THE EMERGING USE OF A BALANCING APPROACH IN CASEY'S UNDUE BURDEN ANALYSIS

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ABSTRACT

This Article highlights an important shift occurring in the analytical framework used to assess the constitutional validity of abortion related laws. Specifically, the Article analyzes the adoption by lower courts of a significant modification to the undue burden analysis developed by Justice O'Connor in Planned Parenthood of Southeastern Pennsylvania v. Casey. *As described by Justice O'Connor, the undue burden analysis focuses on the purpose or legislative basis of an abortion related law, and the effect of the law. If the law is reasonably related to a legitimate state interest, it should be upheld unless the effect of the law presents a substantial obstacle to a woman's liberty interest in being able to legally decide to have an abortion before viability. Lower courts have recently introduced a balancing inquiry into the* Casey *analysis, at least as to an abortion related law enacted to serve state interests in health and safety, e.g., laws designed to prevent the potential for substandard care in the context of abortion. The balancing affects both steps of the* Casey *analysis. In assessing the legislative basis for the law, courts are requiring empirical proof that the law furthers state interests, and also are assessing the extent to which the interests are likely to be advanced. In assessing the effect of the law, a finding that the state has not produced sufficient empirical evidence showing a strong relationship between the law and state interests triggers a diminution of the concept of substantial obstacle. Courts adopting this balancing approach have advanced a number of theories in support of its use, which largely draw on aspects of* Casey *and* Gonzales v. Carhart. *This Article assesses the merits of the theories and concludes that, although a refinement to the traditional understanding of the* Casey *analysis is appropriate, the balancing approach has no support in Supreme Court precedent and represents a move back toward aspects of abortion jurisprudence rejected by a clear majority of the Court in* Casey.

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INTRODUCTION

Planned Parenthood of Southeastern Pennsylvania v. Casey[1] represents an important point in the American experience with legalized abortion. A majority of the Court, seven Justices, agreed that *Roe v. Wade*[2] and its progeny had failed to strike the appropriate balance between a woman's interest in terminating a pregnancy and legitimate state interests arising from the fact that abortion is an act "fraught with consequences for others."[3] *Roe* and its companion case, *Doe v. Bolton*, had opened the door to abortion on demand and substantially closed the door to state legislative efforts relating to abortion, whether to encourage continuation of a pregnancy and preservation of the life of the unborn, to help ensure safe abortion procedures or responsible abortion providers, to ensure the integrity of the medical profession, or to prompt public dialogue that may contribute to better understanding of abortion procedures or medical advances related to abortion.[4] The Justices in *Casey* sought to modify abortion jurispru-

1 505 U.S. 833 (1992).

2 410 U.S. 113 (1973) (invalidating Texas statutes criminalizing abortion).

3 *Casey*, 505 U.S. at 852. Three Justices joined the plurality opinion adopting what has become known as the undue burden analysis, *id.* at 869–79 (O'Connor, J., joined by Kennedy & Souter, JJ.); and four Justices joined an opinion concurring in the judgment and dissenting in part. *Id.* at 944–79 (Rehnquist, C.J., joined by White, Scalia, and Thomas, JJ.) (explaining that *Roe* should be overruled, and that state regulation of abortion should be reviewed using the same approach used to assess laws arguably infringing on a protected liberty interest).

4 The majority in *Roe* characterized a woman's right to decide to abort a pregnancy as "fundamental" and required that state interests be "compelling" to justify regulation. 410 U.S. at 155. The majority also adopted a very narrow view of when those state interests

dence in a way that would better accommodate laws furthering legitimate state interests, but did not agree on the proper way to accomplish that objective. Although seven Justices backed away from viewing the right recognized in *Roe* as fundamental, characterizing it instead as "some freedom to terminate a pregnancy," only three Justices joined Part IV of Justice Sandra Day O'Connor's opinion, which set out a new analysis for assessing the permissibility of state laws relating to abortion.[5]

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would be sufficiently compelling to justify restrictions on abortion. An interest in preservation and protection of maternal health was deemed sufficiently compelling only after the first trimester, and an interest in human life was deemed sufficiently compelling only at viability. *Id.* at 162–63. In *Bolton*, the Court further impeded the ability of state legislatures to foster interests in the health of the mother, the life of the unborn, or medical standards. 410 U.S 179 (1973). The state law at issue in *Bolton* restricted abortion except when the physician, "based upon his best clinical judgment," decided the procedure is "necessary." *Id.* at 183. Justice Harry Blackmun's opinion rejected the challengers' claim that the provision was unconstitutionally vague, finding that it allowed the physician ample freedom to exercise professional or clinical judgment, i.e., the provision would allow the physician freedom to take into account whatever factors the physician deemed appropriate in the exercise of "medical judgment, properly and professionally exercised." *Id.* at 191. Justice Blackmun expressly noted:

> The medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment. And it is room that operates for the benefit, and not the disadvantage, of the pregnant woman.

Id. at 192. Because the decision upheld the challenged abortion law, its negative impact on a state's ability to restrict abortion was not immediately apparent. However, as a consequence of this aspect of *Bolton*, an exception from abortion restrictions for the health of the mother—which the Court in *Roe* required even after viability—has become a vehicle for abortion on demand. The decisions rendered unenforceable all of the existing abortion laws across all fifty states. In the period prior to *Roe*, the process of state-by-state modification of state abortion laws had been spurred by recent promulgation of model abortion laws. However, the legislation struck down in *Roe* was representative of abortion laws that had been in existence for a number of decades, and the legislation struck down in *Bolton* was representative of the newer wave of abortion regulation. Together, *Roe* and *Bolton* required all states to start over—and to enact legislation consistent with *Roe*'s trimester/viability framework and *Doe*'s broad view of the scope of freedom that a woman and her physician must decide whether an abortion is health-related. For a comprehensive explanation of the *Roe* decision, the decision-making process leading to the decision, and its consequences, see CLARKE D. FORSYTHE, ABUSE OF DISCRETION (2013).

5 *See supra* note 3. Justice O'Connor penned the primary opinion. *See Casey*, 505 U.S. at 843–902. Part I of the Court's opinion is a summary of Justice O'Connor's opinion, explaining that the "essential holding of *Roe v. Wade* should be retained and once again reaffirmed" and pronouncing Justice O'Connor's view of the three-part essential holding of *Roe*. *Id.* at 846. Part II of the Court's opinion purports to explain why a woman's "decision to terminate her pregnancy" is a protected liberty interest. *Id.* Part III of the Court's opinion explains why adhering to the concept of stare decisis is appropriate. *Id.* at 854.

Under the *Casey* analysis, generally called the undue burden analysis, laws regulating abortion are permissible if they further legitimate state interests and do not impose a substantial obstacle in the path of a woman seeking an abortion.[6] As predicted by Justice Antonin Scalia, the undue burden analysis has proven to be difficult to apply.[7] Lower courts are adopting differing approaches as to a number of issues, leading to variable and difficult to reconcile results. One key issue the cases have highlighted is the extent to which the analysis—at least as to an abortion-related law enacted to serve state interests in health and safety—includes a weighing of the extent to which the law advances the state interest and, if not sufficiently substantial, a diminution of the substantial obstacle standard. The approach significantly changes the analysis. Rather than a standard threshold, the concept of substantial obstacle becomes a moving target or, if the view of Judge Richard Posner of the Seventh Circuit Court of Appeals is correct—that "[t]he feebler the medical grounds, the likelier the burden, even if slight, to be 'undue' . . . ."[8]—a meaningless standard.

Judge Posner's endorsement of this new approach, referred to herein as the "Balancing Approach," represents a definite and significant shift in abortion jurisprudence.[9] Further, despite the significant modification to the traditional understanding of the *Casey* analysis (or perhaps because of it), lower courts seem eager to embrace the Balancing Approach. Their embrace is reflected in several recent judicial opinions addressing the constitutionality of state laws having practical effects on the ability to easily obtain an abortion.[10] This Ar-

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Justice O'Connor explains that it is the combined considerations of the correctness of *Roe's* decision to characterize the right as a protected liberty interest and the force of stare decisis in this particular context which outweigh arguments to overrule *Roe*. *Id.* at 860, 869. Part IV is a plurality opinion, and it is in Part IV that Justice O'Connor adheres to some aspects of the decision in *Roe* and jettisons others, and articulates a new approach to analyzing state restrictions on abortion. *Id.* at 869–79. Part V involves application of Justice O'Connor's approach to assessing state regulation of abortion. *Id.* at 879.

6 *See infra* notes 29–32 and accompanying text.

7 *See infra* notes 35–38 and accompanying text.

8 Planned Parenthood of Wis. v. Van Hollen, 738 F.3d 786, 798 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 2841 (2014).

9 Circuit court decisions prior to *Van Hollen* did not apply the approach. *See, e.g.*, Greenville Women's Clinic v. Comm'r S.C. Dept. of Health & Envtl. Control, 317 F.3d 357, 363 (4th Cir. 2002); Women's Health Ctr. of W. Cnty., Inc. v. Webster, 871 F.2d 1377, 1381 (8th Cir. 1989).

10 *See, e.g.*, Planned Parenthood Ariz., Inc. v. Humble, 753 F.3d 905 (9th Cir. 2014) (finding that the burden on women seeking abortion outweighs the strength of Arizona's justification for its law); Planned Parenthood Southeast, Inc. v. Strange, 33 F. Supp. 3d 1330 (M.D. Ala. 2014) (deciding, after a ten-day trial, that the challenged state law created a substantial obstacle for women seeking abortions); Planned Parenthood Southeast, Inc.

ticle highlights the theories advanced by courts in support of the Balancing Approach, and analyzes them in light of a careful reading of the most relevant Supreme Court precedent, namely, the *Casey* decision and the decision in *Gonzales v. Carhart*.[11] Careful scrutiny demonstrates that the Supreme Court cases do not support the Balancing Approach. Indeed, adopting the Balancing Approach in reality constitutes a move back toward aspects of abortion jurisprudence abandoned by seven Justices in *Casey*. Further, in adopting the Balancing Approach, lower courts are side-stepping important issues deserving full analysis before invalidating state laws furthering legitimate state interests.

I. THE *CASEY* ANALYSIS

The Court in *Casey* did not overrule *Roe v. Wade*, in part because of an expansive view of the nature of a woman's interest relating to the question whether to terminate a pregnancy,[12] and in part because of concern that acknowledging an error would erode respect for the Supreme Court and concern about upsetting people's reliance on ready access to abortion.[13] However, a majority of the Court agreed that important state interests exist that would justify greater government regulation of access to abortion, abortion procedures, and abortion providers and facilities, and a majority agreed that changes to abortion jurisprudence were necessary and appropriate to better accommodate government initiatives enacted to serve legitimate state interests.[14] The Court in *Casey* expressly overruled aspects of some prior Supreme Court decisions[15] and upheld several state law re-

v. Strange, 9 F. Supp. 3d 1272 (M.D. Ala. 2014) (resolving parties' motions for summary judgment, and deciding a trial was warranted on Planned Parenthood's undue burden claim); Whole Woman's Health v. Lakey, 46 F. Supp. 3d 673 (W.D. Tex. 2014), *aff'd in part, vacated in part, rev'd in part*, Whole Woman's Health v. Cole, 790 F.3d 563 (5th Cir. 2015), *order modified*, 790 F.3d 598 (5th Cir. 2015); *see also* Planned Parenthood of the Heartland, Inc. v. Iowa Bd. of Medicine, 865 N.W.2d 252, 263–64 (2015) (following the view of the Seventh and Ninth Circuits).

11 550 U.S. 124 (2007).

12 *See Casey*, 505 U.S. at 846–53 (Part II of the opinion).

13 *Id.* at 854–69 (Part III of the opinion).

14 *Id.* at 869–79 (Part IV of the opinion). Although only three Justices joined Part IV of the opinion, four other Justices clearly agreed with these propositions, as they would have overruled *Roe*, thereby allowing states to enact laws rationally related to legitimate state interests. *See id.* at 944–79 (Rehnquist, C.J., concurring in the judgment and dissenting in part).

15 *See Thornburgh v. Amer. Coll. of Obstetricians and Gynecologists*, 476 U.S. 747 (1986) (discussing cases that "are inconsistent with *Roe*'s statement that the State has a legitimate interest in promoting the life or potential life of the unborn"); *id.* at 875 (noting that the Court

strictions on abortion: a law requiring a physician to provide informed consent twenty-four hours before performing an abortion;[16] a law prohibiting (except in a medical emergency) an abortion performed on an unemancipated eighteen year old without informed consent of at least one parent or a finding by a court that the woman is mature and capable of giving informed consent;[17] and various record keeping and reporting requirements.[18]

In the main opinion, written by Justice O'Connor, the Court adhered to some aspects of the decision in *Roe* and jettisoned others. On the one hand, Justice O'Connor purported to adhere to the "essential" holding of *Roe*, including the proposition that the Constitution of the United States affords a woman some freedom to terminate her pregnancy.[19] Also, in Part IV (the plurality opinion) Justice O'Connor retained *Roe*'s principle that viability is a key point in a pregnancy; meaning that post-viability a state's interest in preserving and respecting human life would support a ban on abortion (as long as an exception exists to protect the health and life of a woman). [20]

On the other hand, the Court departed from other principles set out in *Roe*—albeit under the guise of giving effect to a part of *Roe* that had been given "too little acknowledgement and implementation by the Court" in cases subsequent to *Roe*.[21] Justice O'Connor focused in part on those sentences in the *Roe* decision that acknowledge the state's "important and legitimate interest in potential life."[22] In *Roe*, Justice Harry Blackmun explicitly held that the state interest in potential life would not justify any regulation of abortion until the point of viability.[23] Justice O'Connor departed from this diminished view of the state interest in human life, noting that:

> Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage [a woman] to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term and that there are procedures and institutions to allow [for] adoption of unwanted children

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has struck down laws that "in no real sense deprived women of the ultimate decision"); 505 U.S. at 882 (overruling aspects of *Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416 (1983).

16 505 U.S. at 881–87.

17 *Id.* at 899–900.

18 *Id.* at 900–01.

19 *Id.* at 869.

20 *Id.* at 846, 870.

21 *Id.* at 871.

22 *Id.* at 871 (citing *Roe*, 410 U.S. at 163).

23 *See* 410 U.S. at 163.

> as well as a certain degree of state assistance if the mother chooses to raise the child herself.[24]

Justice O'Connor also departed from *Roe*'s diminished view of a state's important and legitimate interest in health and safety, which *Roe* deemed sufficiently compelling only after the first trimester—erroneously believing that, until that time, "mortality in abortion may be less than mortality in normal childbirth."[25] Again, seven Justices agreed with the need to abandon these aspects of *Roe*.

The heightened view of the importance of legitimate state interests necessarily required abandonment of *Roe*'s trimester framework.[26] Justice O'Connor noted the contradictory nature of the analysis in *Roe*: because the trimester framework had forbidden any regulation designed to further maternal health until the end of the first trimester, and any regulation designed to promote the state interest in unborn human life before viability, it was incompatible with *Roe*'s recognition that those interests exist throughout pregnancy.[27] Abandonment of the trimester framework in-turn required re-articulation of how to assess whether state regulation bearing on pre-viability abortion is a permissible or impermissible infringement of a woman's protected liberty interest. For this purpose, Justice O'Connor created what has become known as the undue burden analysis. Justice O'Connor explained:

> Numerous forms of state regulation might have the incidental effect of increasing the cost or decreasing the availability of medical care, whether for abortion or any other medical procedure. The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it. Only where the state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.[28]

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24 505 U.S. at 872.

25 *See Casey*, 505 U.S. at 875–76, 878; *Roe*, 410 U.S. at 162–63; *see also* Byron Calhoun, *The Maternal Mortality Myth in the Context of Legalized Abortion; Systematic Review*, 80 THE LINACRE QUARTERLY 264 (2013) (detailing a number of factors making abortion-related data and maternal mortality data unreliable and concluding that flawed techniques have produced an overestimation of maternal mortality and an underestimation of abortion mortality).

26 *Casey*, 505 U.S. at 873 ("The trimester framework suffers from these basic flaws: in its formulation it misconceives the nature of the pregnant woman's interest; and in practice it undervalues the State's interest in potential life, as recognized in *Roe*.").

27 *Id.* at 876.

28 *Id.* at 874.

> . . . 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.[29]
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> . . . What is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so. Regulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose. Unless it has that effect on her right of choice, a state measure designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal. Regulations designed to foster the health of the woman seeking an abortion are valid if they do not constitute an undue burden.[30]

The analysis envisioned by Justice O'Connor thus consists of an inquiry into purpose and effect: a relational inquiry focusing on the purpose of the law and whether the law is reasonably related to a valid state interest, e.g., the life of the unborn child, or the health and safety of the mother; and an inquiry focusing on whether the effect of the law is to place a substantial obstacle in the path of a woman seeking a previability abortion.[31] Justice O'Connor also provided some basic benchmarks: increased cost or practical difficulties indirectly resulting from laws do not constitute a substantial obstacle; rather, a finding of substantial obstacle turns on an effect more directly impacting a woman's interest in legally deciding to abort, i.e., an effect on the decision making process itself.[32]

Although a majority of the Court agreed with these benchmarks, the undue burden analysis itself did not garner the support of a majority of the Court. Two Justices would have adhered to the strict scrutiny analysis set in play with the decision in *Roe*.[33] Four other Jus-

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29 *Id.* at 877.

30 *Id.* at 877–78 (internal citations removed).

31 *See infra* Part IV for a discussion of why this way of framing of the *Casey* analysis is accurate and should be adopted.

32 *See Casey*, 505 U.S. at 874 (emphasizing that an impermissible burden is one that effects "a woman's ability to make [the] decision"); *see also id.* at 875 (noting the past error of striking down laws that "in no real sense deprived women of the ultimate decision"); *id.* at 887–98 (Part V(C) of the opinion) (invalidating a spousal notification provision because, at least for women who feared domestic violence, the provision's effect on a woman's ability to decide to abort was tantamount to a ban on abortion).

33 *Id.* at 934 (Blackmun, J., concurring in part and dissenting in part) ("*Roe*'s requirement of strict scrutiny as implemented through the trimester framework should not be disturbed. No other approach has gained a majority, and no other is more protective of the woman's fundamental right."); s*ee also id.* at 912–22 (Stevens, J., concurring in part and dissenting in part); Stenberg v. Carhart, 530 U.S. 914, 952 (2000) (Rehnquist, C.J., dissenting) (opining that "the *Casey* joint opinion represents the holding of the Court in that case") (citing Marks v. United States, 430 U.S. 188, 193 (1977) (explaining that, when "no single

tices, however, would have simply overruled *Roe* and would review state regulation of abortion using the same approach used to assess laws arguably infringing on a protected liberty interest, i.e., a form of rational basis review.[34]

This later group of Justices also pointed out problematic aspects of the undue burden analysis. Justice Scalia noted that it is a standard without pedigree, i.e., it was "created largely out of whole cloth" as a way to avoid the barriers to reasonable state regulation of abortion without overruling *Roe*.[35] Moreover, precisely because it was "plucked from nowhere," he predicted that the standard would not provide a tool for appropriately cabining judicial discretion: "the question of what is a 'substantial obstacle' to abortion will undoubtedly engender a variety of conflicting views."[36] Pointing to the divergent opinions in the *Casey* decision itself as to the abortion regulations at issue, Chief Justice William Rehnquist similarly noted that the undue burden standard would fail to restrain judges from relying on subjective preferences: that is, similar to the *Roe* decision itself, the undue burden standard would allow a court—and ultimately the Supreme Court—to impart its own preferences on the states under the guise of the Constitution.[37] Justice Scalia agreed, noting that the standard was but a "verbal shell game [concealing] raw judicial policy choices concerning what is 'appropriate' abortion legislation."[38]

Nonetheless, the decision in *Casey* clearly revealed a majority of the Justices departing from *Roe*'s principle that a woman's freedom to decide to have an abortion is a fundamental right triggering a strict-scrutiny type of analysis. Further, although preserving in some respects the abortion on demand aspect of *Roe* and *Bolton* (due to the health exception requirement), the majority in *Casey* viewed states as having legitimate interests justifying regulation of the provision of abortion services—including regulations applicable during the first trimester; and the majority supported an analysis designed to better

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rationale" secures the assent of five Justices, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds")).

