Casey and the Clinic Closings: When “Protecting Health” Obstructs Choice

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Abstract

We seek in this article to understand how the Supreme Court’s abortion jurisprudence addresses laws that invoke not potential life, but women’s health as a reason to single out abortion for burdensome regulation that closes clinics. We approach this project with a sense of urgency. The current wave of health-justified restrictions—prominently including laws that require abortion providers to secure admitting privileges at nearby hospitals or to become the functional equivalents of hospitals themselves—is destroying the clinic infrastructure on which women depend in order to exercise their constitutional right to terminate a pregnancy.

There is now a sharp circuit conflict over how judges are to evaluate the states’ claims that admitting privilege laws protect women’s health. Some circuits read Planned Parenthood of Southeastern Pennsylvania v. Casey and the Court’s subsequent decision in Gonzales v. Carhart to require courts to examine whether health-justified regulations actually and effectively serve health-related ends. Others construe the cases to require judicial deference to the states’ claims. We argue that Casey/Carhart require judicial scrutiny of health-justified regulations to ensure these regulations do not obstruct abortion by unconstitutional means.

The analysis of health-justified restrictions we offer rests on an understanding of Casey’s undue burden standard—applied in Carhart—as the product of a compromise over Roe v. Wade. While prohibiting states from banning abortion before fetal viability, Casey allowed government to express a preference for childbirth throughout a woman’s pregnancy by trying to persuade her, through a 24-hour waiting period and the provision of information, to forgo abortion. Persuasion is the heart of the Casey compromise: government may protect potential life, but not in ways that obstruct women from acting on their constitutionally protected choice.

Regulations that close clinics in the name of women’s health, but without health-related justification, do not persuade; they prevent. In so doing, they violate the constitutional principle at the core of the Casey compromise: that government express respect for the dignity of human life by means that respect the dignity of women.
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The tidal wave of abortion restrictions that has followed recent Republican victories in state legislatures includes many regulations enacted in the name of protecting women’s health. Rather than protect potential life, these abortion restrictions claim to promote women’s safety. States require that doctors who perform abortions have admitting privileges at nearby hospitals or require that abortion clinics be outfitted as “ambulatory surgical centers.” These new laws single out abortion for health-justified restrictions not imposed on other medical procedures of similar risk. As legislators know or suspect, these requirement are unattainable for many abortion providers. As a result, restrictive laws are forcing large numbers of abortion clinics to close their doors. Before enactment of Texas’ admitting-privileges and ambulatory-surgical-
center law, there were 41 clinics remaining in the state; the law’s enforcement would close approximately three-fourths of these clinics. 5

Judges who strike down 6 and uphold 7 these restrictions have cited as authority the same Supreme Court decision from nearly a quarter-century ago: Planned Parenthood of Southeastern Pennsylvania v. Casey. 8 This is not as surprising as it might at first seem. Casey was a compromise, shaped by moderates who were responsive to those who wanted to overturn Roe v. Wade 9 and those who wanted to preserve constitutional protection for the abortion right. 10 The Court allowed states more latitude to restrict abortion in the interests of protecting potential life, so long as states employed means that respect women’s dignity; it required them to employ methods of protecting life that are “calculated to inform the woman’s free choice, not hinder it” 11 and that do not impose an “undue burden” on the abortion decision. 12 Casey has now been the law of the land longer than the unmodified Roe itself; fifteen years after Casey, a different majority, while more skeptical of the abortion right, nonetheless applied the Casey framework in deciding Gonzales v. Carhart. 13

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7 E.g., Whole Woman’s Health v. Cole, 790 F.3d 563 (5th Cir. 2015), mandate stayed pending cert. decision by 135 S. Ct. 2923 (June 29, 2015) (No. 14A1288); Whole Woman’s Health v. Lakey, 769 F.3d 285 (5th Cir. 2014) (overturning District Court injunction against Texas ambulatory-surgical-center requirement), vacated in part, 135 S. Ct. 399 (2014); Planned Parenthood of Greater Tex. Surg. Health Servs. v. Abbott (Abbott II), 748 F.3d 583 (5th Cir. 2014) (overturning the District Court’s permanent injunction against the Texas admitting-privileges law).


10 See infra text accompanying notes 28-31.

11 505 U.S. at 877.

12 Id. (defining undue burden as a restriction that “has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus”).

In what follows, we seek to understand how *Casey* and *Carhart* address laws that invoke not potential life, but women’s health as a reason to single out abortion for burdensome regulation that closes clinics. We approach this project with a sense of urgency. The current wave of health-justified restrictions—prominently including laws that require abortion providers to secure admitting privileges at nearby hospitals or that require abortion clinics to be outfitted as ambulatory surgical centers—is destroying the clinic infrastructure on which women depend in order to exercise their constitutional right to terminate a pregnancy.

There is now a sharp circuit conflict over how judges are to evaluate the states’ claims that these laws seek simply to protect women’s health. Some circuits read *Casey/Carhart* to require courts to examine whether health-justified regulations actually and effectively serve health-related ends. Others construe the cases to prohibit judicial inquiry of this kind and mandate judicial deference to the states’ claims.\(^{14}\) We argue that the *Casey/Carhart* framework requires judicial scrutiny of health-related regulations to ensure these regulations do not prevent abortion by unconstitutional means.

Returning to *Casey*, we find the decision guides the review of health-justified restrictions on abortion in two different ways. First, *Casey* explicitly directs how undue burden analysis applies to such restrictions, instructing judges to determine whether the regulations actually and effectively serve women’s health.\(^{15}\) In upholding the Partial Birth Abortion Ban Act in *Carhart*, the Court reviewed facts asserted in support of the statute, and reaffirmed that the Court “retains an independent constitutional duty to review factual findings where constitutional rights are at stake.”\(^{16}\)

\(^{14}\) *See infra* Part II.B.

\(^{15}\) *See infra* text accompanying notes 51-54.

\(^{16}\) *Carhart*, 550 U.S. at 165 (discussed *infra* text accompanying note 157).
As importantly, our return to *Casey* identifies a second source of limitations on health-justified regulation that flow from the logic of the compromise that the Court struck. *Casey* allows states to restrict abortion to protect the unborn but only by certain means: states may try to persuade women to choose childbirth, but may not obstruct them from acting on their decision to terminate a pregnancy.\(^\text{17}\) This distinction is crucial to *Casey’s* logic, and to the integrity of the undue burden framework as a compromise. A regulation that closes a clinic does not persuade a woman to forgo an abortion; it prevents her from obtaining one. Courts must therefore review a regulation that invokes health reasons for closing a clinic to ensure that the law actually and effectively serves health-related ends and does not enable states to protect potential life by means that *Casey* otherwise prohibits. Preserving this distinction between abortion restrictions that protect potential life and abortion restrictions that protect women’s health is one important way that *Casey* secures constitutional protection for women’s dignity.

Our reading of *Casey/Carhart* thus generates a fresh approach to health-justified restrictions on abortion sometimes called “TRAP laws” (targeted regulation of abortion providers).\(^\text{18}\) With an understanding of the protection that *Casey/Carhart* provides for women’s choices, it becomes clear why states cannot target abortion for onerous health restrictions that only weakly serve health-related ends. Weakly justified health laws that single out abortion for special restrictions—whether expressly or impliedly on the ground that abortion is “exceptional” because it involves the unborn\(^\text{19}\)—may protect the unborn in ways that violate *Casey*.

Our analysis proceeds in two parts. We first develop a framework for analyzing restrictions on the abortion right that is grounded in an understanding of the compromise guiding

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\(^{17}\) 505 U.S. at 877.

\(^{18}\) See infra note 72 and accompanying text.

\(^{19}\) For a particularly vivid example of abortion exceptionalism, see infra text accompanying note 76. For other examples, see infra notes 77, 169.
the *Casey/Carhart* line of cases. With this foundation, we then turn to contemporary litigation over the most recent efforts to restrict access to abortion in the name of women’s health. The circuits have divided over the question of how *Casey/Carhart* requires courts to review health-justified abortion restrictions. We argue that both the text of the *Casey* decision and its structure require courts to examine how effectively a health-justified abortion restriction actually serves the state’s asserted health interests in order to determine whether the burden it imposes is undue.

**Part I: Casey as Compromise**

*Casey* is a compromise in which moderates prevailed over those justices who wanted either to preserve or to reverse *Roe*. That *Casey* is a compromise is clear both from the opinions that make up the decision and from the overt dismay with which advocates on both sides greeted the outcome.\(^20\) The effort of Chief Justice Rehnquist and Justices Scalia and Thomas to replace *Roe’s* strict scrutiny with rational basis review of abortion restrictions ended in failure.\(^21\) *Roe’s* author, Justice Blackmun, also failed in his effort to maintain strict scrutiny and to preserve the trimester framework, which prohibited government from restricting abortion to protect potential

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\(^20\) In the immediate aftermath of *Casey*, a prominent supporter of *Roe* declared that the Court had deprived women of a fundamental right, while a prominent opponent of *Roe* declared that the Court had reaffirmed that fundamental right. *Compare* Roberto Suro, *The Supreme Court; Outside Court, Rival Rallies and Heavy Politicking*, N.Y. TIMES, June 30, 1992, at A15 (quoting Judith L. Lichtman, an abortion-rights advocate and president of the Women’s Legal Defense Fund, declaring shortly after *Casey* that “American women no longer have the fundamental right to make decisions about their own lives”) with Sara Fritz, *The Abortion Decision Ruling Pleases Neither Side: Both Vow to Continue Fight; Debate: The Opposing Camps Turn Their Attention to Upcoming Elections and the Future Makeup of the Supreme Court*, L.A. TIMES, June 30, 1992, at 5 (quoting James Bopp Jr., general counsel for National Right to Life Committee, declaring shortly after *Casey* that “[i]t’s a major loss to have a fundamental right to abortion upheld by the court”); and *id.* (quoting Randall Terry, an anti-abortion leader and founder of Operation Rescue, announcing just after Justices O’Connor, Kennedy, and Souter voted in part to strike down an abortion restriction in *Casey* that “Today the three Reagan-Bush appointees have stabbed the pro-life movement in the back and affirmed the bloodshed”).

