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Lucy E. Hill
Fordham University School of Law

SEEKING LIBERTY'S REFUGE: ANALYZING LEGISLATIVE PURPOSE UNDER *CASEY*'S UNDUE BURDEN STANDARD

*Lucy E. Hill**

In the 1992 decision Planned Parenthood of Southeastern Pennsylvania v. Casey*, the U.S. Supreme Court crafted the "undue burden" standard for evaluating the constitutionality of abortion laws. Under that standard, a state is free to regulate abortion, as long as the regulation does not have the purpose or effect of imposing an undue burden on a woman's right to an abortion. Although the standard is disjunctive, the* Casey *opinion focuses on the "effect" prong of the test, with little guidance as to what a "purpose" prong inquiry would look like. Subsequent Supreme Court abortion jurisprudence has served only to obscure the issue. Circuit courts, therefore, have taken differing approaches to claims that an abortion law was adopted for an invalid purpose.*

This Note addresses the divide in how courts evaluate purpose-based challenges under Casey*'s undue burden standard. One group of courts—including the Tenth, Fifth, and Eighth Circuits—apply heightened scrutiny to purpose prong challenges, requiring that the state articulate an important governmental interest, which is substantially related to the regulation in question. In contrast, a second group of courts–comprised of the Seventh and Fourth Circuits–apply rational basis review to purpose-based claims, requiring only that the law be rationally related to a legitimate state interest. This Note argues that the application of heightened scrutiny to purpose-based challenges more accurately applies prior Supreme Court abortion precedent, and is more consonant with substantive due process jurisprudence as a whole. It concludes with a discussion of the effect that heightened scrutiny would have on many common abortion laws.*

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* J.D. Candidate, 2013, Fordham University School of Law; B.A., 2008, Northwestern University. I would like to thank Professor Tracy Higgins for her assistance with this Note. For Mom, Dad, and Jane.

INTRODUCTION

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

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[2] the U.S. Supreme Court crafted the "undue burden" standard for evaluating the

1. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 844 (1992).
2. 505 U.S. 833 (1992).

constitutionality of laws that affect a woman's right to seek an abortion.[3] Under this standard, states are free to regulate abortion so long as they do not enact regulations that have the "purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[4] The undue burden standard governs a variety of abortion laws, including those that regulate the medical procedure of abortion itself, those that dictate the steps that must be taken by abortion providers and women seeking abortions, and those that affect the financing of abortions.[5] Some common abortion laws include mandatory waiting periods between the initial doctor's visit and the abortion procedure, parental consent or notification laws for minors, and mandatory counseling prior to obtaining an abortion.[6] Others include safety laws that govern specific details of abortion facilities, such as the size of operating rooms or the width of hallways, as well as prohibitions on abortion coverage in health insurance policies.[7] Since *Casey*, the number of major abortion laws enacted in the United States at the state level has hovered around twenty per year.[8] During 2011, however, the number of new abortion laws enacted by states spiked to an all-time high of 135.[9] These new laws range from variations on the commonplace abortion restrictions listed above, to more novel measures that push against the boundaries of constitutionality.[10]

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3. *Id.* at 872–74.

4. *Id.* at 877.

5. *See* Dorothy Samuels, Editorial, *Where Abortion Rights Are Disappearing*, N.Y. TIMES, Sept. 24, 2011, at SR14; *see also States Enact Record Number of Abortion Restrictions in 2011*, GUTTMACHER INST. (Jan. 5, 2012), http://www.guttmacher.org/media/inthenews/2012/01/05/endofyear.html [hereinafter GUTTMACHER INST.].

6. *See, e.g.*, Planned Parenthood Minn., N.D., S.D. v. Daugaard, 799 F. Supp. 2d 1048, 1066 (D.S.D. 2011) (authorizing a preliminary injunction against a 2011 South Dakota law requiring a mandatory seventy-two hour waiting period between the initial physician's visit and the abortion procedure); GUTTMACHER INST., *supra* note 3 (describing new laws in Texas, North Carolina, and South Dakota requiring counseling prior to obtaining an abortion).

7. *See, e.g.*, ACLU of Kan. and W. Mo. v. Praeger, 815 F. Supp. 2d 1204, 1217 (D. Kan. 2011) (upholding a Kansas law restricting insurance coverage for abortion);
Marc Santora, *Mississippi Law Aimed at Abortion Clinic Is Blocked*, N.Y. TIMES, July 2, 2012, at A9 (describing a Mississippi law, which would have required all abortion providers to be licensed "OB-GYNs with privileges to admit patients to a local hospital"); Taunya English, *Defending and Disputing Plan for Changing Pennsylvania Abortion Regulations*, NEWSWORKS (Nov. 16, 2011), http://www.newsworks.org/index.php/component/flexicontent/item/29971–defending–and–disputing–plan–for–changing–pa–abortion–regulations (describing proposed legislation in Pennsylvania that would require all abortion clinics to meet the standards for ambulatory surgical facilities, which must have larger operating rooms, wider hallways, and hospital-grade elevators, among other things).

8. *See* Samuels, *supra* note 3; GUTTMACHER INST., *supra* note 3.

9. *See* GUTTMACHER INST., *supra* note 3.

10. *See, e.g.*, Nick Baumann, *Congressional GOP Pushes Zygote Personhood Bills*, MOTHER JONES (Nov. 8, 2011, 3:00 AM), http://motherjones.com/politics/2011/11/mississippi–personhood–zygote–federal–law (describing "personhood" bills, which have been proposed by various states and by Congress, and define life as beginning at conception); Jessie L. Bonner, *Doc-Lawyer Will Intervene in Idaho Fetal Pain Case*, BLOOMBERG BUSINESSWEEK (June 7, 2012), http://www.businessweek.com/ap/2012-06/D9V8A1S00.htm (detailing a lawsuit challenging Idaho's "fetal pain" statute, which prohibits abortions after nineteen weeks under the premise that fetuses can feel pain after this

Recently, several policy debates at the federal level have also revolved around the issue of abortion. Although the government has prohibited the use of federal money for abortions since the 1970s,[11] health care reform has drawn abortion funding into the spotlight.[12] On the day after President Obama signed the Affordable Care Act,[13] he issued an executive order indicating that no government funding would be provided under the bill to finance abortions, and reaffirming the preexisting federal regulations.[14]

In 2010, the House of Representatives passed the Protect Life Act,[15] which would prohibit federal funding for health care plans that provide abortion services, as well as prevent the withholding of federal funds from health care providers who refuse to perform abortions.[16] Opponents of the bill argue that this would discourage insurance companies from covering abortions, and would protect hospitals from liability for failing to provide life-saving abortions.[17] The bill provoked strong reactions, and was dubbed the "Let Women Die" Act by pro-choice groups following House Minority Leader Nancy Pelosi's statement that under the bill "women can die on the floor and health care providers do not have to intervene."[18] Supporters of the bill say that unwilling taxpayers should not have to subsidize abortion in any way.[19] The Senate has not yet considered the bill.[20]

These new state and federal abortion laws have provoked impassioned responses both from those who firmly believe that abortion takes an innocent child's life, as well as from those who argue that such measures wrongfully turn back the clock on women's rights.[21] Anti-abortion activists

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point); Jo Ingles, *Anti–abortion Forces Rally for "Heartbeat Bill" in Ohio*, REUTERS (Sept. 20, 2011, 8:30 AM), http://www.reuters.com/article/2011/09/20/us-ohio-heartbeat-bill-idUSTRE78J2F020110920 (describing Ohio's proposed "heartbeat" bill, which would ban abortions after the first detectable heartbeat of the fetus, which occurs roughly six weeks after conception).

11. *See infra* Part I.C.2.

12. *See, e.g.*, Stephanie Condon, *Obama: Abortion Funding Not Main Focus of Health Reform*, CBSNEWS (July 21, 2009 11:08 PM), http://www.cbsnews.com/8301-503544_162-5178972-503544.html.

13. The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), provides for widespread health insurance reforms. *See generally id.*

14. Exec. Order No. 13,535, Ensuring Enforcement and Implementation of Abortion Restrictions in the Patient Protection and Affordable Care Act, 75 Fed. Reg. 15,599 (Mar. 29, 2010).

15. H.R. Res. 358, 112th Cong. (2011).

16. *See id.*

17. *See* Laura Bassett, *Protect Life Act: New Bill Would Allow Hospitals to Refuse to Perform Abortions*, HUFFINGTON POST (Dec. 11, 2011, 5:12 AM), http://www.huffingtonpost.com/2011/10/11/protect–life–act–anti–abortion–bill_n_1005937.html?.

18. *See* Deidre Walsh, *House Passes Bill on Abortion Funding*, CNN (Oct. 13, 2011) http://articles.cnn.com/2011-10-13/politics/politics_health-bill-abortion_1_abortion-services-health-care-pitts-bill?_s=PM:POLITICS; *see also* Erin Gloria Ryan, *House Passes 'Let Women Die' Bill After Extremely Depressing Debate*, JEZEBEL (Oct. 14, 2011, 11:40 AM), http://jezebel.com/5849839/house-passes-let-women-die-bill-after-extremely-depressing-debate.

19. *See* Walsh, *supra* note 18.

20. *See* Protect Life Act, H.R.358, 112th Cong. (2011).

21. *Compare* Anu Kumar, *Do U.S. Abortion Restrictions Violate Human Rights?*, HUFFINGTON POST (Oct. 25, 2011, 4:32 PM), http://www.huffingtonpost.com/anu–kumar/

have supported the majority of these new laws as part of their strategy to narrow abortion rights incrementally, law by law.[22] As these abortion laws increasingly restrict a woman's right to obtain an abortion, pro-choice advocates have begun to challenge them on the basis of their purpose, forcing courts to consider whether these new laws truly seek to further legitimate state interests, or if their passage was motivated by an illegitimate interest in preventing abortions.[23]

Although this year marks the twentieth anniversary of *Casey*, there is still uncertainty over what constitutes a permissible abortion law under its undue burden test.[24] The undue burden test as defined by *Casey* is considered disjunctive, prohibiting abortion laws that have the "purpose *or* effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[25] But the vast majority of cases have focused on whether an abortion law has an unconstitutional effect on a woman's right to obtain an abortion.[26]

Conversely, few cases have dealt with the purpose prong, and what jurisprudence exists is far from clear.[27] The lower courts have struggled with (1) what constitutes a permissible legislative purpose; (2) how compelling that purpose must be to justify limiting the right to seek an abortion; and (3) the appropriate level of deference to the state's proffered purposes.[28] The Supreme Court perpetuated this confusion by suggesting, in dicta, that an unconstitutional purpose alone may not be enough to invalidate an abortion law.[29] As a result, courts responding to purpose-based challenges to the new abortion laws face a complicated mess of precedents, which will only compound the thorny political and moral questions accompanying such litigation.

This Note seeks to resolve the conflict among courts over how to apply *Casey*'s purpose prong, by proposing a solution that is consistent not only with the limits set by *Casey*, but also with purpose inquiries in other

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abortion–human–rights_b_1029221.html, *and* Ryan, *supra* note 18, *with* Ryan Bomberger, *Abortion: Planned Parenthood Wants Your Baby Dead*, LIFENEWS.COM (Oct. 27, 2011, 10:16 AM), http://www.lifenews.com/2011/10/27/abortion-planned-parenthood-wants-your-baby-dead/, *and* Ken Connor, Op-Ed., *Abortion: An Inconvenient Truth*, CHRISTIAN POST (Nov. 1, 2011, 10:45 AM), http://www.christianpost.com/news/abortion–an–inconvenient–truth–60025/.

22. *See* Erik Eckholm, *Anti-abortion Groups Are Split on Legal Tactics*, N.Y. TIMES, Dec. 5, 2011, at A1 (describing how some anti-abortion advocates are beginning to abandon the incremental strategy in favor of an "all-out legal assault on *Roe v. Wade*"); Samuels, *supra* note 3.

23. *See, e.g.*, ACLU of Kan. and W. Mo. v. Praeger, 815 F. Supp. 2d 1204, 1212 (D. Kan. 2011) (regarding a purpose-based challenge to a new Kansas law dealing with insurance coverage for abortion); Santora, *supra* note 5 (describing a judge's decision to enjoin a Mississippi law because he found that the purpose of the law was to eliminate Mississippi's only abortion clinic); *see also infra* Part I.C.3.

24. *See infra* Part II.

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

26. *See infra* note 213 and accompanying text.

27. *See infra* Part II.

28. *See infra* Part II.

29. *See* Mazurek v. Armstrong, 520 U.S. 968, 972 (1997); *infra* Part I.C.4.

constitutional contexts. Part I of this Note describes how courts have conducted evaluations of legislative purpose in other areas of constitutional law. It also provides an overview of abortion jurisprudence, from the identification of a fundamental right to abortion access in *Roe*, to the liberty interest described in *Casey*. Part II explains how the various circuits have developed different methods of investigating legislative purpose for abortion laws. Finally, Part III argues that the purpose prong is still a viable part of the *Casey* undue burden test, and that the Supreme Court should adopt a heightened standard of review, using the Fifth Circuit's approach, in order to ensure that legislatures respect the Court's current jurisprudence.

I. THE ROAD TO A CONSTITUTIONAL RIGHT: SUPREME COURT JURISPRUDENCE ON FUNDAMENTAL RIGHTS, LEGISLATIVE PURPOSE, AND THE RIGHT TO ABORTION

Before delving into abortion jurisprudence, it is necessary to provide a basic framework for constitutional analysis. Part I.A discusses the manner in which constitutional rights are identified under substantive due process, as well as the way the Supreme Court typically deals with challenges to legislation based on violations of those rights. Part I.B then examines the various methods employed by the Supreme Court to discern legislative purpose outside of the abortion context. Finally, Part I.C examines the Supreme Court's abortion jurisprudence.