34 *See Casey*, 505 U.S. at 944, 951–52, 966 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) ("A woman's interest in having an abortion is a form of liberty protected by the Due Process Clause, but States may regulate abortion procedures in ways rationally related to a legitimate state interest.")

35 *Id.* at 987 (Scalia, J., concurring in the judgment and dissenting in part); *see also id.* at 964 (Rehnquist, C..J., concurring in the judgment and dissenting in part).

36 *Id.* at 965 (Rehnquist, C.J., concurring in the judgment and dissenting in part).

37 *See id.* at 965–66.

38 *Id.* at 987 (Scalia, J., concurring in the judgment and dissenting in part).

accommodate state laws reasonably related to legitimate state interests notwithstanding some negative impact on ready access to abortion services.

The decision in *Gonzales v. Carhart*[39] confirmed the Court's greater receptivity to legislative efforts to advance legitimate state interests. In *Gonzales*, a majority of the Court rejected a facial challenge to a federal ban on use of the procedure known as partial-birth abortion (or intact dilation and extraction ("intact D & E")).[40] The Justices were able to uphold the law using the principles set out in the *Casey* plurality opinion, but without specifically endorsing *Casey*'s undue burden analysis or its retention of viability as a key factor in assessing the permissibility of legislation regulating abortion.[41] The Court used the undue burden analysis to frame the decision, but the outcome hinged on two distinct aspects of the *Casey* decision: *Casey*'s confirmation of the need for a health exception, and the recognition that abortion jurisprudence must accommodate the government's legitimate interest in preserving and promoting the life of the unborn.[42] In assessing the effect of the law, the Court focused on the failure to include a health exception. The issue, thus, was whether the ban subjected women to "significant health risks."[43] Because the medical evidence was conflicting as to whether the banned procedure was ever genuinely medically necessary, and because a safe alternative method remained available, the Court held that the effect of the ban did not present a substantial obstacle.[44]

Although not endorsing the *Casey* undue burden analysis, the *Gonzales* decision nonetheless shed light on how courts should apply the analysis. Indeed, some lower courts adopting the Balancing Approach have pointed to *Gonzales* as support. As Part III of this Article shows, however, the appropriateness of the Balancing Approach turns on a proper reading of both *Casey* and *Gonzales*. First, however, it is useful to understand the nature of the Balancing Approach and how it impacts judicial review of the constitutionality of state laws relating to abortion. Part IV of the Article highlights the *Van Hollen* decision in which Judge Posner endorsed the Balancing Approach, cases illus-

39 550 U.S. 124, 130 (2007).

40 *Id.* at 133, 167–68 (emphasizing that the decision was limited to a facial challenge to the law).

41 *Id.* at 145–46.

42 *Id.* at 145, 158 (noting that the premise that the state has a legitimate interest in protecting human life from the inception of pregnancy "cannot be set at naught" by *Casey*'s requirement of a health exception).

43 *See id.* at 161.

44 *See id.* at 161–67.

trating that the approach significantly lowers the bar in the substantial obstacle inquiry, and litigation in the Fifth Circuit in which the Balancing Approach has been rejected.

II. INTRODUCTION TO THE BALANCING APPROACH

Lower courts applying the *Casey* analysis have tended to view it as consisting of two steps. Specifically, courts have described the analysis as requiring, first, an assessment of the basis for the law; and, second, an assessment of whether the law imposes an undue burden—i.e., whether the purpose or effect of the law places a substantial obstacle in the path of a woman seeking an abortion. A study of the cases that have explored use of the Balancing Approach shows that the Balancing Approach modifies both steps of the analysis, and does so in ways that work against the Supreme Court's efforts to better accommodate legislative efforts to advance legitimate state interests in the arena of abortion.

1. *The* Van Hollen *Decision*

Judge Posner in 2013 endorsed use of the Balancing Approach in the *Casey* analysis. In *Planned Parenthood of Wisconsin v. Van Hollen*, abortion-providing clinics challenged a statute prohibiting a physician from performing an abortion unless the physician has admitting privileges at a hospital no more than thirty miles from the clinic in which the abortion is performed.[45] The district court had granted a preliminary injunction, and Judge Posner emphasized the difficult balancing involved in making such a decision at the trial court level and the deference given to such a decision on appeal.[46] Judge Posner's decision, however, reflected deference not merely to the district court's findings of fact and discretionary conclusions, but also the court's views of the governing law. Further, as highlighted by a concurring opinion, Judge Posner's decision represented a break from relevant Supreme Court and Seventh Circuit precedent, and yet Judge Posner provided no rationale for the break and cited no authority.

The first half of the opinion reads as though it is an assessment of Planned Parenthood's likelihood of success on the merits, which turned on whether the Wisconsin law imposed an undue burden on

45 *See* 738 F.3d 786, 787 (7th Cir. 2013) (citing WIS. STAT. § 940.15(5) (1985)).

46 *Id.* at 795 (explaining the balancing involved in deciding whether to grant a preliminary injunction).

women.[47] Judge Posner began with a conclusion that the law "seems bound to have a substantial impact on the practical availability of abortion in Wisconsin."[48] This conclusion was grounded in Judge Posner's apparent agreement with a finding made by the district court: that the abortion doctors used by Planned Parenthood would have difficulty obtaining admitting privileges. To support this conclusion, Judge Posner pointed to both facts and speculation: the fact that many of Planned Parenthood's doctors didn't have admitting privileges at hospitals within thirty miles of the clinics and that some of the doctors would have to obtain privileges at multiple hospitals;[49] and speculation that some hospitals would not grant privileges to doctors who perform abortions, and that it would be difficult for abortion doctors to get privileges because relevant factors often include number of admissions, revenue generated, or other economic grounds, which would tend to work against abortion doctors.[50] In agreeing with the district court, Judge Posner did not address important issues, e.g., whether the law itself directly caused the "obstacle," as opposed to the other factors, and why this type of obstacle could be sufficient in light of *Casey*'s benchmarks.[51]

Judge Posner next focused on the need for the law, and thus arguably was assessing the relational inquiry aspect of the undue burden analysis. Here again he simply repeated findings and conclusions made by the district court. In part he disputed the need for the law to be made effective immediately.[52] But he also disputed the need for the law generally, by focusing on the fact that the state's concerns

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47 *Id.* at 791 (explaining the plaintiff's theory in the appeal of the preliminary injunction).

48 *Id.*

49 *Id.*

50 *Id.* at 791–92. It is appropriate to characterize this as speculation because the district court noted testimonial evidence of state witnesses that cast doubt on the plaintiffs' allegations. *See* Planned Parenthood of Wisconsin, Inc. v. Van Hollen, No. 13–cv–465–wmc, 2013 WL 3989238, at *4–5; (W.D. Wis., Aug. 2, 2013). The district court did not make any specific findings of fact about the ultimate ability of plaintiffs' doctors to obtain admitting privileges. *See id.* at *16–17.

51 Indeed, at this point in the opinion Judge Richard Posner did not discuss the legal standard used to decide whether an impact rises to the level of an undue burden. *See Van Hollen*, 738 F.3d at 791–93. In contrast, Judge Daniel Manion began analysis of the undue burden prong of the *Casey* analysis by noting: "We cannot find the requirement unconstitutional unless the plaintiffs can show that the requirement 'will have the likely effect of preventing a significant number of women for whom the regulation is relevant from obtaining abortions.'" *Id.* at 804 (Manion, J., concurring) (citing Karlin v. Foust, 188 F.3d 446, 481 (7th Cir. 1999)).

52 *Id.* at 793. The Wisconsin legislature had enacted the law in mid-June, the governor signed the law on July 5th, a Friday, and it was effective the following Monday. *Id.* at 788; *see also id.* at 803 (Manion, J., concurring).

about continuity of care and qualifications of providers are not limited to the abortion context, and he suggested that the state had not presented evidence showing a link between having admitting privileges and women receiving better care or suffering from fewer complications.[53]

In the first half of the opinion, then, Judge Posner concluded that Planned Parenthood was likely to succeed on the merits because it could prove that the law imposed a substantial obstacle and the state could not prove that the law furthered state interests. Judge Posner did not, in this part of the opinion, discuss the legal standards used to assess whether a burden rises to the level of substantial obstacle. Rather, he simply agreed with the district court's conclusions that the law did impose a substantial obstacle. The district court's conclusions, however, depended on the Balancing Approach. The district court focused on the increased distances some women would have to travel if some of Planned Parenthood's clinics closed.[54] Given *Casey*'s benchmarks, the court could not convincingly conclude that the burden presented a substantial obstacle without changing the standard—which the court did.

> [T]he court considers these obstacles in access to abortion services [an] undue burden in light of the dubious benefits to women's health [from] the admitting privileges restriction . . . . Even if there were some evidence that the admitting privileges requirement would actually further women's health, any benefit is greatly outweighed by the burdens caused by increased travel, decreased access and, at least for some women, the denial of an in-state option for abortion services.[55]

Judge Posner's agreement with the district court's conclusions in this part of the opinion reflects an implicit endorsement of the trial

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53 *Id.* at 793, 795. Here Judge Posner may well have been relying on findings of fact made by the district court. The district court said the state had "failed to establish any credible link between admitting privileges at a nearby hospital and furthering continuity of care." *See Van Hollen*, 2013 WL 3989238, at *9. However, the state had presented evidence and the trial court also found it was "uncertain at best" whether the law would promote continuity of care for at least some women who suffered complications following an abortion. *Id.* The district court also had recognized that the law might promote accountability by way of peer review in cases involving mismanaged health care of patient abandonment. *Id.* at *10.

54 *See id.* at at *16–17. Although the increased distance for these women would be 100 miles, the trial court and Judge Posner focused on the total miles the women would experience: 400 miles (100 miles each way, for two trips since Wisconsin also requires clinics to provide counseling and an ultrasound at least twenty-four hours before performing an abortion). *See Van Hollen*, 738 F.3d at 796. Notably, the Court in *Casey* suggested that costs associated with doubling a six-hour round trip would not be an undue burden. *See Casey*, 505 U.S. at 886–87.

55 *Van Hollen*, 2013 WL 3989238, at *19.

court's view of the law; an endorsement which was made explicit toward the end of the opinion.

But the opinion is written in such a way that the weighing of interests by Judge Posner occurs as part of the analysis of harms that is required in deciding whether to grant a preliminary injunction—a tactic that masks to some extent his endorsement of adding a step to the *Casey* analysis. That is, in some ways, there is nothing obviously novel about his analysis until the end when he abruptly shifts back to the *Casey* analysis and states: "The cases that deal with abortion-related statutes sought to be justified on medical grounds require not only evidence (here lacking as we have seen) that the medical grounds are legitimate but also that the statute not impose an 'undue burden' on women seeking abortions."[56] After noting that abortion statutes justified on medical grounds may not impose an undue burden, he continued:

> The feebler the medical grounds, the likelier the burden, even if slight, to be "undue" in the sense of disproportionate or gratuitous. It is not a matter of the number of women likely to be affected. . . . In this case the medical grounds thus far presented . . . are feeble, yet the burden great because of the state's refusal to have permitted abortion providers a reasonable time within which to comply.[57]

In these few sentences Judge Posner has radically modified the *Casey* analysis. He injected into the analysis an evidentiary assessment of the extent to which an abortion law promotes admittedly legitimate state interests in women's health and, in essence, has lowered the standard used in analyzing whether a law presents a "substantial obstacle" in the path of a woman seeking an abortion.[58]

In addition to endorsing the Balancing Approach, Judge Posner's assessment of the state's justification for the admitting privileges law was nothing short of hostile. The state had argued that the law protects the health of women by helping to ensure continuity of care for women who suffer complications following an abortion and by operating as a sort of "Good Housekeeping Seal of Approval," and had

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56 See Van Hollen, 738 F.3d at 798.

57 *Id.*

58 *See id.* The reference to the relevancy of the "number of women likely to be affected" reflects Judge Posner's rejection of the heightened standard used in facial challenges to abortion laws. *See id.* at 804–05 (Manion, J., concurring in part) (explaining that, in this facial challenge to the law, "[w]e cannot find the requirement unconstitutional unless the plaintiffs can show that the requirement 'will have the likely effect of preventing a significant number of women for whom the regulation is relevant from obtaining abortions'"; and later noting that "more than 70% of women in Wisconsin who seek abortions live in the southern counties near Milwaukee and Madison, where clinics will continue operating" and that "most Wisconsin women seeking abortions can travel to clinics in Illinois").

submitted an affidavit from a qualified physician about a case in which admitting privileges likely would have made a difference.[59] The trial court had explicitly affirmed that credentialing, continuity of care, and peer review of abortion procedures "all may further women's health," noting that "each component may better equip physicians to handle complications."[60] Further, the concurring opinion pointed out that the admitting privileges law had been enacted within weeks of national media attention to the "Gosnell scandal" and that the state had submitted evidence of "numerous other examples of egregious and substandard care by abortion doctors and clinics" (as reflected in the Appendix to the Concurrence).[61]

Judge Posner's response was dismissive and the opinion is filled with criticism directed at the state. He was critical about the legislative process: the limited legislative deliberations leading to the law; that the legislature was concerned about the quality of care for abortion but allegedly not about other invasive procedures performed outside of the hospital; and certain shortcomings in the law (e.g., did not require abortion doctors to care for patients with complications, and did not distinguish between surgical and medication abortions).[62] He similarly criticized the state's efforts at trial. He dismissed arguments about quality of care, pointing to statistics showing very low rates of complications requiring hospitalization following abortion,[63]

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59 *Id.* at 789, 797.

60 *See Van Hollen*, 2013 WL 3989238, at *14–15 (arguing that the state had not "connect[ed] the dots between these components of quality patient care and the admitting privileges requirement" primarily because the state had not produced evidence of a specific case in which a doctor's lack of privileges had been a factor in an abortion patient's negative outcome following complications; the state thereafter provided an affidavit which Judge Posner discounted).

61 *Van Hollen*, 738 F.3d at 802–03, 807–10 (Manion, J., concurring in part) (discussing Gosnell scandal); *see also id.* at 800–04 (highlighting many facts that support the state's position: a statement related to patient safety issued by the American College of Surgeons which includes as one alternative for regulating "office-based surgery" a requirement that physicians performing the surgery to have admitting privileges "at a nearby hospital"; the fact that the plaintiff had offered no evidence that doctors performing other types of "office-based surgery" do not have privileges; the parties' agreement that some abortions result in complications requiring hospitalization; the fact that hospital credentialing decisions are well-recognized as one means of fostering quality care and thus that "every circuit to address the issue has held that admitting privileges requirements further states' legitimate interests"; and the fact that many abortion patients are young and vulnerable and thus arguably in greater need of state attention to quality of care provided in "office-based" clinics). Judge Manion's appendix is included as an appendix to this article. *See infra* Appendix.

62 *Id.* at 789, 798.

63 *See id.* at 797 (pointing to studies showing a 0.05% complication rate for aspiration abortions, and a 0.06% rate for medical abortions).

and was dismissive of the state's concerns about underreporting of complications without more evidence.[64] Regarding affidavit evidence suggesting that a failure to have admitting privileges resulted in poor outcomes, he stated: "one (doubtful) case in 29 years is not impressive evidence of the medical benefits of the Wisconsin statute."[65] As recognized by other courts, Judge Posner was looking for empirical proof of the efficacy of the law.[66] As noted, this assessment occurred as part of the "balancing of the harms" issue central to a decision about a preliminary injunction and, in that context, evidence bearing on the extent to which a law promotes a legitimate state interest arguably is not out of place. But Judge Posner expressly transplanted that assessment into the *Casey* analysis.

The concurring opinion highlighted that the analysis was a break from both Supreme Court and Seventh Circuit precedent,[67] yet, remarkably, Judge Posner provided no analysis or explanation and cited to no authority for the modification.[68] Despite the undisciplined nature of Judge Posner's opinion in *Van Hollen*, other courts have followed suit. To their credit, these opinions have tried to do what Judge Posner did not: articulate a line of reasoning that would support this shift in the *Casey* analysis.[69] Before assessing those theories, it is helpful to understand the impact of the Balancing Approach and the main arguments against the Balancing Approach.

2. *Impact of the Balancing Approach*

The Balancing Approach endorsed in *Van Hollen* affects both steps of the *Casey* analysis. As to the relational inquiry, Judge Posner dismissed the state's argument that the admitting privileges law advanced state interests because the state did not make its case with

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64 *Id.* at 790, 797; *see also Van Hollen*, 2013 WL 3989238, at *7 (faulting the state's witnesses for not citing studies to back statistics about underreporting).

65 *Van Hollen*, 738 F.3d at 797.

66 *See, e.g.*, Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott (Abbott II), 748 F.3d 583, 596 (5th Cir. 2014) (disagreeing with the Seventh Circuit's concerns of a lack of statistical evidence).

67 *See Van Hollen*, 738 F.3d at 799 (Manion, J., concurring in part) (citing *Gonzales*, 550 U.S. 124, 158 (2007); *see also* Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott (Abbott I), 734 F.3d 406, 411 (5th Cir. 2013)) (noting that "legislation regulating abortions must pass muster under rational basis review—*and* must not have the 'practical effect of imposing an undue burden'"); Karlin v. Foust, 188 F.3d 446, 481 (7th Cir. 1999).

68 *Id.* at 798. After noting that the *Casey* analysis involves two distinct steps, Judge Posner cites to important Supreme Court cases, including *Casey* and *Stenberg*. *Id.* However, there is no attempt to tie his modification of the undue burden analysis to the cases.

69 *See infra* Part III.

empirical proof. Further, he assessed not merely whether the law furthered state interests, but also the extent to which the state interests were advanced. Concluding that the justification for the law was "feeble," Judge Posner then modified the substantial obstacle inquiry, such that a burden—even if slight—could be found undue. Although the effect of the admitting privileges law at issue seemed analogous to the indirect obstacles deemed insufficient in *Casey*—increased costs and/or practical difficulties—use of the Balancing Approach changes the calculus. Litigation in the Fifth and Ninth Circuits similarly illustrates that the Balancing Approach significantly changes the *Casey* analysis.

In *Planned Parenthood of Greater Texas Surgical Health Services v. Abbott* (*Abbott I*),[70] the Fifth Circuit considered a facial challenge by Planned Parenthood to an admitting privileges law similar to the law at issue in *Van Hollen*.[71] The district court had struck down the Texas admitting privileges law, finding that the law lacked a rational basis and presented a substantial obstacle.[72] In describing the *Casey* analysis, the district court used language resembling the balancing approach used in *Van Hollen*, noting that courts must first "subject regulations to a rational-basis review to determine whether the law's purpose or effect is rationally related to the state's legitimate interest *balanced with* the woman's interest;" and, if so, according to the court, the second prong of the analysis involves assessing the purpose and effect of the law, to determine whether it places a substantial obstacle before a woman seeking an abortion.[73]

Using the standard approach to the *Casey* analysis, the Fifth Circuit in *Abbott I* disagreed and stayed the district court's injunction pending appeal.[74] Review of the district court's conclusion that the law lacked a rational basis revealed that the district court had applied a heightened rational basis standard. The Fifth Circuit pointed to evidence that the state had presented showing that the admitting privi-

70 *Abbott I*, 734 F.3d 406 (5th Cir. 2013), *motion to vacate stay denied*, 134 S. Ct. 506 (2013).

71 The Texas law required a physician performing or inducing an abortion to have admitting privileges on the date of the abortion at a hospital no more than thirty miles from the location where the abortion is provided. *See* Planned Parenthood of Greater Texas Surgical Health Servs. v. Abbott, 951 F. Supp. 2d 891, 897–98 (W.D. Tex. 2013) (quoting section 2 of House Bill 2, to be codified at TEX. HEALTH & SAFETY CODE § 171.0031(a)(1)); *see id.* at 904 (quoting section 3 of House Bill 2, to be codified at TEX. HEALTH & SAFETY CODE § 171.063). Plaintiffs also challenged a law directing that medication abortions comply with the FDA approved protocol (and thus precluding the popular off-label protocol). *Id.* at 904–06.

72 See *id.* at 902.

73 *See id.* at 898–99 (emphasis added).