\(^21\) *Casey*, 505 U.S. at 965 (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.”) (citation omitted); *id.* at 981 (Scalia, J., concurring in the judgment in part and dissenting in part) (“[A]pplying the rational basis test, I would uphold the Pennsylvania statute in its entirety.”).
life until the interest was deemed compelling at fetal viability, in the third trimester of pregnancy. What emerged, in an opinion jointly written by Justices O’Connor, Kennedy, and Souter, was the undue burden standard—a standard responsive to both proponents and opponents of the Roe framework.

Criticizing Roe’s strict scrutiny of pre-viability abortion restrictions on the ground that it “undervalues the State’s interest in the potential life within the woman,” the joint opinion asserts that the state’s “profound interest in potential life” offers a reason for regulation of abortion throughout pregnancy. But the joint opinion nonetheless imposes constitutional limits on the means by which government can protect its interest in potential life: “the State may take measures to ensure that the woman’s choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion.” While government can restrict access to abortion in the interests of persuading a woman to continue a pregnancy, it cannot do so by means that impose an “undue burden” on a woman’s decision. The joint opinion defines undue burden as “a state regulation that has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.” It explains: “A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman’s free choice, not hinder it.” In this way, a majority of the Casey Court—the three

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22 Casey, 505 U.S. at 929-30 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part). See Planned Parenthood v. Strange (Strange III), 33 F. Supp. 3d 1330, 1337-38 (M.D. Ala. 2014) (striking down an admitting-privileges law under Casey and describing the undue burden standard as a “middle ground between those who would impose strict-scrutiny review of such regulations and those who would require only a rational basis.”).
23 Casey, 505 U.S. at 875.
24 Id. at 878.
25 Id. at 879.
26 Id. at 877.
27 Id. (emphasis added).
authors of the joint opinion and the two Justices who refused to modify Roe’s trimester framework—reaffirm the Constitution’s protection for a woman’s decision whether to carry a pregnancy to term. A different majority of the Court—the three authors of the joint opinion and the four Justices who would have construed Roe in a rational basis framework—allows regulation of a woman’s decision whether to carry a pregnancy to term of a kind that Roe heretofore barred.

What emerged from the struggle within the Court is a holding that respects a woman’s constitutionally protected right to decide whether to continue a pregnancy and the government’s interest in persuading her to do so. Where Roe forbade all efforts to protect potential life before the point of fetal viability, Casey permits government efforts to persuade a woman to choose childbirth and to dissuade her from choosing abortion beginning in the earliest stages of pregnancy—so long as government protects potential life by means that do not unduly burden a woman’s right to make “the ultimate decision” about whether to carry a pregnancy to term.

This limit is crucial. It authorizes the government to protect potential life by means that recognize and preserve women’s “personal dignity and autonomy.”

28 See id. at 922 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part); id. at 910 (Stevens, J., concurring in part and dissenting in part). These justices would have preserved Roe’s trimester framework and thus were prepared to offer as much protection as the undue burden standard provided – and more.

29 Although parts of the joint opinion received only three votes, the joint opinion still represents the holding of the Court according to the rule established in Marks v. United States, 430 U.S. 188, 193 (1977) (“When a fragmented Court decides a case and no single rationale explaining the result enjoys 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.”) (internal quotation marks omitted). For confirmation that the Court considered the Casey joint opinion to be the holding of the court, see Stenberg v. Carhart, 530 U.S. 833, 875 (1992). See id. at 876 (“In our view, the undue burden standard is the appropriate means of reconciling the State’s interest with the woman’s constitutionally protected liberty.”).

30 Roe v. Wade, 410 U.S. 113, 163 (1973) (“With respect to the state’s important and legitimate interest in potential life, the ‘compelling’ point is at viability.”).

31 Casey, 505 U.S. 833, 875 (1992). See id. at 876 (“In our view, the undue burden standard is the appropriate means of reconciling the State’s interest with the woman’s constitutionally protected liberty.”).

32 See id. at 851:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.
Casey’s undue burden framework to give legal form to two values—potential life and the dignity of women—and to guide how these values are to be coordinated: “The joint opinion adopts an undue burden framework that allows government to regulate abortion in ways that respect the dignity of life, so long as the regulation respects the dignity of women.” It is because Casey vindicates multiple constitutional values that government is limited in the ways it can protect potential life. If government wants to protect unborn life, it has to respectfully enlist women in this project and cannot simply commandeer women’s lives for these purposes.

This is the essence of the Casey compromise. The Court allows the community to give voice to deeply held anti-abortion sentiment while nonetheless insisting that the Constitution protects a woman’s right to make her choice. As a compromise, the decision has frustrated advocates on both sides of the question. With respect to the pregnant woman, Casey invites paternalism (is she sure she knows what she is doing?), yet insists that the community respect her dignity (she has a right to decide for herself what she is doing). With respect to the unborn, Casey invites, but does not require, the state to favor childbirth over abortion, while leaving the ultimate decision in women’s hands.

In reviewing Pennsylvania’s restrictions on abortion, Casey dealt principally with regulations justified as protecting unborn life. We begin by examining these more familiar portions of the decision and show how the Court’s application of the undue burden standard makes dignity-respecting modes of persuading women crucial in any effort to protect unborn life. We then turn to a short section of the Casey decision that upholds record-keeping requirements.

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At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

as promoting women’s health. Few attend to this portion of the opinion; but it is an integral part of the undue burden framework, showing how courts ought to evaluate restrictions that claim a health-based rationale.

We conclude our discussion of Casey by considering differences between the state’s interest in protecting unborn life and women’s health. State-imposed obstacles to abortion are now so numerous—states enacted more than two hundred abortion-restricting laws from 2011 to 2014—that it is tempting to consider them as a unified whole. But, as we will show, separating analysis of laws vindicating the state’s interest in protecting unborn life from laws vindicating the state’s interest in protecting women’s health matters in any analysis that is faithful to Casey’s language and logic.

A. Casey on Potential Life and Women’s Health

To understand Casey’s requirement that government protect potential life by means of persuasion and not obstruction, we will examine the Court’s response to the three abortion regulations that were principally under consideration in the case. Pennsylvania’s Abortion Control Act of 1982 promoted the state’s interest in potential life in several ways. First was a counseling requirement directing doctors to provide information about the abortion procedure; the relative risks of abortion and childbirth; embryonic and fetal development; and resources available should the woman choose to carry the pregnancy to term. Laws requiring statements intended to discourage abortion had been held unconstitutional in the 1983 Akron decision as


35 See 18 PA. CONS. STAT. ANN. (West 1982) §§ 3205, 3207, 3209.

well as in a subsequent decision, *Thornburgh v. American College of Obstetricians and Gynecologists*. 37 The Court had held that such efforts at dissuasion improperly deterred women in the exercise of a constitutionally protected choice and interfered with the physician-patient relationship.38

Assuming that the Pennsylvania statute required “the giving of truthful, nonmisleading information,”39 *Casey* overturned those precedents in significant part. The controlling joint opinion of Justices O’Connor, Kennedy, and Souter said: “we permit a State to further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion.”40 The state may have engaged in directive counseling at odds with normal informed consent practice,41 but, given that it did not supply false or misleading information, the Court reasoned that the decision remained the woman’s. The Court thus understood the state to vindicate its interest in protecting unborn life by means consistent with the dignity of women.

The second Pennsylvania regulation the Court reviewed imposed a 24-hour waiting period between receiving the information about fetal development and proceeding with an abortion. Whether this regulation imposed an undue burden was “a closer question,” the joint opinion said, given that it required an additional doctor visit and would predictably lead to additional cost, travel time, and exposure to hostility or harassment. But “[t]he idea that

38 See, e.g., *id.* at 762.
40 *Id.* at 883.
41 See Siegel, *supra* note 33, at 1755 n.168 (explaining how *Casey* permits departure from ordinary informed consent, which is designed to provide information sufficient for autonomous decision-making and which, under principles announced by the President’s Commission for the Study of Ethical Problems in Medicine, obliges doctors to avoid “coercion and manipulation of their patients”).
important decisions will be more informed and deliberate if they follow some period of reflection does not strike us as unreasonable,” the opinion said. The Court allowed the state to impose modest costs and burdens on the exercise of choice as incidental effects of the state’s effort to persuade. “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.” Unlike Roe and the Akron and Thornburgh decisions, Casey recognizes a community interest in dissuading women from choosing abortion, and authorizes states to facilitate that effort, even if it entails the imposition of modest additional costs: States may bring the woman into conversation with a community that seeks to change her mind, so long as they do so in ways that do not unduly burden or obstruct her ultimate choice.

In this respect, as well, Casey understands the state to vindicate its interest in protecting unborn life by means consistent with the dignity of women.

The third significant regulation the Court considered in Casey was the requirement for a married woman to notify her husband before obtaining an abortion; doctors who provided an abortion without receiving a signed statement to that effect would lose their license and would be liable to the husband in damages. The burden imposed by this requirement was undue, the Court concluded. At least two different kinds of considerations informed this conclusion. First, the state had structured the decision-making process in a way that risked endangering those women who would not voluntarily discuss the decision with their husbands as, the Court observed, the overwhelming majority of women do: “We must not blind ourselves to the fact that the

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42 505 U.S. at 885.
43 Id. at 874 (“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.”).
44 Id. at 877.
45 Id. (“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.”).
significant number of women who fear for their safety and the safety of their children are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases.”