A. The Fundamental Rights Framework and the Introduction of "Liberty Interests"

The Supreme Court has found certain rights inherent in the Due Process Clause of the Fifth and Fourteenth Amendments.[30] The Fifth Amendment restricts the power of the federal government, by providing that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law."[31] The Fourteenth Amendment applies the Fifth Amendment to the states, asserting that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law."[32] While liberty includes certain procedural due process guarantees (i.e., certain procedures the government must follow before depriving a citizen of her liberty, such as providing notice and a hearing), the Court has also held that the concept of liberty encompasses a variety of other substantive freedoms.[33] Such rights include many personal and familial rights, including the right to marry,[34] to keep one's family together,[35] to control the education of one's children,[36] to have

30. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 792–93 (3d ed. 2006).
31. U.S. CONST. amend. V.
32. U.S. CONST. amend. XIV.
33. *See* CHEMERINSKY, *supra* note 30, at 545–46.
34. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 12 (1967).
35. *See, e.g.*, Moore v. City of E. Cleveland, 431, 503 U.S. 494 (1977).
36. *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390, 399–400 (1923).

privacy in an intimate relationship,[37] and most saliently to this Note, to be autonomous in making reproductive choices.[38]

Not every law that restricts one of these due process liberties is unconstitutional, however. Rather, courts typically apply a four-factor test to due process based challenges.[39]

First, courts ask: Does a fundamental right exist?[40] Determining what is or is not a fundamental right is a complicated process,[41] and one that often divides the Justices of the Supreme Court.[42] But in cases involving a right already identified by the Court, such as the rights above, the answer to this question is predetermined. Since the right of a woman to seek an abortion has been established since *Roe v. Wade*[43] in 1973,[44] this Note need not address this factor.

If a fundamental right does not exist, courts apply rational basis review to the law.[45] Rational basis review is itself a two-part test.[46] First, courts must determine whether there was a legitimate legislative interest behind the law.[47] Second, courts must determine whether the law is rationally related to that interest.[48] Rational basis is an extremely deferential form of review, wherein the burden of proof is on the challenger to show the law's invalidity.[49] Laws rarely fail rational basis review.[50]

But if a fundamental right does exist, courts proceed to the second step of the fundamental rights evaluation: Was the right infringed?[51] This is an important step, because not every law that burdens a right is considered an infringement.[52] Courts consider whether the interference has a direct or substantial effect on the right.[53] Although courts typically do not pay much attention to this question in the context of other fundamental rights, it has become a central question when discussing abortion laws.[54]

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37. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 567 (2003); Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965).

38. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 153 (1973); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

39. *See* CHEMERINSKY, *supra* note 30, at 794–98.

40. *See id.* at 794; Alan Brownstein, *How Rights Are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine*, 45 HASTINGS L.J. 867, 867 (1994).

41. *See* CHEMERINSKY, *supra* note 30, at 795–96.

42. For two competing approaches, compare *Lawrence*, 539 U.S. 558, 567–79 (employing a natural rights analysis, and arguing that rights must be articulated at a general level so that concepts of liberty can evolve over time), with Michael H. v. Gerald D., 491 U.S. 110, 122–124 (1989) (arguing that there must be a history or tradition of respecting a specific right in order for the right to be constitutionally protected).

43. 410 U.S. 113 (1973).

44. *See infra* Part I.C.1.

45. CHEMERINSKY, *supra* note 30, at 794.

46. *See id.* at 540.

47. *Id.* at 540, 797.

48. *Id.* at 540.

49. *Id.* at 678.

50. *Id.*

51. *Id.* at 796–97; Brownstein, *supra* note 40, at 867.

52. CHEMERINSKY, *supra* note 30, at 796.

53. *Id.*

54. *Id.* at 796–97; Brownstein, *supra* note 40, at 870.

Once courts have answered these two questions in the affirmative, they apply strict scrutiny to the law, which requires a compelling state interest that is narrowly tailored to meet that end.[55] Thus, the third step requires answering the question: Is there a compelling state interest for the government's infringement of the right?[56] As with determining what constitutes a fundamental right, there are no clear criteria for defining a "compelling" state interest.[57] The government bears the burden of proof under strict scrutiny, and it is very difficult for it to articulate a compelling justification.[58] Only concerns of great significance—like national security—have been recognized as compelling state interests.[59]

Finally, courts must then ask: Are the means adequately related to the interest?[60] Under strict scrutiny, a law must be narrowly tailored to achieve the government's interest.[61] It must be the least restrictive alternative to achieve that interest; it cannot merely be a legitimate way to realize that goal, as under rational basis review.[62] Again, there is no formal framework for determining exactly what constitutes narrow tailoring, or what is considered a less-restrictive alternative.[63]

Although this is the traditional framework for evaluating fundamental rights, the Court in *Casey*, and later in *Lawrence v. Texas*,[64] redefined some constitutional interests as "liberty interests" rather than fundamental rights.[65] *Casey* dealt with a woman's right to obtain an abortion.[66] The approach taken by *Casey* will be discussed in detail in Part I.C.3. *Lawrence*, decided more than a decade after *Casey*, dealt with the right to engage in private, consensual sexual conduct.[67] In *Lawrence*, the police responded to a call regarding a reported weapons disturbance, but found two men having sex.[68] They arrested the men under a Texas sodomy law, which prohibited same-sex sexual activity as "deviate sexual intercourse."[69] The men then challenged the validity of the Texas law under the Due Process Clause.[70] Although in *Bowers v. Hardwick*,[71] a similar case

55. CHEMERINSKY, *supra* note 30, at 794–98.
56. *Id.* at 797; Brownstein, *supra* note 40, at 867.
57. CHEMERINSKY, *supra* note 30, at 797.
58. *See* CHEMERINSKY, *supra* note 30, at 542.
59. *See, e.g.*, Korematsu v. United States, 323 U.S. 214, 216–18 (1944) (identifying national security as a compelling state interest).
60. *See id.* at 797; Brownstein, *supra* note 40, at 868.
61. CHEMERINSKY, *supra* note 30, at 797–98.
62. *Id.* at 797.
63. *Id.* at 797–98.
64. 539 U.S. 558 (2003).
65. *See id.* at 567 (discussing "[t]he liberty protected by the Constitution" instead of fundamental rights); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 876 (1992) (referring to "the woman's constitutionally protected liberty" rather than her fundamental right).
66. *See generally Casey*, 505 U.S. 833.
67. *See Lawrence*, 539 U.S. at 567.
68. *Id.* at 562–63.
69. *Id.* at 563.
70. *Id.*
71. 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 559 (2003).

decided in 1986, the Court had held that there was no "fundamental right . . . [of] homosexuals to engage in sodomy,"[72] the *Lawrence* Court overruled that holding.[73] The *Lawrence* Court reasoned that the liberty protected by the Constitution allows all people to have privacy in making choices about sexual conduct, which is just one element of the inherently related freedom to enter into intimate relationships.[74]

Although the *Lawrence* Court relied upon older cases that identified fundamental rights,[75] nowhere in its opinion did the Court categorize the freedom to enter into intimate relationships as a fundamental right, nor did it articulate a level of scrutiny.[76] Nonetheless, the Court flatly rejected the state's interest in promoting the moral condemnation of homosexuality. The Court stated, "[t]he issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. 'Our obligation is to define the liberty of all, not to mandate our own moral code.'"[77] The rejection of this state interest suggests the Court applied some form of heightened scrutiny to this law, as a moral justification for a law is sufficient to pass rational basis review.[78]

In other areas of constitutional law, there is a level of review between strict scrutiny and rational basis known as intermediate scrutiny.[79] Intermediate scrutiny requires that a law be substantially related to an important government interest.[80] It is not clear, however, if the Court applied this level of scrutiny in *Lawrence*.[81]

B. Evaluation of Legislative Purpose in Other Constitutional Contexts

Although this Note focuses on the analysis of legislative purpose in the abortion context, courts often rely by analogy on other cases that examine other types of legislative purpose. Evaluating the "institutional intentions of a deliberative body" is difficult for courts, and raises uncomfortable issues of comity between the judiciary and the legislature.[82] This section

72. *Id.* at 190.
73. *Lawrence*, 539 U.S. at 577–78.
74. *See id.* at 567.
75. *See id.* at 564–66 (discussing the line of cases which identify the fundamental right to privacy, including *Griswold v. Connecticut*, *Eisenstadt v. Baird*, and *Roe*).
76. *See* CHEMERINSKY, *supra* note 30, at 846. *See generally Lawrence*, 539 US 559.
77. *Id.* at 571 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 850 (1992)).
78. CHEMERINSKY, *supra* note 30, at 846. In his dissent in *Lawrence*, Justice Scalia listed a variety of commonplace laws which are supported by a morality interest, such as laws banning bigamy, same-sex marriage, adult incest, adultery, prostitution, masturbation, fornication, bestiality, and obscenity. *See Lawrence*, 539 U.S. at 589–90 (Scalia, J., dissenting) ("Countless judicial decisions and legislative enactments have relied on the ancient proposition that a governing majority's belief that certain sexual behavior is 'immoral and unacceptable' constitutes a rational basis for regulation.").
79. *See* CHEMERINSKY, *supra* note 30, at 540.
80. *See id.*
81. *See, e.g.*, CHEMERINSKY, *supra* note 30, at 846 ("[T]he Court in *Lawrence* did not articulate the level of scrutiny to be used.").
82. *See* Brownstein, *supra* note 40, at 941–42.

details several non-abortion cases examining legislative purpose, which courts have cited when evaluating abortion cases.

1. Analysis of Legislative Purpose Under the Establishment Clause

Edwards v. Aguillard[83] addressed a challenge to a state statute under the Establishment Clause of the First Amendment.[84] This clause provides, "Congress shall make no law respecting an establishment of religion."[85] The case dealt with a challenge to the Louisiana Creationism Act,[86] which forbade public schools from teaching evolution unless creationism was also taught.[87] The law was challenged as furthering an impermissible religious viewpoint favoring the Biblical story of creation; the state countered by arguing that the Creationism Act served the legitimate purpose of protecting academic freedom.[88] The Court applied the three-pronged test it had developed for evaluating whether legislation comports with the Establishment Clause: "First, the legislature must have adopted the law with a secular purpose. Second, the statute's principal or primary effect must be one that neither advances nor inhibits religion. Third, the statute must not result in an excessive entanglement of government with religion."[89] Since the Court found Louisiana to have acted with an impermissible religious purpose, the Court did not analyze the other two steps.[90]

The Court provided several factors to consider when evaluating legislative purpose:

> A court's finding of improper purpose behind a statute is appropriately determined by the statute on its face, its legislative history, or its interpretation by a responsible administrative agency. The plain meaning of the statute's words, enlightened by their context and the contemporaneous legislative history, can control the determination of legislative purpose. Moreover, in determining the legislative purpose of a statute, the Court has also considered the historical context of the statute, and the specific sequence of events leading to passage of the statute.[91]

The Court also explained that "[w]hile the Court is normally deferential to a State's articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham."[92] Here, the Court found that the statute did not further the purported goal of promoting academic freedom.[93] Whereas Louisiana teachers formerly had the liberty to teach

83. 482 U.S. 578 (1987).
84. *Id.* at 580–81.
85. U.S. CONST. amend. I. The First Amendment has also been applied to the states via the Fourteenth Amendment. *See* CHEMERINSKY, *supra* note 30, at 499–503.
86. LA. REV. STAT. ANN. §§ 17:286.1–286.7 (1982).
87. *Edwards*, 482 U.S. at 581.
88. *Id.* at 581–82.
89. *Id.* at 582–83.
90. *See id.* at 596–97.
91. *Id.* at 594–95 (citations omitted).
92. *Id.* at 586–87.
93. *Id.* at 587–88.

any scientific theory of life, they were now constrained to a particular curriculum.[94] Because the law did not further the purported purpose of promoting academic freedom, the Court reasoned that this was not the true purpose of the law.[95]

2. Purpose Analysis for Facially Neutral Laws with a Disparate Impact

In *Washington v. Davis*,[96] the Supreme Court set forth the test for facially neutral laws with a discriminatory impact on a constitutionally protected group.[97] *Washington* dealt with a constitutional challenge to a literacy test used for qualification for the Washington, D.C., police force.[98] Although the test was facially neutral, as it did not explicitly distinguish between groups,[99] black applicants tended to score disproportionately lower on the exam, and the plaintiffs therefore asserted that the test was being used to exclude black applicants from the police force.[100] The Court held that a facially neutral policy with a disparate impact on a particular protected group could be struck down only if the group could show it was motivated by an unconstitutional purpose to discriminate.[101] Once evidence of an unconstitutional purpose was shown, the burden shifted to the state to rebut this presumption.[102] The Court acknowledged that, in certain situations, the discriminatory impact would be so great that it would be difficult for the legislature to demonstrate any non-discriminatory purpose.[103] If the group could not show an unconstitutional purpose for the facially neutral law, however, the law would simply have to meet rational basis review.[104] Because the applicants had presented no evidence that the test was adopted for the purpose of discriminating, the law had only to pass rational basis review.[105] The Court upheld the test, finding that it furthered the legitimate interest in having a police force with certain communicative capabilities.[106]

3. Analysis of Legislative Purpose in Gerrymandering Cases

In *Miller v. Johnson*[107] and *Shaw v. Hunt*,[108] two voting rights cases decided around the same time, the Court struck down two legislative redistricting plans in Georgia and North Carolina, which were

94. *See id.*
95. *Id.* at 588–89.
96. 426 U.S. 229 (1976).
97. *Id.* at 241–42.
98. *Id.* at 232–35.
99. *See id.* at 246.
100. *Id.* at 233–34.
101. *Id.* at 238–41.
102. *Id.* at 241.
103. *Id.* at 242.
104. *See id.* (finding that a disproportionate impact alone does not trigger strict scrutiny under the Equal Protection Clause).
105. *See id.* at 246.
106. *Id.* at 245–46.
107. 515 U.S. 900 (1995).
108. 517 U.S. 899 (1996).

gerrymandered in order to create several districts with a majority of black voters.[109] As stated earlier in *Washington*, a facially neutral law with a discriminatory impact is only void if it was motivated by a discriminatory purpose.[110] *Miller* lays out a test for determining when a discriminatory purpose can be presumed in the gerrymandering context:

> The plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations. Where these or other race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a State can "defeat a claim that a district has been gerrymandered on racial lines." These principles inform the plaintiff's burden of proof at trial.[111]

This test was again applied in *Shaw*.[112]

Often in the case of gerrymandering, such a purpose is plain because of the unusual shape of the electoral districts, which cannot be explained except by racial motivations.[113] In both cases, the shape of the legislative district was exceedingly unusual.[114] And in both cases, the Court had additional evidence of actual legislative intent: that the legislature was concerned with maximizing the power of the black vote under an affirmative action mandate from the Justice Department under the Voting Rights Act.[115] In both cases, because the legislature was found to have acted with the predominant purpose of discriminating on racial lines, the plans were subjected to strict scrutiny, and ultimately struck down.[116]

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109. *See id.* at 901–02; *Miller*, 515 U.S. at 927–28.

