undue burden standard has profoundly shaped the abortion landscape in the United States to exacerbate discrepancies between the white and affluent and low-income communities of color.

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\(^{144}\) Whole Woman’s Health v. Hellerstedt, 579 US _ (2016)
IV.
ON THE GROUND: EXAMINING UNDUE BURDEN IN THE STATES

Current State of National Abortion Access

Before demonstrating how abortion laws affect populations in South Dakota and Oregon, this subsection seeks to provide factual information about the current overall state of abortion access in the United States. The sheer number of people seeking abortions and the procedure’s low safety risks contextualizes just how moot restrictive policies are and how little they promote health. The quantity of restrictive policies in certain regions of the country and of itself is reflective of how partisanship is the most influential factor in enacting restrictive legislation. Overall, state legislatures, mostly Republican, have implemented more than 1,000 restrictions to abortion access since the 1973 Roe v. Wade decision.145 In the years between Stenberg (2007) and Hellerstedt (2016) alone, states enacted 338 restrictions to abortion access, accounting for approximately 30 percent of the total 1,142 restrictions currently in place.146 Despite the procedure’s safety — less than 0.05 percent of people obtaining abortions experience a complication — legislatures continue implementing laws that curtail access under the guise of protecting the mother’s health.147

Contraceptive use is a “key predictor” of whether someone will have an abortion.148 A survey from the Guttmacher Institute finds “In 2011, the very small group of American women who were at risk of experiencing an unintended pregnancy but were not using contraceptives accounted for the majority of abortions. Many of these women did not think they would get pregnant or had concerns about contraceptive methods. A minority of abortions occurred among the much larger group of women who were using contraceptives in the month they became pregnant. Many women who fall into this category have reported difficulty using contraceptives consistently.”149 In the same year, 18 percent of all recorded pregnancies resulted in abortions — meaning 3 of 10 women in the United States will have an abortion by the time they are 45-years old.150 And though there are a significant number of abortions that occur each year, the rate of abortion has steadily decreased since Roe, notably from the increased accessibility of contraceptives. The graph below depicts the declining rate of abortions in the United States from Roe in 1973 through 2010.

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146 Id.
147 Id.
148 Id.
149 Id.
150 Id.
Though the abortion rate has steadily declined, the need for safe, affordable and accessible facilities still far outweighs the number of available venues. It is important to note that most experts believe this decline in abortions is not a result of fewer people actually choosing abortion, but rather a product of improved access to contraceptives and fewer unintended pregnancies. Guttmacher Institute policy analyst Joerg Dreweke finds that “Contraceptive use is likely the key driver of the 2008–2011 declines in unintended pregnancy and subsequent abortions.”\(^{151}\) The study also finds that contraceptive methods like the IUD and implant more than tripled between 2007 and 2012, and that the two-thirds of women who use contraceptives consistently and correctly account for only 5 percent of all unintended pregnancies.\(^{152}\) These findings are key to arguments about whether healthcare should cover the costs of birth control, since “they validate that supporting and expanding women’s access to contraceptive services leads to a lower incidence of abortion.”\(^{153}\) Oregon’s legislature has specifically enacted legislation to provide accessible contraception to counteract federal cuts to contraceptive coverage, more of which will be touched upon further in the next section.

\(^{152}\) Id.
\(^{153}\) Id.
In 2014, 90 percent of all counties did not have a single abortion clinic, with 39 percent of women of reproductive age living in those counties.\textsuperscript{154} Nearly half of all pregnancies in the United States in 2011 were unintentional and four in 10 of these pregnancies were terminated by abortion.\textsuperscript{155} To put this figure into further perspective, 57 percent of women between the ages of 15 and 44 live in a state “hostile or extremely hostile to abortion rights” and one-third of patients had to travel more than 25 miles to have an abortion in 2008.\textsuperscript{156}

Still, these numbers are only part of the story. States with restrictive policies literally force pregnant people to take matters into their own hands, and for those with extremely limited access to transportation or other valuable resources this can mean attempting to self-perform an abortion. One study shows that “When unable to access abortion services in the face of restrictive laws, some women may turn to self-induced abortion. One study estimated that as many as 100,000 women aged 18–49 residing in Texas had ever attempted to end a pregnancy on their own, and a media analysis found that interest in self-induced abortion . . . was higher in states with restrictive abortion laws than in states without them.”\textsuperscript{157} So though states enact legislation designed to protect health or preserve life (that is, of the fetus), they greatly exacerbate health risks that would otherwise be absent.