But the fact that the decision-making process was structured to expose women seeking an abortion to the risk of domestic violence was not the only constitutional flaw in the spousal-notice requirement. In a remarkable four-page discussion, the Court explained that the state could not vindicate its interest in protecting potential life by requiring a woman to notify her husband before obtaining an abortion because structuring the decision-making process in this way reflected and perpetuated a long-standing, but now unconstitutional, understanding of the marital relationship. The husband’s interest in the life of the child his wife is carrying does not permit the State to empower him with this troubling degree of authority over his wife. The contrary view leads to consequences reminiscent of the common law. Casey prohibits the state from requiring a woman to place her constitutionally protected decision in her husband’s hands, even to save potential life, instead requiring the state to save life only by means that respect women’s dignity. “A State may not give to a man the kind of dominion over his wife that parents exercise over their children.”

46 Id. at 894 (observing that “about 95% [of married women] notify their husbands of their own volition”). In defending the spousal notice requirement, the state had argued that because only 20 percent of women seeking abortions were married, and 95 percent of those women voluntarily notified their husbands, the notice requirement affected only one percent of women and thus could not be deemed facially invalid. In rejecting this argument the joint opinion observed: “The analysis does not end with the one percent of women upon whom the statute operates; it begins there. Legislation is measured for consistency with the Constitution by its impact on those whose conduct it affects.” Id. at 894. The joint opinion concluded that the impact “must be judged by reference to those for whom it is an actual rather than an irrelevant restriction.” Viewed from this perspective, “in a large fraction of the cases in which [the spousal notice requirement] is relevant, it will operate as a substantial obstacle to a woman’s choice to undergo an abortion.” Id. at 895.

47 Casey’s discussion of the spousal-notice requirement ranges over eleven pages, of which the last four concern constitutional concerns raised by its perpetuation of common law understandings of the marriage relationship.

48 Id. at 898.

49 Id.
These passages of *Casey* do more than prohibit the government from coercing women into continuing a pregnancy. In these passages, *Casey* constrains the ways in which government may persuade women to continue a pregnancy. For example, in any effort to dissuade women from choosing abortion, *Casey* restricts the government to providing information that is “truthful” and “nonmisleading.”\(^{50}\) Government may not provide a woman false or misleading information that might persuade her to continue a pregnancy, presumably because it would transform the woman into the government’s instrument for childbearing. In barring this mode of persuasion, *Casey* prohibits the government from protecting potential life by means that deny women liberty and equality. A principled understanding of this kind also leads the Court to strike down the spousal notice provision. Government may not require a woman to tell her husband of her decision to end a pregnancy, even if it begins a conversation that saves a potential life, because persuasion under these conditions perpetuates the husband’s historic forms of authority over his wife. Government may not structure the decision-making process in this way, *Casey* holds, even in non-abusive relationships, because it denies women liberty and equality. In these different applications of the undue burden framework, the Court shows us that government may persuade women to forego abortion and thus to protect potential life—but only if government employs modes of persuasion that are, in the Court’s view, consistent with the dignity of women.

In reviewing the Pennsylvania statute, *Casey* addresses health-justified regulation of abortion as well as fetal-protective restrictions. The joint opinion begins its discussion of how *Casey* governs the regulation of abortion with a statement of principles setting forth how its

\(^{50}\) *Id.*
undue burden standard separately applies to laws promoting each of these state interests. 51 The joint opinion makes clear that some health-justified regulations are permissible, while others are not:

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. 52

The Court thus allows regulation of abortion in the interests of protecting women’s health to the extent that it is consistent with ordinary medical practice (“as with any medical procedure”). But the Court prohibits as an undue burden health-justified regulations that are “unnecessary” and have the “purpose or effect” of making access to abortion substantially more difficult. Singling out abortion for onerous regulation not applied other medical procedures of similar risk is thus suspect in this framework, as we develop below.

A final section of the joint opinion applies these principles to the one provision of the Pennsylvania statute at issue that regulated abortion in the interests of public health. The Pennsylvania law required providers to report information to the state about their practice of abortion. The Court viewed Pennsylvania’s reporting requirements as protecting women’s health, distinguishing that interest from the state’s interest in protecting potential life by dissuading women from ending a pregnancy:

Although [the requirements] do not relate to the State’s interest in informing the woman’s choice, they do relate to health. The collection of information with respect to actual patients is a vital element of medical research, and so it cannot be said that the requirements serve no purpose other than to make abortions more difficult. Nor do we

51 Id. at 878-79. Both Roe and Casey clearly distinguish between the state’s interest in protecting women’s health and in protecting unborn life. In Roe, the Court authorized the state to regulate abortion in the interests of protecting women’s health and protecting unborn life at different stages of pregnancy. Roe v. Wade, 410 U.S. 113, 163-64 (1973). While eliminating the trimester framework and authorizing government regulation promoting each of these interests throughout pregnancy, Casey continues to treat the two state interests as analytically distinct.

52 505 U.S. at 878.
find that the requirements impose a substantial obstacle to a woman’s choice. At most they might increase the cost of some abortions by a slight amount. While at some point increased cost could become a substantial obstacle, there is no such showing on the record before us.\textsuperscript{53}

In this passage, \textit{Casey} discusses how the undue burden analysis applies to restrictions on abortion justified on the grounds, not of protecting unborn life, but of protecting women’s health. In applying undue burden analysis, here as in its summary of principles, the Court separately considers both the purpose and effect of the regulation. In this passage, it is clear that a regulation enacted for the putative purpose of protecting women’s health must \textit{in fact} promote health to justify imposing increased costs on the practice of abortion. A restriction on abortion enacted for the claimed purpose of protecting women’s health is not constitutional if it “serve[s] no purpose other than to make abortions more difficult.” But the Court does not examine purpose as the sole criterion of constitutionality. The undue burden framework is equally concerned with effects, thus leading the Court to inquire whether the reporting requirement “impose[s] a substantial obstacle to a woman’s choice.” The Court allows regulation that promotes health, even if the health regulation had the incidental effect of increasing abortion’s cost “by a slight amount”—reserving the question of the conditions under which increased cost becomes a “substantial obstacle.”\textsuperscript{54}

Few have engaged seriously with these passages discussing the application of undue burden analysis to abortion restrictions enacted in the interest of protecting women’s health as

\textsuperscript{53} 505 U.S. at 900-01 (emphasis added). The only section of the reporting requirements the Court declined to uphold required doctors to report to the state a woman’s reasons for not notifying her husband about her choice to terminate a pregnancy. \textit{Id}.

\textsuperscript{54} The few lower-court decisions that cite this passage have typically invoked it only for the proposition that a marginal increase in the cost of an abortion does not constitute an undue burden. \textit{See} A Woman’s Choice-\textit{E. Side Women’s Clinic v. Newman}, 904 F. Supp. 1434, 1458 (S.D. Ind. 1995) (“However, the joint opinion in \textit{Casey} shows that increased cost and inconvenience, apparently even for little or no actual benefit, do not establish an undue burden in the sense that the law would actually prevent women from having abortions they would choose to have.”); \textit{see also} Davis v. Fieker, 952 P.2d 505, 515 (Okla. 1997); Planned Parenthood Sw. Ohio Region v. DeWine, 696 F. 3d 490, 512 (6th Cir. 2012).
distinct from protecting fetal life. In the next section we discuss how Casey both distinguishes and relates health-justified and fetal-protective restrictions on abortion.

**B. Health Justifications for Restricting Abortion**

Casey applies the same undue burden framework to restrictions on abortion enacted in the interest of protecting potential life and in the interest of protecting women’s health. Yet, as we will show, preserving the Casey compromise requires applying undue burden with attention to the differences between these two regulatory interests.

Public debate about abortion has overwhelmingly focused on fetal-protective reasons for restricting abortion, as has most of the Court’s abortion jurisprudence. The Casey court repeatedly emphasized that its reason for abandoning the trimester framework and replacing it with the undue burden framework was the concern expressed on and off the Court that Roe had “undervalue[d]” the state’s interest in protecting unborn life. In upholding the federal Partial Birth Abortion Ban Act, which prohibited an infrequently used method of performing abortion during the second trimester, Gonzales v. Carhart invoked these very passages of Casey in the course of applying its undue burden standard. In reviewing the constitutionality of the federal statute, the Court emphasized “that the government has a legitimate and substantial interest in

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55 No cases appear to engage with the passages of Casey discussing the reporting requirement. There are, however, cases that address the discussion of undue burden and health restrictions on abortion that appears in the part of the joint opinion in which its three authors state the principles governing their analysis. For an early case, see Tucson Women’s Clinic v. Eden, 379 F.3d 531, 539-40 (9th Cir. 2004) (quoting Casey for the proposition that, “[a]s 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”). Several recent decisions quote the language on health restrictions that appears in the summary. See, e.g., infra text accompanying note 128.

56 505 U.S. at 873.

57 Gonzales v. Carhart, 550 U.S. 124, 146 (2007) (observing that Casey’s undue burden standard “struck a balance” between protecting “the woman’s exercise of the right to choose” and the ability of the state to “express profound respect for the life of the unborn”).
promoting fetal life,”⁵⁸ and set out to “determine whether the Act furthers the legitimate interest of the Government in protecting the life of a fetus that may become a child.”⁵⁹

But the deference that the Court extends to the state’s interest in protecting potential life does not necessarily extend to the state’s interest in regulating abortion to protect women’s health. Indeed, *Casey* cautions against conflating these interests. To show how this is so, we return to the passages in which the Court discusses the application of undue burden analysis to health-justified restrictions on abortion. In each discussion, the Court invites judges to distinguish between health restrictions that are needed and those that are “unnecessary” or pretextual.⁶⁰ *Casey* does not similarly examine the grounds for restricting abortion in furtherance of the state’s interest in protecting potential life.