110. *See supra* Part I.B.2.

111. *Miller*, 515 U.S. at 916 (quoting Shaw v. Reno, 509 U.S. 630, 647 (1993)).

112. *Shaw*, 517 U.S. at 905–06.

113. *See, e.g.*, *id.*; *Miller*, 515 U.S. at 917.

114. *Shaw*, 517 U.S. at 905–06 ("[T]he serpentine district has been dubbed the least geographically compact district in the Nation."); *Miller*, 515 U.S. at 917 (describing the district's shape as containing various narrow land bridges to connect the city's black populations).

115. *See Shaw*, 517 U.S. at 911–13; *Miller*, 515 U.S. at 905–07.

116. *See Shaw*, 517 U.S. at 918; *Miller*, 515 U.S. at 927–28. Although remedying past racial discrimination can be a compelling state interest, in *Miller*, the state only created the district to comply with Justice Department mandates under the Voting Rights Act. *See Miller*, 515 U.S. at 920–22. The Court rejected the Justice Department's interpretation of the Act. *See id.* at 923. In *Shaw*, the Court held that even if there were a compelling state interest in complying with section 2 of the Voting Rights Act, the proposed district was not narrowly tailored to meet that end. *Shaw*, 517 U.S. at 915.

C. Supreme Court Abortion Jurisprudence

This section describes the course of Supreme Court abortion jurisprudence, beginning with the identification of a fundamental right to abortion in *Roe* and the early abortion funding cases. Next, it discusses the articulation of the undue burden test for evaluating abortion laws in *Casey*. Finally, this section addresses two post-*Casey* abortion cases which touch upon issues of legislative purpose and the appropriate standard of review: *Mazurek v. Armstrong*[117] and *Gonzales v. Carhart*.[118]

1. *Roe v. Wade*

Since the Supreme Court's landmark decision in *Roe*, women have had the constitutional right to seek an abortion.[119] The Court struck down a Texas law criminalizing abortion, and determined that a woman's decision to terminate her pregnancy was part of the privacy right implicit in the Fourteenth Amendment's guarantee of personal liberty.[120] Because the Court identified the choice to seek an abortion as a fundamental right, any abortion law had to meet strict scrutiny.[121] The *Roe* Court identified two compelling state interests in the abortion context: first, in preserving and protecting the health of the woman; and second, in protecting a potential human life.[122]

The Court determined that each of these state interests became "compelling" at a different point in the pregnancy, and established a trimester framework for analyzing abortion restrictions.[123] During the first trimester of pregnancy, a woman has an absolute right to choose an abortion.[124] Once a woman enters her second trimester, however, the government interest in protecting the health of the woman becomes compelling, because at this stage in the pregnancy, an abortion procedure becomes more perilous to the woman's life than childbirth.[125] The state, therefore, can regulate abortion procedures to further its interest in protecting women's health and lives.[126] Finally, in the third trimester, the state's interest in protecting potential life becomes compelling.[127] This is such because at this late stage in the pregnancy, the fetus is "viab[le]"—meaning that it is "capab[le] of meaningful life outside the mother's womb."[128] Therefore, the state may prohibit women from obtaining an abortion in the third trimester of their pregnancy in order to further the

117. 520 U.S. 968 (1997).
118. 550 U.S. 124 (2007).
119. Roe v. Wade, 410 U.S. 113, 153 (1973).
120. *Id.*; *see* CHEMERINSKY, *supra* note 30, at 820.
121. *Roe*, 410 U.S. at 155; CHEMERINSKY, *supra* note 27, at 821.
122. *Roe*, 410 U.S. at 162; CHEMERINSKY, *supra* note 27, at 821.
123. *Roe*, 410 U.S. at 162–63; CHEMERINSKY, *supra* note 27, at 821.
124. *Roe*, 410 U.S. at 163; CHEMERINSKY, *supra* note 27, at 821.
125. *Roe*, 410 U.S. at 149, 163; CHEMERINSKY, *supra* note 27, at 821.
126. *Roe*, 410 U.S. at 163; CHEMERINSKY, *supra* note 27, at 821.
127. *Roe*, 410 U.S. at 163; CHEMERINSKY, *supra* note 27, at 821.
128. *Roe*, 410 U.S. at 163; CHEMERINSKY, *supra* note 27, at 821.

state's interest in potential life, so long as the state provides an exception for the life or health of the woman.[129]

2. The Abortion Funding Cases

Shortly after the politically controversial decision in *Roe*, a line of cases known as the "abortion funding" cases were decided. Some states reacted to *Roe* by implementing measures limiting the availability of abortions under government funded healthcare programs like Medicaid.[130] *Beal v. Doe*,[131] and its better-known companion case, *Maher v. Roe*,[132] challenged the constitutionality of state laws that limited abortion funding.[133] *Beal* held that Title XIX of the Social Security Act[134] (Title XIX), the law establishing the Medicaid program, did not require Pennsylvania to fund non-therapeutic abortions as a condition of participation in the federal Medicaid program; rather, states were allowed broad discretion to determine what medical assistance was "reasonable" and "consistent with the objectives" of Title XIX.[135] The Court also recognized the right of the state to "encourage[] normal childbirth" in light of the state's interest in preserving fetal life.[136] Nevertheless, this decision did not prevent states from funding abortions under their Medicaid program if they so chose.[137]

Maher involved a challenge to a virtually identical Connecticut law, this time under the Equal Protection Clause of the Fourteenth Amendment.[138] The Court found that a law prohibiting Medicaid funding for abortions, but providing funding for childbirth, did not implicate a fundamental right, and therefore did not violate the Equal Protection Clause.[139] The *Maher* Court stated, "[t]here is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy."[140] Since the state had no obligation to provide medical assistance at all, it was not placing an additional obstacle in an indigent woman's path to an abortion by refusing to fund this procedure.[141] Although the state's choice to fund childbirth may make this a more attractive option, the Court reasoned that an indigent woman's

129. *Roe*, 410 U.S. at 163–64; CHEMERINSKY, *supra* note 27, at 821.
130. *See* Jon F. Merz et al., *A Review of Abortion Policy: Legality, Medicaid Funding, and Parental Involvement, 1967–1994*, 17 WOMEN'S RTS. L. REP. 1, 7 (1995).
131. 432 U.S. 438 (1977).
132. 432 U.S. 464 (1977).
133. *Id.* at 466–67; *Beal* at 442.
134. 42 U.S.C. § 1396 et seq. (1970).
135. *Beal*, 432 U.S. at 444, 447.
136. *Id.* at 445–46.
137. *Id.* at 447.
138. *See generally Maher*, 432 U.S. 464. The Equal Protection Clause provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.
139. *Maher*, 432 U.S. at 470–71.
140. *Id.* at 475.
141. *Id.* at 474.

inability to obtain an abortion was a product of her own poverty, not the state's regulation.[142]

Justice Thurgood Marshall penned a blistering dissent to both decisions.[143] Besides addressing the social impact of forcing already-impoverished women to bear the additional costs of raising a child, Justice Marshall argued that these laws circumvented *Roe* by advancing an unconstitutional purpose to impose the moral viewpoint that abortion is wrong.[144] He also identified the likely effect of such laws—that poor women would be prevented from obtaining safe and legal abortions.[145]

While those cases were making their way to the Supreme Court, Representative Henry Hyde introduced a rider—known today as the Hyde Amendment[146]—to the 1977 federal appropriation law.[147] The Hyde Amendment prohibits the use of federal funding for abortions, and restricts abortion coverage for Medicaid recipients, federal employees, Native Americans, and women in the military, among others.[148] Originally, the Hyde Amendment provided no exceptions; however, it was amended in 1978 to include an exception for pregnancies that threatened the life of the mother.[149] Hyde stated his reason for proposing the bill: "I would certainly like to prevent, if I could legally, anybody having an abortion, a rich woman, a middle-class woman, or a poor woman. Unfortunately, the only vehicle available is the [Medicaid] bill."[150] The Hyde Amendment therefore legislatively overruled the policy established in *Beal*, by which states could exercise their discretion over whether or not to fund abortions under Medicaid.

Implementation of the Hyde Amendment was enjoined for several years while its constitutionality was litigated.[151] Unsurprisingly, in *Harris v. McRae*,[152] the Supreme Court followed the line of precedents it established in *Beal* and *Maher*, and found that the Hyde Amendment violated no statutory or constitutional prohibitions.[153] Specifically, the Court held that Title XIX did not require states to fund medically necessary abortions for which federal funding was unavailable under the Hyde Amendment (i.e., abortions in the event of pregnancies which threatened the woman's health, but not her life).[154] The Court reasoned, "Title XIX was designed as a cooperative program of shared financial responsibility, not as a device for

142. *See id.*
143. *See generally* Beal v. Doe, 432 U.S. 454 (1977) (Marshall, J., dissenting).
144. *Id.* at 455–57.
145. *See id.* at 458.
146. *See* Magda Schaler-Haynes et al., *Abortion Coverage and Health Reform: Restrictions and Options for Exchange-Based Insurance Markets*, 15 U. PA. J.L. & SOC. CHANGE 323, 337 (2012).
147. Pub. L. No. 94-439, 90 Stat 1418 (1976).
148. *See* Schaler-Haynes et al., *supra* note 146, at 337–39 & n.109.
149. Harris v. McRae, 448 U.S. 297, 302–03 (1980).
150. 123 CONG. REC. 19,700 (1977) (statement of Rep. Henry Hyde).
151. *See Harris*, 448 U.S. at 304.
152. 448 U.S. 297 (1980).
153. *See id.* at 326; *see also* CHEMERINSKY, *supra* note 30, at 838–39.
154. *See Harris*, 448 U.S. at 309; *see also* CHEMERINSKY, *supra* note 30, at 839.

the Federal Government to compel a State to provide services that Congress itself is unwilling to fund."[155]

The Court also found that the Hyde Amendment did not impinge on the fundamental right guaranteed in *Roe*.[156] The Court applied the same reasoning to the plaintiff's Fifth Amendment challenges as it did to the claim in *Maher*, reasoning that a state may make "a value judgment favoring childbirth over abortion, and . . . implement[] that judgment by the allocation of public funds."[157] Although a woman has a constitutional right to obtain an abortion to protect her health, her "freedom of choice [does not] carr[y] with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices."[158] As in *Maher*, the Court concluded that "[t]he financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency."[159]

Because the Hyde Amendment did not impinge on a fundamental right, the Court found that it only needed to meet rational basis review.[160] By incentivizing childbirth through the Medicaid program, the Hyde Amendment was rationally related to the legitimate government interest in protecting fetal life.[161] Therefore, the Court held that the Hyde Amendment was constitutionally permissible under the Fifth Amendment.[162] Since then, the Hyde Amendment has been reenacted every year.[163] Under the current version of the Hyde Amendment, states may obtain federal funding not only for abortions that are necessary to save the life of the woman, but also for abortions where the pregnancy resulted from rape.[164]

The abortion funding cases conveyed a clear message: although women have the right to obtain an abortion under *Roe*, they have no right to government funding or assistance in pursuing that right, even where the government provides money generally for medical treatment.