This is part of the frustration with the language the Supreme Court has used since \textit{Casey}, placing increasing weight on the undue burden test instead of focusing on analyzing abortion cases with strict scrutiny. The policies that restrict abortion access by retracting federal funding, closing abortion clinics, creating unnecessary and ineffective waiting periods and so on, are impeding on the fundamental right to abortion access and, by definition, not safeguarding women’s health. Undue burden, a flimsy tool at the end of the day, has allowed for widespread disparities in abortion accessibility across the country when strict scrutiny would not. Though the Supreme Court usually creates a more uniform standard for state laws, this test creates a legal loophole for states to restrict abortion access.

Specifically, there is a lack of abortion facilities in the central United States. A \textit{Los Angeles Times} article reads: “As more states adopt more restrictive laws and the number of clinics dwindles in the so-called ‘abortion desert’ — an area that stretches from Florida to New Mexico and north into the Midwest — women are increasingly traveling across state lines to avoid long waits for appointments and escape the legal barriers in their home states.”\textsuperscript{158} But in accordance with the interpretation of undue burden, traveling and burdensome wait periods do not constitute a significant enough barrier for the Court to disallow it.

\begin{footnotesize}
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\item \textsuperscript{155} \textit{Id}.
\item \textsuperscript{156} \textit{Id}.
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The undue burden test’s qualifier that when “a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus” that regulation is unconstitutional does not reach certain states.\(^{159}\) Not only do many state policies directly and intentionally block access to the procedure for political or supposedly moral reasons, they are unabashed about doing so. Besides the more obvious examples of protestors setting up camp around clinics and harassing patients, providers and others, states take other suppressive and inane measures in an attempt to dissuade people from choosing abortion. For example, 29 states allow “Choose Life” license plates that cost between $25 and $70 that directly support the antichoice organizations or crisis pregnancy centers that often provide biased and medically inaccurate counseling.\(^{160}\)

Some states have also begun implementing shamefully targeted policies that curtail abortion access for racial minorities. Recently, state legislatures have begun enacting legislation that bans “sex-selective abortions” — abortions performed on the basis of the predicted sex of the fetus — because of perceived preferences for male-born children in other countries in South and East Asia that have not been reflected in the United States abortion rate. “Bans on sex-selective abortions place a burden on providers, who are forced to not only question all women’s reasons for seeking an abortion, but to also second-guess and stigmatize Asian-American women and communities. While disguised as a means to eliminate gender discrimination, these laws make abortion less accessible.”\(^{161}\) In other states, like Arizona, blatantly racialized laws are also coming into effect. The state recently passed legislation that prohibits abortion on the basis of race, essentially encouraging providers to specifically question the motives of people of color obtaining abortions. This legislation is born from the popular antiabortion logic that abortion clinics target communities of color since women of color have higher abortion rates than white women; even though in reality, six in 10 abortion providers are in majority white neighborhoods and “moreover, data show that women of color face higher rates of unintended pregnancies, which leads to higher rates of abortion.”\(^{162}\)

The next two subsections explore how access can vary so widely from the abortion desert to more liberal states. Further, they will explain how legislatures move further away from analyzing abortion cases with strict scrutiny by relying on the less stringent undue burden test. The charts on the following two pages are helpful for understanding the national landscape on abortion access, providing a visual aid for the quantity and quality of abortion policies. Overall, the number of restrictive policies is inexcusable and irrational since Roe is the law of the land. In this sense, the existence of these restrictive laws underscores how Casey ultimately set abortion access back.