Why might *Casey* invite judicial skepticism toward regulation enacted on behalf of one interest and not the other? When the Court cautions against “unnecessary health regulations”⁶¹ or health-justified restrictions that “serve no purpose other than to make abortions more difficult,”⁶² the Court seems to be concerned about a legislative subterfuge: while talking in terms of women’s health, the legislature is actually trying to make abortions “more difficult” for a different purpose—to protect unborn life. Presumably it is the effort to evade constitutional restrictions on the means by which government may protect unborn life that would animate subterfuge of this kind. Recall that *Casey* imposes constitutional limits on the means by which government can protect its interest in potential life: “the State may take measures to ensure that the woman’s choice is informed, and measures designed to advance this interest will not be

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⁵⁸ Id. at 145.
⁵⁹ Id. at 146. For further discussion of *Carhart*, see infra Part II.C.1.
⁶⁰ See supra text accompanying notes 54-54.
⁶¹ 505 U.S. at 878.
⁶² 505 U.S. at 900-01 (emphasis added).
invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion.”

“To preserve Casey’s core protection for a woman’s decision, judges have to review health-justified restrictions on abortion in order to ensure that they in fact serve health-related ends and do not instead protect potential life by unconstitutional means—by obstructing women’s access to abortion without attempting to reason with them about their decision. That is the essence of the undue burden inquiry and the core of the Casey compromise.

Yet how are judges to distinguish between constitutional and constitutionally suspect forms of health regulation? States are of course entitled to regulate the practice of medicine as a matter of their police power, and judges, as a longstanding matter of federalism, will be loath to interfere with that prerogative. For example, five years after Casey, the Court in Mazurek v. Armstrong, a brief per curiam opinion, upheld a Montana law providing that only a doctor could perform an abortion. The Court noted that physician-only requirements of various kinds had been sustained in its prior cases, including both Roe and Casey. As the regulation at issue in Mazurek would not force any woman to travel to a different facility, the Court judged its effects minimal. The Court declined to find Montana’s physician-only requirement unconstitutional in purpose, in the face of the Supreme Court’s several cases sanctioning

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63 Id. at 879 (emphasis added).
64 Id. (emphasis added).
66 Id. at 973 (emphasizing that “[o]ur cases reflect the fact that the Constitution gives the States broad latitude to decide that particular functions may be performed by licensed professionals, even if an objective assessment might suggest that those same tasks could be performed by others” (emphasis omitted) (quoting Casey, 505 U.S. at 885).
67 Id. at 973-974.
physician-only requirements, the requirement’s minimal effects on abortion access, and the fact that similar rules existed in forty other states.\(^{68}\)

Of course at some point the state’s police power may be exercised in such a way as to violate a constitutionally protected right. For example, the state’s interest in public health is not, after *District of Columbia v. Heller*,\(^{69}\) sufficient to justify a ban on possession of handguns in the home. *Casey* itself seems to offer some guidance for courts in distinguishing between regulations of the practice of medicine that are a legitimate exercise of the police power and regulations of the practice of medicine that may run afoul of a constitutional right. In upholding Pennsylvania’s reporting requirement, the Court emphasizes that “[t]he collection of information with respect to actual patients is a vital element of medical research.”\(^{70}\) The Court reasons that the reporting requirement conforms to the general regulation of the practice of medicine outside the abortion context, and that benchmark seems to guide the Court in upholding the law against constitutional challenge.\(^{71}\)

The reporting requirements upheld in *Casey* differ in this important respect from restrictions enacted across the nation that single out abortion providers for extraordinary or unusual regulation. Such regulations impose only on abortion clinics requirements not imposed on other similarly situated institutions that may provide outpatient medical care. (Opponents

\(^{68}\) Id. at 973.

\(^{69}\) 554 U.S. 570 (2008).


\(^{71}\) In summarizing the decision’s guiding principles, the authors of the joint opinion again invoke this comparative benchmark: “As with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion.” Id. at 878 (quoted in full *supra* text accompanying note 52).
sometimes term restrictions of this kind “TRAP” laws—short for targeted regulation of abortion providers.  

What does Casey have to say about abortion exceptionalism of this kind? Judges differ profoundly in their understanding of how Casey’s undue burden framework applies to laws that single out abortion for health-justified restrictions. A debate among judges on the Fourth Circuit illustrates the nature of this disagreement. At issue was the constitutionality of a South Carolina law that targeted physicians’ offices and medical clinics performing five or more first-trimester abortions a month with special licensure and operational requirements. The District Court struck down the regulations as imposing an undue burden. The requirements were “medically unnecessary,” the court said, imposing “costs and other burdens” that were “not justified by the stated interest in protecting the health of the women undergoing the procedure.” The Fourth Circuit reversed, over a dissent that objected that the state law “singles out and places additional and onerous burdens upon abortion providers which are neither justified by actual differences nor rationally related to the state’s legitimate interest in protecting the health and safety of women seeking first trimester abortions.” The majority upheld the regulations as protecting women’s health and explained the justification for treating abortion differently:

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72 See, e.g., Guttmacher Institute, State Policies in Brief, Targeted Regulation of Abortion providers As of June 1, 2015 (2015), http://www.guttmacher.org/statecenter/spibs/spib_TRAP.pdf (“Efforts to use clinic regulation to limit access to abortion, rather than to make its provision safer resurfaced in the 1990s and have gained steam since 2010.”). See also Center for Reproductive Rights, Targeted Regulation of Abortion Providers (TRAP), March 5, 2009. http://www.reproductiverights.org/project/targeted-regulation-of-abortionproviders-trap (“TRAP’ (Targeted Regulation of Abortion Providers) laws single out the medical practices of doctors who provide abortions and impose on them requirements that are different and more burdensome than those imposed on other medical practices.”); Dawn Johnsen, ‘TRAP’ing Roe in Indiana and a Common-Ground Alternative, 118 YALE L.J. 1356, 1369 (2009) (describing as a TRAP law a law that “targeted abortion providers with onerous regulations that were not supported by health or safety needs.”).


74 Id. at 737.

75 Greenville Women’s Clinic v. Bryant, 222 F. 3d 157, 205 (4th Cir. 2000) (citing Romer v. Evans, 517 U.S. 620, 632 (1996)) (observing, “‘its sheer breath is so discontinuous with the reasons offered for it that [Regulation 61-12] seems inexplicable by anything but animus toward the class it affects’”).
It is regrettable that our good colleague in dissent would rule on the basis that abortion is like any other simple medical procedure that is directed at injury or disease. Thought of in this way, it is understandable that he, like the district court, might find many of South Carolina’s regulations unnecessary. Why have inspections, keep records, and minimize the medical risks for only the abortion procedure, when such a protocol is not mandated for comparable medical practices addressing injury and disease? But the importance of the deeply divided societal debate over the morality of abortion and the weight of the interests implicated by the decision to have an abortion can hardly be overstated. As humankind is the most gifted of living creatures and the mystery of human procreation remains one of life’s most awesome events, so it follows that the deliberate interference with the process of human birth provokes unanswerable questions, unpredictable emotions, and unintended social and, often, personal consequences beyond simply the medical ones.\textsuperscript{76}

As these unusually frank judicial exchanges demonstrate, abortion exceptionalism denotes something more than the fact of singling out abortion for special, health-justified restrictions. Visible here, but more often submerged in neutral language, is the notion that there is a special moral valence to abortion that, because it concerns the unborn, warrants special forms of health regulation singling out abortion for health regulation not imposed on procedures of comparable risk.

Setting the Fourth Circuit’s opinion alongside \textit{Casey} shows how \textit{Casey} rejects abortion exceptionalism of this kind.\textsuperscript{77} \textit{Casey} treats with utmost gravity the state’s interest in regulating

\textsuperscript{76} Id. at 175 (emphasis added). On the law’s health rationale, see id. at 163.

\textsuperscript{77} Examples of abortion exceptionalism abound. In 2011, for example, Oklahoma, enacted a law requiring abortion providers to use an outdated protocol in dispensing the medication that produces non-surgical abortion in early pregnancy. While one-third the dose indicated on the drug’s Final Printed Label is now regarded in the medical community as appropriate practice, the Oklahoma law deemed the lower dose a prohibited “off-label” use. Off-label uses for approved medications are common and do not violate federal law; notably, an Oklahoma law prohibits health insurers from excluding coverage of off-label cancer treatments. Okla. Rev. Stat. § 63-1-2604. See Respondents’ Brief in Opposition at 5, Cline v. Oklahoma Coalition for Reproductive Justice (No. 12-1094).

Laws prohibiting the “off-label” use of abortion-inducing medication offer a paradigm case of abortion exceptionalism. “The Supreme Court itself has noted that off-label use ‘is an accepted and necessary corollary of the FDA’s mission.’ Planned Parenthood Ariz., Inc. v. Humble, 753 F. 3d 905, 915 (9th Cir. 2014) (quoting Buckman Co. v. Plaintiffs’ Legal Comm., 531 U.S. 341, 350 (2001)). Judge Moore, dissenting from the Sixth Circuit’s decision upholding Ohio’s requirement that doctors use the dosage on the outdated label, noted that “the Act focuses solely on abortions” and that Ohio continued to permit off-label uses of the identical medication outside the abortion context. Planned Parenthood Sw. Ohio Region v. DeWine, 696 F. 3d 490, 507 n.17 (6th Cir. 2012) (Moore, J., dissenting in part).
abortion in the interest of protecting unborn life. It provides the community a means of vindicating this interest: dissuading women from having an abortion. Yet the Court does not permit regulation justified as protecting women’s health to function as an additional means of protecting the interest in potential life. Casey allows health-justified regulation of abortion where consistent with the ordinary regulation of the practice of medicine but objects to “unnecessary” health regulation whose purpose or effect is to deter women from acting on a decision to end a pregnancy: “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.”

As this passage shows, the undue burden framework prohibits laws that single out abortion for “unnecessary” health regulations that obstruct access and express moral condemnation of the practice. Under Casey, government may not mix regulatory interests and use health-justified regulations to obstruct access to abortion by non-dissuasive means.