3. The Shift to the "Undue Burden" Standard: *Planned Parenthood of Southeastern Pennsylvania v. Casey*

In *Webster v. Reproductive Health Services*,[165] a plurality of the Court upheld three Missouri abortion restrictions under what appeared to be a

155. *Harris*, 448 U.S. at 309.
156. *Id.* at 318.
157. *Id.* at 314 (alterations in original) (quoting Maher v. Roe, 432 U.S. 464, 474 (1977)).
158. *Id.* at 316.
159. *Id.*
160. *See id.* at 324.
161. *Id.* at 325.
162. *Id.* at 326.
163. *See* Consolidated and Further Continuing Appropriations Act, Pub. L. No. 112-55, § 202, 125 Stat. 552, 619 (2011) (the current version of the Hyde Amendment); Schaler-Haynes et al., *supra* note 146, at 338.
164. § 202, 125 Stat. at 619.
165. 492 U.S. 490 (1989).

rational basis review.[166] The plurality called into question the *Roe* trimester framework for evaluating abortion restrictions, calling it "unsound in principle and unworkable in practice."[167] The plurality also indicated that the state has a compelling interest to protect potential human life throughout a woman's pregnancy, not just after viability.[168] In response to this decision, many states began enacting more restrictive abortion regulations, as the Court seemed poised to overrule *Roe*.[169]

Pennsylvania was one such state, enacting the requirements that would be at issue in *Casey*: informed consent, a twenty-four-hour waiting period, spousal notification, parental notification, and reporting requirements for abortion facilities.[170] Although the *Casey* Court affirmed the core holding of *Roe*—that women have the constitutional right to seek an abortion prior to viability—they rejected *Roe*'s trimester framework for evaluating abortion laws, and changed the test to the "undue burden" standard.[171]

A woman's right to abortion was redefined as a liberty interest rather than a fundamental right, and the Court adopted a balancing test to assess the constitutionality of abortion laws.[172] States were allowed to regulate abortion throughout pregnancy as long as they did not impose an undue burden on a woman's right to obtain an abortion.[173] The Court offered the following definition:

> A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it. And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends.[174]

The Court determined that the state had a profound interest in protecting potential life throughout a woman's pregnancy, and not merely after viability.[175] The Court reasoned that, although a woman has a right to terminate her pregnancy prior to viability, the government was free to take steps to ensure that the choice was "thoughtful and informed."[176] The state, for example, was free to provide a woman with information about adoption

166. *See generally id.*
167. *Id.* at 518 (quoting Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546 (1985)).
168. *Id.* at 519.
169. *See* Linda J. Wharton et al., *Preserving the Core of* Roe*: Reflections on* Planned Parenthood v. Casey, 18 YALE J.L. & FEMINISM 317, 325 (2006).
170. *Id.* at 324. *See generally* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).
171. *Casey*, 505 U.S. at 872–74.
172. *See id.* at 853, 873; CHEMERINSKY, *supra* note 30, at 826–28.
173. *Casey*, 505 U.S. at 874.
174. *Id.* at 877.
175. *Id.* at 871–73.
176. *Id.* at 872.

or welfare services that could help her provide for the child.[177] As in the abortion funding cases, the Court reiterated the idea that the government may express a preference for childbirth over abortion by enacting laws pursuant to its interest in protecting the life of the unborn.[178]

But the Supreme Court explicitly rejected one potentially legitimate interest—a state interest in condemning abortion as morally wrong.[179] It pointed out that, although some of the Justices might personally find abortion morally repugnant, the Court's "obligation is to define the liberty of all, not to mandate our own moral code."[180] The Court acknowledged that although the government can typically adopt a position on an issue, it cannot do so where the choice involves a constitutionally protected liberty.[181]

The Court also highlighted several types of regulations that would not constitute an undue burden, such as "law[s] which serve[] a valid purpose, one not designed to strike at the right itself, [or those that have] the incidental effect of making it more difficult or more expensive to procure an abortion."[182] Furthermore, the government could enact regulations which were no more than a "structural mechanism" to express respect for the life of the unborn, so long as they were not substantial obstacles in the woman's path.[183] States are also free to enact laws designed to foster the health of a woman, if such laws are not an undue burden on her right to choose an abortion.[184] Finally, "a state measure designed to persuade [a woman] to choose childbirth over abortion will be upheld if reasonably related to that goal," as long as it does not constitute an undue burden on her right to choose.[185]

The Court's application of the undue burden standard in *Casey*, however, is not entirely consistent, as demonstrated through its examinations of two of the provisions within the opinion: the twenty-four hour waiting period and the spousal notification provision.[186] Although an undue burden is defined by the purpose or effect of a law,[187] the Court did not inquire too deeply into the "purpose" portion of the test when examining the restriction requiring a woman to wait twenty-four hours between her initial

177. *Id.*
178. *See id.* at 872–73.
179. *See id.* at 850.
180. *See id.*
181. *See id.* at 850–51.
182. *Id.* at 874.
183. *Id.* at 877.
184. *Id.* at 878.
185. *Id.*
186. The undue burden test as set out in *Casey* is generally acknowledged to be unclear. *See* CHEMERINSKY, *supra* note 30, at 829–30 (describing the undue burden test as "confusing to apply" and "ambigu[ous]"); Wharton et al., *supra* note 169, at 332–33 ("[D]educing the meaning of the undue burden standard from the joint opinion's application of it to the Pennsylvania law is . . . difficult.").
187. *Casey*, 505 U.S. at 877.

consultation with her physician and the abortion procedure.[188] The Court itself articulated Pennsylvania's purpose as seeking to encourage reflective decision-making on the part of the woman, and a goal to protect the life of the unborn.[189] The Court stated: "The idea that important decisions will be more informed and deliberate if they follow some period of reflection does not strike us as unreasonable . . . . In theory, at least, the waiting period is a reasonable measure to implement the State's interest in protecting the life of the unborn."[190] The Court did not investigate whether this was in fact Pennsylvania's purpose in passing the law, or whether there was any evidence that women made more thoughtful decisions after twenty-four hours.[191]

The Court used an equally cursory approach to evaluate the effect prong of the test. Although the Eastern District of Pennsylvania found that the increased cost of making two trips to an abortion clinic, instead of one, would be "particularly burdensome"[192] to poor women, the Court did not find that this constituted an impermissible effect.[193] The Court dismissed the idea that, for impoverished women, making two trips to an abortion clinic might very well constitute an undue burden on their financial ability to seek an abortion.[194] The Court appears to have relied on the Eastern District of Pennsylvania's the choice of words, rather than the substance of its findings, in making its decision that "[a] particular burden is not of necessity a substantial obstacle."[195]

Conversely, the Court did strike down the spousal notification provision, which required that a married woman inform her husband prior to obtaining an abortion.[196] Without explicitly mentioning purpose, the Court here recognized that the statute was enacted to further the illegitimate state interest of subordinating the wife's interests to that of the husband's—relying on old-fashioned stereotypes about women.[197]

Interestingly, in a dissenting opinion, Justice Stevens had argued that the twenty-four hour waiting period either served only the illegitimate purpose of making abortions more difficult, or was otherwise unconstitutional because it was based upon outmoded stereotypes about a woman's ability to make a rational decision on her own.[198] Justice Stevens pointed to the

188. *See* Julie F. Kowitz, Note, *Not Your Garden Variety Tort Reform: Statutes Barring Claims for Wrongful Life and Wrongful Birth Are Unconstitutional Under the Purpose Prong of* Planned Parenthood v. Casey, 61 BROOK. L. REV. 235, 251–52 (1995) (arguing that the Court "devoted virtually no attention to analyzing the purpose" behind the law).

189. *Casey*, 505 U.S. at 885–86.

190. *Id.* at 885.

191. *See* Kowitz, *supra* note 188, at 251–52 (stating that the Court "simply presumed that the Act's purpose was to 'inform' or influence a woman's decision . . . without further investigation").

192. *Casey*, 505 U.S at 886.

193. *Id.* at 886–87.

194. *Id.* at 886.

195. *Id.* at 887; *see also* Wharton et al., *supra* note 169, at 336.

196. *Casey*, 505 U.S. at 898.

197. *See id.* at 896–98.

198. *Id.* at 918–19 (Stevens, J., concurring in part and dissenting in part).

complete lack of evidence that the delay benefitted women or that it aided the doctor in conveying information to the patient, instead comparing it to the parental notification requirements for minor women seeking abortions.[199] While there was evidence that teenagers needed help making a rational choice regarding abortion, none of this reasoning applied to adult women.[200] He concluded:

> The mandatory delay thus appears to rest on outmoded and unacceptable assumptions about the decisionmaking capacity of women. . . . Just as we have left behind the belief that a woman must consult her husband before undertaking serious matters, so we must reject the notion that a woman is less capable of deciding matters of gravity.[201]

Although the Court did not acknowledge Justice Stevens's argument in its analysis of the twenty-four hour waiting period, the Court found this argument persuasive in the context of the spousal notification provision.[202] It noted that a man has a significant interest in the child his wife is carrying, yet rejected the state interest in protecting the husband as insufficiently weighty to justify limiting the wife's right to obtain an abortion, given the "inescapable biological fact that state regulation . . . will have a far greater impact on the mother's liberty than on the father's."[203] The Court reasoned that a spousal notification requirement was repugnant to a modern conception of a woman's autonomy in marriage: "The husband's interest in the life of the child his wife is carrying does not permit the State to empower him with this troubling degree of authority over his wife. . . . Women do not lose their constitutionally protected liberty when they marry."[204]

Furthermore, the requirement also had an unconstitutional effect.[205] The Court found that the provision constituted a substantial obstacle to abortion access for women in abusive relationships.[206] The Eastern District of Pennsylvania made substantial findings that women in such relationships will often face psychological or physical abuse from their husbands upon informing them of their choice to obtain an abortion, and have an increased risk of unplanned pregnancy as the result of spousal rape or coerced sexual activity.[207] The Court held that this provision would deter these women from seeking abortions, and therefore have the effect of placing a substantial obstacle in the path of these women.[208]

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199. *Id.*
200. *Id.*
201. *Id.* (internal citations omitted).
202. *See id.* at 895–98.
203. *Id.* at 896 (plurality opinion). The Court further stated that because the state regulation implicated a woman's "bodily integrity" as well as "the private sphere of the family," it was "doubly deserving of scrutiny." *Id.*
204. *Id.* at 898.
205. *Id.* at 893–94.
206. *Id.*
207. *See id.* at 888–92.
208. *Id.* at 889, 893–94.

In contrast to the consideration given to the potential burden the twenty-four hour waiting period imposed on some subset of impoverished women, the Court asserted that the spousal notification provision had to be struck down even though it only affected one percent of women seeking abortions in Pennsylvania.[209] The Court stated: "The analysis does not end with the one percent of women upon whom the statute operates; it begins there. . . . The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant."[210]

Therefore, even in *Casey* itself, the undue burden test is somewhat unclear,[211] especially as to the purpose prong.[212] Although *Casey* outlines a disjunctive test analyzing the "purpose or effect" of placing a substantial obstacle in the path of a woman seeking an abortion, the *Casey* Court only seriously analyzes the effect of such laws, and this is how most other courts have applied the test.[213]

4. Purpose Analysis Post-*Casey*: *Mazurek v. Armstrong* and *Gonzales v. Carhart*

Since *Casey*, the Supreme Court examined purpose under the undue burden test in two cases. In the first, *Mazurek*, the Court went so far as to suggest that an improper purpose without an improper effect is insufficient to strike down an abortion law.[214] That case dealt with a Montana law that restricted the performance of abortions to licensed physicians.[215] At the time, there was only one non-physician performing abortions in Montana, a physician's assistant named Susan Cahill.[216]

The District of Montana denied a preliminary injunction of the law, but the Ninth Circuit vacated that judgment and remanded for further fact-finding and consideration of the law's purpose.[217] The Ninth Circuit found that the District of Montana had erroneously confined its purpose inquiry—the district court refused to enjoin the law refused to enjoin the law because

209. *Id.* at 894.
210. *Id.*
211. Brownstein, *supra* note 40, at 878 ("The description of the 'undue burden' test in the joint opinion is, unfortunately, not free from ambiguity.").
212. *See* CHEMERINSKY, *supra* note 30, at 830 ("The problem is that the joint opinion says both that the state cannot act with the purpose of creating obstacles to abortion and that it can act with the purpose of discouraging abortion and encouraging childbirth. Every law adopted to limit abortion is for the purpose of discouraging abortions and encouraging childbirth. How is it to be decided which of these laws is invalid as an undue burden and which is permissible?").
213. *See* Wharton et al., *supra* note 169, at 354 ("Most post–*Casey* legal challenges have been facial challenges that seek to demonstrate that the challenged restrictions will have an actual improper effect on women's access to abortion.").
214. *See* Mazurek v. Armstrong, 520 U.S. 968, 972 (1997).
215. *Id.* at 969.
216. *Id.* at 971.
217. *See id.* at 980 (Stevens, J., dissenting).

it could not assume that none of the legislators was motivated by a legitimate purpose to foster the health of a woman seeking an abortion.[218]

On appeal, the Ninth Circuit rejected the district court's purpose inquiry.[219] But because *Casey* did not provide a purpose-based test, the Ninth Circuit instead relied upon the Court's articulation of the predominant factor test in two gerrymandering decisions, *Miller* and *Shaw*, to conduct a purpose inquiry.[220] Based on this test, the Ninth Circuit reasoned that the process which led to the law, as well as the structure of the legislation, were relevant in determining the purpose behind the law.[221] The Ninth Circuit concluded: "A determination of purpose in the present case, then, may properly require an assessment of the totality of circumstances surrounding the enactment of [the physician-only law], and whether that statute in fact can be regarded as serving a legitimate health function."[222]

The Supreme Court overturned the Ninth Circuit's decision to remand, and called into question whether an invalid purpose alone can constitute a justification for declaring a law unconstitutional.[223] The Court stated: "[E]ven assuming the correctness of the Court of Appeals' implicit premise—that a legislative *purpose* to interfere with the constitutionally protected right to abortion without the *effect* of interfering with that right . . . could render the Montana law invalid—there is no basis for finding a vitiating legislative purpose here."[224] The Supreme Court cited to *Washington* to support the proposition that an unconstitutional purpose cannot be assumed, even when there is an unconstitutional effect.[225] In *Washington*, it was determined that a facially neutral law was not unconstitutional merely because it had a discriminatory effect; rather, a separate showing of unconstitutional purpose was required to invalidate the law.[226] Although the Court seemed to imply that both an unconstitutional purpose and effect are required to invalidate an abortion law, the Court

218. Armstrong v. Mazurek, 94 F.3d 566, 567 (9th Cir. 1996), *rev'd*, 520 U.S. 968 (1997).

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *See* Mazurek v. Armstrong, 520 U.S. 968, 972 (1997). It is interesting to note that, in later state court litigation, Montana found this law to have an impermissible purpose under their state constitution's guarantee of personal liberty. *See* Armstrong v. State, 989 P.2d 364, 381–82 (Mont. 1999) ("The reality of this case is that, while the legislature could not make pre-viability abortions facially unlawful, it could, and did—under the facade of 'protecting women's health' and the lesser 'undue burden' test of [*Casey*]—attempt to make it as difficult, as inconvenient and as costly as possible for women to exercise their right to obtain, from the health care provider of their choice, a specific medical procedure protected by the Due Process Clause of the federal constitution and, independently of the Fourteenth Amendment, protected by their greater right of individual privacy under Article II, Section 10 of the Montana Constitution.").