\(^{162}\) Id.
### Overview Of State Abortion Law (Page 1 Of 2)

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| TOTAL | 38 | 18 | 18 | 43 | 19 | 17 | 32+DC | 11 |

▼ Permanently Enjoined; Law Not in Effect.
* Exception In Case Of Threat To The Woman's Physical Health.
† Exception In Case Of Rape Or Incest.
‡ Exception In Case Of Life Endangerment Only.
Ω Exception In Case Of Fetal Abnormality.
§ Only Applies To Surgical Abortion.
Φ Law Limits Abortion Provision To OB/GYNs.

Source: Guttmacher Institute, 2017
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Source: Guttmacher Institute, 2017
Oregon’s Progressive Approach to Abortion

Since abortion’s legalization in 1973 and subsequent widespread practice, Oregon has by far and away provided some of the best access and facilities in the United States. Oregon does not require waiting periods or mandatory in-person counseling, which necessitate two trips to a clinic, nor does it have many of the other common antiabortion restrictions. Statistically, Oregon does not perform a disproportionate number of abortions in the country, accounting for 1 percent of the overall abortions provided in the United States.\(^{163}\) This means that there is not a rampant number of abortions given the minimal number of restrictions — a fear that many conservative legislators have invoked in rationalizing antiabortion laws. Oregon’s trends regarding abortion rates between demographics are generally reflective of national ones. Composing two percent of the state’s general population, Black people account for approximately six percent of abortions in Oregon; the Hispanic population in Oregon accounts for approximately 12 percent of the population and 12 percent of abortions; white people account for roughly 88 percent of the population and 70 percent of abortions; and American Indian, Asian/Pacific Islands, other/multiple races comprise the remaining 12 percent of abortions.\(^{164}\)

Oregon’s approach to reproductive healthcare is effective because it takes a holistic approach to these issues. More people have access to affordable contraceptives, which in turn prevents more unintended pregnancies, meaning fewer abortions. This phenomenon also indicates the logic that many Republican legislators use to justify, for example, cutting birth control coverage under healthcare plans, is deeply flawed and counterproductive to their alleged mission of preserving life and health. Most studies show that if there is better access to contraceptives leads to fewer unintended pregnancies and in turn, fewer abortions. In Oregon, this much is clear: the practice of providing accessible contraceptives has a direct correlation with the 15-percent decline in the state’s abortion rates from 2011–2014, from 14.1 to 12.0 abortions per 1,000 women of reproductive age.\(^{165}\) Many leaders of pro-choice organizations have specifically argued this point, arguing that while abortion access is a fundamental and vital right, it can be a backend solution to problems that start far earlier. “They argue that these rights, although critical, must be lodged in the broader health, social and economic context of women’s lives — especially the lives of poor and low-income women who are disproportionately minority — and interconnected with other critical life needs and aspirations. [African American Women Evolving]’s mission, for example, states forthrightly that ‘a woman’s ability to lead [a] reproductive healthy life] is closely connected to her ability to overcome other social and economic barriers.’”.\(^{166}\)

This discussion about the intersection of race, class and other socioeconomic factors is pivotal to understanding how the Court neglects to consider these qualities in the application of undue burden. In its inadvertent shift from more stringent reviews of state policy, the Court fails to properly employ strict scrutiny, which would doubly allow for closer consideration of state policies on the basis of race and on violating fundamental rights. Restrictive policies undeniably have disproportionate effects on racial minority groups. In states like Oregon, legislatures take proactive measures to combat these negative ramifications in direct confrontation with federal legislation that fails these communities — hence the distinction between Oregon being one of the best states and South Dakota being the worst for reproductive healthcare.

In recent years, Oregon’s legislature continues to prioritize protecting reproductive healthcare rights despite threats to federal funding. Currently, the state government is proactively taking protective measures in light of President Trump’s efforts to repeal and replace the Affordable Care Act by proposing House Bill 3391. The American Healthcare Act, Trump’s healthcare plan, “compromised roughly $10 billion in federal funds to [Oregon] through proposed abortion restrictions and overturning minimum coverage requirements for birth control and other reproductive services that were carved into the existing Affordable Care Act.” Though initially written in response to the AHCA — pulled by Republicans in March 2017 after it became increasingly clear it was headed for failure — Oregon Democrats plan on following through with HB 3391. The bill, otherwise referred to as the Reproductive Health Equity Act, “would strengthen those existing policies by mandating Oregon health plans to cover abortion procedures, birth control, pap smears and other reproductive health services at no additional out-of-pocket cost to the consumer.” The legislation is set for review in coming months.