Part II. The Clinic Closings: Prevention, Not Persuasion

In recent years, states have been enacting increasingly burdensome laws that impose restrictions on abortion providers that are not imposed on others who perform health care procedures of similar risk. Some laws require providers to acquire admitting privileges at hospitals which for reasons of politics, religion, or stigma want nothing to do with doctors who perform abortions; others require the clinics to be retro-fitted as small hospitals at unaffordable

79 See infra notes 97-100 and accompanying text.
expense. The practical impact of these health restrictions appears to be much greater than that of fetal-protective laws designed to dissuade women from having an abortion; those communicate to one woman at a time the state’s message that abortion is the wrong choice.

By contrast, the recently enacted health restrictions dramatically shrink abortion providers’ infrastructure, shutting clinics and disabling doctors from serving their patients. For example, in overturning Mississippi’s admitting-privileges law, the Fifth Circuit concluded that the law imposed an undue burden because it would have the effect of closing the sole remaining abortion clinic in the state. In Texas, the Federal District Court blocked House Bill 2 after observing that the number of abortion clinics in the state had already shrunk from more than forty to half that number since the law’s admitting-privileges requirement took effect in late 2013. On appeal, the Fifth Circuit largely reversed the District Court’s injunction, permitting a reduction in the number of clinics to “at least eight” in the state of Texas. Judge Richard A. Posner, in affirming a preliminary injunction against Wisconsin’s admitting-privileges law,

80 For an example of these provisions in Texas, see supra note 5 and accompanying text. For the cost imposed by requiring that abortion clinics be rebuilt as “ambulatory surgical centers,” see, e.g., Kathryn Smith, Virginia Adopts Stricter Rules for Abortion Clinics, POLITICO (Apr. 15, 2013), http://www.politico.com/story/2013/04/virginia-adopts-stricter-rules-for-abortion-clinics-90042.html (noting that the cost of compliance could require a small abortion and gynecology clinic in Falls Church to “add five rooms and could cost up to $1 million”); see also Rachel Benson Gold & Elizabeth Nash, TRAP Laws Gain Political Traction While Abortion Clinics—and the Women They Serve—Pay the Price, 16 GUTTMACHER POL’Y REV. 7, 11 (Spring 2013).

81 See, e.g., Esme E. Deprez, Abortion Clinics Close at Record Pace After States Tighten Rules, BLOOMBERG BUSINESS, Sept. 3, 2013, http://www.bloomberg.com/news/articles/2013-09-03/abortion-clinics-close-at-record-pace-after-states-tighten-rules (reporting that “[a]t least 58 U.S. abortion clinics—almost 1 in 10—have shut or stopped providing the procedure since 2011 as access vanishes faster than ever amid a Republican-led push to legislate the industry out of existence,” and reporting that at the time of publication laws that “make[] it too expensive or logistically impossible for facilities to remain in business” were responsible for a third of the closings with a new round of closings anticipated).


84 Whole Woman’s Health v. Cole, 790 F.3d 563, 597 (5th Cir. 2015), mandate stayed pending cert. decision by 135 S. Ct. 2923 (June 29, 2015) (No. 14A1288); see also Manny Fernandez and Erik Eckholm, Court Upholds Texas Limits on Abortions, N.Y. TIMES, Jun. 9, 2015 (reporting on the reduction of the number of Texas clinics from eighteen to ten when the Fifth Circuit’s decision goes into effect).
which gave doctors one weekend to come into compliance, noted in his opinion for the Seventh Circuit that the law would have shut down two of the state’s four abortion clinics. In Alabama, three of the state’s five abortion clinics sued to block the state’s admitting-privileges law, informing the District Court that if the law went into effect, they would be forced to stop performing abortions.

State leaders involved in enacting these laws expressed hostility to abortion, even as they claimed a health-protective purpose. Shortly after the Texas admitting-privileges and ambulatory-surgical-center bill was sent to the House, then-Lieutenant Governor David Dewhurst tweeted a photo of a map that showed all of the abortion clinics that would close as a result of the bill, writing “We fought to pass SB5 thru the Senate last night, & this is why!” Dewhurst quickly backpedaled, tweeting “I am unapologetically pro-life AND a strong supporter of protecting women’s health. #SB5 does both.”

Lawmakers have offered similar observations in Mississippi, where an admitting-privileges law threatened to shut down the last clinic in the state. In a “state of the state” speech

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85 Planned Parenthood of Wis., Inc. v. Van Hollen, 738 F.3d 786, 789 (7th Cir. 2013).
86 Planned Parenthood Se., Inc. v. Strange (Strange II), 9 F. Supp. 3d 1272, 1276 (M.D. Ala. 2014). Judge Myron Thompson declared the law unconstitutional, reasoning that the Supreme Court “gave us our marching orders in Casey.” Planned Parenthood v. Strange (Strange III), 33 F. Supp. 3d 1330, 1380 (M.D. Ala. 2014). Other states where new health-justified regulations have led to clinic closings include Arizona, where the number of clinics has dropped from eighteen to six since 2010. Laura Bassett, Anti-Abortion Laws Take Dramatic Toll on Clinics Nationwide, HUFFINGTON POST, (Aug. 26, 2013) www.huffingtonpost.com/2013/08/26/abortion-clinic-closures_n_3804529.html. Five clinics closed in Ohio, leaving nine in operation, as the result of a 2013 law requiring clinics to have a patient-transfer agreement with a nearby private hospital; previously, the clinics could use the more willing public hospitals. Amanda Seitz, Abortion Clinic Stops Procedures, 9 Facilities Remain in Ohio, DAYTON DAILY NEWS, Aug. 20, 2014. One of the two abortion clinics in Knoxville, Tenn. closed after the state enacted its “Life Defense Act of 2012,” requiring doctors at abortion clinics to have hospital admitting privileges. Kristi L. Nelson, Abortion Clinic Director Blames New State Law for Closure, KNOXVILLE NEWS SENTINEL, Aug. 18, 2012.
88 David Dewhurst, TWITTER (June 19, 2013, 10:06 AM), https://twitter.com/DavidHDewhurst/status/347400087191814145; see also Vertuno, supra note 83.
delivered on the 41st anniversary of *Roe*, Gov. Phil Bryant said: “I believe we have also done an admirable job in protecting our children both born and unborn. By strengthening the Child Protection Act and by requiring that abortionists obtain admitting privileges at local hospitals, we are protecting women’s health. But let me be clear, on this unfortunate day of *Roe v. Wade*, my goal is to end abortion in Mississippi.”

It isn’t surprising that states enacting and defending admitting-privilege statutes assert that the laws protect women’s health. Acknowledging a fetal-protective justification for the

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The handbook of model legislation published annually by Americans United For Life discusses “admitting privileges” fifty-eight times in its 2015 edition, and includes the requirement in several model laws, including its *Women’s Health Protection Act* and its *Abortion Providers’ Admitting Privileges Act*. See AMERICANS UNITED FOR LIFE, DEFENDING LIFE et seq. (2015), http://www.aul.org/downloads/defending-life-

2015/AUL_Defending_Life_2015.pdf; see also id. at 354-65; cf. Planned Parenthood of Wis., Inc. v. Van Hollen, No. 13-CV-465-WMC, 2015 WL 1285829 *3 (W.D. Wis. Mar. 20, 2015) (reporting that Wisconsin’s admitting-privileges legislation was proposed to its legislative sponsor by representatives of the state’s Right to Life chapter and “opposed by the state’s leading medical and public health associations”).

90 See, e.g., Planned Parenthood of Wis., Inc. v. Van Hollen, 738 F.3d 786, 789 (7th Cir. 2013) (“The stated rationale of the Wisconsin law is to protect the health of women who have abortions.”); *Strange II*, 9 F. Supp. 3d 1271, 1298 (M.D. Ala. 2014) (“The State contends that the statute was passed only with the purpose of furthering women’s health.”).

But Texas, by contrast, offered shifting rationales for enacting its admitting-privileges law. The official bill analysis for the state senate observes of its admitting-privileges law “[w]omen who choose to have an abortion should receive the same standard of care any other individual in Texas receives, regardless of the surgical procedure performed. HB 2 seeks to increase the health and safety of a woman who chooses to have an abortion...”


Initially, in the District Court in *Abbott*, Texas argued that its admitting-privileges requirement served to protect maternal health. *See* Defendants’ Trial Brief at 42, Planned Parenthood of Greater Tex. Surg. Health Servs. v. Abbott (*Abbott I*), 951 F. Supp. 2d 891 (W.D. Tex. 2013) (No. 1:13CV00862) (“HB 2 was enacted to protect the health and safety of patients”). In trial, see infra note 169, and on appeal, however, the state changed course and defended the admitting-privileges requirements requirement as promoting women’s health and protecting fetal life: “The Texas Legislature enacted the admitting privileges requirement to promote the health and safety of abortion patients and to advance the State’s interest in protecting fetal life.” *Appellants’ Brief* at 2, Planned Parenthood of Greater Tex. Surg. Health Servs. v. Abbott (*Abbott II*), 748 F. 3d 583 (5th Cir. 2014) (No. 13-51008). *See also* Appellants’ *Reply* Brief at 6, *Abbott II*, 748 F.3d 583 (5th Cir. 2014) (No. 13-51008) (“The admitting-privileges requirement was enacted to make abortions safer for patients who choose abortion and to protect fetal life for those patients who do not.”). State officials also embraced the two state interests. See Manny Fernandez and Erick Eckholm, *Court Upholds Texas Law Criticized as Blocking Access to Abortions*, NEW YORK TIMES (June 9, 2015), http://www.nytimes.com/2015/06/10/us/court-upholds-texas-law-criticized-as-blocking-access-to-abortions.html?emc=edit_tnt_20150609&nlid=66491664&ntemail0=y&r=0 (“The Texas attorney general, Ken Paxton, called the Fifth Circuit’s decision upholding the law, a ‘victory for life and women’s health.’ “H.B. 2 both protects the unborn and ensures Texas women are not subjected to unsafe and unhealthy conditions,’ Mr. Paxton
laws—given the laws’ role in forcing clinics to close—would plainly violate the constitutional limits *Casey* imposes on the means by which states can protect unborn life.