224. *Mazurek*, 520 U.S. at 972.

225. *Id.* (citing Washington v. Davis, 426 U.S. 229, 246 (1976)).

226. *See supra* Part I.B.2.

ultimately reversed the Ninth Circuit's decision on the basis that there was no evidence of invalid purpose here, rendering the above reasoning dicta.[227]

In reversing the Ninth Circuit, the Court rejected two types of evidence of an improper purpose put forth by the respondents in *Mazurek*.[228] First, the respondents argued that there must be an unlawful purpose because there was no medical reason supporting the physician-only restriction.[229] The Supreme Court rejected this argument based on the statement in *Casey* that states have "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*."[230] Second, the respondents asserted that an anti-abortion group drafted the Montana law at issue, suggesting that the purpose of the law was to limit abortions.[231] The Court rejected this argument with no analysis, simply stating that this said nothing about the legislature's purpose in passing the law.[232]

A three-Justice dissent penned by Justice Stevens strongly disagreed with the majority's analysis of the merits, because the procedural posture of the case suggested that it should have been remanded for further fact-finding.[233] Furthermore, Justice Stevens argued that the existing record contained substantial evidence that the Montana legislature was motivated by an improper purpose.[234] He reasoned that the law was likely directed at preventing Cahill specifically from performing abortions, as she was mentioned by name in the legislative record.[235] Justice Stevens also pointed to the language in *Casey* that a law is invalid if it "serve[s] no purpose other than to make abortions more difficult."[236] He concluded that the statute must therefore serve an improper purpose, because no health benefit to women could be shown.[237]

Justice Stevens's dissent also suggested that the majority should provide "enlightenment" as to whether the Ninth Circuit misapplied the Supreme Court's decisions in *Miller* and *Shaw*.[238] In a footnote, the majority in *Mazurek* skirted the issue of the Ninth Circuit's reading of those cases, saying it need not be addressed since the record did not reflect that the legislature's predominant motive was to prevent abortions.[239] But the

227. *Mazurek*, 520 U.S. at 972; *see also* Okpalobi v. Foster, 190 F.3d 337, 355–56 (5th Cir. 1999) (interpreting this as dicta), *rev'd on other grounds en banc*, 244 F.3d 405 (5th Cir. 2001); Karlin v. Foust, 188 F.3d 446, 494 (7th Cir. 1999) (interpreting this as dicta).
228. *See id.* at 972–73.
229. *Id.* at 973.
230. *Id.* (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 885 (1992)).
231. *See id.*
232. *Id.*
233. *Id.* at 977–81 (Stevens, J., dissenting).
234. *See id.* at 978–79.
235. *Id.*
236. *Id.* at 979 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 901 (1992)).
237. *Id.* at 979–80.
238. *Id.* at 981.
239. *Id.* at 974 n.2 (majority opinion).

Ninth Circuit did not definitively say whether this had been the predominant motive; rather, it remanded for further fact-finding on this question.[240] Therefore, it remains an open question whether the Supreme Court would find the Ninth Circuit's approach to evaluating purpose valid in the event of a different factual record.

Since *Mazurek*, the most significant Supreme Court decision dealing with legislative purpose in the abortion context is *Gonzales*, which is important because it is the Supreme Court's most recent articulation of the undue burden test.[241] In *Gonzales*, the Court upheld the constitutionality of the Partial Birth Abortion Ban Act of 2003[242] (Act).[243] The Act banned a particular form of abortion known as intact dilation and extraction, which is performed late in pregnancy.[244] This procedure involves partially delivering the fetus before completing the abortion.[245] The Act banned the procedure except when necessary to save the life of the woman, but did not include an exception to protect the woman's health.[246]

The vast majority of abortions—eighty-five to ninety percent—are performed using other procedures in the first trimester, and these were not affected by the Act.[247] The Act also left in place alternative methods of late-term abortion.[248] For instance, the Act permitted non-intact dilation and evacuation, a procedure in which the doctor would partially dilate a woman's cervix to the extent necessary to insert surgical tools into the uterus.[249]

The Act was challenged for its lack of a health exception, because there was evidence that the alternative of non-intact dilation and evacuation presented increased health risks.[250] It was also asserted that intact dilation

240. Armstrong v. Mazurek, 94 F.3d 566, 568 (9th Cir. 1996), *rev'd*, 520 U.S. 968 (1997).

241. *See generally* Gonzales v. Carhart, 550 U.S. 124 (2007).

242. 18 U.S.C. § 1531 (2006).

243. *See Gonzales*, 550 U.S. at 132–33.

244. *Id.* at 136–37; *see also* B. Jessie Hill, *Dangerous Terrain: Mapping the Female Body in* Gonzales v. Carhart, 19 COLUM. J. GENDER & L. 649, 651 (2010).

245. *Gonzales*, 550 U.S at 138–39.

246. *Id.* at 141–43; *see also* Jessica L. Waters, *In Whose Best Interest?* New Jersey Division of Youth and Family Services v. V.M. and B.G. *and the Next Wave of Court-Controlled Pregnancies*, 34 HARV. J.L. & GENDER 81, 105 (2011).

247. *Gonzales*, 550 U.S. at 134; *see also Supreme Court Upholds Federal Abortion Ban, Opens Door for Further Restrictions by States*, 10 GUTTMACHER POL'Y REV., Spring 2007, at 19, *available at* http://www.guttmacher.org/pubs/gpr/10/2/gpr100219.pdf ("Based on its last census of abortion providers in 2000, the Guttmacher Institute estimated that just 2,200 [intact dilation and extraction] procedures were performed in that year, or 0.17% of all U.S. abortions; virtually all of these procedures were performed in the late second trimester. Today in the United States, nearly 90% of abortions are performed in the first trimester (before 12 weeks' gestation).").

248. *Gonzales*, 550 U.S. at 140.

249. *See id.* at 135–36, 146–47 (stating that the Act bans the intact dilation and extraction procedure).

250. *See id.* at 161; *see also* Press Release, Am. Coll. of Obstetricians & Gynecologists, ACOG Statement on the US Supreme Court Decision Upholding the Partial-Birth Abortion Ban Act of 2003 (Apr. 18, 2007), http://web.archive.org/web/20110610140050/http://www.acog.org/from_home/publications/press_releases/nr04-18-07.cfm (stating that

and extraction was safer for women with certain medical conditions or fetal anomalies.[251] The lack of a health exception was legally significant,[252] as the Court had struck down a similar Nebraska law for its failure to have a health exception a few years earlier in *Stenberg v. Carhart*.[253] Nevertheless, the Court found that legislatures could still act to ban the procedure in the face of "medical uncertainty," in direct contrast to its findings in *Stenberg*.[254]

Although the Act was not challenged on the basis of having an improper purpose,[255] the Court nonetheless determined that Congress articulated a legitimate purpose for the law without doing a full purpose analysis.[256] The Court found that Congress acted out of respect for the dignity of fetal life, which was identified as a legitimate state interest in *Casey*.[257] According to the Court, the Act furthered this state interest by preventing intact dilation and extraction, because the procedure had a "disturbing similarity to the killing of a newborn infant."[258] The Court stated:

> Where it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn.[259]

Here, the Court suggested that the interest only needed to meet rational basis review, without fully analyzing the law.[260]

Without factual findings to support this point, the Court also found that the Act could be justified by a secondary interest in helping women make

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the "safety advantages of intact dilatation and evacuation . . . procedures are widely recognized").

251. *Gonzales*, 550 U.S. at 161; *see also* Waters, *supra* note 246, at 105–06 ("Following the Court's decision, the American College of Obstetricians and Gynecologists . . . lambasted the decision as discounting and disregarding the medical consensus that intact dilation and extraction is safest and offers significant benefits for women suffering from certain conditions that make the potential complications of other abortion procedures especially dangerous." (internal quotation marks omitted)).

252. *See Gonzales*, 550 U.S. at 143.

253. 530 U.S. 914 (2000) (striking down a Nebraska partial birth abortion ban as unconstitutional, because it lacked an exception to protect the health of the woman, and it imposed an undue burden by banning both intact dilation and extraction and non-intact dilation and evacuation).

254. *See* Hill, *supra* note 244, at 653 (noting the disconnect between *Gonzales* and *Stenberg*). *Compare Gonzales*, 550 U.S. at 166, *with Stenberg*, 530 U.S. at 936–38 (finding that "a division of opinion among some medical experts over whether [intact dilation and extraction] is generally safer" meant that the statute should contain a health exception).

255. *See Gonzales*, 550 U.S. at 143.

256. *See id.* at 156–60.

257. *Id.* at 157; *see also supra* note 169 and accompanying text.

258. *Gonzales*, 550 U.S. at 158 (internal quotation marks omitted). *But see* Erwin Chemerinsky, *Turning Sharply to the Right*, 10 GREEN BAG 2D 423, 426 (2007) ("There is nothing but the view of the five male Justices in the majority that abortions done through a particular procedure are 'barbaric.'").

259. *Gonzales*, 550 U.S. at 158.

260. *See id.*

an informed decision.[261] The Court concluded: "While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained."[262] The Court reasoned that doctors often do not tell women the exact details of the intact dilation and extraction procedure, and that a woman who regrets having an abortion after the fact "must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form."[263] Therefore, the Court recognized two legitimate state interests for the Act without specifically analyzing how the statute is rationally related to those ends, or explicitly identifying a level of scrutiny.

In a four-Justice dissent, Justice Ginsburg observed that even if these interests were legitimate, they were not rationally related to the Act's prohibition of intact dilation and extraction.[264] While the Act proscribed this procedure, as stated earlier, it allowed non-intact dilation and evacuation, a method of abortion that involves dismembering a fetus in the uterus and then evacuating it in pieces.[265] Justice Ginsburg emphasized that the Act did not further the state's interest in promoting respect for fetal life, as it not only failed to protect any fetus from being aborted, but also permitted this equally "brutal" abortion procedure.[266]

Furthermore, Justice Ginsburg stated that the interest in helping women make informed choices about abortion was not rationally related to the outright ban on intact dilation and extraction procedures.[267] Instead of having doctors simply "inform women, accurately and adequately, of the different procedures and their attendant risks. . . . [T]he Court deprives women of the right to make an autonomous choice."[268] Justice Ginsburg noted that such a justification for the law was impermissibly based upon "ancient notions about women's place in the family . . . that have long since been discredited," such as the need to pass laws to protect women based on their perceived timidity, weakness, and dependence on men.[269] Justice Ginsburg also highlighted the uncertainty regarding how compelling the

261. *Id.* at 159–60; *see also* Chemerinsky, *supra* note 258, at 426 ("As Justice Kennedy candidly admitted, there is no reliable data to support the notion that the ban on so-called partial birth abortions will improve the psychological health of women.").

262. *Gonzales*, 550 U.S. at 159.

263. *Id.* at 159–60.

264. *Id.* at 181–82 (Ginsburg, J., dissenting).

265. *Id.*

266. *See id.*; *see also* Chemerinsky, *supra* note 258, at 427 ("Alternative procedures last longer and involve increased risks of perforation of the uterus, blood loss, and infection. Moreover, the most used alternative is to dismember the fetus in the uterus and remove it piece by piece. This is no less 'barbaric' and is more dangerous because it requires repeated surgical intrusions into the uterus.").

267. *Gonzales*, 550 U.S. at 181–82 (Ginsburg, J., dissenting).

268. *Id.* at 184; *see also* Hill, *supra* note 244, at 654–55 (arguing that the majority opinion relies on paternalistic views about women in making this assessment).

269. *Gonzales*, 550 U.S. at 185.

state interest must be in order to limit a woman's liberty interest in obtaining an abortion: "Instead of the heightened scrutiny we have previously applied, the Court determines that a 'rational' ground is enough to uphold the Act."[270] Regardless of these disconnects with *Casey*, a five-to-four majority upheld the Act.[271]

II. THE MANY FACES OF PURPOSE: CONFLICTING VIEWS OF THE CIRCUIT COURTS

The differing evaluations of legislative purpose under the undue burden test established in *Casey*, and referenced in *Mazurek* and *Gonzales*, have led to inconsistent applications of the purpose prong in the lower courts. Some courts read *Casey* as creating per se rules regarding which types of abortion laws are constitutional, rather than applying the undue burden test to the particular set of facts before them.[272] However, *Casey* leaves two important questions up for debate. First, what is the standard for evaluating legislative purpose in the abortion context? *Casey* states that abortion laws are invalid if they "serve no purpose other than to make abortions more difficult," yet it provides no test for evaluating purpose.[273] Furthermore, *Mazurek* rejected certain types of evidence used to show legislative purpose, without explicitly repudiating the "predominant factor" test used by the Ninth Circuit.[274] Therefore, it is still unclear what the proper test is.