74 *See Abbott I*, 734 F.3d at 409.

leges law fostered a woman's ability to seek consultation and treatment for complications directly from the physician who performed the abortion (as opposed to an emergency room provider), and thus would help prevent patient abandonment; and evidence showing that the law would help ensure that abortion providers were qualified to provide high quality care, and thus would help ensure patient safety.[75] The district court had ignored this evidence or found it insufficient to show a rational basis for the law.[76] The Fifth Circuit emphasized the low level of judicial review appropriate in rational basis review, noting that a legislative choice "is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data."[77] The court also found the district court's approach to be inconsistent with the Supreme Court's recognition, in a case upholding a law restricting the performance of abortion to licensed physicians, that "the Constitution gives the States broad latitude to decide that particular functions may be performed only by licensed professionals, *even if an objective assessment might suggest that those same tasks could be performed by others*."[78]

In reviewing the district court's decision that the admitting privileges law presented a substantial obstacle, the Fifth Circuit began with the benchmark established in *Casey*, namely, that a law that serves a valid purpose is not rendered unconstitutional by an incidental effect of making it more difficult or expensive to obtain an abortion;[79] and the court's analysis focused solely on the effect of the law. The court again focused on evidence the district court had ignored. The district court had focused only on evidence of clinic closings that would impact twenty-four counties in the Rio Grande Valley.[80] The Fifth Circuit focused on evidence that more than 90% of women seeking an abortion in Texas would be able to obtain one from a physician within 100 miles of their residence.[81] Under *Casey*'s benchmarks this

75 *Id.* at 411–12.

76 *See id.* at 411 (explaining that the district court focused on other evidence involving emergency room treatment provided to women experiencing complications, i.e., the district court focused on the fact that women going to ERs generally receive good medical care, but ignored the state's concern that abortion providers be available to consult their patients who suffer complications and the state's attempt to prevent patient abandonment).

77 *Id.* (quoting FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993)).

78 *Id.* at 412 (quoting Mazurek v. Armstrong, 520 U.S. 968, 973 (1997)).

79 *Id.* at 413 (quoting *Gonzales*, 550 U.S. at 157–58 (quoting *Casey*, 505 U.S. at 874)).

80 *Id.* at 414.

81 *Id.* at 414–15. In exploring whether the law presented a substantial burden in a "large fraction" of the cases, the Fifth Circuit explained that, because the law applies to any phy-

effect is not a substantial obstacle. The Fifth Circuit also noted that much of the evidence Planned Parenthood had relied on to show that it would not be able to staff its facilities with physicians with admitting privileges was unrelated to the Texas admitting privileges law—and thus not relevant to *Casey*'s undue burden analysis.[82] Without the Balancing Approach, which lowers the substantial obstacle threshold, the admitting privileges law readily survived the *Casey* analysis.

Planned Parenthood Arizona, Inc. v. Humble,[83] illustrates even more dramatically the impact of the Balancing Approach. The case involved a facial challenge to an Arizona law requiring medication-induced abortions to be administered in compliance with protocol outlined in the FDA approved label for the medication.[84] The law was aimed at use of RU-486, or mifepristone. When the FDA approved mifepristone for use in inducing abortions, the approved drug label described a particular regimen (the on-label regimen). Yet, as is often the case, off-label use of the drug quickly emerged.[85] Legislative

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sician who performs abortions in Texas, the law affects every woman in Texas seeking an abortion. *Id.* at 414.

82 *Id.* at 415 (citing the old age of physicians performing abortions and other reasons why recruiting efforts were unsuccessful).

83 753 F.3d 905 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 870 (2014).

84 *Id.* at 907, 909 (citing H.B. 2036, codified at Ariz. Rev. Stat. § 36-449.03(E)(6), and the implementing regulation, Ariz. Admin. Code § R9-10-1508(G)).

85 *See id.* at 909 (explaining that once approved for marketing, the FDA does not prohibit or discourage off-label uses of drugs and further, because adding uses to an approved label requires action by a drug manufacturer, valid uses supported by evidence sometimes never make it onto the label). This is what happened in the case of mifepristone: an off-label regimen was developed and it has never been added to the drug's label. Both regimens involve two medications: mifepristone, which kills the embryo/fetus, and misoprosol, which causes the uterine to contract and expel the embryo/fetus. Planned Parenthood Arizona, Inc. v. Humble, 13 F. Supp. 3d 1017, 1020 (D. Ariz. 2014). The on-label regimen involves taking 600 milligrams of mifepristone orally at a health facility, returning two days later to take 400 micrograms of misoprosol orally, and returning for a follow-up visit. Clinical evidence submitted to the FDA to obtain approval for marketing showed this on-label regimen to be safe and effective for inducing abortion through seven weeks of pregnancy, or forty-nine days from the woman's last menstrual period ("LMP"). *Humble*, 753 F.3d. at 907. The off-label regimen involves taking 200 milligrams of mifepristone orally at a clinic, taking 800 micrograms of misoprostol two days later at home, and returning to the clinic for a follow-up visit. *Id.* at 907–08. Studies (of some sort) have shown the off-label regimen to be safe and effective through nine weeks of pregnancy, or sixty-three days LMP. *Id.* at 907. The off-label regime involves a lower dosage of mifepristone, but doubles the dosage of misoprosal—the drug causing the contractions and expulsions. The more intense and prolonged contractions resulting from the increased dosage of misoprosal is the reason the off-label regimen is effective through sixty-three days LMP. The more effective expulsion also is the reason its proponents can say that the off-label regimen has reduced risk factors: namely, the incidence of on-going

findings accompanying the law explained its purpose as protecting women from "dangerous and potentially deadly off-label use of abortion-inducing drugs, such as, for example, mifepristone," and as ensuring that physicians abide by protocol tested and approved by the FDA "as outlined in the drug labels."[86]

Using the standard approach to the *Casey* analysis, the district court in *Humble* had denied a preliminary injunction, finding that the law passed rational basis scrutiny and did not impose an undue burden on the right to decide to terminate a pregnancy. The district court acknowledged that the challengers presented evidence suggesting that medication abortions generally are as safe or safer than surgical abortions; that many practicing physicians consider the off-label regimen to reflect best practices; that the risk of ongoing pregnancies and the need for surgical intervention are reduced due to a higher dosage of a drug causing contractions; and that the off-label regimen may be used through sixty-three days from the last menstrual period ("LMP"), rather than through day forty-seven LPM.[87] Yet, following a traditional approach to rational basis review, the court explained that this evidence did not mean there was no rational basis for the law: "The State need not legislate the best means by which to achieve a goal. There is no least restrictive means component to rational basis review; rational speculation will suffice. An imperfect fit can be rational, and it is not for the [c]ourt to 'improve' or 'cleanse' the legislative process."[88] The legislature had sought to protect women from dangerous off-label uses and the court specifically pointed to Legislative Finding #13, which reflected concern about increased risk of complications due to failure to complete the two-step medication dosage.[89] Requiring the on-label regimen (which involves taking the second step at the health facility) is one way to address this concern. The court stated: "Where reasonable minds can disagree, there is a rational basis."[90]

Regarding the burdens caused by the law, the court acknowledged that requiring the on-label regimen would increase the cost of obtaining a medication abortion (costs stemming from the higher dosage of

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pregnancies is reduced from 1% to 0.5%, and the need for surgical intervention to fully clear the uterus is reduced from 8% to less than 2%. *Id.* at 908.

86 *Id.* at 910; *Humble*, 13 F. Supp. 3d at 1020.

87 *Humble*, 13 F. Supp. 3d, at 1022–23; *see supra* note 85 for a description of the two regimens.

88 *Id.* at 1023 (citing *Abbott II*, 748 F.3d at 593–94).

89 *Id.* at 1022.

90 *Id.* at 1023 (citing *Beach Commc'ns*, 508 U.S. at 315).

mifepristone and from an additional clinic visit), but noted that such burdens generally have been found to fall short of creating a substantial obstacle.[91] The court concluded that, "[i]n a large fraction of [the] cases, the law [simply operated to] change the method" available.[92] For women seeking medication abortion through day forty-nine LMP, the law precluded access to the off-label regimen, but left open the on-label regimen and the option of a surgical abortion.[93] As to women denied access to medication abortion between days forty-nine and sixty-three LMP, the option of surgical abortion remained. In light of *Casey* and *Gonzales*, the ready availability of a safe alternative method of abortion undermined the challengers' argument.[94] As to the argument that the law imposed a substantial obstacle for women seeking abortions between days forty-nine and sixty-three LMP who for some medical reason could not safely have a surgical abortion, the court explained that the challengers did not produce sufficient evidence or explanation to meet its burden on the issue of substantial obstacle, but also noted that a proper approach to the claim would be an "as-applied challenge" to the law.[95] The district court opinion thus closely paralleled the majority opinion in *Gonzales*.

The Ninth Circuit reversed, faulting the district court for not following a refinement to the *Casey* analysis purportedly established in an earlier Ninth Circuit case—a refinement involving the Balancing Approach.[96] The Ninth Circuit explained that, given the refinement,

> [W]e compare the extent of the burden a law imposes on a woman's right to abortion with the strength of the state's justification for the law. The more substantial the burden, the stronger the state's justification for the law must be to satisfy the undue burden test; conversely, the stronger the state's justification, the greater the burden may be before it becomes "undue." . . . In [hard cases], we must weigh the burdens against the state's justification, asking whether and to what extent the challenged regulation actually advances the state's interests. If a burden significantly exceeds what is necessary to advance the state's interests, it is "undue."[97]

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91 *Id.* at 1025 (citing and following Planned Parenthood Southwest Ohio Region v. DeWine, 696 F.3d 490, 514 (6th Cir. 2012) (upholding a similar state law)).

92 *Id.*

93 *Id.* at 1020.

94 *Id.* at 1026.

95 *Id.*

96 *Humble*, 753 F.3d at 914.

97 *Id.* at 912–13 (citing Tucson Woman's Clinic v. Eden, 379 F.3d 531, 542 (9th Cir. 2004) and WEBSTER'S THIRD NEW INT'L DICTIONARY 2492 (1993) (noting that "undue" is defined as "excessive" or "unwarranted")).

Use of the Balancing Approach altered the analysis substantially. The Ninth Circuit reversed the district court, and ordered the court to issue the preliminary injunction requested by Planned Parenthood.[98]

Although the Ninth Circuit assumed the law would pass rational basis review, the court nonetheless discounted Arizona's legislative findings, which the district court had said plainly reflected a legitimate purpose. The district court had required no trial evidence where the legislative purpose is plain and the law passes rational basis review, but the Ninth Circuit held that without evidence in the record demonstrating that the law advances women's health the law appears "wholly 'unnecessary as a matter of [women's] health.'"[99] This finding clearly impacted the burden analysis. The Ninth Circuit found that the law created a substantial obstacle because it would increase costs, which evidence suggested would prevent some poor women from obtaining abortions; would perhaps lead to one Planned Parenthood clinic closing, which would lead to greater travel burdens for some women, which in-turn might delay some abortions; and would effectively ban medication abortions for some women, e.g., those who do not discover a pregnancy within forty-nine days LMP.[100] Whereas the district court had found that, in light of *Casey* and *Gonzales*, these burdens were not substantial—especially in light of the ready availability of a safe alternative method, e.g., surgical abortion, use of the Balancing Approach changed the calculus such that burdens clearly less substantial sufficed. The Ninth Circuit distinguished *Gonzales* and, despite the ready availability of a safe alternative means to abort, the Ninth Circuit held that the burden created a substantial obstacle.[101]

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98 *Id.* at 917–18 (concluding that the challengers had shown a likelihood of success on their claim that the law imposes an undue burden, and noting that Arizona had not argued that plaintiffs failed to show "a likelihood of irreparable harm or that the balance of hardships and public interest do not favor a preliminary injunction," and thus had waived such an argument).

99 *Id.* at 914–15 (assuming, without deciding, that the law passed rational basis review, and quoting *Eden*, 379 F.3d at 542 (alteration in original)). The Ninth Circuit also highlighted a district court statement that the off-label regime has a "clear advantage" in that it allows medication abortion through the ninth week of pregnancy, rather than the seventh week, an "advantage" from the perspective of allowing women to choose medication abortion over surgical abortion for a longer period of time. *Id.*

100 *Id.* at 915–16. The court explained that *Eden* recognized numerous types of burdens: "significant increase in the cost"; impact on supply of providers and clinics; delay caused by the law and the idea that "delay increases health risks"; "a law's stigmatizing of abortion practice"; legislative "usurping of providers' ability to exercise medical judgment"; and the way that the law "interacts with women's lived experience, socioeconomic factors, and other abortion regulations." *Id.* at 915.

101 *Id.* at 917. The court explained:

The Balancing Approach thus significantly modifies the *Casey* analysis. In these cases, the challenges would have been unsuccessful "but for" a weighing of the extent to which the challenged laws furthered state interests and a diminution of the concept of substantial obstacle. Without the Balancing Approach, the courts could not have legitimately concluded that the effect of the laws on access to abortion rose to the level of an undue burden.

3. *The Fifth Circuit's Rejection of the Balancing Approach*

The Fifth Circuit in decisions after *Abbott I* has continued to explicitly reject use of the Balancing Approach. In *Abbott II*, the Fifth Circuit's review of the case on the merits, the court more clearly rejected use of the Balancing Approach.[102] Planned Parenthood had expressly urged the court to adopt a "stricter standard" because the state interest in play was that of protecting the mother's health rather than fetal life.[103] The court did not do so, noting that Supreme Court precedent does not support such a "bifurcation."[104] The court also emphasized the illogical nature of the proposal. By way of example, the court explained that it makes no sense to try to treat laws protecting the life of the unborn child differently from laws making abortion safer—because both types of laws serve to protect children: "every limit on abortion that furthers a mother's health also protects any existing children and her future ability to bear children even if it facilitates a particular abortion."[105] To the Fifth Circuit, then, the appropriate analysis, even as to an abortion regulation aimed primarily at

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> [I]n *Gonzales*, the challenged law left in place "a commonly used and generally accepted method" that was very similar to the one it banned. Therefore, the burden in *Gonzales* was slight, while the government's interest in fetal life was sufficient to justify the burden. Here, the Arizona law imposes a greater burden and is not justified by any interest. . . . [F]or women between 49 and 63 days LMP, the Arizona law prohibits medication abortion entirely, leaving surgical abortion as the only legal alternative. In contrast to [the two surgical procedures at issue in *Gonzales*], medication abortion and surgical abortion are very dissimilar procedures.

Id. *Gonzales* involved the federal ban on Partial Birth Abortion, which banned use of a procedure involving delivery and killing of an intact fetus, but left in place procedures involving intentional dismemberment and removal of fetus parts. *Id.*

102 *Abbott II*, 748 F.3d at 590.

103 *Id.* (noting that Planned Parenthood, for support, cited *Akron Ctr. for Reprod. Health*, 462 U.S. at 431, a case the Ninth Circuit noted had been superceded by *Casey*).

104 *Id.*

105 *Id.*

patient safety or regulation of the medical profession, focuses on the two standard inquiries in the *Casey* analysis.[106]

The application of the two-step analysis in *Abbott II* tracks *Abbott I* closely, especially as to the conclusion that the Texas admitting privileges law did not present a substantial obstacle to women's access to abortion services.[107] However, the court in *Abbott II* more strongly emphasized the traditional approach to assessing the basis for the law, and the reason for the approach. The approach is very deferential, and a court's job is simply to determine whether any conceivable rationale exists. The court explained:

> Because the determination does not lend itself to an evidentiary inquiry in court, the state is not required to "prove" that the objective of the law would be fulfilled. Most legislation deals ultimately in probabilities, the estimation of the people's representatives that a law will be beneficial to the community. Success often cannot be "proven" in advance. The court may not replace legislative predictions or calculations of probabilities with its own [without usurping] the legislative power. . . . The fact that reasonable minds can disagree on legislation, moreover, suffices to prove that the law has a rational basis. . . . [T]here is no least restrictive means component to rational basis review.[108]

The Fifth Circuit also explained why this approach is particularly appropriate in the realm of constitutional adjudication:

> If legislators' predictions about a law fail to serve their purpose, the law can be changed. Once the courts have held a law unconstitutional, however, only a constitutional amendment, or the wisdom of a majority of justices overcoming the strong pull of *stare decisis* will permit that or similar laws to again take effect.[109]

The district court clearly had not used this approach. The Fifth Circuit acknowledged the evidence presented by Planned Parenthood, which tended to show that women experiencing complications from

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106 *Id.*

107 *Id.* at 590, 595. The Fifth Circuit held the district court findings about clinic closings vague and unsupported, but also noted that even if "both clinics in the Rio Grande Valley" were to close, the evidence did not show that any woman would lack reasonable access to a clinic in Texas. *Id.* at 597–98. Travel between the four counties in the Rio Grande Valley and Corpus Christi (where abortion services remain available) involves at most 150 miles and takes less than three hours on Texas highways. *Id.* at 597. Further, 90% of women seeking abortion in Texas would be able to access abortion services within 100 miles of their residence. *Id.* at 598. The court concluded that any "burden does not fall on the vast majority of Texas women seeking abortions," and thus the regulation would "not affect a significant (much less 'large') fraction of such women, and it imposes on other women in Texas less of a burden than the waiting-period provision upheld in *Casey*." *Id.* at 600. The court also pointed to the lack of evidence showing that abortion providers would be unable to comply with the admitting privileges law. *Id.* at 598–99.

108 *Id.* at 594 (internal citations omitted).

109 *Id.*

abortions generally can be treated successfully at emergency rooms.[110] But the state had presented evidence showing that the law had the potential to improve patient care: evidence that most serious medical errors involve miscommunication that occurs when patients are handed from one caregiver to another; that an abortion provider with admitting privileges would be in a better position to know which specialists at the hospital could best help a woman with complications; and that most emergency rooms nationwide lack adequate on-call coverage by specialists such as Ob/Gyns, which very often is the type of specialist a woman with complications would need.[111] Under a traditional rational basis inquiry, then, the state's evidence clearly sufficed.[112]

The Fifth Circuit bolstered its conclusion by pointing to decisions from the Fourth and Eighth Circuits which had upheld similar admitting privileges laws,[113] and expressly discounted the Seventh Circuit's *Van Hollen* decision.[114] The Seventh Circuit had faulted the state for not producing statistical evidence that the admitting-privileges law would promote patient safety, and the Fifth Circuit objected, noting that the first-step in the *Casey* analysis of an abortion regulation "is *rational* basis review, not *empirical* basis review."[115]

Within months another lawsuit was filed, raising as-applied challenges to the Texas admitting privileges law (as applied to the McAllen and El Paso clinics), and facial and as-applied challenges to another Texas abortion regulation, namely, rules directing that minimum standards for abortion facilities must be equivalent to minimum standards for ambulatory surgery centers ("ASC").[116] In *Whole*

110 *Id.* at 591.

111 *Id.* at 592–93, 595.

112 *Id.* at 594–95. The Fifth Circuit also found that the district court wrongly analyzed whether the law was unconstitutional due to a "purpose" of presenting a substantial obstacle. The court emphasized that the burden of proof lies with parties challenging an abortion regulation, and that the district court had gotten it "plainly backwards." *Id.* at 597.

113 *Id.* at 595 (citing *Greenville Women's Clinic*, 317 F.3d at 363; *Webster*, 871 F.2d at 1381).

114 *Id.* at 596. In part this was because *Van Hollen* involved facts that more readily warranted granting a preliminary injunction regardless of the decision on the merits, e.g., the admitting privileges law at issue had been enacted on a Friday and became effective on the following Monday—meaning that access to abortion services certainly would be disrupted at least in the short-term. But the Fifth Circuit also disagreed with the approach used by the court in *Van Hollen*. *Id.*

115 *Id.* (noting that the court in *Van Hollen* had "ignored case law from its own circuit holding, consistent with the Supreme Court's oft-repeated guidance, that there is 'never a role for evidentiary proceedings' under rational basis review").