Despite its liberal legacy, Oregon is certainly not immune to conservative pushback. In February 2017, Republican lawmakers introduced a bill that would reverse current law and ban late-term abortions. The law, if passed, would prevent doctors in Oregon from performing an abortion if the fetus is more than 20-weeks old, require doctors to inquire about the age of the fetus and perform medical exams, and force doctors to submit reports to the Oregon Health Authority after each abortion, which would then be published in an annual Health Authority publication. Oregon Right to Life, a prominent anti-abortion organization, backed 10 of the bill’s 23 sponsors with $108,720 in cash and campaign services. Republicans have also sponsored a sex-selective abortion ban in Oregon set for consideration later this year.

If states continue enacting this type of legislation, the Supreme Court will likely hear another abortion case in coming years. Hellerstedt establishes that abortion provisions must show clear intentions to provide health benefits for women and cannot be partisan-driven attacks on the fundamental right to abortion itself; but an evolving and increasingly conservative Court — the recent appointment of conservative Justice Neil Gorsuch and the impending retirement of

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168 Id.
170 Id.
abortion advocate Justice Ruth Bader Ginsburg — might mean trouble moving forward for pro-choice proponents and more states enacting legislation that mirrors that of South Dakota and getting away with it. As previously discussed, reasonable judgment on this issue on the Court is almost entirely contingent on ideological composition. Partisanship tends to infect the Court in instances of staunchly divided partisan issues, threatening the foundations of abortion rights with the shifting dynamics. There is nothing that would stop the Supreme Court from overturning Roe should it choose to take another abortion case and find the original 1973 ruling flawed in its judgment. Though unlikely, this very well could become a reality, which is why measures like House Bill 3391 could become so essential in protecting abortion rights down the line. The visual below puts Oregon’s status even further into perspective on how uniquely it handles abortion access. The orange indicates states that have passed restrictions, the pink (Oregon) the state that has not.

![Map of States That Have Passed Abortion Restrictions Since Roe v. Wade: 49](image)

Oregon ultimately provides the best reproductive healthcare access not only because of its funding for abortion clinics but because of its legislature’s concerted effort to provide accessible contraceptive care and counteract federal policies geared toward curtailing abortion access. Its model, though certainly not perfect, is exemplary for the country.
South Dakota and Its Accessibility Problem

South Dakota is a valuable case study because it exemplifies how the negative effects of living in the abortion desert are exacerbated not only by state policies, but by policy in surrounding states as well. Because of its sheer size, abortion access in South Dakota is doubly restrictive since the closure of a single clinic can dramatically increase travel time. While some living in states with strict legislation choose to travel to neighboring states for services — for example, there are Oregon-based nonprofits that provide abortion access to Idaho residents — South Dakota’s geographic traits make it nearly impossible to travel a reasonable distance for abortion services.

In 2014, 98 percent of counties in South Dakota had no clinics that provided abortions with 77 percent of the state’s women living in those counties; the same year, there were only two abortion-providing facilities across the entire state, one of which was a clinic. The lack of clinics is especially detrimental because of the number of abortions performed in these types of facilities: “Sixteen percent of facilities in 2014 were abortion clinics (i.e., clinics where more than half of all patient visits were for abortion), 31% were nonspecialized clinics, 38% were hospitals and 15% were private physicians' offices. Fifty-nine percent of all abortions were provided at abortion clinics, 36% at nonspecialized clinics, 4% at hospitals and 1% at physicians' offices.”

Though only 550 abortions occurred in South Dakota in 2014, 0.1 percent of total abortions in the United States, “not all abortions that occurred in South Dakota were provided to state residents, as some patients may have traveled from other states; likewise, some individuals from South Dakota may have traveled to another state for an abortion.”