Second, there is the question of what level of scrutiny courts should apply to legislative purpose in the context of abortion laws. Although *Gonzales* contains language suggesting that the purpose need only be a "legitimate" one that is "rationally related" to the law's means,[275] *Casey* suggests that a higher form of scrutiny is required by rejecting ostensibly legitimate state interests—such as moral interests—as insufficient to justify limiting the abortion right.[276] Furthermore, the "legitimate" interest identified in *Gonzales*—protecting human life—was identified in *Casey* as a "substantial" state interest,[277] again suggesting that higher scrutiny is applied. Therefore, there is uncertainty as to how important the legislative interest must be in order to justify impinging a woman's abortion rights, and how closely the law must be tailored to meet that end.

As a result of this uncertainty, various circuits have adopted different analyses of the purpose prong. The Tenth, Fifth, and Eighth Circuits have

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270. *Id.* at 187.
271. *See id.* at 168 (majority opinion).
272. *See* Wharton et al., *supra* note 169, at 357 ("[T]he proper analysis in assessing challenges to [abortion-related laws] is whether, based on the specific evidentiary record, they are likely to unduly burden those women affected by them. Most other courts, however, have made the mistake of mechanically imposing *Casey*'s result, rather than applying its undue burden analysis to assess these provisions.").
273. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 901 (1992).
274. *See supra* notes 228–30, 240 and accompanying text.
275. *See supra* note 259 and accompanying text.
276. *See supra* notes 179–81 and accompanying text.
277. *See Casey*, 505 U.S. at 876.

struck down laws based on impermissible purpose,[278] though only the Eighth Circuit has done so on the basis of purpose alone, with no finding of an unconstitutional effect.[279] These circuits apply a more searching review of the stated legislative purpose, and apply heightened scrutiny to the laws.[280] Relying upon the *Mazurek* dicta, the Seventh and Fourth Circuits have taken a different approach to evaluating legislative purpose, and have invalidated laws on the basis of improper purpose only if they fail rational basis review (i.e., the law is not rationally related to a legitimate government interest).[281] Therefore, there is a conflict among the circuits regarding how to evaluate legislative purpose and how significant that purpose must be to uphold the abortion law in question. This section will analyze the various approaches these courts have taken.

A. The Tenth, Fifth, and Eighth Circuits: Applying Heightened Scrutiny to Legislative Purpose Under Casey

The Tenth, Fifth, and Eighth Circuits have each applied a slightly different form of heightened scrutiny to legislative purpose. The Tenth Circuit relied upon gerrymandering cases to evaluate legislative purpose, and found no legitimate purpose for the law in question.[282] The Fifth Circuit investigated legislative purpose using both the Establishment Clause test from *Edwards* and the indicia of the predominant factor test, and struck down the challenged law under heightened scrutiny.[283] Similarly, the Eighth Circuit affirmed a district court's use of independent factual findings regarding legislative purpose, and also struck down the challenged law under heightened scrutiny.[284]

1. The Tenth Circuit Approach: Adoption of the "Predominant Factor" Test

The Tenth Circuit's decision in *Jane L. v. Bangerter* was the first to strike down a statute under a purpose prong analysis.[285] *Jane L.* dealt with a Utah statute defining viability at twenty weeks, and forbidding non-therapeutic abortions after that point.[286] The *Jane L.* court cited to *Casey*, *Miller*, *Shaw*, and the Ninth Circuit in *Mazurek*[287] when it adopted the

278. *See infra* Part II.A.
279. *See infra* Part II.A.3.
280. *See infra* Part II.A.
281. *See infra* Part II.B.
282. *See infra* Part II.A.1.
283. *See infra* Part II.A.2.
284. *See infra* Part II.A.3.
285. 102 F.3d 1112 (10th Cir. 1996).
286. *Id.* at 1114.
287. Although the Tenth Circuit decided *Jane L.* before the Supreme Court's decision in *Mazurek*, Mazurek did not diminish *Jane L.* because of the different factual records in both cases. In *Jane L.*, the record reflected that the legislature's predominant motive was to prevent abortions. *See infra* notes 289–93 and accompanying text. Conversely, the lack of such facts in the record was the reason for the Supreme Court's decision in *Mazurek*. *See supra* notes 224, 239–40 and accompanying text.

predominant factor test, again looking at the structure of the legislation and the process of its enactment to determine whether the government was predominantly motivated by an impermissible purpose.[288]

The Tenth Circuit found that the evidentiary record in *Jane L.* clearly reflected that Utah's legislature acted with an improper predominant purpose.[289] The Tenth Circuit held that the Utah legislature had deliberately ignored the clear statement in *Roe* and subsequent Supreme Court cases stating that viability was a matter for the woman's physician to determine, not the legislature.[290] The court also found that the legislature acted with an impermissible purpose because it established an abortion litigation trust to finance a challenge to *Roe* through litigating this statute.[291] Moreover, Utah conceded in its briefs that it felt that women who waited more than twenty weeks to obtain an abortion had simply waited too long.[292] Therefore, the court concluded that the law in question had been adopted predominantly for the impermissible purpose of preventing abortions.[293] Because the court was unable to find a legitimate purpose for the law, the statute clearly failed rational basis review, and therefore, Tenth Circuit did not need to articulate a specific level of scrutiny.[294]

Although the court highlighted impermissible purpose as an independent basis for invalidating the statute, the Tenth Circuit also found that the statute had the impermissible effect of placing a substantial obstacle in the path of women seeking to abort non-viable fetuses after twenty weeks of pregnancy, by forcing them to travel to other states for the procedure.[295]

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288. *Jane L.*, 102 F.3d at 1116.

289. In a prior decision in the same case, the Tenth Circuit quoted Utah's legislative resolution, which served as the precursor to the legislation at issue in *Jane L.*:

> The policy and position of the Legislature is to favor childbirth over abortion, and [to regulate abortion] as permitted by the U.S. Constitution . . . .
>
> [L]ives of human beings are to be recognized and protected regardless of their degree of biological development . . . .
>
> Utah has a compelling state interest in the life of the unborn throughout pregnancy . . . .
>
> [A]bortion is not a legitimate or appropriate method of birth control . . . .
>
> [I]t is the policy of the Legislature that, if an abortion is granted, it should be only under very limited circumstances, including danger to the life or physical health of the mother, pregnancies resulting from rape or incest, and cases of severe deformity of the unborn child.

Jane L. v. Bangerter (*Jane L. IV*), 61 F.3d 1493, 1497 (10th Cir. 1995) (alterations in original) (quoting H.R.J. Res. 38, 48th Leg., 1990 Utah Laws 1554–55), *rev'd sub nom.* Leavitt v. Jane L., 518 U.S. 137 (1996).

290. *Jane L.*, 102 F.3d at 1116–17.

291. Like the legislation in *Casey*, the abortion regulations at issue here were enacted in 1991 as a vehicle to challenge *Roe* after the decision in *Webster*. *See Jane L. IV*, 61 F.3d at 1495; *see also supra* notes 165–70 and accompanying text.

292. *Jane L.*, 102 F.3d at 1116–17.

293. *Id.* at 1117.

294. *See id.*

295. *Id.* at 1117–18.

In the more recent case of *American Civil Liberties Union of Kansas and Western Missouri v. Praeger*,[296] the District of Kansas (located in the Tenth Circuit) reviewed a motion for preliminary injunction against enforcement of a Kansas statute that prohibited insurance companies in Kansas from providing coverage under comprehensive health insurance policies for abortions not necessary to save the life of the mother.[297]

Judge Brown, notably one of the three judges who decided *Jane L.*, interpreted the Supreme Court in *Mazurek* as having confirmed that "a law is not invalid for an improper purpose unless the record supports a conclusion that the legislature's 'predominant motive' was to create a substantial obstacle to abortion."[298] Judge Brown concluded that the plaintiffs had not met their burden in proving that the Kansas legislature's predominant motive in passing this legislation was to create a substantial obstacle to abortion, as Kansas contended that the law furthered the state interest in lowering insurance costs.[299] Furthermore, the state relied by analogy on the abortion funding cases, arguing that this law was a "freedom of conscience provision" that prevents those who object to abortion from having their money fund abortions, as "the pooling of premiums and risk pools makes insurance comparable to [the taxpayer money in the abortion funding] cases."[300] Because Kansas presented other motives for passing the legislation, Judge Brown concluded that the legislature's predominant purpose in passing the law was not an unconstitutional one.[301]

Judge Brown seemed to apply only rational basis review to the law,[302] and in doing so, conflated the two inquiries of (1) whether there was a legitimate state interest and (2) whether the law was rationally related to that interest: as long as Kansas offered some legitimate purpose for the law, the law must stand.[303] The opinion provides little analysis of whether such legitimate purposes are sufficiently weighty to justify infringing on the abortion right.[304] Judge Brown relied on the state's analogy to the abortion funding decisions to determine that the state interests were legitimate, simply stating that "[a]lthough defendant cites no authority upholding such a view, neither has this particular argument been directly tested or foreclosed by the Supreme Court."[305]

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296. 815 F. Supp. 2d 1204 (D. Kan. 2011).
297. *Id.* at 1204.
298. *Id.* at 1214.
299. *Id. But see* Roy G. Spece, Jr., *The Purpose Prong of* Casey*'s Undue Burden Test and Its Impact on the Constitutionality of Abortion Insurance Restrictions in the Affordable Care Act or Its Progeny*, 33 WHITTIER L. REV. 77, 100–01 (2011) (arguing that some courts characterize an intent to interfere with abortion as a legitimate purpose to encourage childbirth or to protect life).
300. *Praeger*, 815 F. Supp. 2d at 1214.
301. *Id.* at 1215.
302. *See id.*
303. *See id.* at 1214–15; Spece, *supra* note 299, at 100–01 ("Some precedent . . . ignores or guts the purpose prong by finding it met, in effect, if there is any imaginable legitimate purpose that might be advanced.").
304. *See Praeger*, 815 F. Supp. 2d at 1214.
305. *Id.*

2. The Fifth Circuit Approach: Examining Indicia of Legislative Purpose

In *Okpalobi v. Foster*,[306] the Fifth Circuit used the purpose prong to strike down a Louisiana statute that made abortion providers liable in tort for any damage done to a woman or her unborn child as a result of the abortion, thereby altering ordinary medical malpractice laws in the abortion context.[307]

The Fifth Circuit acknowledged that although the judiciary should typically grant significant deference to a legislature's stated purpose, courts are not required to accept the government's purpose at face value if it is a mere "sham."[308] The *Okpalobi* court relied upon the indicia used in the gerrymandering and Establishment Clause cases to determine how the Supreme Court conducts purpose inquiries, although it did not demand a showing of "predominant motive."[309] In assessing whether a legislative purpose was a "sham," the Supreme Court looked at factors such as "the language of the challenged act, its legislative history, the social and historical context of the legislation, or other legislation concerning the same subject matter as the challenged measure."[310]

The Fifth Circuit deemed this approach to be consistent with *Mazurek* and *Jane L.*[311] The *Okpalobi* Court read *Mazurek* to suggest that two types of evidence were insufficient to demonstrate improper purpose: the lack of medical evidence and the involvement of anti-abortion groups in drafting the law.[312] It also relied upon the Tenth Circuit's decision in *Jane L.*, reading it to stand for the proposition that if a legislature admits to improper purpose, then the regulation will obviously fail the undue burden test.[313] Nevertheless, the Fifth Circuit interpreted both cases as confirming that "indicia of improper legislative purpose, such as statutory language, legislative history and context, and related legislation," are relevant to the purpose prong of the undue burden test.[314]

The state asserted that the law's purpose was to encourage a doctor to inform a woman of all the risks associated with having an abortion.[315] The Fifth Circuit found that there was already existing legislation that dealt with informed consent in the abortion context.[316] The pre-existing statute allowed a physician to escape civil liability if he or she had fully complied

306. 190 F.3d 337 (5th Cir. 1999), *rev'd on other grounds en banc*, 244 F.3d 405 (5th Cir. 2001). Although on rehearing the Fifth Circuit determined that the plaintiffs lacked standing to sue, the opinion provides insight into how the Fifth Circuit would evaluate purpose prong inquiries in the future.

307. *Id.* at 357.

308. *Id.* at 354 (citing Edwards v. Aguillard, 482 U.S. 578, 586–87 (1987)).

309. *Id.*

310. *Id.*

311. *Id.* at 355–56.

312. *Id.* at 355.

313. *Id.* at 356.

314. *Id.* at 355.

315. *Id.* at 356.