116 *Lakey*, 46 F. Supp. 3d at 676–78 (noting that the ambulatory-surgical center requirements are codified at Tex. Health & Safety Code Ann. § 245.010(a) & 25 Tex. Admin. Code § 139.40). All plaintiffs in the case challenged the ambulatory-surgical-center (ASC) provi-

Woman's Health v. Lakey, the district court enjoined the laws, finding that the ASC provision places an undue burden on women throughout Texas; that the ASC and the admitting privileges law, as-applied to the McAllen and El Paso clinics, place an undue burden on women in the Rio Grande Valley; and that the provisions together place an undue burden on women throughout Texas[117] (a finding resulting in an order in direct contradiction to *Abbott II*'s rejection of a facial challenge to the admitting privileges law).[118]

In reaching these conclusions, the district court defiantly departed from Fifth Circuit precedent. The district court acknowledged that, in light of *Abbott II*'s clarification, both the ASC and admitting privileges requirements "surmount[ed] the low bar of rational-basis review."[119] As such, the court's conclusions would flow from the substantial obstacle analysis. In concluding that both laws presented a substantial obstacle, the court focused on clinic closures and the fact that the ASC requirements would make it difficult for new abortion facilities to open.[120] The court found that "a signification number of the reproductive-age female population of Texas [would] need to travel considerably further in order to exercise its right to a legal previability abortion," and discounted the state's claim that facilities remaining open could handle the demand.[121] To bolster its finding that increased travel distances rose to the level of a substantial obstacle, the court pointed to a host of other practical difficulties that might also be experienced by women: "lack of availability of child care, unreliability of transportation," inability to get "time off from work, immigration status and inability to pass border checkpoints, poverty," the time and expenses associated with increased distances, and "other, inarticulable psychological obstacles."[122] According to the court, "[t]hese factors combine with increased travel distances to establish a *de facto* barrier to obtaining an abortion for a large number of Texas women of reproductive age who *might* choose to seek a legal

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sion on its face and as applied to medication abortions, and the admitting privileges requirement ASC provision was challenged as-applied to the McAllen and El Paso Clinics. *Id.* at 678.

117 *Id.* at 687.

118 Whole Woman's Health v. Lakey, 769 F.3d 285, 293 (5th Cir. 2014), *vacated in part*, 135 S. Ct. 399 (2014).

119 *Lakey*, 46 F. Supp. 3d at 680. Although the court expressly limited the finding to the as-applied challenges of the El Paso and Rio Grande Valley clinics, *id.*, the finding logically would apply to all challenges in the lawsuit.

120 *Id.* at 682, 684.

121 *Id.* at 681–82.

122 *Id.* at 682–83.

abortion."[123] Yet, in reality, the court pointed only to factors relating to practical difficulties and expenses; effects that, under *Casey*'s benchmarks, do not present a substantial obstacle.[124]

To bolster its conclusion, the district court again introduced the balancing inquiry into the analysis. The court assessed the empirical basis for the state's argument that the laws furthered the state's interests in the health and safety of women seeking abortions in Texas.[125] Regarding the admitting privileges law, the court found that—despite the potential for increased safety recognized by the Fifth Circuit in *Abbott II*—the law nonetheless fell short "compared to the burden the requirement imposes on women [in the Rio Grande and El Paso] areas."[126] The court characterized the credentialing rational as "weak and speculative,"[127] and thus concluded:

> After thorough consideration of the severity of the burdens presented by the act's two requirements, the court concludes that the requirements, independently and when viewed as they operate together, have the ultimate effect of erecting a substantial obstacle for women in Texas who seek to obtain a previability abortion. . . . Finally, the court [also] concludes that the ambulatory-surgical-center requirement imposes an undue burden specifically as applied to the provision of medication abortions, where any medical justification for the requirement is at its absolute weakest in comparison with the heavy burden it imposes.[128]

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123 *Id.* at 683 (emphasis in original). To counter the state's argument that the Fifth Circuit in *Abbott I* and *II* recognized a de facto safe harbor of 150 miles, the court stated: "It is overly simplistic and reductionist to conclude that absolute distances or theoretical travel times measured under ideal circumstances act identically on a population as diverse as Texas's. They simply do not." *Id.* at 682–83.

124 *Id.* The court also did not frame its conclusion in the terms the Fifth Circuit used in *Abbott II*: there is no assessment of whether "the burden," although impacting significant numbers of women, "fall[s] on the vast majority of Texas women seeking abortions." *Abbott II*, 748 F.3d at 600.

125 *Lakey*, 46 F. Supp. 3d at 684. The court credited the plaintiffs' evidence that abortion in Texas before enactment of the laws was relatively safe in terms of "low rates of serious complications" or deaths, safer than "many common medical procedures not subject to such intense regulation and scrutiny," and that risks are not lower for patients undergoing abortions at ambulatory surgical centers. *Id.* Regarding the ASC requirements, the court also noted that many of the facility standards have only a "tangential relationship to patient safety in the context of abortion;" and that, because the effect of the laws included a potential for delay in access abortion services, any potential for increased safety was offset by risks associated with delay. *Id.*

126 *Id.* at 685 (concluding that "the heavy burden imposed on the women of West Texas, El Paso, and the Rio Grande Valley by the admitting privileges requirement is not appropriately balanced by a credible medical or health rationale").

127 *Id.*

128 *Id.* at 685–86.

The resulting order effectively enjoined enforcement state-wide of both the admitting privileges and ASC requirements.[129]

The state again sought stay of the injunctions pending appeal and the Fifth Circuit in *Lakey* held that the state had made a strong showing of likelihood of success on the merits as to all but one claim.[130] In the decision on the merits, *Whole Woman's Health v. Cole*, the Fifth Circuit opinion largely parallels the decision in *Lakey*.[131] In both decisions the court expressly rejected the Balancing Approach.

The court first noted that "facial invalidation of the admitting privileges [law] was directly contrary" to *Abbott II* and thus clearly wrong.[132] As to the ASC requirements, because the trial court had acknowledged that the provision surmounted rational basis review, the Fifth Circuit focused only on the second prong of the *Casey* analysis; and, further, focused primarily on whether the requirements had the "effect of placing a substantial obstacle in the path of a woman seeking an abortion."[133]

The Fifth Circuit highlighted several errors in the district court's analysis: e.g., the court further diluted the facial challenge standard, as a matter of both the legal standard[134] and the assessment of the ev-

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129 *Id.* at 687–88*; see also Lakey*, 769 F.3d at 289–92, *vacated in part*, 135 S.Ct. 399 (2014) (highlighting uncertainty regarding the district court's order, and electing to address a stay as to injunctions of both laws "on their face" and as applied to the McAllen and El Paso clinics, and of the ASC requirement as applied to medication abortions).

130 *Lakey*, 769 F.3d at 301.

131 790 F.3d 563 (5th Cir. 2015), *mandate stayed*, 135 S. Ct. 2923 (2015). In *Cole*, the court vacated the district court's enjoinment of enforcement of: (i) the admitting privileges requirement and the ACS requirement "as applied to 'all women seeking a previability abortion,'" *id.* at 567; (ii) the ASC requirement as applied to medication abortions, *id.* at 591; and (iii) the admitting privileges and ACS requirement as-applied to the El Paso abortion facility, *id.* at 567. The court allowed enforcement, but narrowed the district court's order, as to the admitting privileges and the ACS requirements as-applied to the McAllen facility. *Id.* at 594–96.

132 *Cole*, 790 F.3d at 581; *Lakey*, 769 F.3d at 293.

133 *Cole*, 790 F.3d at 584; *Lakey*, 769 F.3d at 294. The district court had found that the ASC requirement was unconstitutional under the purpose inquiry, and the Fifth Circuit rejected this view: "the Texas Legislature's stated purpose was to improve patient safety;" courts may not "second guess a legislature's stated purposes absent clear and compelling evidence to the contrary"; and the district court cited no such evidence and reached a conclusion about disparate treatment based on an erroneous interpretation of the regulatory scheme. *Cole*, 790 F.3d at 584–86; *Lakey*, 769 F.3d at 294–95.

134 *Lakey*, 769 F.3d at 296. Applying "neither the Fifth Circuit's 'no set of circumstances' test nor *Casey*'s 'large fraction' test," the district court instead rested its conclusion on its finding that "'a *significant number* of the reproductive-age female population of Texas [would] need to travel considerably further in order to exercise its right to a legal previability abortion.'" *Id.* (emphasis in original).

idence;[135] the court improperly relied on a multitude of "practical concerns" associated with increased travel, when a proper analysis must be on obstacles imposed by the law itself;[136] and the court's finding regarding the inability of remaining clinics to serve women seeking abortion was not supported by evidence in the record.[137] While the record evidence did suggest that the overall cost of accessing an abortion provider likely would increase, the Fifth Circuit reiterated Supreme Court precedent noting that a law that serves a valid purpose is not facially invalid due to an "incidental effect of making it more difficult or more expensive to procure an abortion."[138]

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135 *Id.* at 298. To the appellate court, evidence presented during the trial was not sufficient to show that a "large fraction" of women seeking abortion would face a substantial obstacle due to the ASC requirements. The Fifth Circuit explained that the numbers presented by plaintiffs' expert suggested that, after the clinic closures, only 16.7% of women seeking an abortion would live more than 150 miles from the nearest clinic, and that assuming 150 miles is the relevant cut-off, this surely would not suffice for facial invalidation of an abortion regulation. The court held, "The general standard for facial challenges allows courts to facially invalidate a statute only if 'no possible application of the challenged law would be constitutional.' In other words, the law must be unconstitutional in 100% of its applications. We decline to interpret *Casey* as changing the threshold for facial challenges from 100% to 17%." *Cole*, 790 F.3d at 588; *Lakey*, 769 F.3d at 298 (internal citations omitted). The Fifth Circuit also rejected the plaintiffs' argument that would have narrowed the appropriate denominator in the "large fraction analysis" to only "women 'who could have accessed abortion services in Texas prior to the implementation of the challenged requirements, but who will face increased obstacles as a result of the law.'" *Id.* at 299. The Fifth Circuit explained that this approach makes the test "merely a tautology." *Cole*, 790 F.3d at 589; *Lakey*, 769 F.3d at 299. That is, to narrow the denominator to only those women who plaintiffs argue will face an undue burden would always result in a large fraction: "The demoninator would be women that Plaintiffs claim are unduly burdened by the statute, and the numerator would be the same." *Cole*, 790 F.3d at 589; *Lakey*, 769 F.3d at 299.

136 *Cole*, 790 F.3d at 589 (quoting Harris v. McRae, 448 U.S. 297, 316 (1980)); *Lakey*, 769 F.3d at 299; Maher v. Roe, 432 U.S. 464, 474 (1977) ("The indigency that may make it difficult—and in some cases, perhaps, impossible—for some women to have abortions is neither created nor in any way affected by the [state's] regulation.").

137 *Lakey*, 769 F.3d at 299–300 & n.17 (noting that "there [was] no evidence in the record that women have faced delays, have been turned away for lack of capacity, or will face delays in the future"); *see also* Cole, 790 F.3d at 590.

138 *Lakey*, 769 F.3d at 300. The Fifth Circuit in *Cole* also disagreed with the district court's conclusion as to the burden resulting from the admitting privileges and ASC requirements as-applied to the El Paso facility. The court noted that an effect of the laws was the closure of the facility, and that women in El Paso would face an increased travel distance greater than 500 miles if they choose to use a clinic in Texas. *Cole*, 790 F.3d at 596, 598. However, a clinic existed within the same metropolitan area as El Paso—across the state line in Santa Teresa, New Mexico. *Id.* at 597–98. Although the court in *Lakey* decided it was constrained from considering the Santa Teresa clinic due to a recent Fifth Circuit opinion holding that the focus must remain on clinics within Texas, the court in *Cole* distinguished the case. 790 F.3d at 597 (noting that Texas still had some abortion providers within the state) (citing *Lakey*, 769 F.3d at 304 (citing Jackson Women's Health Org. v. Currier, 760 F.3d 448, 457–58 (5th Cir. 2014)).

In rejecting the Balancing Approach, the Fifth Circuit again acknowledged that other circuits have used the approach, but reiterated *Abbott II*'s emphasis on the inappropriateness "of second-guessing the wisdom of the legislature in a constitutional challenge."[139] The Fifth Circuit in *Lakey* also supplemented the reasoning provided in *Abbott II*, explaining that, in essence, "the district court's approach ratchets up rational basis review into a pseudo-strict-scrutiny approach . . . [and] we have no authority by which to turn rational basis into strict scrutiny under the guise of the undue burden inquiry."[140]

Although this characterization is not as accurate or helpful as it could be, it makes a valid point. The district court did not purport to conduct the first step of the *Casey* analysis, and thus the district court's use of the Balancing Approach did not ratchet up the inquiry into the legislative basis for the laws. Nonetheless, the Balancing Approach radically changes the *Casey* analysis and does so by introducing aspects of strict scrutiny analysis: lower courts clearly are ratcheting up the relational inquiry by requiring empirical evidence showing a substantial relationship to important state interests, and are critical if the laws are not narrowly tailored.

In the *Abbott* and *Lakey* litigation, the Fifth Circuit advanced three main reasons for rejecting incorporation of a balancing approach into the *Casey* analysis: (1) there is no reason to assess the constitutionality of abortion laws serving a state interest in women's health and

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139 *Lakey*, 769 F.3d at 297 ("The district court's weighing of the interests basically boils down to the district court's own view that the facilities are already safe for women and that the [ASC] provision, when implemented, will not serve to promote women's health."). The court also rejected the plaintiffs' claim that an earlier Fifth Circuit decision, *Barnes v. Mississippi*, 992 F.2d 1335, 1339 (5th Cir. 1993), supported use of the balancing approach. *Id.* at 297–98. *See also Cole*, 790 F.3d at 587 (quoting *Abbott II*, 748 F.3d at 594; *Gonzales*, 550 U.S. at 163, 164, 166) (emphasizing that medical judgments are generally decided by the legislature).

140 *Lakey*, 769 F.3d at 297, n.11 (citing *Abbott II*, 748 F.3d at 594) (noting that "[t]his is particularly problematic in a facial challenge to a newly enacted law," given that "most legislation deals ultimately in probabilities, the estimation of the people's representatives that a law will be beneficial to the community"—and thus that "[s]uccess often cannot be 'proven' in advance"); *see also Cole*, 790 F.3d at 587 (quoting *Lakey*, 769 F.3d at 297).

A dissenting opinion in *Lakey* did not view *Abbott II* as precluding the district court's approach. The dissent construed *Abbott II* as rejecting empirical assessment as part of the rational basis analysis (step-one of the *Casey* analysis), but as leaving the door open to an assessment of the weight of the state's interest as part of the "undue burden" prong. 769 F.3d at 307 (Higginson, J., concurring in part and dissenting in part). The dissenting opinion's primary rationale for affirming use of the balancing analysis, however, was to avoid a split in circuit authority; but the opinion also cites—as have other courts—the statement in *Casey* that "*[u]nnecessary* health regulations that have the purpose or effect of presenting a substantial obstacle . . . impose an undue burden." *Id.* at 307.

safety differently from laws serving a state interest in the life of the unborn child; (2) the relational inquiry in the *Casey* analysis does not require supporting empirical evidence and should be deferential to state legislatures, particularly in the context of constitutional challenges to the laws; and (3) the Balancing Approach is an unwarranted back-door entry to strict scrutiny analysis of abortion regulation, and results in significant dilution of the substantial obstacle test.

III. ASSESSMENT OF THEORIES

As noted, Judge Posner in *Van Hollen* provided no analysis or explanation and cited to no authority for modifying the *Casey* analysis.[141] Rather, without question or explanation he simply adopted a view of the law as articulated and applied by the district court.[142] The district court had provided at least some explanation.[143] Additionally, courts in two decisions issued in 2014 have provided thoughtful theories in support of the Balancing Approach: the Ninth Circuit Court of Appeals in *Planned Parenthood Arizona, Inc. v. Humble*,[144] and the District Court for the Middle District of Alabama in *Planned Parenthood Southeast, Inc. v. Strange*.[145] The explanations are but the flip side of the reasons identified by the Fifth Circuit for declining to modify the *Casey* analysis. The theories turn on a perceived need to treat laws advancing women's health and safety differently from laws advancing respect for unborn human life; on a reading of *Casey* and *Gonzales* that requires courts to balance or reconcile legitimate state interests and a women's interest in access to abortion as part and parcel of *Casey's* undue burden analysis; and on a reading of *Gonzales* that requires states to produce evidence of both the need for the law to protect women's health and the extent to which the law actually will

141 *See supra* notes 67–68 and accompanying text; *see also Van Hollen*, 738 F.3d at 798. After noting that the *Casey* analysis involves two distinct steps, Judge Posner cited important Supreme Court cases (*Casey*, *Carhart*, and *Mazurek*). *Id.* However, he did not attempt to tie his modification of the undue burden analysis to those cases. *Id.* at 798–99.

142 *Id.* The district court's conclusion regarding the second prong of the *Casey* analysis clearly hinged on the balancing approach: "Even if there were some evidence that the admitting privileges requirement would actually further women's health, any benefit is greatly outweighed by the burdens caused . . . ." *Van Hollen*, 2013 WL 3989238, at *13, 19.

143 *Id.* at *9.

144 753 F.3d 905 (9th Cir. 2014).

145 *See Strange*, 33 F. Supp. 3d 1330, 1332–33 (M.D. Ala. 2014) (deciding, after a ten-day trial, that the challenged state law created a substantial obstacle for women seeking abortions) *order amended*, No. 2:13cv405–MHT, 2014 WL 5426891 (M.D. Ala. Oct 24, 2014,), *and supplemented*, 33 F. Supp. 3d 1381 (M.D. Ala. 2014)); *Strange*, 9 F. Supp. 3d at 1275, 1299 (resolving parties' motions for summary judgment, and deciding a trial was warranted on Planned Parenthood's undue burden claim).

succeed. This part of the Article describes and assesses the merits of the theories which, in the end, hinge on proper interpretation of *Casey* and *Gonzales*.

A. Reading Casey *as Requiring the Balancing Approach*

1. *A Purported Directive to Analyze Health Laws Differently*

The need to treat health laws differently as a reason for modifying the *Casey* analysis was most clearly articulated and relied on by the Ninth Circuit in the *Humble* decision. As noted, the court in *Humble* faulted the district court for not following an earlier case purportedly refining the *Casey* analysis, namely, *Tucson Woman's Clinic v. Eden*.[146] The court in *Humble* read *Eden* as requiring the Balancing Approach because of the nature of the law being challenged. The law at issue in *Humble* (requiring medication induced abortions to be administered in compliance with the on-label regimen) was enacted to advance state interests related to women's health. In *Eden*, the Ninth Circuit had suggested that the undue burden analysis might not apply in the same way to a challenge involving women's health laws. Specifically, the Ninth Circuit in *Eden* had made the following statement.

> [*Casey*'s] application of the "undue burden" standard is often not extendable in obvious ways to the context of a law purporting to promote maternal health.
>
> In the context of a law purporting to promote fetal life, whatever obstacles that law places in the way of women seeking abortions logically serve the interest the law purports to promote—fetal life—because they will prevent some women from obtaining abortions. By contrast, in the context of a law purporting to promote maternal health, a law that is poorly drafted or which is a pretext for anti-abortion regulation can both place obstacles in the way of women seeking abortions *and* fail to serve the purported interest very closely, or at all.[147]

The court in *Humble* interpreted *Eden* as thereby establishing a modified way of applying the substantial obstacle analysis, wherein "the extent of the burden a law imposes on a woman's right to abortion [is compared] with the strength of the state's justification for the law [and] [t]he more substantial the burden, the stronger the state's justification for the law must be to satisfy the undue burden test; [and] conversely, the stronger the state's justification, the greater the bur-

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146 *Humble*, 753 F.3d at 912–14 (discussing *Eden*, 379 F.3d at 539–40, 542); *see supra* notes 96–97 and accompanying text.