In addition to the state’s physical size creating impediments to abortion access, South Dakota has some of the strictest legislation in the country. These restrictions are so intense that abortion would altogether be banned in the state if Roe were to be overturned. The charts on pages 55 and 56 visually represent the number of policies in place in South Dakota, but below is a more detailed list of the policies currently in place in the state:

- Mandatory state-directed counseling involving information designed to discourage women from having an abortion, and then wait 72 hours before the procedure is provided, thereby necessitating two trips to the facility. The 72-hour waiting period does not include weekends or annual holidays.
- Health plans offered in the state’s health exchange under the Affordable Care Act can only cover abortion if the person’s life is endangered or health is severely compromised.
- The use of telemedicine to administer medication abortion is prohibited.
- The parent of a minor must be notified before an abortion is provided.
- Public funding is available for abortion only in cases of life endangerment.
- An abortion may be performed at 20 or more weeks postfertilization (22 weeks after the person’s last menstrual period) only if the woman’s life is endangered or if her physical health is severely compromised. This law is based on the assertion, which is inconsistent

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172 Id.

173 Id.
with scientific evidence and has been rejected by the medical community, that a fetus can feel pain at that point in pregnancy.\textsuperscript{174}

With all of these restrictions in place, a Jezebel article presents a narrative version of what might happen to someone seeking an abortion in South Dakota, which provides a highly detailed and powerful hypothetical about the state’s abortion access:

You are a 25 year-old [pregnant] woman living in Faith, South Dakota. Unfortunately, there is only one abortion provider in all of South Dakota — the Sioux Falls Planned Parenthood. Sioux Falls is about six hours and 348 miles away. ... It'll cost about $56 round trip. And although there are other pregnancy help centers in South Dakota — the closest, two hours away — you decide it’s less hassle to do everything in one place. ... Your doctor also assesses your ‘circumstances’ to ensure that no one is coercing you to have an abortion. ... An hour later, you sign a mountain of paperwork, fork over a $20 copay. ... Stepping out that door begins the 72-hour waiting period before you can have an abortion. The medical abortion costs between $350 and $650, and involves taking a pill to break down the lining of your uterus. A surgical abortion costs between $450 and $940, and uses a suction device to empty the contents of your uterus. ... When all is said and done, you’ve spent at least $800 and a week's worth of time to have your abortion — not to mention the unimaginable emotional and physical stress you've gone through.\textsuperscript{175}

All of this to obtain a legal service. This is what an undue burden looks like.

Currently, South Dakota legislators are pushing for increased restrictions on top of the plethora of existing ones. Surprisingly, the state’s House Judiciary Committee recently rejected a bill that would have prohibited the use of D&E abortions; though the dismissal was not in respect to the fundamental right to abortion, but rather a result of the backlash the state grappled with in light of a 2014 provision that was ultimately overruled. The 2014 law cost the state a “$170,000 legal


tab in 2014 for defending a law that forced doctors to falsely say abortion care is linked to suicide [untrue], among other provisions. The state attorney general estimated that defending that law could cost upwards of $4 million. “176 These expenses, paid for by state taxes to defend the anti-abortion legislation, make lawmakers in South Dakota wary of replicating a similar situation to that of what ensued with the 2014 provisions, but not so hesitant as to not continue attempting to implement variations of less blatantly restrictive policies. The previous bill contained numerous additional provisions, including a strict 72–hour waiting rule from the first consultation between the patient and doctor.