In this Part, we briefly examine the most recent health-justified restrictions on abortion. Our focus is on the laws requiring abortion providers to have admitting privileges at local hospitals. We begin by showing that these laws rest on highly contested factual premises. Some but not all courts take this into consideration in applying *Casey*. Beginning with Judge Posner’s 2013 decision in *Planned Parenthood of Wisconsin, Inc. v. Van Hollen*, some courts read *Casey* as requiring inquiry into the question whether a health-justified regulation of abortion will actually protect women’s health. The Fifth Circuit, by contrast, opposes judicial scrutiny of the state’s claims, ruling instead in favor of a rational basis review of the state’s justifications for enacting the regulation. We review the courts’ competing approaches for their consistency with the Supreme Court’s decisions in *Casey* and *Carhart*.

A. The Justification for Admitting-Privileges Laws

States claim to protect women’s health by requiring abortion providers to have admitting privileges at a local hospital. Yet there are deep questions about whether evidence supports this claim. Abortion during the first trimester of pregnancy, when 89 percent of abortions take

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91 738 F. 3d 786 (7th Cir. 2013).


93 See *supra* note 90 and accompanying text.
place.\textsuperscript{94} is extremely safe, with complications that require a hospital visit occurring in 0.05 percent of early abortions (i.e., in approximately 45 instances out of the 900,000 first-trimester abortions that take place each year).\textsuperscript{95} Of this small number of complications, many are minor, presenting symptoms similar to those of early miscarriage, which is a common reason for emergency room visits and a condition that emergency room physicians are accustomed to treating.\textsuperscript{96}

Despite its safety, states single out abortion for restrictions not imposed on procedures of comparable risk. In Texas, the District Court found that before passage of the state law imposing admitting-privilege and ambulatory-surgical-center requirements on abortion, “abortion in Texas was extremely safe with particularly low rates of serious complications and virtually no deaths occurring on account of the procedure . . . much safer, in terms of minor and serious complications, than many common medical procedures not subject to such intense regulation and scrutiny.”\textsuperscript{97} In enacting H.B. 2, the legislature required all who provided abortion to have admitting privileges at a local hospital, at a time when there was no other medical procedure that the legislature singled out for a comprehensive restriction of this kind.\textsuperscript{98} H.B.2 also required

\begin{thebibliography}{98}
\bibitem{Id} \textit{Id}.
\bibitem{SeeAbbottII} See \textit{Abbott II}, 748 F. 3d at 591 (citing testimony of Dr. Jennifer Carnell, an emergency room physician, on the minor nature of abortion complications.); see also \textit{Lakey}, 46 F. Supp. 3d at 684 (observing that “abortion in Texas was extremely safe with particularly low rates of serious complications”).
\bibitem{Lakey} \textit{Lakey}, 46 F. Supp. 3d at 684 (emphasis added).
\bibitem{H.B.2} H.B. 2 required that all physicians performing and inducing abortion “have active admitting privileges” at a hospital no more than 30 miles away. Tex. Health & Safety Code Ann. § 171.0031(a). The admitting privileges requirement singled out abortion from all other medical procedures, even those of much greater risk.

The only other named medical procedure that Texas health regulations specifically address in the context of admitting privileges is kidney dialysis, which is provided in diverse settings that include patients’ homes and that has a markedly higher complication rate than abortion. \textit{See} 40 Tex. Admin. Code § 97.405 (agencies licensed to provide home dialysis services “must have a written transfer agreement with such a hospital, or all physician members of the agency's medical staff must have admitting privileges at such a hospital”). Dialysis has a significantly greater rate of major complications than abortion. \textit{Compare} T.A. Weitz et al., \textit{Safety of Aspiration Abortion Performed by Nurse Practitioners, Certified Nurse Midwives, and Physician Assistants under a California Legal Waiver}, 103 AMERICAN JOURNAL OF PUBLIC HEALTH 454, 461 (2013) (reporting that 0.05% of women who
abortion clinics to comply with ambulatory surgical center (ASC) standards, but then denied properly licensed abortion clinics “grandfathering” or variances from the newly imposed ASC building requirements. In contrast, the state had previously provided grandfathering provisions such that existing ASCs need not comply with the enhanced licensing standards.99)


Colonoscopy, arthroscopic surgery, and gynecologic procedures other than abortion, such as dilation and curettage of the uterus, are among outpatient procedures for which Texas does not specify admitting privileges although their complication rates are equal to or higher than that of abortion. Judge Posner, ruling on a challenge to an admitting-privileges case from Wisconsin, noted that colonoscopy is three to six times more dangerous than abortion, and observed that “the state seems indifferent to complications from non-hospital procedures other than surgical abortion (especially other gynecologic procedures), even when they are more likely to produce complications.” Planned Parenthood of Wis., Inc. v. Van Hollen, 738 F. 3d 786, 790 (7th Cir. 2013).

99 H.B. 2 required that abortion facilities comply with ASC standards. Tex. Health & Safety Code Ann. § 245.010 (“On and after September 1, 2014, the minimum standards for an abortion facility must be equivalent to the minimum standards adopted under Section 243.010 for ambulatory surgical centers.”). H.B. 2 did not provide a grandfathering provision that would have allowed existing abortion facilities that were not ASCs prior to H.B. 2 to continue operating as such. By contrast, the 2009 statute on ASC construction requirements for existing ASCs does provide a grandfathering provision such that existing ASCs were not forced to comply with expensive new building requirements. See 25 Tex. Admin. Code § 135.51(a)(1) (“A licensed ambulatory surgical center (ASC) which is licensed prior to the effective date of these rules is considered to be an existing licensed ASC and shall continue, at a minimum, to meet the licensing requirements under which it was originally licensed.”); see also 25 Tex. Admin. Code § 135.51(a)(2) (In lieu of meeting the requirements in paragraph (1) of this subsection, an existing licensed ASC may, instead, comply with National Fire Protection Association (NFPA) 101, Life Safety Code 2003 Edition (NFPA 101), Chapter 21, Existing Ambulatory Health Care Occupancies.”).

The Department of State Health Services’ implementing regulations explain this contrast:

The adopted rules do not incorporate by reference the provisions of §135.51(a)(1) and (2) that exempt certain ambulatory surgical centers from compliance with the construction standards.

[T]he enactment of HB 2 evidenced the Legislature’s intention to place licensed abortion facilities under minimum standards that are equivalent to licensed ambulatory surgical centers. To employ the limited exemption of §135.51 out of context to abortion facilities that were licensed on or before June 18, 2009, would be contrary to the Legislature’s specific intent to improve the safety of licensed abortion facilities and contradict the Legislature’s unequivocal decision to place licensed abortion facilities under enhanced regulation.


The District Court described the legislature’s decision to subject abortion clinics to implementing rules regarding grandfathering and waivers that were harsher than those applied to other ambulatory surgical centers: The requirement’s implementing rules specifically deny grandfathering or the granting of waivers to previously licensed abortion providers. This is in contrast to the “frequent” granting of some
The way in which Texas singled out abortion for admitting privilege requirements is familiar. In Wisconsin, the state stipulated before trial that for no other outpatient procedures were doctors required to have hospital admitting privileges. \(^{100}\) The state explained neither the reason for singling out abortion for special treatment nor the rush to pass its law, which was enacted “precipitously” in 2013. \(^{101}\)

In defending the need for admitting privileges, states assert that the requirement serves important credentialing and monitoring functions, assures necessary “continuity of care,” and prevents patient abandonment. \(^{102}\) While the states’ claims imply that doctors who receive admitting privileges are superior in quality, that is far from obvious. Requirements for admitting

sort of variance from the standards which occur in the licensing of nearly three-quarters of all licensed ambulatory surgical centers in Texas. Such disparate and arbitrary treatment, at a minimum, suggests that it was the intent of the State to reduce the number of providers licensed to perform abortions, thus creating a substantial obstacle for a woman seeking to access an abortion. This is particularly apparent in light of the dearth of credible evidence supporting the proposition that abortions performed in ambulatory surgical centers have better patient health outcomes compared to clinics licensed under the previous regime.

Lakey, 46 F. Supp. 3d at 685, aff’d in part, vacated in part, rev’d in part sub nom. Whole Woman’s Health v. Cole, 790 F.3d. 563 (5th Cir. 2015), mandate stayed pending cert. decision by 135 S. Ct. 2923 (June 29, 2015) (No. 14A1288). On appeal, the Fifth Circuit disputed Judge Yeakel’s conclusion that the lack of a grandfathering provision was the result of the legislature’s intent to obstruct access to abortion. Whole Woman’s Health v. Cole, 790 F.3d 563, 585 (5th Cir. 2015) (“Even assuming arguendo there is some ‘disparate treatment,’ the lack of a grandfathering provision is simply evidence that the State truly intends that women only receive an abortion in facilities that can provide the highest quality of care and safety—the stated legitimate purpose of H.B. 2.”), mandate stayed pending cert. decision by 135 S. Ct. 2923 (June 29, 2015) (No. 14A1288).

\(^{100}\) Planned Parenthood of Wis., Inc. v. Van Hollen, No. 13-CV-465-WMC, 2015 WL 1285829, at *130-131 (W.D. Wis. Mar. 20, 2015) (noting that “the legislation inexplicably singles out abortion procedures for special treatment when the evidence demonstrates that abortion is at least as safe as, and often much safer than, other outpatient procedures regularly performed in this State.”). Among commonly performed outpatient surgery for which Wisconsin has not sought to require admitting privileges are, e.g., colonoscopy, arthroscopic surgery, and gynecological procedures that are similar to early abortion, including dilation and curettage of the uterus. See Van Hollen, 783 F.3d. at 789-90.