147 *Id.* at 912 (quoting *Eden*, 379 F.3d at 539–40 (citations omitted)).

den may be before it becomes 'undue.'"[148] The Ninth Circuit in *Humble* expressly claimed that the court in *Eden* "described" this approach to applying the substantial obstacle analysis.[149]

This basis for the Balancing Approach is untenable. The Ninth Circuit in *Eden* did not describe the undue burden analysis in the way claimed by the court in *Humble*, and clearly did not apply it in that way. Rather, the court in *Eden* simply highlighted the importance of ensuring that a law purporting to protect the state's interest in women's health does in fact further that interest. In doing so, the court emphasized two aspects of the *Casey* analysis. The court noted that the *Casey* plurality expressly indicated that the substantial obstacle analysis applies even as to health regulations.[150] The court in *Eden* also noted that, following *Casey*, rational basis review of a state law might in some cases eliminate the need for the substantial obstacle analysis: "the undue burden standard is not triggered at all if a purported health regulation fails to rationally promote an interest in maternal health on its face, as would be the case where the state required physicians to provide false or misleading information to women seeking abortions."[151]

Because the challenged laws in *Eden* undeniably constituted a "typical set of health and safety regulations," the Ninth Circuit focused on the second prong of the *Casey* analysis.[152] However, nothing in the court's discussion of the substantial obstacle analysis reflects applica-

148 *Id.* at 912–13 ("[In hard cases], we must weigh the burdens against the state's justification, asking whether and to what extent the challenged regulation actually advances the state's interests. If a burden significantly exceeds what is necessary to advance the state's interests, it is 'undue.'" (citing *Eden*, 379 F.3d at 542 and WEBSTER'S THIRD NEW INT'L DICTIONARY 2492 (1993) (noting that "undue" is defined as "excessive" or "unwarranted"))).

149 *Id.* at 912.

150 *Eden*, 379 F.3d at 539. As to this point, the court quoted the following confusing statement from *Casey*: "As with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion. Unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right." *Id.* (quoting *Casey*, 505 U.S. at 878).

151 *Id.* at 540 (quoting *Casey*, 505 U.S. at 882) (noting, that"[i]f the information the State requires to be made available to the woman is truthful and not misleading, the requirement may be permissible"). The court also relied on *Mazurek v. Armstrong*, 520 U.S. 968 (1997), to make this point. The court in *Eden* explained that, in *Mazurek*, the Supreme Court applied the substantial obstacle analysis to a law "*even* in the face of evidence that it was objectively unnecessary." *Eden*, 379 F.3d at 540–41.

152 *Eden*, 379 F.3d at 537, 541 (noting the laws required facilities performing five or more first trimester abortions in any month or any second or third trimester abortion to be licensed as health care institutions, and also imposed other requirements relating to administration, personnel, staffing, the procedure itself, transfer and discharge, medical records, equipment, and physical facilities).

tion of the balancing attributed to *Eden* by the court in *Humble*. Rather, the court in *Eden* reversed the lower court decision because the district court failed to make inferences regarding increased costs, failed to consider whether a significant increase in cost could, alone, present a substantial obstacle, and failed to consider other potential burdens allegedly caused by the regulations.[153] Thus, although the court in *Eden* certainly used language that could be used to support modifying the *Casey* analysis,[154] the *Eden* court did not articulate or apply a Balancing Approach.

Perhaps recognizing its exaggeration of *Eden*, the Ninth Circuit also expressly sought to connect the balancing to *Casey*. Foremost, the court latched onto the statement in *Casey* that "[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right."[155] The court in *Humble* elaborated on this statement by noting: "Whether a regulation is necessary depends on whether and how well it serves the state's interest."[156] The court also pulled another sentence from *Casey*: "[T]he 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."[157] The court extended this idea to laws enacted to protect women's health: according to the Ninth Circuit, "they 'must be calculated' to advance women's health, 'not hinder it.'"[158]

This basis for the Balancing Approach also is unpersuasive. Latching onto one sentence in *Casey* as a reason for treating health laws differently is poor legal analysis. Sound analysis depends not on plucking one sentence from a Supreme Court case, but on a full analysis of the relevant portions of the key governing decisions, namely, *Casey* and *Gonzales*.

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153 *Id.* at 541–43.

154 In addition to the text the *Humble* court relied on, the court in *Eden* also noted: "Indeed, in his concurring opinion in *Casey*, Justice Stevens indicated that a burden need not be onerous to be undue, if it is not supported by a legitimate state interest." *Eden*, 379 F.3d at 540 (citing *Casey*, 505 U.S. at 920–21 (Stevens, J., concurring in part and dissenting in part)). The court in *Humble* did not rely on this statement in *Eden*, presumably recognizing that Justice Stevens's view could not legitimately be taken as a good indication of the views reflected in the *Casey* plurality opinion.

155 *Humble*, 753 F.3d at 913 (quoting *Casey*, 505 U.S. at 878 (emphasis omitted)).

156 *Id.*

157 *Id.* (quoting *Casey*, 505 U.S. at 877).

158 *Id.* The court's citation to *Casey* for the extension to health laws is an overstatement. At most the proper citation signal would have been "cf."

Casey's explanation of the undue burden analysis spans five and one-half pages.[159] The sentence relied on by the Ninth Circuit is in one paragraph in Justice O'Connor's "summary."[160] In the lengthy discussion preceding the summary, Justice O'Connor expressly makes clear that the undue burden analysis will apply to all laws bearing on abortion. For example, in introducing the analysis Justice O'Connor notes that "[n]umerous forms of state regulation" might have the incidental effect of increasing the cost or decreasing the availability of abortion services, and "[t]he fact that a law which serves a valid purpose . . . has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it."[161] More of the discussion speaks of the state's interest in the unborn human life within the woman, because Justice O'Connor was concerned in particular with remedying the undervaluation of that state interest in *Roe* and subsequent Supreme Court cases.[162] But Justice O'Connor clearly intended the proposed analysis to apply to any state law bearing on the decision to abort. She stated:

> [I]t is an overstatement to describe [the right at stake] as a right to decide whether to have an abortion "without interference from the State." *All abortion regulations* interfere to some degree with a woman's ability to decide whether to terminate her pregnancy. . . . Not all governmental intrusion is of necessity unwarranted . . . .[163]

Similarly, in a closing paragraph Justice O'Connor states that "[s]ome guiding principles should emerge" from the discussion.[164] She first addresses laws that reflect the state's "profound respect for the life of the unborn."[165] But she concludes with a reference to health laws: "Regulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden."[166] Giving dispositive weight to one sentence in a "summary" of the opinion thus reflects poor legal analysis. Justice O'Connor's overall discussion simply does not create a distinction between laws based on the particular state interest at stake.

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159 *Casey*, 505 U.S. at 874–79.

160 *See id.* at 878 (contrasting permissive health regulations to further health and safety of mother with unnecessary health regulations that impose an undue burden).

161 *Id.* at 874.

162 *See, e.g.*, *id.* at 875–77 (clarifying the distinction between regulating abortions and denying women of the right to choose whether to terminate pregnancy).

163 *Id.* at 875 (citations omitted) (emphasis added).

164 *Id.* at 877.

165 *Id.* at 877–78.

166 *Id.* at 878.

Gonzales confirms this reading of *Casey*. The ban in *Gonzales* served a variety of state interests: protecting and preserving unborn human life; maintaining the integrity of the medical profession and society's confidence in the medical community; fostering a woman's interest in fully understanding the brutal nature of the banned abortion procedure; and avoiding a "coursening of society" associated with freely allowing a procedure akin to infanticide.[167] Yet the analysis in *Gonzales* did not turn on the nature of the interest at stake. Rather, the analysis focused on whether the ban furthered in some way those legitimate state interests.[168] To that extent, the Ninth Circuit's statement that health laws must be "calculated" to advance women's health is not wholly off base. But upon concluding that the ban did further the many interests at stake, the Court in *Gonzales* simply focused on the effect of the ban.[169] As explained in greater depth in the next Part, the analysis in *Gonzales* did not involve any balancing or any assessment of "whether and how well" the law served the state interests.[170] Therefore, the Ninth Circuit's view of *Casey* as requiring a Balancing Approach for laws designed to foster women's health is undermined by careful reading of *Casey* and *Gonzales*.[171]

2. *Balancing in* Casey

Rather than focusing on one sentence in *Casey*, the district court in *Strange* relied more heavily on the overall balancing that is reflected in *Casey*. The court in *Strange* addressed the constitutionality of an Alabama admitting privileges law. [172] The law required every physi-

167 *See Gonzales*, 550 U.S. at 157–160 (discussing congressional intent).

168 *See id.* (declaring explicitly that congressional goals were furthered).

169 *See id.* (drawing inferences about potential changes in the practice of late term abortions).

170 *See infra* notes 187–237 and accompanying text.

171 Further, even if it is true that, as stated by the Ninth Circuit in *Eden*, in the context of a law purporting to promote maternal health, "a law that is poorly drafted or which is a pretext for anti-abortion regulation can both place obstacles in the way of women seeking abortions and fail to serve the purported interest very closely, or at all," 379 F.3d at 540, it is not clear why the balancing approach becomes the appropriate solution. The decisions in *Casey* and *Gonzales* emphasize the need for abortion jurisprudence to accommodate laws furthering legitimate state interests. The decisions make clear that such laws should be upheld unless they have the effect of presenting a substantial obstacle. If concern exists about whether a state law is a "pretext" for antiabortion regulation, the decisions—especially *Gonzales*—suggest that the task for courts is careful scrutiny as to the relational inquiry. But the decisions do not support an empirical inquiry or an assessment of the extent to which the laws further the state interests.

172 *See Strange*, 9 F. Supp. 3d at 1274–75 (denying summary judgment against substantive due process claim on similar admitting privileges law).

cian who performs either medication or surgical abortions to have staff privileges "at an acute care hospital within the same standard metropolitan statistical area as the facility is located" and that would permit the physician to perform procedures "reasonably necessary to treat abortion related complications."[173] As in the *Van Hollen* and *Humble* cases, adoption of the Balancing Approach proved determinative. The court engaged in a lengthy analysis, and reached a conclusion similar to that in *Van Hollen*: that the Alabama staff privileges law created a substantial obstacle because the state's justifications were weak and the burden imposed severe.

The district court in *Strange* viewed *Casey* as establishing and applying the Balancing Approach. The court did not rely as heavily as the *Humble* court on the confusing sentence in *Casey* regarding "unnecessary health regulations," but, rather, relied in part on the *Casey* opinion's overall objective of finding a "middle way": a way between Justice Blackmun's plea for preservation of *Roe*'s strict scrutiny analysis and Justice Rehnquist's call for use of rational basis review.[174] A middle ground between an approach that undervalues the state's legitimate interests in regulating abortion and an approach that is overly deferential to state regulation.[175] The court in *Strange* repeatedly characterizes *Casey*'s middle approach as involving a balancing of both a woman's right to an abortion and state interests; and points to that balancing as dictating use of the Balancing Approach.[176]

And of course it is true that *Casey* involved balancing. In *Casey*, Justice O'Connor sought to preserve the essence of *Roe* while modifying abortion jurisprudence in a way that would better accommodate state laws furthering legitimate state interests. In Part IV of the opinion, Justice O'Connor characterized *Roe* as establishing that a woman's liberty interest includes some freedom to terminate her preg-

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173 *See id.* at 1276 (quoting § 4(c) of the Women's Health and Safety Act, codified at 1975 Ala. Code § 26-23E-4(c)).

174 *See id.* at 1281–83. (arguing that the Justice O'Connor decision is best understood in response to both dissenting opinions).

175 *Id.* at 1280.

176 *Id.* at 1282–83. The court points to *Casey*'s basic explanation that the undue burden analysis focuses on whether the challenged law poses a substantial obstacle, *id.* at 1282 (citing *Casey*, 505 U.S. at 877), to (c) of Justice O'Connor's "summary" of her explanation of the undue burden analysis (which includes the confusing sentence about "unnecessary" health laws), *id.* (citing *Casey*, 505 U.S. at 878), and also to the fact that the undue burden analysis is an approach between the retention of strict scrutiny championed by Justice Blackmun and use of only the rational basis inquiry as championed by Justice William Rehquist. *Id.* at 1282–83 (citing *Casey*, 505 U.S. at 926 (Blackmun, J., concurring in part and in the judgment and dissenting in part); *Casey*, 505 U.S. at 966 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part)).

nancy, but also affirmed that a woman's freedom must give way to some state laws designed to further legitimate state interests.[177] Justice O'Connor retained viability as the point before which the woman's freedom to terminate exists.[178] That is, a state may not prohibit abortion previability. In large part the retention of viability as the key temporal point limiting a state ban was due to O'Connor's view of stare decisis: "We have twice reaffirmed [*Roe*] in the face of great opposition."[179] But she also repeated the explanation given in *Roe*: that viability is the point when there is a

> realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman. . . . And there is no other line than viability which is more workable.[180]

It is thus fair to characterize Justice O'Connor's decision to retain the point of viability as involving a balancing: according to *Roe* and Justice O'Connor in *Casey*, it is at this point that the state's interest can logically be said to *override* a woman's interest in terminating her pregnancy, i.e., at this point the state's interest becomes sufficiently weighty to justify a ban on termination.[181]

Similarly, when Justice O'Connor rejected *Roe*'s trimester framework which precluded any state regulation in the first trimester, and most other laws previability, the emerging question involved the "weight" of the state's interest in protecting human life; i.e., identifying when a state regulation of abortion ought to be allowed notwithstanding some effect on access to abortion.[182] Justice O'Connor rejected *Roe*'s crabbed approach and the trimester framework because they undervalued state interests and overvalued the women's interest at stake.[183] She replaced the trimester framework with the undue burden analysis.[184] This also involved a balancing. In her own words, the undue burden analysis "is the appropriate means of reconciling

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177 *Casey*, 505 U.S. at 869.

178 *Id.* at 870.

179 *Id.* (citing *Thornburgh*, 476 U.S. at 759; *Akron I*, 462 U.S. at 419–20).

180 *Id.* (citing *Roe*, 410 U.S. at 163).

181 *Id.* (upholding *Roe* while overruling cases that did not adequately weigh the state's interest in regulating abortion); *see also Roe*, 410 U.S. at 163 (declaring viability as the point at which the state's "important and legitimate interest in potential life" is compelling enough to justify regulation).

182 *Casey*, 505 U.S. at 871 (noting that the "weight to be given the state interest [in protecting human life], not the strength of the woman's interest, was the difficult question faced in *Roe*," and that the Court in *Roe* discounted the state interest).

183 *Id.* at 872–73.

184 *See id.* at 873–76; *see also id.* at 877–79.

the State's interest with the woman's constitutionally protected liberty."[185]

Thus, yes, the *Casey* opinion reflects balancing. Balancing is what led to adoption of the undue burden analysis. The question, however, is whether *Casey*'s undue burden analysis itself involves balancing.

The key sentences from *Casey* describing the undue burden analysis were set out in Part I of this Article. Nothing in Justice O'Connor's description of the undue burden analysis suggests that the analysis involves weighing the extent to which a particular law achieves or furthers a state interest and balancing that against the burden the law imposes on access to abortion. Rather, in picking the undue burden analysis, Justice O'Connor in essence determined that state laws *should* be allowed as long as they further a legitimate state interest—and so long as they do not have the effect of presenting a substantial obstacle to the woman's interest in being able to legally decide to terminate a pregnancy.

> What is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so. Regulations which do no more than create a structural mechanism by which the State . . . may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's right to choose. . . . Regulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden.[186]

Stated another way, Justice O'Connor's approach is the flip side of the approach in *Roe*. Under *Roe*, state laws promoting interests such as the interest in human life or the interest in health and safety or in regulating the medical profession were never sufficiently weighty in the first trimester, and rarely ever sufficiently weighty previability. Under *Casey*, state laws furthering legitimate interests should be respected and given effect as long as they do not pose a substantial obstacle.

The approach nonetheless is rightly considered a "middle-way." Due to the addition of the substantial obstacle inquiry it provides more protection for the woman's interest than the mere rational basis review approach advocated by Justice Rehnquist. It also provides more room for state regulation than the strict scrutiny approach advocated by Justices Blackmun and Stevens by rejecting the need for a state to show that the interest is compelling or that the law is narrowly tailored. But *Casey*'s adoption of a middle-way does not support use of the Balancing Approach as part of the undue burden analysis.

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185 *Id.* at 876.

186 *Id.* at 877–78.

Further, the Balancing Approach substantially undermines the balance struck in *Casey*, and reintroduces aspects of strict scrutiny analysis clearly rejected in *Casey*.

B. Reading Gonzales *as Requiring Balancing and Empirical Evidence*

The Ninth Circuit in *Humble* and the district court in *Van Hollen* point to *Gonzales* for support of the Balancing Approach and, in particular, as requiring heightened scrutiny of the basis for a challenged abortion regulation. Reading *Gonzales* as a reason for modifying the *Casey* analysis was most clearly articulated and relied on by the district court in *Van Hollen*.[187] As noted, *Van Hollen* involved a challenge to a Wisconsin law prohibiting a physician from performing an abortion unless the physician has admitting privileges at a hospital no more than thirty miles from the clinic in which the abortion is performed. The discussion of *Van Hollen* in Part II focused on Judge Posner's review of the state's justification of the law and his endorsement of the Balancing Approach. Here, the focus is on the explanation of the governing law provided by the district court—which Judge Posner implicitly affirmed.

1. *Balancing in* Gonzales

The district court in *Van Hollen* set the stage for the Balancing Approach by its explanation of *Casey*. In explaining the undue burden analysis, the court noted that in *Casey* the Supreme Court "appears to have stepped back from requiring a 'compelling state interest' to justify any limitation on access to abortion," but that "[h]ow far back remains open to debate"[188]; and that the Court in *Casey* "expressly adopted [a] new, arguably less rigorous 'undue burden' standard," and "acknowledged the government's latitude to regulate abortion even during the first trimester for reasons of maternal health or fetal viability."[189] But, the court also emphasized that *Casey* did not overrule *Roe v. Wade*.[190]

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187 *See Van Hollen*, 2013 WL 3989238, at *15.

188 *Id.* at *12.

189 *Id.*

190 *Id.* The court's explanation is clearly erroneous on at least two counts. First, the "undue burden" analysis was not expressly adopted by the Court in *Casey*, given that Part IV of Justice O'Connor's opinion did not garner a majority of the Court. *See supra* notes 33–34 and accompanying text. Second, the court also states that, under current Supreme Court jurisprudence, "a woman's right to an abortion remains fundamental to the point of viability." *Van Hollen*, 2013 WL 3989238, at *13. This is incorrect, given that at least seven Justices in *Casey* backed away from *Roe*'s "overvaluation" of a woman's legitimate interest

Thereafter, the district court focused on *Gonzales*. In some respects, the district court's description of *Gonzales* adhered closely to the two-pronged analysis used by lower courts: "where the government 'has a rational basis to act' and the restriction 'does not impose an undue burden,' the government 'may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interest in regulating the medical profession in order to promote respect for life, including life of the unborn.'"[191] But the court elsewhere described *Gonzales* as incorporating balancing into the *Casey* analysis. In particular, the court described the outcome in *Gonzales* as follows: "Ultimately, Justice Kennedy found that the question of constitutionality came down to whether the government's unquestioned interest in 'potential life' and 'protecting the integrity and ethics of the medical profession,' . . . *outweighed* any health risks to women by the prohibition of [the] procedure."[192] And the court relied on this view of *Gonzales* in assessing the state law at issue:

> [T]he court considers these obstacles in access to abortion services [an] undue burden in light of the dubious benefits to women's health [from] the admitting privileges restriction . . . . Even if there were some evidence that the admitting privileges requirement would actually further women's health, any benefit is greatly outweighed by the burdens caused by increased travel, decreased access and, at least for some women, the denial of an in-state option for abortion services.[193]

The district court's conclusion in *Van Hollen* thus clearly hinged on the Balancing Approach.

The district court in *Van Hollen* supported its statement that the outcome in *Gonzales* turned on whether the government's interest *outweighed* health risks to women by citing to discussion in *Gonzales* addressing and finding that the ban furthers legitimate state interests in human life and integrity of the medical profession.[194] The district continued by explaining that the majority in *Gonzales* deferred to Congress's findings that the banned procedure had a "disturbing similarity to the killing of a newborn infant" and would not impose significant health risks on women.[195] The court then stated: "Accord-

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relating to a decision to abort a pregnancy. For these seven Justices, a woman simply has "some freedom to terminate a pregnancy," *Casey*, 505 U.S. at 869, and for four of these Justices, state regulation of access to abortion can be justified if the law is rationally related to a legitimate state interest. *Id.* at 981.

191 *Id.* at *13 (citations omitted).

192 *Id.* (emphasis added).

193 *Id.* at *19.

194 *Id.* at *13 (citing *Gonzales*, 550 U.S. at 157, 159).

195 *Id.* (citing *Gonzales*, 550 U.S. at 158, 162).

ingly, the burden . . . was held not to be 'undue,' at least where alternatives are 'available to the prohibited procedure that have extremely low rates of medical complications' and are 'generally the safest method of abortion during the second trimester.'"[196] The implication is that the outcome in *Gonzales* hinged on balancing a strong state interest against a minimal burden on women.