South Dakota is also not exceptional in its disparate pay gap: women who work full-time, year-round earn 77 cents on the dollar compared with similarly employed men.177 If current trends continue, this wage gap will not close until 2081.178 South Dakota’s government also lacks diversity, with women of color holding zero representative seats. So overall, women are more likely to be impoverished without representation in government seats that control reproductive healthcare decisions, making it more difficult to afford abortions and to change legislation that impedes access (no surprise, the majority of women are pro choice).179

<table>
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<tr>
<th>Overview of the Status of Women of Color in South Dakota</th>
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<td><strong>Political Participation</strong></td>
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<td>Number of Women in Statewide Elected Executive Office, 2015 (out of 10 offices)</td>
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<td>Number of Women in U.S. Congress, 2015 (out of 3 offices)</td>
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<td><strong>Employment &amp; Earnings</strong></td>
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<td>Women’s Median Annual Earnings (Full-Time, Year-Round), 2011-2013</td>
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<td>Ratio of Women’s to White Men’s Earnings, 2011-2015</td>
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<td>Women’s Labor Force Participation, 2011-2013</td>
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Source: Institute for Women’s Policy Research

178 Id.
It is sometimes difficult to conceptualize the effects that Supreme Court decisions have on people’s lived experiences trying to obtain an abortion, but the state’s barriers to access certainly depict the effects of these restrictions well. When the Court measures policies against an undue burden standard only to find the restrictions in South Dakota constitutional, there is something fundamentally wrong with the way this determination is made. The cost alone involved in obtaining an abortion in South Dakota cannot possibly be justified, let alone the time, energy and effort that this process requires. These policies indisputably harm the most vulnerable groups in the United States, making abortion’s legality all but moot for certain people who simply cannot dedicate or do not have the time and/or resources to procure an abortion. Thus socioeconomic status plays a major role in who can freely access facilities and who ultimately gets cornered into having an unwanted child or taking extreme measures to self-terminate a pregnancy. Still the Court uses a barometer that does not reflect an understanding of how such regulations predominately harm low-income and people of color, employing variations of the test that fail to account for the disproportionately burdensome impact regulations have on these communities.
V.
CONCLUSION

Scrutinizing Undue Burden

This thesis’s driving argument is that the Court’s shift from focusing on analyzing abortion cases with strict scrutiny to using the undue burden standard allows states to create legally permissible loopholes that restrict the fundamental right to abortion access. These provisions disproportionately affect low-income women, the majority of whom are women of color in the United States. Conservative state legislatures take drastic measures to prevent abortions from occurring since Roe still holds, but instead of stopping abortions altogether these policies simply make it difficult for the most vulnerable communities to terminate unwanted pregnancies. Recall the three most commonly cited reasons people obtain abortions are concern for or responsibility to other individuals; the inability to afford a child; and the belief that having a baby would interfere with work, school or the ability to care for dependents. Half of people obtaining an abortion also said they did not want to be a single parent or were having problems with their husband or partner. Thus, restrictive abortion legislation under the undue burden standard that disparately affects low-income women perpetuates cycles of poverty when insurmountable barriers are placed in the path of those seeking the procedure — making abortion a right that’s up for sale.

From Roe v. Wade (1973) to Whole Women’s Health v. Hellerstedt (2016), the Court grapples with restrictive state policies and demonstrates how partisanship can infiltrate decisions. As a result of relentless political pushback, artificial distinctions have been drawn between the fundamental right to abortion and having fair access to the procedure, though no true distinction really exists between the two. Logically, the right to abortion is moot if the procedure remains so inaccessible in most regions of the country. Restrictive policies allowed under the undue burden standard then tend to undermine principles laid out in Roe and create unreasonably significant barriers to the procedure. Roe v. Wade determined that the right to abortion can be found in the implications of the Ninth Amendment though not specifically enumerated. The Framers’ open-ended language indicates an understanding that the Constitution could not encompass all rights that would ever be challenged in the Court, but that justices would make departures and determinations about fundamental rights in the future. Abortion is now one of these.

But since Roe, state legislatures have chipped away at this fundamental right under the Court’s watchful eye. The undue burden standard that has come to shape the legal landscape of abortion access is simply not stringent enough to protect abortion as a fundamental right. Most states have not indicated they will slow down on rolling out anti-abortion measures, which means that the Supreme Court needs to adopt a new approach to assessing legislation if it intends to protect abortion access in years to come. In the mean time, the most vulnerable communities in the United States will suffer at the hands of legislatures fixated on curtailing access by placing expensive, unnecessary and undue burdens on those seeking an abortion.