\(^{101}\) Van Hollen, 2015 WL 1285829, at *13. Introduced in the state Senate on June 4, the legislation cleared both houses of the legislature in nine days and was signed by the governor on July 5, a Friday. The admitting-privileges requirement would have gone into effect immediately after the weekend had the District Court not granted a temporary restraining order. Planned Parenthood of Wis., Inc. v. Van Hollen, 963 F. Supp. 2d 858 (W.D. Wis. 2013).

\(^{102}\) See, e.g., Van Hollen, 738 F.3d at 789 (“[P]roponents of the law argue that if a woman requires hospitalization because of complications from an abortion she will get better continuity of care if the doctor who performed the abortion has admitting privileges at a nearby hospital.”); Abbott II, 748 F.3d at 592 (“The State focused its defense of the admitting-privileges requirement on two of these factors: continuity of care and credentialing.”).
privileges may have nothing to do with quality. Many hospitals condition the award of admitting privileges on a certain number of patient admissions,\textsuperscript{103} setting quotas impossible for most abortion providers to meet when their patients so rarely need hospital care. Hospitals may refuse to extend admitting privileges to doctors who perform a procedure to which the hospital’s governing body has religious objections.\textsuperscript{104} Patient care is not likely to be improved by requirements that are medically unnecessary and sufficiently burdensome to shut down the very facilities at which patients seek care.\textsuperscript{105}

Other features of the litigation raise questions about the evidence that supports the states’ health justifications for singling out abortion as requiring admitting privileges. An individual named Vincent Rue has organized the set of witnesses who testify across state lines in support of

\textsuperscript{103} For example, in Wisconsin, hospitals typically require doctors to admit 20 patients a year in order to retain their privileges. Three doctors in the Wisconsin litigation were informed by the hospital where they practiced that retaining their admitting privileges would depend on the hospital’s review of five patient admissions within a six-month period, a standard the doctors testified that they could not meet because they did not expect to admit any patients. \textit{Van Hollen}, 2015 WL 1285829, at *98.

\textsuperscript{104} In the Wisconsin case, the trial judge noted that the plaintiff clinics “credibly argue that the religious affiliation of hospitals, and in particular Catholic hospitals, may pose a continuing barrier to securing admitting privileges.” \textit{Van Hollen}, 2015 WL 1285829, at *99. The impact of Catholic abortion doctrine on the U.S. health care system is non-trivial. Catholic hospitals account for 20 million emergency room visits and 5.4 million admissions every year; one in every six hospital patients receives care in a Catholic hospital. United States Conference of Catholic Bishops, \textit{Catholic Health Care and Social Services}, www.usccb.org/about/media-relation/statistics/health-care-social-service.cfm. For discussion of other reasons that hospitals deny admitting privileges, see Brief of Amici Curiae American College of Obstetricians and Gynecologists and the American Medical Association in Support of Plaintiffs-Appellees and in Support of Affirmance at 4, Planned Parenthood of Greater Tex. Surg. Health Servs. v. Abbott (No. 13-51008), Document 00512477474 [hereinafter ACOG Brief].

\textsuperscript{105} See ACOG Brief, supra note 97 (arguing that the Texas admitting-privileges requirement does not serve the health of women in Texas and jeopardizes women’s health by restricting access to abortion providers). In the Texas litigation, for example, Dr. Paul Fine, director of one of the plaintiff clinics, testified that fewer than 0.3 percent of patients undergoing first-trimester abortions experience a complication that requires hospitalization. Another of the plaintiff’s witnesses, Dr. Jennifer Carnell, an emergency-room doctor, testified that admitting privileges were unnecessary as doctors who staff emergency rooms are trained to treat abortion-related complications, which are similar to conditions seen with miscarriages, commonly seen in emergency rooms. \textit{Abbott II}, 748 F. 3d at 591. Yet imposition of these requirements can close clinics, which itself imposes health risks. “The farther a woman must travel to reach an abortion provider, the less likely she will be to return to that provider for follow-up care and the more dangerous it would be for her to return in the case of an emergency.” Plaintiff’s Application to Vacate Stay of Final Judgment Pending Appeal at 17, Whole Woman’s Health v. Lakey (Oct. 6, 2014) (No. 14A365).
the admitting privilege statutes. Rue is no stranger to abortion-related controversy. Decades ago, Vincent Rue played a central role in developing “post-abortion syndrome” or PAS, the claim that abortion traumatizes and inflicts psychological harm on women. When he appeared as an expert witness for the state in Pennsylvania’s initial defense of the abortion regulations at issue in *Casey*, the District Court dismissed his testimony, finding it “devoid of the analytical force and scientific rigor” of the testimony presented by the plaintiff’s expert witnesses. Thereafter, Rue largely disappeared from courtrooms, only to reemerge as a behind-the-scenes paid consultant to states defending their admitting-privileges requirements as protecting women’s health, where his role included recruiting witnesses to appear in court and sometimes ghostwriting their testimony.

Rue’s conduct has drawn reproach from judges in Alabama, Texas, and Wisconsin. For example, Judge Thompson, rejecting one Rue-recruited expert, said, “Whether Anderson lacks

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106 Because courts have questioned Rue’s professional credibility, he seems to have played a behind-the-scenes role in organizing expert witnesses who testified that recent restrictions on abortion promote women’s health. *See, e.g.*, Irin Carmon, *Who is Vincent Rue?*, MSNBC, June 10, 2014 (“Rue was involved in recruiting many of the witnesses for the trials in Wisconsin and Alabama. . . . Many of the same experts had been called upon to justify admitting privileges laws in other states, including in Texas, where the law has shut down over one third of the state’s abortion clinics.”); Molly Redden, *Texas Pays ‘Thoroughly Discredited’ Expert $42,000 to Defend Anti-Abortion Law*, MOTHER JONES, Aug. 13, 2014 (“In the past two years, Republican administrations in four states—Alabama, North Dakota, Texas, and Wisconsin—have paid or promised to pay Rue $192,205.50 in exchange for help defending antiabortion laws.”).


109 *See, e.g.*, Emily Bazelon, *A Huge Abortion Win in Texas*, SLATE (Sept. 2, 2014) (“Texas has paid Rue thousands, yet other witnesses tried to mask his role in the case, denying that he helped draft documents.”); Judith Davidoff, *Rue Assists State in Wisconsin Abortion Law Defense*, ISTMUS, June 5, 2014 (“According to the agreements, Rue was hired to assist the DOJ in the ‘development of case strategy, procurement of expert witnesses’ and in ‘discovery and trial preparation.’ He is also a ‘liaison between the office and the experts.’”); *see also supra* note 106 (sources discussing Rue’s role).

judgment, is dishonest, or is profoundly colored by his bias, his decision to adopt Rue’s supplemental report and submit it to the court without verifying the validity of its contents deprives him of credibility.”

In the Texas case, Judge Yeakel had this to say:

> The credibility and weight the court affords the expert testimony of the State’s witnesses Drs. Thompson, Anderson, Kitz, and Uhlenberg is informed by ample evidence that, at a very minimum, Vincent Rue, Ph.D., a non-physician consultant for the State, had considerable editorial and discretionary control over the contents of the experts’ reports and declarations. The court finds that, although the experts testified that they personally held the opinions presented to the court, the level of input exerted by Rue undermines the appearance of objectivity and reliability of the experts’ opinions. Further, the court is dismayed by the considerable efforts the State took to obscure Rue’s level of involvement with the experts’ contributions.

**B. Judicial Review of Admitting-Privileges Litigation**

How does dispute over the justification for admitting-privileges laws arise in litigation over the laws’ constitutionality? Factual questions concerning the health justification of such laws are distinct from questions concerning their impact on abortion access—the “effects” prong of the undue burden inquiry.

As we will discuss, courts have divided over this question. Led by the Seventh Circuit, some courts invite the state to demonstrate the factual basis of its claim that restricting abortion promotes women’s health, and apply undue burden analysis in a weighted balancing test that attends to the strength of the state’s showing that the restriction achieves that goal. The Fifth Circuit, by contrast, asserts that it is wholly improper for judges to examine the factual basis of the state’s claim that a restriction on abortion promotes women’s health. The circuit applies

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111 *Strange III*, 33 F. Supp. 3d at 1388.
112 *Lakey*, 46 F. Supp. 3d at 688 n.3. The Fifth Circuit, in upholding the ambulatory-surgical-center regulation in the most recent opinion, failed to note that Judge Yeakel at trial had rejected the credibility of the only defense expert to testify that the regulation offered health benefits to abortion patients. That witness, Dr. Thompson, testified that Vincent Rue had written portions of her report and testimony. See Application for a Stay Pending the Filing and Disposition of a Petition for a Writ of Certiorari at 17 n.7, Whole Woman’s Health v. Cole (June 19, 2015).
113 See infra text accompanying notes 115-130.
deferential rational basis review, simply credits the state’s claim to regulate in the interests of women’s health, and then determines whether the law’s impact creates a substantial obstacle.\footnote{See infra text accompanying notes 131-144.} The Seventh Circuit reads \textit{Casey} as requiring courts to evaluate the factual basis of the state’s claim to restriction abortion to promote women’s health; the Fifth Circuit reads \textit{Casey} to prohibit this very inquiry. In what follows, we contrast these two very different approaches to applying undue burden analysis to health-justified restrictions on abortion.