However, careful analysis of *Gonzales* readily negates this characterization. The Court in *Gonzales* did not conduct a distinct analysis of what the lower courts consider as the first step in the *Casey* analysis. Rather, the decision turned on application of the second prong of the analysis: assessing whether the purpose or effect of the challenged law is to place a substantial obstacle in the path of a woman seeking a previability abortion (Part IV of the opinion).[197] The analysis of the purpose of the law (Part IV(A)) turned on whether the law furthered legitimate government interests.[198] After finding that the ban did so, the Court concluded: "[W]e reject the contention that the congressional purpose of the Act was 'to place a substantial obstacle in the path of a woman seeking an abortion.'"[199]

The analysis next focused on whether the ban had the effect of imposing an undue burden given the absence of a health exception (Part IV(B)).[200] The majority explained that, "under precedent we here assume to be controlling," the ban would be unconstitutional "if it 'subject[ed] [women] to significant health risks."[201] The analysis turned on the evidence. Although the challengers presented evidence that the banned procedure may be the safest method for some women in certain situations, the government presented contradicting evidence.[202] The Court determined that the challengers' evidence was insufficient to show that the law presented in undue burden.[203] The Court stated: "The medical uncertainty over whether the Act's prohibition creates significant health risks provides a sufficient basis to conclude in this facial attack that the Act does not impose an un-

196 *Id.* (citing *Gonzales*, 550 U.S. at 164).

197 *Gonzales*, 550 U.S. at 156. The majority also considered arguments that the federal ban is unconstitutionally vague and imposes an undue burden because its restrictions are overbroad. *See id.* at 148–50, 150–56.

198 *Id.* at 157–60.

199 *Id.* at 160 (quoting *Casey*, 505 U.S. at 878).

200 *Id.* at 161–64.

201 *Id.* at 161 (quoting Ayotte v. Planned Parenthood of New England, 546 U.S. 320, 328 (2006)).

202 *Id.* at 161–62 (noting also that courts had struggled with the issue).

203 *Id.* at 164. The majority also clarified that, rather than mounting a facial attack, the challengers should have pursued an "as-applied" challenge. *Id.* at 167–68.

due burden." The majority bolstered that conclusion by pointing to other facts, namely, the availability of another safe method of abortion commonly used in the second trimester.

Nothing in the decision ties the two portions of the analysis together (Parts IV(A) and IV(B)) in any way that would support characterizing the outcome as hinging on the Balancing Approach. Nothing in the analysis even remotely looks like the majority is assessing whether the government's interest *outweighed* any health risks to women stemming from the federal ban.

At the outset of the opinion (Part II), Justice Kennedy does describe *Casey* as striking a balance.[204] The discussion of *Casey* leading to that statement readily paints the *Casey* analysis as reflecting a need to better accommodate state regulation of abortion that furthers legitimate government interests—particularly government's legitimate and substantial interest in preserving and promoting fetal life.[205] But again, recognizing the *Casey* analysis as effectuating a balance between a woman's interest in access to abortion and the state's interest in human life is not an invitation to introduce an additional balancing into the analysis established by *Casey*.

To the Court in *Gonzales*, the crux of the challenge turned on whether the ban could survive a facial attack when the challengers' evidence had cast substantial doubt on the state's premise that a safe alternative method was always available.[206] The Court pointed to the traditional principle of giving legislatures "wide discretion" in areas of medical and scientific uncertainty, noting that this traditional rule is consistent with *Casey*'s recognition that abortion jurisprudence must accommodate reasonable regulations furthering legitimate state interests.[207] The challengers' evidence was therefore held to be insufficient to show that the effect of the law presented an undue burden.[208] No balancing was involved in reaching this conclusion.

2. *Heightened Rational Basis Review*

The district court in *Van Hollen* also read *Gonzales* as directing courts to use a heightened standard when reviewing the basis for the challenged law. At the trial in *Van Hollen*, the state had presented evidence that the admitting privileges law helps to foster continuity of

204 *Id.* at 146.
205 *Id.* at 145–46.
206 *Id.* at 162.
207 *Id.* at 163.
208 *Id.* at 164.

care and provision of competent care by the abortion provider. The district court explained that, to the state, the evidence was sufficient given language in *Gonzales* according wide discretion to legislatures in areas where there is "medical and scientific uncertainty."[209] The district court rejected the state's view, noting on the one hand that the state's submissions had failed to establish "a credible, medical disagreement."[210] But on the other hand, the court stressed two things. First, that the Court in *Gonzales* emphasized that courts have a duty to "review factual findings where constitution[al] rights are at stake."[211] Second, that "*Gonzales* involved the weighing of medical uncertainty with respect to the potential negative impact on women's health [resulting from the ban] against the state's compelling interests in respecting the life of the unborn and in the integrity and ethics of the medical community."[212] In this sentence, the district court seems to be suggesting two distinct ideas: (1) that the outcome in *Gonzales* turned on a balancing (which has already been discussed), and (2) that deference to the legislature in light of uncertainty was only appropriate because the case involved "compelling state interests." That the district court used a heightened standard is confirmed by the court's statement that "[e]ven under a more lenient standard of review, the 'reasonably related' requirement . . . still has significance."[213]

Here also the district court's statements and analysis reflect a serious misunderstanding of *Gonzales*. As noted, the Court in *Gonzales* did not conduct a distinct analysis of the first step—or a relational inquiry—of the *Casey* analysis. Rather, the decision turned on the Court's assessment of whether the purpose or effect of the challenged law was to place a substantial obstacle in the path of a woman seeking a pre-viability abortion.[214] The analysis of the *purpose* of the law turned on whether the law furthered legitimate government interests.[215] The analysis of the *effect* of the law turned on an assessment of the evidence bearing on whether banning the procedure created a

209 *Van Hollen*, 2013 WL 3989238, at *15.

210 *Id.*

211 *Id.* at *13,*15.

212 *Id.* at *15.

213 *Id.* at *15.

214 *Gonzales*, 550 U.S. at 156. The majority also considered arguments that the federal ban is unconstitutionally vague, *id.* at 148–50, and imposes an undue burden, because its restrictions are overbroad. *Id.* at 150–56.

215 As noted, the opinion thereby suggests a refinement to the *Casey* analysis that merges the relational inquiry into the basis of the law and purpose inquiry often considered part of the substantial obstacle inquiry. *See infra* Part IV.

significant health risk; and it is in this portion of the opinion that the Court explicitly discussed deference to legislatures. Importantly, both portions of the analysis shed light on the appropriate level of scrutiny to be used by courts when assessing the basis for a challenged abortion law.

The Court's *purpose* analysis confirms the appropriateness of deferential review of the basis for the law. In the first part of the analysis, Justice Kennedy identified the relevant state interests and confirmed that precedent, including *Casey*, affirms the legitimacy of state interests in human life and the integrity of the medical profession.[216] Regarding laws protecting the integrity of the medical profession, Justice Kennedy 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.[217]

The analysis then turned to the question whether the law furthered the government's objectives. Because the law only interfered with a decision about an abortion procedure used in a very small number of cases, and because the law left in place a standard procedure that is equally brutal as the banned procedure,[218] the challengers had argued that the law did little to promote the government's interest in the life of the unborn. The Court determined, however, that the law passed scrutiny and, in doing so, the Court gave considerable deference to the legislature.

To the objection that the law was not rational because it left in place equally brutal methods of abortion, the Court invoked the principle that legislatures are given room to draw boundaries or bright lines. Here, the line was justified by a congressional finding that the partial birth abortion method was "disturbing[ly] similar[] to the killing of a newborn infant," and Congress's concern in distin-

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216 *Gonzales*, 550 U.S. at 157–58 (stating that the government "may use its voice and its regulatory authority to show its profound respect for . . . life" and that *Casey*'s recognition that abortion jurisprudence must accommodate state laws that further that interest "cannot be set at naught" by *Casey*'s requirement of a health exception).

217 *Id.* at 158.

218 *Id.* at 134–35, 140 (explaining that 85–90% of abortions occur in the first trimester; that most of the remaining 10–15% occur in the second trimester; that usual procedure used for second trimester abortions was not banned (the standard D & E procedure); and that another procedure exists and often is used for late second trimester abortions (medical induction)). The majority's description of both the standard D & E procedure and the banned "intact" D & E procedure made very clear that both procedures are very brutal. *Id.* at 135–40.

guishing abortion from infanticide.[219] The opinion explains that the banned procedure—intact D & E—differs from a standard D & E "because the former occurs when the fetus is partially outside the mother to the point of one of the Act's anatomical landmarks;" and thus it was "reasonable for Congress to think that partial-birth abortion, more than standard D & E, 'undermines the public's perception of the appropriate role of a physician during the delivery process, and perverts a process during which life is brought into the world.'"[220]

In a similarly deferential way, Justice Kennedy based the determination that the law furthered respect for human life on a "reasonable inference." More specifically, the opinion explains that the existence of the law would promote both (i) public knowledge of details of the partial-birth abortion procedure (which he suggests very often are not explained to women in clear and precise terms by abortion doctors), and (ii) helpful public dialogue; and, therefore, "[i]t is a reasonable inference that a necessary effect of the regulation and the knowledge it conveys will be to encourage some women to carry the infant to full term . . . ," or to encourage the medical profession to find "different and less shocking methods to abort the fetus in the second trimester . . . ."[221]

The Court's analysis of purpose, then, does not suggest a role for heightened judicial scrutiny into the assessment of whether a challenged law furthers a legitimate state interest. Importantly, the opinion does reflect that, in rational basis review, the judicial analysis is not a rubberstamp. A court may, and should, assess the rationality of the argument that a law furthers a legitimate state interest. But in concluding that a reasonable connection existed between the ban and legitimate state interests, the Court did not require evidence demonstrating the level of success in achieving the state interests and did not inquire as to the fit between the law and the interests. Reasonable assertions and reasonable inferences will suffice. Characterizing the decision as creating a role for heightened scrutiny or a need for empirical evidence is thus misplaced.

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219 *Id.* at 158.

220 *Id.* at 160. Justice Kennedy also drew support from *Washington v. Glucksberg*, noting that that case upheld a similar instance of line-drawing as being reasonable. *Id.* at 158 (quoting Washington v. Glucksberg, 521 U.S. 702, 732–35, n.23 (1997)).

221 *Id.* at 160 ("The State's interest in respect for life is advanced by the dialogue that better informs the political and legal systems, the medical profession, expectant mothers, and society as a whole of the consequences that follow from a decision to elect a late-term abortion.").

The analysis of the *effect* of the law similarly does not support use of heightened scrutiny. As explained, the analysis turned on an assessment of the evidence bearing on whether banning the procedure created a significant health risk. The abortion doctors challenging the ban had presented evidence suggesting that the intact D & E procedure has some safety advantages: e.g., they testified that the procedure "decreases the risk of cervical laceration or uterine perforation because it requires fewer passes into the uterus with surgical instruments and does not require the removal of bony fragments of the dismembered fetus;" and that it "reduces the risks that fetal parts will remain in the uterus."[222] However, other doctors had testified, both in litigation and before Congress, that the standard D & E procedure was "always a safe alternative."[223] Justice Kennedy noted that the disagreement was reflected in other litigation as well, although the lower courts had routinely found that the intact D & E procedure had some safety advantages for at least some women in some circumstances.[224] Justice Kennedy emphasized that the question was "whether the Act can stand when this medical uncertainty persists."[225]

That is, the issue was framed in terms of whether the law could survive a facial attack when the challengers' evidence had cast substantial doubt on the state's premise or assertion that a safe alternative method was always available. The Court pointed to the traditional principle of giving legislatures "wide discretion" in areas of medical and scientific uncertainty, noting that this traditional rule is consistent with *Casey*'s recognition that abortion jurisprudence must accommodate reasonable regulations furthering legitimate state interests.[226] The opinion explains, in essence, that abortion jurisprudence should not treat abortion doctors differently than other physicians; that all physicians are subject to reasonable laws regulating the medical community.[227] In support of taking this stance, the opinion cites precedent and includes parenthetical explanations highlighting (i) the inappropriateness of abortion jurisprudence that results in courts serving as "*ex officio* medical board[s] with powers to approve or disapprove medical and operative practices and standards throughout

222 *Id.* at 161.

223 *Id.* at 162.

224 *Id.*

225 *Id.* at 163.

226 *Id.*

227 *Id.* ("Physicians are not entitled to ignore regulations that direct them to use reasonable alternative[s] . . . . The law need not give abortion doctors unfettered choice in the course of their medical practice, nor should it elevate their status above other physicians in the medical community.").

the United States"[228]; and (ii) the appropriateness of abortion jurisprudence that upholds state regulations relating to medical standards governing abortion even in the face of arguments that "all health evidence contradicts the claim that there is any health basis for the law."[229] This discussion does not suggest a role for heightened scrutiny, but instead emphasizes that, even as to state laws with some effect on access to abortion, courts generally should give substantial deference to legislative choices in the arena of regulations furthering patient health and safety, and should give "wide discretion" if a law regulates in an area of medical uncertainty.

The opinion does thereafter acknowledge that courts retain "an independent constitutional duty to review factual findings where constitutional rights are at stake."[230] The acknowledgement was prompted, however, by the Attorney General's contention that the federal ban should be upheld solely on the basis of congressional findings.[231] The opinion explains that uncritical deference to legislative fact finding is inappropriate, because sometimes those finding are erroneous—as two of the factual findings were in the case of the federal ban at issue.[232] Again, however, the discussion nowhere suggests the need for heightened scrutiny or empirical evidence as to the relational inquiry in the *Casey* analysis. Stating that courts have a duty to review fact finding where constitutional rights are at stake simply acknowledges that a role exists for judicial assessment of the basis for the challenged law.[233]

Further, the discussion confirms that, in the substantial obstacle analysis, the burden of proof as to the degree of the burden lies with the challengers and that deference to state legislative findings can offset evidence of the burden.[234] In the discussion related to the independent duty to review the basis for the law, Justice Kennedy ex-

228 *Id.* at 163–64 (citing Webster v. Reprod. Health Servs., 492 U.S. 490 (1989)).

229 *Id.* at 164 (citing *Mazurek*, 520 U.S. 968).

230 *Id.* at 165.

231 *Id.* (citing Brief for Petitioner in No. 05-380, at 23).

232 *Id.* at 165–66 (pointing to a finding that no medical schools provide instruction on intact D & E, and a finding that there exists "a medical consensus" that intact D & E is never medically necessary).

233 The case cited in support of the proposition does not direct courts to use a heightened standard, but, rather, simply instructs courts to review findings of fact made by administrative agencies in agency adjudications when the facts are relevant to constitutional claims. *See* Crowell v. Benson, 285 U.S. 22 (1932).

234 The Court held that the challengers' evidence was insufficient to show that the law presented an undue burden. *Gonzales*, 550 U.S. at 164. The majority also clarified that, rather than mounting a facial attack, the challengers should have pursued an "as-applied" challenge. *Id.* at 167–68.

plicitly rejected the doctors' argument that the existence of "substantial medical authority" undermining the government's position was sufficient to invalidate the challenged law.[235] He rejected the argument because use of that standard would allow courts to strike down legitimate abortion regulations "if some part of the medical community were disinclined to follow the proscription."[236] He instead reiterated: "Considerations of marginal safety, including the balance of risks, are within the legislative competence when the regulation is rational and in pursuit of legitimate ends."[237]

Gonzales therefore does not support heightened review of the basis for a state abortion law, but, rather, in reality largely confirms the traditional approach to review of the basis for legislative action: deference to the legislature is appropriate, and even substantial contrary evidence is not a reason for invalidating a law if some medical or scientific uncertainty exists—as long as the government can articulate some reasonable connection between the law and a legitimate state interest. It is therefore not accurate to read *Gonzales* as employing more rigorous review of the basis for state laws regulating abortion. In the analysis of both the purpose and the effect of the law, the majority opinion largely confirms use of traditional rational basis review. A state remains able to support a law by pointing to a reasonable connection between the law and the legislature's objectives, and empirical evidence is not required as even a reasonable inference sufficed in *Gonzales*.

C. Implicit Signals in Casey

Courts adopting the Balancing Approach have also relied on implicit signals in *Casey*. The courts in *Humble* and *Strange* point to *Casey*'s application of the undue burden analysis to the spousal notification provision at issue; and the district court in *Strange* developed two additional arguments grounded on the use of citations in Justice O'Connor's plurality opinion.

1. *Analysis of the Spousal Notification Requirement*

Both the Ninth Circuit in *Humble* and the district court in *Strange* explained the application of the substantial obstacle analysis in the *Casey* opinion in a way that, if valid, would support taking into ac-

235 *Id.* at 166.
236 *Id.*
237 *Id.*

count the weight of the state's interest.[238] Specifically, the courts focused on *Casey*'s view that the parental notification and consent provisions were permissible, but that the spousal notification provision was not permissible. Both courts suggest that the Court in *Casey* distinguished the parental consent law from the spousal notification law based on the state's comparatively weaker justification for the spousal notification.[239] The court in *Strange* included the following quote from *Casey*.

> [P]arental-consent] enactments, and our judgment that they are constitutional, are based on the quite reasonable assumption that minors will benefit from consultation with their parents and that children will often not realize that their parent have their best interests at heart. We cannot adopt a parallel assumption about adult women.[240]

To the court in *Strange*, this supported its view that the outcome in *Casey* turned on consideration of the extent the provision furthered the state's interest.

This reading of *Casey* is not convincing. Justice O'Connor's discussion of the spousal notification provision spans eleven and one-half pages and she nowhere in the analysis discussed the extent to which the requirement furthers the state interest being promoted by the law.[241] In the first half of the analysis, Justice O'Connor focused solely on the effect of the law on women—and, in particular, on women who may be victims of domestic violence and who thus have reasons to fear notifying their spouse.[242] After discussing data of various sorts highlighting the reality of domestic violence, Justice O'Connor concluded that, for these women, the spousal notification requirement likely would deter abortions "as surely as if the Commonwealth had outlawed abortion in all cases."[243] That is, the effect of the provision went to the decision making process itself. She thus concluded that the requirement was an undue burden and invalid.[244]

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238 *See Humble*, 753 F.3d at 913. The Ninth Circuit followed this discussion by noting that the Seventh Circuit's decision in *Van Hollen*, 738 F.3d 786 had adopted a balancing approach. *Id.* at 913–17; *see also Strange*, 9 F. Supp. 3d at 1287 (summary judgment).

239 *See Humble*, 753 F.3d at 913 (citing *Casey*, 505 U.S. at 895); *Strange*, 9 F. Supp. 3d at 1287 (summary judgment).

240 *Strange*, 9 F. Supp. 3d at 1287 (summary judgment).

241 *See Casey*, 505 U.S. at 887–98.

242 *See id.* at 887–95.

243 *Id.* at 893–94.

244 *Id.* at 895. It is in this part of the opinion that Justice O'Connor muddies the waters regarding the proper standard in facial challenges. The state had pointed out that the law would have that effect in less than one percent of women seeking abortions, and thus that the law could not be found invalid on its face. Justice O'Connor disagreed, noting that

Immediately following this conclusion, Justice O'Connor distinguished parental notification or consent requirements, using the language quoted above and relied on by the court in *Strange*. Because the entirety of the analysis had focused on the *effect* on women, the reasonable implication is that Justice O'Connor meant the statement to pertain to the *effect* of the parental notification on access to abortion by minors, and not as relating to the state's interest. Furthermore, the statement reasonably can be read that way. Consultation with parents might result in parents agreeing and supporting the minor's choice to abort a pregnancy. Or, it might result in parents persuading a minor that abortion is not the best choice and supporting the minor as she carries the child to full term. The point is that the effect of requiring a minor to consult with parents likely operates to the benefit and not the detriment of the minor—and in many cases a minor may not realize the benefits of consultation and fear consultation. In contrast, the effect of the spousal notification requirement would not so likely operate to the benefit of a woman who does not want to consult with her spouse.

In the remainder of the discussion of the spousal notification requirement, Justice O'Connor elaborated on the mother's liberty interest (seemingly to bolster her view that the effect of the law struck at the essence of the woman's interest—the right to make the decision itself).[245] The application of the undue burden analysis to the spousal notification requirement therefore does not support the Balancing Approach.