316. *Id.* at 356–57.

with the law.[317] Therefore, the court found that the legislature's stated purpose for the new law was likely a "sham," since Louisiana already had laws addressing the interest.[318]

Furthermore, without explicitly identifying a level of scrutiny, the Fifth Circuit appeared to apply heightened scrutiny to the law when it found that the means employed by the statute were not substantially related to the stated purpose. Again, the stated purpose was to encourage physicians to inform women of all the risks associated with having an abortion.[319] But the statute provided a cause of action to a woman for any "injuries suffered or damages occasioned by the unborn child or mother."[320] The signing of an informed consent provision by the woman prior to the abortion procedure did not negate the cause of action, but rather only lessened the amount of damages that the woman could recover.[321] Therefore, the *Okpalobi* court found that the means employed by the statute were not substantially related to the purpose of promoting informed consent, since doctors were still liable even if they fully informed their patients.[322]

Although the court struck down the law under the purpose prong,[323] it also found that there was significant evidence that the law would drive abortion providers out of the state by prohibitively increasing their civil liability.[324] Therefore, like the Tenth Circuit in *Jane L.*, the Fifth Circuit suggests that purpose alone is enough to declare the regulation unconstitutional, but in practice strikes down the challenged law using both the purpose and effect prongs.[325]

3. The Eighth Circuit Approach: Advocating Independent Judicial Findings Regarding Legislative Purpose

Of the circuit courts, only the Eighth Circuit in *Planned Parenthood of Greater Iowa, Inc. v. Atchison*[326] has struck down a government decision on the basis of improper purpose alone, without a concurrent finding of unconstitutional effect.[327] In 1977, Iowa enacted a generally applicable "certificate of need" (CON) law that regulates the development of new or changed institutional health services.[328] The law requires that healthcare providers apply to the Iowa Department of Health for a CON before commencing a new development project.[329] The decision to grant a CON is made by the Health Facilities Counsel, whose members are chosen by the

317. *Id.* at 357.
318. *Id.* at 356–57.
319. *Id.* at 356.
320. *Id.* (emphasis omitted) (quoting LA. REV. STAT. ANN. § 9:2800.12(B)(2) (1999)).
321. *Id.*
322. *See id.*
323. *Id.* at 357.
324. *See id.*
325. *See id.* at 354–57.
326. 126 F.3d 1042 (8th Cir. 1997).
327. *See id.* at 1049.
328. *Id.* at 1044.
329. *Id.*

governor.[330] The CON law exempts physician-owned clinics from its reach, and over the years, as the types of health care providers changed, this was typically construed to include physician-controlled clinics as well.[331] The government sought to compel a new Planned Parenthood clinic to undergo CON review, even though this type of clinic would typically fall under the exemption.[332] The *Atchison* court found that while CON laws themselves are entirely permissible, the state subjected Planned Parenthood to CON review solely for the purpose of impeding access to abortions for Iowa women.[333]

In evaluating the governmental purpose behind the law, the Eighth Circuit reviewed the Southern District of Iowa's findings and, without articulating an exact test for determining legislative purpose, found that the Southern District of Iowa properly investigated the decision to subject Planned Parenthood to CON review:

> There is no question but that the groups opposed to abortion have a perfect right to lobby in favor of subjecting [Planned Parenthood]'s proposed new facility to CON review. Our concern, however, chiefly lies in the state authorities' response to these lobbying efforts . . . . The plaintiff introduced evidence of specific clinics across Iowa that were structured similarly to its proposed project and which were exempted from CON review. The plaintiff also introduced evidence of specific family planning clinics across Iowa which were structured similarly to its proposed project, and which provided essentially the same services, but not abortions, and which were exempted from CON review. Moreover, Department officials could not explain the Department's deviation from its past practice of exempting similar clinics which did not offer pregnancy termination services to including the plaintiff's clinic which would offer such services.[334]

The Eighth Circuit did not show deference to the government's conceivably legitimate decision that Planned Parenthood's new clinic was reviewable because "it was a new 'institutional health facility' subject to CON reviewability insofar as it was an 'organized outpatient facility.'"[335] Instead, the Southern District of Iowa made independent factual findings that the legislature impermissibly caved to community pressure in making the decision to subject the Planned Parenthood clinic to CON review.[336]

Furthermore, the Eighth Circuit held the legislature's actions to heightened scrutiny. The court observed: "No one contends that Iowa's CON laws serve no legitimate state interest, or that Iowa has no legitimate interest in enforcing its CON laws."[337] The opinion stated two such legitimate interests: to prevent the establishment of unnecessary health care

330. *Id.*
331. *Id.* at 1044–46.
332. *Id.*
333. *Id.* at 1049.
334. *Id.*
335. *Id.* at 1045.
336. *Id.* at 1049.
337. *Id.* at 1048–49.

facilities and to ensure the orderly development of new health care facilities.[338] Although requiring the Planned Parenthood clinic to undergo CON review was rationally related to these interests, the Court found this insufficient. Because it found that CON laws were not ordinarily applied to facilities like the Planned Parenthood clinic, the court held that the means were not substantially related to the state's interest, since the CON review seemed like a discriminatory, one-time decision, rather than a general policy in furtherance of the law's stated goals.[339] The Eighth Circuit concluded by citing *Casey*: "Where a requirement serves no purpose other than to make abortions more difficult, it strikes at the heart of a protected right, and is an unconstitutional burden on that right."[340] Therefore, the Eighth Circuit advocated heightened scrutiny of legislative purpose in the abortion context.

B. Deference to the Legislature: The Fourth and Seventh Circuits Apply Rational Basis Review

Although some circuits applied heightened scrutiny to legislative purpose in the context of abortion related laws, other circuits have been more deferential. In *Karlin v. Foust*,[341] the Seventh Circuit interpreted the *Mazurek* dicta as vastly diminishing the power of the purpose prong, applying an extremely deferential form of review to the stated legislative purpose, and requiring that the purpose need only meet rational basis review.[342] Similarly, the Fourth Circuit in *Greenville Women's Clinic v. Bryant*[343] rejected the approach used by the Eighth Circuit in *Atchison*, opting instead for a deferential review of the legislature's stated purpose—even in the face of lower court findings to the contrary—and subjecting the regulation to rational basis review.[344]

1. The Seventh Circuit Approach: Purpose-Based Challenges Are Virtually Impossible After *Mazurek*

In *Karlin*, the Seventh Circuit rejected a purpose prong challenge to a Wisconsin informed consent statute that required a face-to-face meeting between the physician and the woman twenty-four hours before the abortion procedure.[345]

In seeking a standard by which to evaluate legislative purpose, the *Karlin* court relied upon *Casey*'s acceptance, at face value, of the state purpose for a twenty-four waiting period.[346] The Seventh Circuit reasoned:

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338. *Id.* at 1048.
339. *See id.* at 1049.
340. *Id.* (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 878 (1992)).
341. 188 F.3d 446 (7th Cir. 1999).
342. *See id.* at 493.
343. 222 F.3d 157 (4th Cir. 2000).
344. *See generally id.*
345. *See Karlin*, 188 F.3d at 453, 495.
346. *Id.* at 494–95.

> *Casey* would seem to indicate that the Court would not scrutinize too closely the stated purpose or purposes of a regulation given the state's legitimate interest from the outset of a woman's pregnancy in persuading women to choose childbirth over abortion as long as the regulation was reasonably designed to further that interest.[347]

The *Karlin* court showed great deference to the legislative purposes asserted by the state, without doing any independent investigation into whether they were in fact true.[348] The court stated: "Absent some evidence demonstrating that the stated purpose is pretextual, our inquiry into the legislative purpose is necessarily deferential and limited."[349]

The court also read *Mazurek* to suggest that a state abortion regulation would survive an impermissible purpose challenge if it were reasonably designed to further the state's legitimate interests in protecting the life of the fetus or the health of the mother.[350] Based on its readings of *Casey* and *Mazurek*, the Seventh Circuit concluded that abortion regulations only needed to meet something similar to rational basis review under a purpose prong challenge.[351] Because Wisconsin proffered several legitimate state interests for the regulation,[352] the *Karlin* court found that the waiting period was rationally related to these interests and upheld the regulations against a purpose prong challenge.[353]

Therefore, while the Seventh Circuit did not altogether foreclose the idea of a purpose prong challenge, it stated that "such a challenge will rarely be successful, absent some sort of explicit indication from the state that it was acting in furtherance of an improper purpose."[354] This places an extremely high burden on plaintiffs, as the state must effectively concede to an improper purpose for a purpose-based challenge to be successful in the Seventh Circuit.

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347. *Id.* at 493.
348. *Id.* at 496.
349. *Id.*
350. *Id.* at 494.
351. *See id.*
352. Wisconsin provided four state interests:

> 1. Protecting the life and health of the woman subject to an elective abortion and, to the extent constitutionally permissible, the life of her unborn child.
> 2. Fostering the development of standards of professional conduct in the practice of abortion.
> 3. Ensuring that prior to the performance or inducement of an elective abortion, the woman considering an elective abortion receive personal counseling by the physician and be given a full range of information regarding her pregnancy, her unborn child, the abortion, the medical and psychological risks of abortion and available alternatives to the abortion.
> 4. Ensuring that a woman who decides to have an elective abortion gives her voluntary and informed consent to the abortion procedure.

Id. at 496 (quoting WIS. STAT. § 253.10(1)(b) (1996)).
353. *Id.* at 497.
354. *Id.* at 493.

2. The Fourth Circuit Approach: Deference to the Legislature Even in the Event of Judicial Findings to the Contrary

Without providing much of an analytical framework, the Fourth Circuit adopted a similarly deferential test in *Greenville Women's Clinic v. Bryant.*[355] *Bryant* dealt with a South Carolina statute requiring most abortion facilities to be licensed by the state, and to meet various regulations regarding "sanitation, housekeeping, maintenance, staff qualifications, emergency equipment and procedures to provide emergency care, medical records and reports, laboratory, procedure and recovery rooms, physical plant, quality assurance, infection control, and information on and access to patient follow-up care necessary to carry out the purposes of this section."[356] A physician challenged these regulations, because the prohibitive cost of modifying his clinic would have forced him to close it.[357]

Similar to the Southern District of Iowa's approach in *Atchison*, the District of South Carolina made factual findings to determine that the new regulations served no legitimate state interest, since there was no evidence that they would improve health care within the state.[358] The Fourth Circuit rejected the factual findings of the district court, deferring to the stated health-related purposes of the legislature even in the face of contrary findings by the lower court.[359] Despite the district court's findings regarding legislative purpose, the Fourth Circuit deferred to the ostensibly legitimate reason given by the South Carolina legislature of acting to safeguard women's health.[360]

Furthermore, the Fourth Circuit appeared to apply rational basis review to the regulations. To justify their deferential level of review, the Fourth Circuit relied on the statement in *Casey* that "[i]f a regulation serves a valid purpose—'one not designed to strike at the right itself'—the fact that it also has 'the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it.'"[361] Although the district court's findings indicated that these regulations were not substantially related to any actual benefit to women's health, the Fourth Circuit ignored this lack of nexus, stating that "there is no requirement that a state refrain from regulating abortion facilities until a public-health problem manifests itself."[362] Because these clinic specifications were a "reasonable attempt to further the health of abortion patients in South Carolina," the Fourth Circuit upheld them.[363]

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355. 222 F.3d 157 (4th Cir. 2000).
356. *Id.* at 160 (quoting S.C. CODE ANN. § 44–41–75(B) (1999)).
357. *Bryant*, 222 F.3d at 162.
358. *Id.* at 162–63.
359. *See id.* at 167–69.
360. *See id.* at 172.
361. *Id.* at 166 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 874 (1992)).
362. *Id.* at 169.
363. *Id.*

III. THE CONTINUED IMPORTANCE OF THE PURPOSE PRONG

In the absence of explicit guidance from *Casey* on how to conduct a purpose prong inquiry, lower courts have adopted an array of methods to analyze legislative purpose in the context of abortion laws. Part III of this Note seeks to synthesize the methods of the various circuits, and to provide a practicable solution for courts to conduct purpose prong inquiries in the future.

As a threshold matter, it appears clear that *Mazurek* did not wholly foreclose purpose prong challenges. Although the Court in *Gonzales* did not directly face a purpose prong challenge, the vigorous debate over the legitimacy of the legislative purposes suggests that the Justices are still considering this issue.[364] That four justices were willing to strike down an abortion law in *Gonzales* for having an improper purpose indicates that *Mazurek* did not eviscerate *Casey*'s purpose prong.[365] This reading is logical given that in every other area of law—constitutional or otherwise—a law that serves an unconstitutional interest can be struck down.[366] Therefore, it is illogical to assume that litigants cannot bring purpose-based challenges in the abortion context.

Acknowledging that purpose prong challenges remain viable, courts must next struggle with the first question addressed by this Note: How searching should their review of legislative purpose be? It is not always easy to tell what the legislature's purpose was in enacting a law.[367] Although sometimes an unguarded legislature will concede to an unconstitutional purpose (as in *Jane L.*),[368] purpose prong challenges should not be limited to cases where an unconstitutional purpose is flaunted before the court. Although the Seventh and Fourth Circuits advocate a deferential approach to evaluating legislative purpose,[369] courts need not be blind to the fact that many of these laws are proposed and supported by anti-abortion activists in an attempt to narrow the abortion right.[370] Furthermore, some legislators appear unwilling to respect current Supreme Court abortion precedent, as shown by their willingness to propose unconstitutional legislation such as the personhood bills or heartbeat bills.[371] Therefore, in the context of abortion laws, such deference to the legislature is not warranted.

This Note contends that the method adopted by the Fifth Circuit in *Okpalobi* is the most appropriate for evaluating the context of abortion laws.[372] *Okpalobi* relies in part on the test used for Establishment Clause

364. *See supra* notes 255–69 and accompanying text.
365. *See supra* note 264 and accompanying text.
366. *See supra* notes 45–48 and accompanying text.
367. *See supra* note 82 and accompanying text.
368. *See supra* notes 289–93 and accompanying text.
369. *See supra* Part II.B.
370. *See supra* note 22 and accompanying text.
371. *See supra* note 10 and accompanying text. These regulations are unconstitutional under current jurisprudence because the personhood bills seek to ban all abortions, and the heartbeat bills seek to ban most pre-viability abortions. *See supra* note 171 and accompanying text.
372. *See supra* Part II.A.2.

challenges.[373] Like laws that are challenged under the Establishment Clause, abortion laws are often motivated by moral or religious beliefs.[374] Courts should not be required to ignore this reality and defer to another stated purpose if that purpose is a mere "sham."[375] Furthermore, the *Okpalobi* test itself encompasses the underlying elements of the tests used by the Tenth and Eighth Circuits.[376] The *Okpalobi* test divines a state's predominate motive through the same indicia of legislative purpose test as was used by the Tenth Circuit in *Jane L.*: the language of the challenged law, its legislative history, the social and historical context of the legislation, or other legislation concerning the same subject matter as the challenged measure.[377] The Eighth Circuit in *Atchison* also examined these factors in conducting their purpose inquiry without explicitly laying out a test.[378] Adopting the *Okpalobi* test will provide a useful, unambiguous framework for courts to use in evaluating the legislative purpose behind abortion laws.