2. *Citations*

To bolster its characterization of *Casey* as establishing the Balancing Approach, the court in *Strange* developed arguments grounded in citations used by Justice O'Connor: specifically, a citation to ballot-

"in a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion." *Id.*

245 *Id.* at 895–98. In particular, Justice O'Connor presents several reasons why—as to state regulations relating to a child prior to birth—a mother's liberty interest outweighs the father's interest in the welfare of the child. She agreed that, as to a child after its birth who is being raised by both parents, the father's interest and the mother's interest are equal. *Id.* at 895–96. But she concluded that the "Constitution does not permit a State to require a married woman to obtain her husband's consent before undergoing an abortion." *Id.* at 897. Much of her reasoning relates to women in situations of domestic violence, but she also based her conclusion on concerns that a spousal notification requirement would give a husband a "troubling degree of authority over his wife"—and would resurrect outdated conceptions of marriage and the nature of women's rights. *Id.* at 897–98.

access box cases and a citation to *Doe v. Bolton*,[246] the companion case to *Roe v. Wade*. Neither argument is persuasive.

(a) The Ballot-Access Cases

In *Casey*, after rejecting *Roe*'s trimester framework but before introducing the undue burden standard, Justice O'Connor stated:

> As our jurisprudence relating to all liberties save perhaps abortion has recognized, not every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right. [For example, we] have held that not every ballot access limitation amounts to an infringement of the right to vote. Rather, the States are granted substantial flexibility in establishing the framework within which voters choose the candidates for whom they wish to vote.[247]

She followed the statement with a citation to two cases: *Anderson v. Celebrezze* and *Norman v. Reed*.[248] The court in *Strange* decided that the citation was intended to support "more than just the narrow point that not every regulation of abortion is unconstitutional."[249] Rather, the court construed the citation as indicating that these particular cases reflected the type of analysis Justice O'Connor intended to be established through the adoption of the undue burden analysis.[250]

As interpreted by the court in *Strange*, *Anderson,* and *Norman* reflect an analysis that asks a court to weigh both the obstacles abortion regulations create for women seeking abortions and the nature and strength of the state's justification for the laws.[251] That is, in applying the undue burden analysis, "the 'character and magnitude of the asserted injury,' affects whether the 'corresponding interest [is] sufficiently weighty to justify the limitation.'"[252] To the court, assessing the relationship between the obstacle and the state justification is the "heart of the test": in short, the test is whether the obstacles imposed are greater than is warranted by the state's justification.[253]

This argument suffers from significant shortcomings. As an initial matter, the analysis in the *Anderson* and *Norman* cases—as interpreted by the court in *Strange*—is not the analysis described by Justice O'Connor and applied to the state laws in *Casey*. As detailed, the

246 *Bolton*, 410 U.S. 179.

247 *Casey*, 505 U.S. 833, 873–74 (1992).

248 *Id.* at 874 (citing Norman v. Reed, 502 U.S. 279 (1992); Anderson v. Celebrezze, 460 U.S. 780 (1983)).

249 *Strange*, 9 F. Supp. 3d at 1284 (summary judgment).

250 *Id.* at 1283–84 (quoting *Norman*, 502 U.S. at 288–89; *Anderson*, 460 U.S. at 789).

251 *Id.* at 1280 & 1283–84 (citing *Norman*, 502 U.S. 279; *Anderson*, 460 U.S. 780).

252 *Id.* at 1284 (citing *Norman*, 502 U.S. at 288–89; *Anderson*, 460 U.S. at 789).

253 *Id.* at 1287.

analysis developed by Justice O'Connor in *Casey* does not include a balancing inquiry and readily accommodates state laws furthering legitimate state interests (i.e., laws with a valid purpose), as long as the effect of the laws does not place a substantial obstacle in the path of a woman's freedom to decide to terminate a pregnancy. There is no reason to give more importance to Justice O'Connor's use of a citation than to the text of the opinion itself.

Moreover, a careful reading of the *Anderson* and *Norman* cases reveals several reasons why the *Strange* court is wrong to claim that the cases are the "key" to understanding the undue burden analysis.[254] First, the rights at issue in the cases are different than in the abortion context. The rights at issue in *Anderson* and *Norman* were the right of politicians or political parties to get onto state ballots and corresponding rights of voters.[255] The Court in *Anderson* explained that the impact of candidate eligibility requirements on voters implicates both the right of qualified voters to cast votes effectively and the right of association to advance political beliefs—rights that the Court readily characterized as fundamental, and as rights "among our most precious."[256] In contrast, although Justice O'Connor in *Casey* described a woman's interests relating to abortion in rather sweeping terms,[257] seven Justices in *Casey* declined to characterize the right at stake as fundamental, and Justice O'Connor characterized the right only as "some freedom" to terminate a pregnancy previability (and thereafter if necessary to preserve the life or health of the mother):[258] a freedom arising because of the personal nature of the decision, and its relation to personal dignity and autonomy,[259] but a nonetheless limited freedom because abortion "is an act fraught with consequences for others."[260]

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254 *Cf. id.* at 1284–85 (explaining how *Casey*'s rejection of tiers of scrutiny, a concept stated in *Anderson* and *Norman*, is the focus of the undue burden analysis).

255 *See Norman*, 502 U.S. at 282 (affirming in part and reversing in part a decision of the Illinois Supreme Court to bar candidates from running under a political party label in an election); *Anderson*, 460 U.S. at 786–87 (explaining how candidate eligibility requirements affect the rights of voters).

256 *Anderson*, 460 U.S. at 787–88, n.7 (quoting Williams v. Rhodes, 393 U.S. 23, 30–31 (1968)).

257 *See Casey*, 505 U.S. at 851–52 (describing abortion rights as those that are central to human dignity and autonomy).

258 *See id.* at 869, 879 (explaining how women have a constitutional freedom to terminate their pregnancy, holding that a state cannot outlaw a woman from terminating her pregnancy before viability).

259 *See id.* at 851–53 (explaining how an abortion decision is central to personal dignity and autonomy).

260 *Id.* at 852.

Second, although the Court in *Anderson* used the language quoted in *Strange* in describing the analysis used for assessing the constitutionality of state regulations infringing on the rights at issue,[261] the Court's application of the analysis in *Anderson* strongly resembles the second prong of strict scrutiny: the restrictions were invalidated because they were "not necessary,"[262] were not the "best means to the end,"[263] were not "essential,"[264] were not "precisely drawn," and because a "less drastic" way of furthering its legitimate interests was available.[265] This aspect of the analysis was confirmed when the Court in *Norman* explained the analysis as follows:

> To the degree that a State would thwart [the] interest by limiting the access of new parties to the ballot, we have called for the demonstration of a corresponding interest sufficiently weighty to justify the limitation, (citations omitted), and we have accordingly required any severe restriction to be narrowly drawn to advance a state interest of compelling importance.[266]

Because *Norman* was decided just five months prior to *Casey*, it is reasonable to assume that Justice O'Connor was aware that the ballot-access cases mirrored to a considerable extent strict scrutiny analysis. Yet in *Casey,* Justice O'Connor and six other Justices explicitly rejected use of a strict scrutiny approach.

Moreover, in reality, the undue burden analysis as described and applied in *Casey* resembles not the analysis described and used by the majority in *Anderson*, but, rather, resembles somewhat the analysis described by the *dissenting* Justices in *Anderson*—which included Justice O'Connor. The dissenting Justices in *Anderson* chided the majority for missing the point that, in cases like the one at hand,

> we have never required that States meet some kind of "narrowly tailored" standard in order to pass constitutional muster. [Rather,] we have said before that a court's job is to ensure that the State "in no way freezes the status quo, but implicitly recognizes the potential fluidity of American political life." (Citations omitted.) If it does not freeze the status quo,

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261 *Strange*, 9 F. Supp. 3d at 1284 (quoting *Anderson*, 460 U.S. at 789) (summary judgment).

262 *See Anderson*, 460 U.S. at 797, 800 (explaining how the measure at issue was not necessary to the efficient operation of elections).

263 *See id.* at 798 (quoting Va. Pharmacy Bd. v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976)) (disparaging Ohio's ballot notification measure as one that impermissibly closes communication to the public).

264 *See id.* at 803 (citing Storer v. Brown, 415 U.S. 724, 733 (1974) (describing how a ballot measure that was deemed essential in prior case was constitutional)).

265 *See id.* at 806 (quoting NAACP v. Button, 371 U.S. 415, 438 (1963); Kusper v. Pontikes, 414 U.S. 51, 58–59 (1973)) (showing how when our most precious freedoms, such as the right to vote, are regulated, the reglulations must be precise and necessary to satisfying the applicable state interest).

266 *Norman*, 502 U.S. at 288–89.

> then the State's laws will be upheld if they are "tied to a particularized legitimate purpose, and [are] in no sense invidious or arbitrary."[267]

This analysis has obvious parallels to the analysis in *Casey*. It seeks to accommodate state laws designed to further legitimate state interests, up to the point at which a state infringement goes too far: when the law "freezes the status quo." The analysis also is much closer to the sentiment expressed in the sentence in *Casey* to which the citation to *Anderson* and *Norman* is attached—wherein Justice O'Connor said that, in the arena of ballot access limitations, "the States are granted substantial flexibility in establishing the framework within which voters choose the candidates for whom they wish to vote."[268] Thus, if one wants to read the use of Justice O'Connor's citation to the *Anderson* and *Norman* cases as an implicit signal as to the "key" to the undue burden standard, it seems considerably more likely that Justice O'Connor was thinking of the analysis she agreed with in *Anderson*. This conclusion is bolstered by the fact that Justice O'Connor listed *Anderson* first in the citation, even though *Norman* ordinarily would be listed first since it is the more recent decision. Thus the theory that the citation to *Anderson* and *Norman* supports use of the Balancing Approach simply does not withstand scrutiny.

(b) *Bolton v. Doe*

In the opinion issued following the trial, the court in *Strange* included one additional argument supporting its adoption of the balancing approach. Specifically, the court found *Doe v. Bolton* to be particularly instructive to the issue of the proper application of the substantial obstacle analysis.[269] The court explained that *Bolton* involved, in part, a challenge to a law requiring abortions to be performed in a hospital setting and that, in *Casey*, the plurality cited *Bolton* approvingly.[270] According to the court in *Strange*, the Supreme Court struck down the law in *Bolton*, finding that the challengers' evidence showed that alternative clinic settings with appropriate staff and facilities were "entirely adequate to perform abortions" and that the state's evidence did not show that the law was necessary to its interest in health and safety.[271] The court noted: "despite acknowledg-

267 *Anderson*, 460 U.S. at 817 (Rehnquist, C.J., dissenting) (quoting Rosario v. Rockefeller, 410 U.S. 752, 762 (1973)).

268 *Casey*, 505 U.S. at 873–74.

269 *Strange*, 3 F. Supp. 3d. at 1339 (citing *Doe*, 410 U.S. 179) (post-trial motion).

270 *Id.* (citing *Casey*, 505 U.S. at 874–75).

271 *Id.* at 1340 (quoting *Doe*, 410 U.S. at 195).

ing the State's legitimate interest in protecting women's health, the Court [in *Bolton*] carefully considered the evidence on the degree to which the hospital regulation would actually advance that interest;" the Court "required the State to establish, through evidence, that the regulation really was strongly justified."[272] The court in *Strange* thus concluded: "This approach . . . laid a foundation for the analysis mandated by *Casey* and articulated by this court."[273]

This theory also fails to withstand scrutiny. Foremost, careful reading of the *Casey* opinion shows that Justice O'Connor cited to *Bolton* as part of the discussion relating to rejection of the trimester framework set out in *Roe*. In the *Casey* opinion, she first confirmed the "essential aspect of Roe" (that a woman has some freedom to terminate her pregnancy prior to viability);[274] emphasized that the right has never been absolute, given the many consequences impacting others;[275] and explained one aspect of the flawed trimester framework (that it overvalues the pregnant woman's interest).[276] She then explained that abortion jurisprudence should focus instead on whether the challenged state law impacting freedom to abort imposes an undue burden on a woman's ability to make the decision.[277] She stated: "For the most part, the Court's early abortion cases adhered to this view," and the citation to *Bolton* follows (along with other cases).[278] Justice O'Connor continued the discussion by explaining another aspect of the flawed trimester framework: that it undervalues the state's interests.[279] The key point she was making is that the undue burden analysis will strike a more appropriate balance because "not all regulations must be deemed unwarranted."[280] The citation to *Bolton* is thus in the middle of that portion of the opinion where Justice O'Connor is making the case for shifting away from the trimester framework to an "undue burden analysis."

It therefore is not convincing to assert that the citation was intended to signal anything about the proper application of the undue

272 *Id.* at 1340–41.

273 *Id.*

274 *See Casey*, 505 U.S. at 869–70 (explaining a woman has some freedom to end her pregnancy).

275 *See id.* at 871, 852 (classifying abortion as a unique act that has consequences for others).

276 *See id.* at 872–73 (declaring the trimester approach to misunderstand the pregnant woman's interest).

277 *See id.* at 873–76 (holding the Due Process Clause only invalidates abortion regulations when they pose an undue burden on a woman's decision to have an abortion).

278 *Id.* at 874–75.

279 *Id.* at 875.

280 *Id.* at 876.

burden analysis. Justice O'Connor did not begin discussing how the analysis should be applied until after she had made the case for adopting the analysis. Stated another way, it is immediately after making the case for adopting the analysis that she began a description of how the analysis should be applied by explaining: "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."[281] It simply isn't plausible, then, to assert that the citation to *Bolton* has bearing on how to apply to substantial obstacle analysis.

Further, the court in *Strange* has attempted to use the citation to *Bolton* as support for substantially diluting the substantial obstacle analysis. The court emphasized that, in *Bolton*, the Court's analysis hinged on scrutiny of the evidence for a showing by the state of the degree to which the challenged state furthered a legitimate state interest; that the Court "required the State to establish, through evidence, that the regulation really was strongly justified."[282] This tactic (which also reflects a misreading of *Bolton*)[283] represents a misunderstanding of *Casey*. Seven Justices in *Casey* were seeking to modify abortion jurisprudence to better accommodate state laws furthering legitimate state interests. Nothing in *Casey* or *Gonzales* emphasizes the

281 *Id.* at 877.

282 *See* Planned Parenthood Se., Inc. v. Strange, 33 F. Supp. 3d 1330, 1341 (M.D. Ala.), as corrected (Oct. 24, 2014) (post-trial motion).

283 Several aspects of the *Strange* court's description of *Bolton* are erroneous. First, the Court in *Bolton* invalidated the provision requiring that abortions be performed in a hospital because it failed to exclude abortions performed in the first trimester. *Bolton*, 410 U.S. at 195. The other discussion related to evidence was dicta only. *See id.* at 194–95 (beginning the paragraph as follows: "This is not to say that Georgia may not or should not, from and after the end of the first trimester, adopt standards for licensing all facilities where abortions may be performed so long as those standards are legitimately related to the objective the State seeks to accomplish."). Second, the analysis in *Bolton* as to the three challenged provisions focused almost exclusively on one simple issue: whether the provisions furthered state interests. *See id.* at 193 (noting that JCAH accreditation had "no present particularized concern with abortion as a medical or surgical procedure"); *id.* at 197–98 (noting that the committee approval requirement would not further a state interest in potential life because a physician would have already made a "medical judgment," nor necessary to protect hospitals and thus "serves neither the hospital nor the State); *id.* at 199 (noting that the two-physician concurrence "has no rational connection" to maternal health given that a woman's physician must make the same decision). Nothing in the analysis suggests a balancing approach hinging on the weight of the state interests versus the extent of the burden on a women's freedom to abort. Third, the analysis does not support use of any heightened scrutiny when assessing whether the law furthers state interests. As to each provision, the Court simply found no connection between the provision and the state interests. *Id.* at 195, 217, 220.

need for a state to prove with evidence the degree to which a state law will be successful in fulfilling the state's legitimate interest.

V. APPROPRIATE REFINEMENTS TO THE *CASEY* ANALYSIS AND OTHER CONSIDERATIONS

The many distinct analyses in this article highlight several important points relating to refinements to the *Casey* analysis. Foremost, none of the rationales developed by the courts embracing the Balancing Approach are persuasive. In short, nothing in *Casey* or *Gonzales* legitimately supports analyzing laws designed to advance state interests in health and safety differently from laws advancing other legitimate state interests; or engaging in an evidentiary assessment of the extent to which an abortion law promotes legitimate state interests and in-turn using the result of that assessment to lower the standard used in deciding whether a law presents a substantial obstacle. What *Casey* and *Gonzales* do support is an analysis that genuinely respects and better accommodates state laws furthering legitimate state interests—while recognizing that constitutional principles allow women some freedom to terminate a pregnancy. In working out the standard to be used to decide whether a law impacting ready access to abortion should be upheld or invalidated, it must be remembered that, although three Justices settled on the substantial obstacle standard, four other Justices opined that the substantial obstacle standard was too high. Thus any refinement that dilutes the standard is at odds with the majority view in *Casey*.

Similarly, any refinement that introduces heightened review of the legislative basis for the law or requires "narrowly tailored" laws is at odds with *Casey* and *Gonzales*. Seven Justices in *Casey* rejected use of strict scrutiny in the context of abortion regulation. Further, none of these seven Justices were in favor of lesser forms of heightened scrutiny: the opinions are devoid of any language requiring or suggesting that, to be permissible, state laws must be "substantially related to sufficiently important state interests," or "substantially related to legitimate state interests."[284] Rather, Justice O'Connor and the four Justices favoring only rational basis review spoke only in terms of state laws reasonably related to legitimate state interests. The *Gonzales* decision readily confirmed that approach.

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284 *See, e.g.*, City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440–42 (1985) (explaining various forms of heightened scrutiny).

Moreover, there is no reason for heightened scrutiny in the context of legislation relating to abortion. Heightened scrutiny of the legislative basis for a law was developed to protect constitutional rights deemed fundamental, or to protect against legislative classifications based on factors that ordinarily are not relevant, such as race, alienage, national origin, gender, or illegitimacy—classifications that therefore very likely reflect "prejudice and antipathy."[285] In these situations, the general rule that legislation is presumed valid falls away, opening the door to judicial scrutiny of the appropriateness of the law. *Casey* points away from heightened scrutiny in the abortion context. Seven Justices in *Casey* expressly backed away from *Roe's* vision of a fundamental right to terminate a pregnancy. Seven Justices in *Casey* also recognized and acknowledged that state regulation relating to abortion is not "very likely" driven by prejudice and antipathy, but, rather, is driven by a variety of legitimate state interests that must be respected given that a decision to abort a pregnancy is an act "fraught with consequences for others."[286] There is thus no reason to deviate from the standard paradigm of judicial restraint. As recognized by the Fifth Circuit in *Abbott II* in rejecting the Balancing Approach, this "rule of restraint" respects the legislative process.[287] The *Casey* analysis, as modeled by the Court in *Casey* and *Gonzales*, allows courts to guard against prejudice and antipathy by ensuring that a challenged law relating to abortion furthers—i.e., is reasonably related to—legitimate state interests. If so, the analysis requires courts to uphold the law unless the effect of the law rises to the level of a substantial obstacle. The inclusion of the substantial obstacle element is the means by which Justice O'Connor raised the undue burden analysis beyond mere rational basis review.

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285 *Id.*; *see also Beach Commc'ns*, 508 U.S. at 313–15 (noting that judicial intervention may be necessary where an inference of antipathy exists).

286 *Casey*, 505 U.S. at 852.

287 *See supra* notes 108–09 and accompanying text. As the Supreme Court has explained:

> The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted. . . .
>
> [T]hose attacking the rationality of the [law] have the burden "to negative every conceivable basis which might support it," . . . . Moreover, because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged [law] actually motivated the legislature. . . . [A] legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data. 'Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function.'

Beach Commc'ns, 508 U.S. at 314–15. (citations omitted).

Importantly, however, study of *Casey* and *Gonzales* also suggests that the traditional or standard articulation of (or approach to) the *Casey* analysis reflected in lower court decisions should be modified. Lower courts applying the *Casey* analysis have tended to view it as consisting of two steps, articulated as follows: the analysis requires, first, an assessment of the basis for the law; and, second, an assessment of whether the law imposes an undue burden—i.e., whether the purpose or effect of the law places a substantial obstacle in the path of a woman seeking an abortion.[288] The *Gonzales* decision clarifies a useful refinement to this vision of the *Casey* analysis—a refinement that merges the relational inquiry in what lower courts consider as step-one of the *Casey* analysis, with the purpose inquiry in step-two.

In *Gonzales*, the Court did not conduct what lower courts would consider a "step-one" analysis. Rather the decision hinged on the question whether the purpose or effect of the federal ban was to place a substantial obstacle in the path of a woman seeking a previability abortion (Part IV).[289] The analysis of the purpose of the law turned on whether the law furthered a legitimate government interest (Part IV(A)).[290] As discussed, using a deferential approach to the question and in part based on reasonable inferences, the Court found that the ban furthered legitimate state interests.[291] Based on that finding, the Court rejected the challenger's claim that the congressional purpose of the Act was to "place a substantial obstacle in the path of a woman seeking an abortion."[292] Under this approach, a finding that a law furthers a legitimate state interest suffices to take purpose out of the substantial obstacle inquiry, or, stated another way, streamlines the substantial obstacle analysis by allowing a court to focus only on the effect of the law.[293]

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288 As to the first step in the analysis the key disagreement between courts adopting and courts rejecting the Balancing Approach has been whether to use a traditional rational basis inquiry (as emphasized by the Fifth Circuit) or to require empirical evidence of the extent to which the challenged law furthered state interests (as endorsed by Judge Posner). As explained, the *Gonzales* decision does not support requiring states to prove with empirical evidence that a challenged abortion law furthers state interests, and confirms appropriateness of resort to traditional rational basis review.

289 *Gonzales*, 550 U.S. at 156–67.

290 *Id.* at 156–60.

291 *Id.*; *see also supra* Part III(B)(2).

292 *Gonzales*, 550 U.S. at 160.

293 *But see* June Med. Servs., LLC v. Kliebert, No. 14-525-JWD-RLB, 2015 WL 2239877, at *12–13 (M.D. La. May 12, 2015) (declining to adopt the argument offered by the Louisiana Department of Health and Hospitals that circuit precedent finding that the challenged abortion regulation furthers a legitimate state interest took the "purpose" inquiry off the

This way of understanding the *Casey* analysis is fully consistent with Justice O'Connor's explanation of the undue burden analysis. Justice O'Connor explained in *Casey* that "[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 non-viable fetus."[294] Yet, as Justice O'Connor continued to provide guidance regarding the analysis, she focused on the idea that permissible laws regulating abortion must have a valid purpose or further state interests: laws designed to serve legitimate interests (laws designed to further the interest in human life, or laws designed to foster the health or safety of a woman seeking an abortion) "will be upheld if reasonably related" to the legitimate interest—but only if "they are not a substantial obstacle to the woman's exercise of the right to choose."[295] By way of example, she explained that a state law "designed to persuade [a woman] to choose childbirth over abortion will be upheld if reasonably related to that goal" —"[u]nless it has the *effect* [of a substantial obstacle] on her right of choice."[296] It also is fully consistent with the important role of the relational inquiry: that of guarding against prejudice and antipathy by ensuring that a challenged law relating to abortion furthers legitimate state interests. Accordingly, the better way of articulating the *Casey* analysis is as follows:

> The analysis consists of an inquiry into purpose and effect: (1) a relational inquiry focusing on the *purpose* of the law, namely, whether the law is reasonably related to a legitimate state interest (e.g., the life of the unborn child, the health and safety of the mother or unborn child, the integrity of the medical profession, education of the community, etc.); and (2) an inquiry focusing on whether the *effect* of the law is to place a substantial obstacle in the path of a woman seeking a previability abortion.[297]

This formulation of the analysis retains a two-step approach, but each step is focused on a distinct inquiry: the purpose or legislative basis of the law in one step, and the effect of the law in the other.

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table, for the reason that the circuit court of appeals approached the analysis in the traditional two-stepped way).

294 *Casey*, 505 U.S. at 877.

295 *Id.* at 877–78.

296 *Id.* at 878 (emphasis added). She also reiterated the flip side of the equation: even a law reasonably related to a legitimate state interest is impermissible if the law imposes a substantial obstacle on a woman's decision to abort previability. *Id.* at 877 ("[W]e answer the question, left open in previous opinions discussing the undue burden formulation, whether a law designed to further the State's interest in fetal life which imposes an undue burden on the woman's decision before fetal viability could be constitutional. The answer is no." (citation omitted)).

297 *See supra* note 31 and accompanying text (describing the *Casey* analysis in this way).

This refinement also makes clear that the analysis does not depend on the nature of the state interests being advanced by the challenged state law and, importantly, preserves the concept of substantial obstacle as a meaningful standard for assessing the constitutionality of abortion restrictions. The district court in *Strange* had defended the Balancing Approach in part precisely because it undermined the substantial obstacle standard. The court explained:

> If the severity of the burdens imposed has nothing to do with the strength of the reasons for those burdens, then courts are left to articulate a one-size-fits-all definition of "substantial obstacle" applicable regardless of the weight of the governmental interests at stake.
>
> This approach is hopelessly unworkable. If the one-size-fits-all level of "substantial obstacle" is set too low, then courts will be instructed to strike down regulations even in the face of compelling health consequences, an outcome no one desires. If, on the other hand, the one-size-fits-all level of "substantial obstacle" is set too high, then essentially all abortion regulation would be permitted, no matter how severe the burdens and how slight the governmental interests.[298]

The court in *Strange* is right that setting the standard at the wrong point would be problematic. Indeed that was the whole point of the shift in abortion jurisprudence in *Casey*. *Roe* and its progeny had set the bar too high: requiring that challenged laws survive strict scrutiny (i.e., the laws must have been narrowly tailored and designed to advance compelling state interests), and miscalculating the point at which state interests would become compelling. Justice O'Connor adjusted the standard to better accommodate state laws furthering legitimate state interests.

But that the substantial obstacle standard remains to be applied on a case-by-case basis does not render it unworkable. Justice O'Connor intended the standard to be definite and meaningful. She believed that courts could identify the appropriate point at which a burden would infringe too greatly on a woman's limited freedom to decide to abort. In her vision, that point would be consistent with the name she selected "substantial"; and thus not merely "slight" as it could be in a case using the Balancing Approach. Preserving the standard as envisioned by Justice O'Connor is central to maintaining the overarching objective in *Casey*—modifying abortion jurisprudence to better accommodate state regulation of abortion furthering legitimate state interests.

In reality, the emerging use of the Balancing Approach largely reflects judges attempting to give effect to their subjective views that re-

298 *Strange*, 9 F. Supp. 3d at 1293 (summary judgment).

cent state legislative initiatives should not be permitted because the effect of the laws—although not "substantial"—warrants invalidation. The laws at issue impact the ease with which abortion providers such as Planned Parenthood can maintain and set up abortion clinics. In enacting admitting privileges laws or laws establishing higher standards for facilities where abortions are carried out—or laws aimed at ensuring that woman have appropriate guidance and assistance, whether for surgical or medication induced abortions—state legislatures are acting primarily to prevent the potential for substandard care in the context of abortion. This concern is reasonable in light of known instances of substandard care (see Appendix), and reasonable even if instances of substandard care are somewhat rare.[299] Planned Parenthood and other abortion providers are claiming a purported inability to comply and pointing to clinic closures.[300] The judges adopting the Balancing Approach primarily have been concerned about the potential that some woman will face greater practical difficulties accessing abortion services, and the Balancing Approach has simply been the vehicle allowing them to find that those difficulties render the laws unconstitutional—despite being analogous to effects the Court in *Casey* signaled as falling short of a substantial obstacle.

Additionally, in adopting the Balancing Approach the courts have side-stepped two important and distinct issues. The first issue is whether practical difficulties such as increases in travel distances and

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299 Judge Manion, in a concurring opinion in *Van Hollen* explained that, in defending the admitting privileges law, Wisconsin presented to the court numerous examples of egregious conditions and practices at some abortion clinics, emphasizing in particular the practices of Dr. Kermit Gosnell, which garnered national attention and shock just a few weeks prior to the enactment of the Wisconsin law. *See Van Hollen*, 738 F.3d at 802–03 (Manion, J., concurring) (noting that the Gosnell situation revealed use of unlicensed employees to conduct gynecological examinations and administer drugs, resulting in the death of a patient; instances of physical assault and forced abortion on a minor; leaving fetal remains in a woman's uterus causing excruciating pain; and unclean and bloody facilities). Judge Manion appended to the opinion a list of the examples of egregious and substandard care by abortion providers that Wisconsin had presented to the court. *Id.* at 807–10. Judge Manion's Appendix is included as an appendix to this Article.

300 The legitimacy of the claims is suspect, of course, given that Planned Parenthood regularly reports annual income in the billions. For example, for the fiscal year ending June 30, 2014, Planned Parenthood reported an overall income of $1.3 billion. *See* Planned Parenthood Federation of America, *2013–2014 Annual Report: Our Health. Our Decisions. Our Moment.*, at 19–22, (2014), http://www.plannedparenthood.org/files/6714/1996/2641/2013-2014_Annual_Report_FINAL_WEB_VERSION.pdf. Further, Planned Parenthood has recently opened a number of "mega" abortion facilities. *See, e.g.*, Randal K. O'Bannon, *Abortion Clinic Closings in Texas—What do they really mean?* (Mar. 14, 2014), http://www.nationalrighttolifenews.org/news/2014/03/abortion-clinic-closings-in-texas-what-do-they-really-mean/#.VNEzxC79x7Y (reporting that Planned Parenthood had opened up more than a dozen giant mega-centers between 2010 and 2014).

associated costs can ever rise to level of a substantial obstacle—which turns on the nature of the woman's interest protected by the undue burden analysis. Is it a liberty interest in being able to legally make the ultimate decision to terminate a pregnancy previability; or an interest that, in essence, requires states to facilitate abortion through a regulatory scheme that ensures ready and easy access to abortion providers. The second issue is whether it is reasonable to view the laws as causing the difficulties—as opposed to other factors, such as hospital-based decisions to deny staff privileges, or the meager number of physicians willing to perform abortions. These issues warrant analysis beyond the scope of this Article, and laws furthering legitimate state interests that indirectly result in practical difficulties in accessing abortion services should not be invalidated absent that careful analysis.

Lastly, another point is worthy of consideration. In large part the courts adopting the Balancing Approach have been reacting to the closure of some abortion clinics. Yet it is reasonable to view those closures as an effect that is due, in reality, to the preclusion of abortion-related regulation in the decades following *Roe*. That is, the preclusion of abortion regulation allowed Planned Parenthood and other abortion providers to set up clinics and offer abortion services with virtually no regulatory oversight. If the Court in *Roe* had exercised more restraint and allowed states room to strike the right balance legislatively—the balance between a woman's liberty interest in terminating a pregnancy and legitimate state interests—states may well have enacted the regulations now emerging in the immediate aftermath of *Roe*. If so, a possible consequence might have been fewer abortion clinics than the number that emerged under *Roe*'s analytical framework. If so, it would have been difficult to characterize the state regulations as presenting a substantial obstacle in the path of a woman seeking an abortion. Rather, the very same regulations would have been part and parcel of the process for allowing women legal access to abortion.

APPENDIX

List of Evidence of Substandard Abortion Care or Practices,

PREPARED BY JUDGE MANION IN *VAN HOLLEN*

APPENDIX TO THE CONCURRENCE

Dr. Soleiman Soli in Pennsylvania. *See* Mark Scolforo, *Two Abortion Clinics Closed After Reports,* THE WASHINGTON TIMES, Mar. 10, 2011, http://www. washingtontimes.com/news/2011/mar/10/2–abortion–clinics–closedafter–reports/ (two abortion clinics shut down when inspection revealed expired drugs, uncalibrated medical equipment, and untrained personnel; a network of abortion care providers described the clinics as "women exploiters").

Dr. Andrew Rutland in California. *See* C. Perkes, *Abortion Doctor Gives Up License Over Death,* ORANGE COUNTY REGISTER, Jan. 25, 2011, http://www.ocregister.com/articles/rutland–285561–death–license.html (woman died where clinic "was not equipped to handle emergencies" and the abortion doctor "failed to recognize [an allergic] reaction, adequately attempt resuscitation or promptly call 911." The doctor had previously given up his license "after allegations of . . . scaring patients into unnecessary hysterectomies, botching surgeries, lying to patients, falsifying medical records, over-prescribing painkillers and having sex with a patient in his office.").

Dr. Albert Dworkin in Delaware. *See* Steven Ertelt, *Hearing: Delaware Abortionist Helped Kermit Gosnell Avoid Law,* LIFENEWS, Mar. 16, 2011, http://www.lifenews.com/2011/03/16/hearing-delaware-abortionist-helpedkermit-gosnell-avoid-law/ (doctor complicit in Kermit Gosnell's violations has license suspended).

Dr. James Pendergraft in Florida. *See* Steven Ertelt, *Abortion Practitioner James Pendergraft Loses Florida License a Fourth Time,* LIFENEWS, Jan. 1, 2009, http://www.lifenews.com/2009/01/01/state–5339/(abortion doctor's license suspended for fourth time for entrusting drug administration to unlicensed employee, previous suspensions included a botched abortion that resulted in the unborn child being shoved into the abdominal cavity and requiring that the woman receive a hysterectomy).

The Gentilly Medical Clinic for Women and the Hope Medical Group for Women in Louisiana. *See* Steven Ertelt, *Abortion Business in Louisiana Loses License for Poor Health, Safety Standards,* LIFENEWS, Jan. 20, 2010, http://www. lifenews.com/ 2010/01/20/state–4743/ (clin-

ic lost license for operating without trained nurse or proper drug license); P.J. Smith, *Louisiana Abortion Clinic Shut Down for Ignoring "Most Basic" Medical Practices,* LIFENEWS, Sep. 7, 2011, http://www.lifesitenews.com/news/archive/ldn/2010/sep/10090707 (clinic's operations suspended for failing to observe "the most basic medical practices" including "provid[ing] women a physical examination prior to abortions" or "follow[ing] necessary protocols for the administration of anesthesia and monitoring their clients' vital signs").

Drs. Romeo Ferrer, George Shepard, Leroy Carhart, and Nicola Riley in Maryland. *See, respectively,* Steven Ertelt, *Pro–Lifers Want Maryland Practitioner Disciplined, Killed Woman in Botched Abortion,* LIFENEWS, June 1, 2010, http://www.lifenews.com/2010/06/01/state–5145/ ("Board of Physician's Peer Reviewers concluded the woman's death resulted from Ferrer's failure to meet the standard of quality care in violation of state law."); Steven Ertelt, Troubled Abortion Biz Sees Two Practitioners Lose Medical Licenses, LIFENEWS, Sept. 3, 2010, http://www.lifenews.com/2010/09/03/state–5416/ (transfer of patient of botched abortion in a rental car to a clinic in another state leads to the discovery, and suspension, of two doctors circumventing state law); Authorities: Woman Died from Abortion Complications, USA TODAY, June 12, 2013, http:// www.usatoday.com/story/news/nation/2013/02/21/woman-late-term-abortion-bled-todeath/1935799/ (Dr. Carhart is under investigation for the death of Jennifer Morbelli, a 29 year-old school teacher who underwent a late-term abortion); The order is available at http://abortiondocs.org/wp-content/uploads/2013/05/Nicola–Riley–MD–Permanent–Revocation–May–6–2013.pdf (order permanently revoking Dr. Nicola Riley's medical license Maryland after she failed to call for emergency help for a critically injured abortion patient and transported her to the hospital in the backseat of a rental car).

Dr. Steven Brigham in Maryland, New Jersey, and Pennsylvania. *See N.J. Targets Abortion Doctor Steven Brigham's License,* LEHIGH VALLEY LIVE, Sept. 9, 2010, http://www.lehighvalleylive.com/phillip-burg/index.ssf/2010/09/nj_targets_abortion_doctor_ste.html (New Jersey seeks to take doctor's license after Maryland already took his license for risky interstate abortion scheme).

Dr. Rapin Osathanondh in Massachusetts. *See* Denise Lavoie, *Doctor Gets 6 Months in Abortion Patient Death,* MSNBC, Sep. 14, 2010, http://www.msnbc.msn.com/*id*/39177186/ns/us_news-crime_and_courts/t/doctor-gets-months-abortion-patientdeath/ (doctor sentenced to six months in jail for involuntary manslaughter because "he failed to monitor [abortion patient] while she was under anesthesia,

delayed calling emergency services when her heart stopped, and later lied to try to cover up his actions.").

Dr. Alberto Hodari in Michigan. *See Schuette Files Suit to Close Unlicensed Abortion Clinic,* Office of the Attorney General, State of Michigan, Mar. 29, 2011, http://www.michigan.gov/ag/0,4534,7–164–253426—,00.html (Michigan Attorney General sues to close abortion clinic for failing to comply with health and safety rules applicable to surgical outpatient facilities).

Drs. Salomon Epstein and Robert Hosty in New York. *See* Steven Ertelt, *Practitioner Denies He Botched Legal Abortion That Killed Hispanic Woman,* LIFENEWS, Mar. 1, 2010, http://www.lifenews.com/2010/03/01/state–4858/ (New York police investigate doctor after 37–year–old patient dies in botched abortion); http://operationrescue.org/pdfs/Hosty%20revocation.pdf (eventually, responsibility for the death Dr. Epstein was investigated for was attributed to another doctor at the clinic, Dr. Hosty, whose license was revoked in this order); Southwestern Women' Options in New Mexico, *see* Jeremy Kryn, *New 911 Call from New Mexico Abortion Clinic Exposes Pattern of Emergencies,* LIFENEWS, Oct. 20, 2011, http://www.lifesitenews.com/news/new–911–call–from–new–mexico-abortion-clinic-exposes-pattern-of-emergencies ("A recording of a 911 call . . . highlights the continuing danger [at] an Albuquerque abortion clinic. . . . The call is the eleventh emergency call [from the clinic] in less than two years. . . ." it was transcribed as follows, "'Uh, we have a 31–year–old female who underwent an abortion today. She's continuing to bleed. We need to transfer her to the hospital, please . . . . The bleeding is persistent. It will not stop.'").

Dr. Tami Lynn Holst Thorndike in North Dakota. *See* Denise Burke, *North Dakota Abortionist Practices With Expired License,* AMERICANS UNITED FOR LIFE, Nov. 8, 2010, http://www.aul.org/2010/11/north-dakota-abortionist-practices-with-expiredlicense/ ("[A] North Dakota abortionist is being investigated for practicing with an expired license.").

Drs. Robert E. Hanson Jr., Margaret Kini, Douglas Karpen, Pedro J. Kowalyszyn, Sherwood C. Lynn Jr., Alan Molson, Robert L. Prince, H. Brook Randal, Franz Theard, and William W. West, Jr. of Whole Women' Health in Texas. *See* Steven Ertelt, *Tenth Texas Abortion Practitioner Under State Investigation,* LIFENEWS, Aug. 24, 2011, http://www.lifenews.com/2011/08/24/tenth-texas-abortion-practitioner-under-state-investigation/ (abortion center investigated for "illegal dumping of patient records and medical waste").

Dr. Thomas Walter Tucker II in Alabama and Mississippi. *See Abortion Doctor Suspended for Improper Drug Storage,* ORLANDO SENTINEL,

Apr. 24, 1994, http://articles.orlandosentinel.com/1994–04–24/news/9404240462_1_abortion-doctor-tucker-licensing (Dr. Tucker lost his medical license for drug-storage violations, and was subsequently found liable for $10 million in a medical malpractice case involving the death of an abortion patient. *See Former Abortion Doctor Ordered to Pay $10 Million,* SUN HERALD, Dec. 8, 1996, 1996 WLNR 256209).

Dr. Mi Yong Kim in New York and Virginia. *See* Operation Rescue, *Troubled Virginia Abortion Clinic Puts Bleeding Botched Abortion Patient in Hospital,* LIFESITENEWS, Apr. 20, 2012, http://www.lifesitenews.com/news/troubled-virginia-abortion-clinic-putsbleeding-botched-abortion-patient-in/ (patient put in hospital after abortion at clinic run by a doctor whose license had been surrendered. The surrender order available at http://abortiondocs.org/wp-content/uploads/2012/04/KimVALicense-Surrender05182007. pdf.).