Although this standard will provide courts with a practical test to discern legislative purpose in the abortion context, it does not answer the more significant question raised by this Note. While a law can be struck down if it does not further any legitimate purpose, there is still uncertainty as to the standard of review when the state offers some rational purpose for the law.[379] The Fourth and Seventh Circuits assume that the law need only pass rational basis review: the legislature must articulate a legitimate purpose, and the regulation must be rationally related to that purpose.[380] Conversely, the Fifth and Eighth Circuits require a form of heightened scrutiny: the government must offer a more important interest than simply a legitimate one, and the regulation must be substantially related to that interest.[381]

Consistent with the approaches taken by the Fifth and Eighth Circuits,[382] this Note advocates that an abortion law must meet heightened scrutiny, requiring that a regulation be substantially related to an important government interest.[383] The legislative action need not meet strict scrutiny, but not every legitimate state interest is sufficiently weighty to justify limiting the abortion right.[384] Although *Casey* and *Gonzales* contain language that could suggest that abortion regulations must be supported by a mere "legitimate" state interest,[385] the undue burden standard is not synonymous with rational basis review, but is instead a unique

373. *See supra* note 309 and accompanying text.
374. *See supra* Part I.B.1.
375. *See supra* note 92 and accompanying text.
376. *See supra* Part II.A.
377. *See supra* notes 288, 308–14 and accompanying text.
378. *See supra* notes 334–36 and accompanying text.
379. *See supra* notes 276–81 and accompanying text.
380. *See supra* notes 45–50, 350–53, 361–63 and accompanying text.
381. *See supra* notes 79–80, 319–22, 337–40 and accompanying text.
382. *See supra* notes 319–22, 337–40 and accompanying text.
383. *See supra* notes 79–80 and accompanying text.
384. *See supra* notes 76–80, 179 and accompanying text.
385. *See supra* notes 185, 259 and accompanying text.

constitutional standard.[386] *Casey* intended to replace the rigid framework of *Roe* with a balancing test.[387] By introducing the undue burden test, *Casey* acknowledged that the state's interests in protecting the health of the mother and promoting respect for fetal life are important enough to justify some infringement on a woman's right to obtain an abortion throughout her pregnancy,[388] and not merely after certain points in her pregnancy as stated in *Roe*.[389] But *Casey* also made clear that those rights are not absolute, and must be balanced against the woman's liberty interest in obtaining an abortion if she so chooses.[390] Instead of tipping the balance in favor of either the woman's rights or the state's interests, an intermediate level of scrutiny that balances both is appropriate.

An analysis of the permissible state interests identified in the *Casey* opinion strongly supports the use of heightened scrutiny, as the plurality rejected several "legitimate" state interests sufficient to pass rational basis review.[391] For example, *Casey* rejected a husband's interest in the life of a fetus carried by his wife as insufficiently significant to justify infringing upon a woman's right to an abortion, even though his interest is undoubtedly legitimate.[392] *Casey* also explicitly stated that moral disapproval of abortion is insufficient to justify burdening a liberty interest, even though morality interests typically constitute legitimate state interests.[393] Interestingly, even the Seventh Circuit, which does not apply heightened scrutiny, interpreted *Casey* as requiring something more than just any legitimate state interest, as the court in *Karlin* recognized that only the state's interests in protecting the life of the fetus or the health of the mother are considered "legitimate" in the abortion context.[394]

The application of heightened scrutiny to abortion laws is also supported by the Supreme Court's fundamental rights jurisprudence outside of the abortion context.[395] The Supreme Court has always required that a legislature offer more than simply a legitimate state interest to justify infringement of a constitutionally protected right.[396] Therefore, it is a logical reading of *Casey* that heightened scrutiny is the appropriate standard of review for purpose prong inquiries.

More clarity from the Supreme Court on what constitutes an "important" state interest in the context of abortion laws would be helpful. Nevertheless, *Roe*, *Casey*, and the abortion funding cases identify four frequently used state interests which are sufficiently important to validate

386. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 981, 987 (Scalia, J., dissenting) (arguing for the application of rational basis review and protesting the creation of a wholly new standard).
387. *See supra* notes 171–73 and accompanying text.
388. *See supra* notes 175–78 and accompanying text.
389. *See supra* notes 123–29 and accompanying text.
390. *See supra* notes 174–85 and accompanying text.
391. *See supra* notes 76–78, 179–81, 203–04 and accompanying text.
392. *See supra* notes 203–04 and accompanying text.
393. *See supra* notes 75–78, 179–81 and accompanying text.
394. *See supra* notes 350–53 and accompanying text.
395. *See supra* Part I.A.
396. *See supra* Part I.A.

infringement of a woman's liberty interest in obtaining an abortion: (1) protecting a woman's health; (2) promoting respect for fetal life; (3) informing a woman's choice; and (4) encouraging childbirth.[397] The lower courts have struggled with purpose in part because regulations that encourage childbirth and regulations that discourage abortion are two sides of the same coin—one side being permissible, and one side being impermissible.[398] Thus, even acknowledging that heightened scrutiny applies, the question remains: How can courts draw this fine distinction between permissible and impermissible state interests?

This issue can be resolved simply by applying the second step of heightened scrutiny: whether the regulation is substantially related to the valid purpose.[399] If it does not in fact substantially further the stated purpose, it may be logically inferred that the stated purpose is a "sham," and that the legislature adopted the regulation to advance the impermissible interest of hindering a woman's right to an abortion.[400] To provide clarity to the proposed standard, this Note demonstrates how various categories of abortion laws either are, or are not, substantially related to their purported purpose.

Regulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden.[401] While the Fourth Circuit in *Bryant* pointed out that legislatures need not wait for a public health crisis in order to regulate abortion,[402] neither can a legislature justify arbitrary restrictions on doctors or clinics that are not substantially related to any actual benefit to women's health.[403] For example, regulations mandating the exact width of hallways and the type of elevators in an abortion clinic, although ostensibly related to regulating the medical profession, do not substantially advance an interest in making abortions safer for women.[404] Such health-based regulations must be grounded in legitimate medical science in order to guarantee the substantial relationship between the legislative purpose and the regulation.[405] Without empirical evidence showing that these regulations benefit women's health, it may be inferred that such regulations were only passed to make it more onerous for physicians to provide abortions.[406]

The other three constitutional interests of informing a woman's choice, protecting fetal life, and promoting childbirth will be treated together. While informing a woman's choice is a state interest in and of itself, it is also a means by which the state can promote respect for fetal life and

397. *See supra* notes 122, 136, 176–78, 183–85 and accompanying text.
398. *See supra* notes 174, 185, 212 and accompanying text.
399. *See supra* notes 79–80, 264–65 and accompanying text.
400. *See supra* notes 92–95 and accompanying text.
401. *See supra* note 184 and accompanying text.
402. *See supra* note 362 and accompanying text.
403. *See supra* notes 264–66 and accompanying text.
404. *See supra* note 7 and accompanying text.
405. *See supra* notes 250–54, 264–66 and accompanying text.
406. *See supra* notes 236–37 and accompanying text.

encourage childbirth.[407] Providing a woman with truthful information about her pregnancy and the abortion procedure, as well as information about alternative options, such as adoption or the possibility of child support payments, advances these interests by informing a woman of other options besides abortion with which she may not be familiar.[408] A woman might be convinced to choose childbirth after hearing about other available options or learning about the medical risks of abortion.[409] Therefore, providing a woman with truthful information is substantially related to the goals of encouraging childbirth, promoting respect for fetal life, and ensuring that a woman makes an informed choice.

Another common abortion law that is substantially related to encouraging a woman to choose childbirth is parental notification.[410] Empirical evidence demonstrates that minors do not have the same rational decision-making capabilities as adults, nor do they necessarily consider the consequences of their actions in the same way.[411] Speaking to a parent before obtaining an abortion could encourage a young woman to think seriously about her options. Furthermore, a parent would reasonably be able to provide the young woman with truthful information about what it is like to raise a child, as well as how much financial and emotional support she could expect from her parent by doing so.[412] All of this will serve to inform her choice of what is the best option. Therefore, such regulations are also substantially related to their purpose of informing a minor woman's choice and encouraging her to choose childbirth.

But several other laws promulgated under the ostensible interest of informing a woman's choice and encouraging her to choose childbirth are not substantially related to this goal. One such category of regulations includes laws requiring a waiting period between an initial visit to the physician and the abortion procedure.[413] Although the legislative goal of informing a woman's choice to obtain an abortion is itself fully valid, legislatures may not rely upon outdated paternalistic stereotypes about a woman's decision-making capacities in determining which regulations serve to inform a woman's choice.[414] Requiring a fully-informed woman who is resolute in her decision to wait for an abortion assumes that she is incapable of making a thoughtful decision without state intervention.[415] Furthermore, if a woman feels that she needs time to weigh her options after speaking to her doctor, she is free to make that choice on her own.[416]

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407. *See supra* notes 176–78 and accompanying text.
408. *See supra* note 177 and accompanying text.
409. *See supra* notes 176–77 and accompanying text.
410. Whether these regulations have the unconstitutional effect of imposing an undue burden on some subset of minors seeking abortions is outside the scope of this Note.
411. *See supra* note 200 and accompanying text.
412. *See supra* notes 176–77 and accompanying text.
413. *See supra* note 6 and accompanying text.
414. *See supra* notes 198–201, 268–69 and accompanying text.
415. *See supra* notes 201, 268–69 and accompanying text.
416. *See supra* note 268 and accompanying text.

By relying upon outmoded stereotypes instead of proven facts,[417] the relationship between the purpose and the regulation is severed. Rather, the law and its purpose can only be tied together by this wholly discredited line of logic, and such laws should be struck down as unconstitutional.[418]

Another problematic category of laws is restrictions that prevent insurance companies from covering abortions under their generally applicable healthcare policies.[419] Legislators proffer a variety of purposes for such laws, such as encouraging childbirth, decreasing insurance costs, and protecting those who morally oppose abortions from indirectly funding them.[420]

Insurance bans do not further the purported purpose of encouraging childbirth.[421] The Court in *Casey* stated that the government may encourage childbirth by ensuring that a woman's choice to obtain an abortion was thoughtful and informed, and by enacting laws to promote respect for fetal life.[422] An insurance law, by contrast, does not inform a woman's choice with any new information, but instead simply increases the out-of-pocket cost for an abortion.[423] Coercing a woman through financial pressure violates *Casey*'s mandate that abortion laws must serve to inform a woman's free choice, not hinder it.[424]

Similarly, the remaining purported interests of decreasing costs and protecting the rights of those morally opposed to abortion, while legitimate, are not important state interests. *Casey* explicitly foreclosed the argument that a moral justification alone is important enough to limit the abortion right.[425] Similarly, cutting insurance costs fails to rise to the level of an

417. In *Gonzales*, the Court explicitly admitted that it had no evidence that women come to regret their choices to get an abortion, or need state protection from their decisions. *See supra* note 261 and accompanying text. It is worth noting that Justice Ginsburg, the only woman on the Court at the time *Gonzales* was decided, dissented. *See supra* note 264 and accompanying text.

418. This evaluation differs from the result in *Casey*, which upheld the twenty-four hour waiting period. *See supra* notes 187–90 and accompanying text. But *Casey* did not delve deeply into the purpose behind the law; rather, the opinion focused upon the fact that the waiting period in that particular instance did not have an unconstitutional effect. *See supra* notes 187–91 and accompanying text. Courts now often rubber-stamp waiting-period laws, instead of looking at the unique circumstances of each individual case, because one such provision was upheld in *Casey*. *See supra* note 272 and accompanying text. This Note argues that this is an erroneous application of *Casey*, and that waiting periods are often motivated by an unconstitutional purpose to make abortions more difficult to obtain. *See supra* note 22 and accompanying text.

419. *See supra* notes 7, 296–304 and accompanying text.

420. *See supra* notes 19, 136, 157, 299–300, 305 and accompanying text.

421. *See supra* notes 175–78 and accompanying text.

422. *See supra* notes 177–78 and accompanying text.

423. *See* Spece, *supra* note 299, at 101 ("[Persuading women to forego abortions] is reasonably to be taken as a reference to genuine attempts to facilitate a woman's decision-making process and prevent future regret by providing information and time to assure that the woman's choice is both informed and voluntary. Otherwise, there would be virtually no limits to the nature and duration of persuasive practices.").

424. *See supra* notes 174, 273 and accompanying text.

425. *See supra* notes 179–81 and accompanying text.

important state interest.[426] Courts must be careful not to elide the undue burden standard with rational basis review; the *Casey* Court rejected the idea that any legitimate purpose is sufficient to justify infringing upon the abortion right.[427]

CONCLUSION

This Note provides a meaningful framework for the lower courts properly apply the purpose prong of *Casey*. For the reasons stated above, this Note advocates a searching review of legislative purpose using the principles established in *Okpalobi*, as well as the application of heightened scrutiny to abortion laws.

While most consonant with Supreme Court fundamental rights jurisprudence as a whole, this approach also ensures that legislatures respect the boundaries of a woman's right to liberty in making the decision of whether or not to bear a child. This guarantees that the credibility and dignity of the Court in its role as the final arbiter of constitutional meaning remains intact, and safeguards a liberty interest which is considered fundamental by many women. Though many Americans may find abortion morally repugnant, America was founded on the principles of individual liberty, which necessarily encompasses the freedom of choice.

426. *See supra* notes 59, 66–67, 74 and accompanying text.
427. *See supra* note 181 and accompanying text.