The Seventh Circuit’s approach to review of admitting-privileges legislation, forged by Judge Richard Posner, makes factual support for the state’s health interest central in applying the undue burden test. In December 2013, the Seventh Circuit affirmed an order preliminarily enjoining enforcement of a recently enacted Wisconsin admitting-privileges requirement.\footnote{\textit{Van Hollen}, 738 F.3d 786 (7th Cir. 2013).} Judge Posner observed that while the state defended the requirement solely on the ground of protecting women’s health, the state’s lawyer at oral argument “did not mention any medical or statistical evidence” and “[n]o documentation of medical need for such a requirement was represented to the Wisconsin legislature when the bill that became law was introduced on June 4 of this year.”\footnote{\textit{Id.} at 789-90.} The medical evidence was “feeble,” Judge Posner said, “yet the burden [was] great.”\footnote{\textit{Id.} at 798. Judge Posner noted that the requirement would shut down two of the state’s four abortion clinics.} He explained that the judge had to consider the evidentiary basis of the state’s claim that it had health justifications for restricting abortion when the judge applied the undue burden test:

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. . . . The feebler the medical grounds, the likelier the
burden, even if slight, to be ‘undue’ in the sense of disproportionate or gratuitous.¹¹⁸

Judge Posner said little more. Yet he managed in very few words, and almost obliquely, to derive from Casey two crucially important messages: that states seeking to justify a health-related restriction must produce evidence, and that the strength of this evidentiary showing was relevant in determining whether any related burden on access was, in Casey’s terms, undue.

Judge Posner’s opinion adopting this weighted balancing test in Planned Parenthood v. Van Hollen has proven influential. Judge Thompson cited it in his Alabama admitting-privileges decision three months later, observing, “it is not enough to simply note the State has a legitimate interest; courts must also examine the weight of the asserted interest, including the extent to which the regulation in question would actually serve that interest.”¹¹⁹ On this account, the “weight” of an interest turns on a question of fact: how well the challenged regulation would in fact—“actually”—advance the interest it is asserted to serve. Judge Thompson explained that the court was to consider the evidence the state amassed in justification of the regulation into account in applying the undue burden framework, reasoning that “the court examines the severity of obstacles created by the regulation as well as the weight of the State’s justifications for the regulation, and then determines whether the obstacle is more significant than is warranted by the justifications.”¹²⁰

Another recent opinion to require an inquiry into the factual basis for a health-justified abortion restriction came from the Ninth Circuit in June 2014. In Planned Parenthood of Arizona v. Humble, the panel preliminarily enjoined an Arizona law requiring doctors to use an outdated

¹¹⁸ Id. (citing Casey and Mazurek).
¹¹⁹ Strange III, 33 F.Supp.3d at 1393 (citing Van Hollen); see also Planned Parenthood Se., Inc. v. Strange (Strange II), 9 F. Supp. 3d 1271, 1287 (M.D. Ala. 2014) (“[T]he court must determine whether, examining the regulation in its real-world context, the obstacle is more significant than is warranted by the State’s justification for the regulation.”).
¹²⁰ Id. at 1296-97 (citing Van Hollen).
protocol for administering the medication that causes an early-term abortion. States have increasingly attempted to curb the growing popularity of medication abortion by forbidding doctors to deviate from the dosage on the F.D.A.-approved label—despite the fact that such “off-label” uses of approved medications are common outside the abortion context, and the fact that the medical profession has concluded that, in this instance, a smaller dose is safer and more effective. While we have not focused on the medication-abortion controversy, 

Humble reviews a health-justified restriction on abortion and so is directly relevant to our discussion.

The Ninth Circuit applies Casey with attention to the question of whether restrictions on abortion are asserted to serve the state’s interest in protecting fetal life or women’s health. In examining laws asserted to promote women’s health, the circuit employs a weighted balancing test that compare[s] the extent of the burden a law imposes on a woman’s right to an abortion with the strength of the justification for the law. . . The more substantial the burden, the stronger the state’s justification for the law must be to satisfy the

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121 753 F.3d 905 (9th Cir. 2014), cert. den. 135 S. Ct. 870 (Dec. 15, 2014).
122 At Planned Parenthood clinics, medication abortion—accomplished by administering two prescription drugs, mifepristone and misoprostol—accounts for forty-one percent of first trimester abortions. Id. at 908.
123 See supra note 77 (noting the Supreme Court’s recognition of the ordinary practice of off-label use).
124 Planned Parenthood Ariz., Inc. v. Humble, 753 F.3d 905, 917 (9th Cir. 2014) (citing Brief for American College of Obstetricians & Gynecologists and the American Medical Ass’n as Amici Curiae at 13-17).
125 Restrictions of this kind have been upheld in the Fifth and Sixth Circuits and struck down in the Ninth Circuit. Compare Planned Parenthood of Greater Tex. Surg. Health Servs. v. Abbott (Abbott II), 748 F.3d 583, 604-05 (5th Cir. 2014) (upholding law restricting medication abortion to dosage on F.D.A.-approved label) and Planned Parenthood Sw. Ohio Region v. DeWine, 696 F. 3d 490, 514-15 (6th Cir. 2012) (same) with Humble, 753 F. 3d at 917 (preliminarily enjoining the prohibition on off-label use as an undue burden). See also Planned Parenthood of the Heartland, Inc. v. Iowa Bd. of Med., 865 N.W. 2d 252, 264 (Iowa 2015) (striking down an Iowa regulation prohibiting the use of telemedicine in administering medication abortion under the Iowa Constitution and applying the federal undue burden test, reasoning that “[l]ike the Seventh and Ninth Circuits, we believe the ‘unnecessary health regulations’ language used in Casey requires us to weigh the strength of the state’s justification for a statute against the burden placed on a woman seeking to terminate her pregnancy when the stated purpose of a statute limiting a woman’s right to terminate a pregnancy is to promote the health of the woman.”).
126 Humble, 753 F.3d at 912 (observing “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”) (quoting Tucson Women’s Clinic v. Eden, 379 F.3d 531, 539-40 (9th Cir. 2004)).
undue burden test; conversely the stronger the state’s justification, the greater the burden may be before it becomes “undue.”

Reviewing Arizona’s restriction on medication abortion in *Humble*, Judge Fletcher observed that the Ninth Circuit’s approach followed from *Casey’s* direction to determine whether health regulations were “‘unnecessary,’” and approvingly quoted the framework Judge Posner had set forth in *Van Hollen* as “an approach much like ours”: “The court in *Van Hollen* granted a preliminary injunction against the enforcement of the Wisconsin law on the ground that ‘the medical grounds thus far presented . . . are feeble, yet the burden great.’ Here, the ‘medical grounds thus far presented’ are not merely ‘feeble.’ They are non-existent.” Judge Fletcher noted that, “Arizona has introduced no evidence that the law advances in any way its interest in women’s health.”

The Fifth Circuit has taken a dramatically different approach in applying *Casey* to the admitting-privileges and ambulatory-surgical-center law whose combined effect has been to shut down most of the clinics in Texas. In *Planned Parenthood of Greater Texas Surgical Health Services v. Abbott (Abbott II)*, Judge Edith Jones asserted that she was following *Casey’s* undue burden framework, but then invoked the Supreme Court’s decision in *Gonzales v. Carhart* to infuse the undue burden inquiry with rational basis review. At issue was precisely the question we have been discussing: whether the undue burden framework of *Casey/Carhart* requires judges to examine the factual basis of a state’s claim to restrict abortion in the interests of protecting women’s health.

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127 Id. at 912 (quoting Eden, 379 F.3d at 542).
128 Id. at 913.
129 Id. at 917 (citation omitted).
130 Id. at 916.
131 748 F.3d 583 (5th Cir. 2014).
132 Id. at 590.
Judge Jones initially characterized *Carhart* as “holding that the State may ban certain abortion procedures and substitute others provided that ‘it has a rational basis to act, and it does not impose an undue burden.’”\(^{133}\) She then reversed the District Court’s finding that the state’s admitting-privileges law had no rational relationship to protecting women’s health\(^{134}\) with a much more far-reaching claim about the *Casey-Carhart* framework:

> Nothing in the Supreme Court’s abortion jurisprudence deviates from the essential attributes of the rational basis test, which affirms a vital principle of democratic self-government. It is not the courts’ duty to second guess legislative factfinding, “improve” on, or “cleanse” the legislative process by allowing relitigation of the facts that led to the passage of a law. . . . Under rational basis review, courts must presume that the law in question is valid and sustain it so long as the law is rationally related to a legitimate state interest. . . . As the Supreme Court has often stressed, the rational basis test seeks only to determine whether any conceivable rationale exists for an enactment. . . . A law “based on rational speculation unsupported by evidence or empirical data” satisfies rational basis review.\(^{135}\)

In this remarkable passage, the Fifth Circuit takes the language in *Carhart* that applies the undue burden test and uses it to characterize the undue burden test as rational basis review—the standard of review championed by the dissenting justices in *Casey*.\(^{136}\) Judge Jones suggests that it is beyond the proper role of a court in a constitutional democracy to inquire into the factual basis of a legislature’s claim that restricts the exercise of the abortion right: “Nothing in the Supreme Court’s abortion jurisprudence deviates from the essential attributes of the rational basis test, which affirms a vital principle of democratic self-government.” She thereafter proceeds to reject the *Van Hollen* approach to applying undue burden: “The first-step in the analysis of abortion regulation is rational basis review, not empirical basis review.”\(^{137}\)

\(^{133}\) See *Abbott II*, 748 F.3d. at 590 (quoting Gonzales v. Carhart, 550 U.S. 124, 158 (2007)).

\(^{134}\) *Id.* at 593.

\(^{135}\) *Id.* at 594 (emphasis added) (citations omitted).

\(^{136}\) See supra text accompanying notes 21-22.

\(^{137}\) *Id.* at 596.
In so reasoning, the Fifth Circuit breaks with the Seventh and Ninth Circuits, which, as we have seen, understand the inquiry into the evidentiary basis of the state’s claim to regulate in the interests of women’s health as part of the undue burden inquiry—as part of the question of whether the health-justified law was “unnecessary” and (un)warranted in light of the burdens it imposes on women’s access.\(^\text{138}\) In the Fifth Circuit, by contrast, a court has no reason to examine the state’s factual support for a health-justified restriction on abortion because “[a] law based on rational speculation unsupported by evidence or empirical data satisfies rational basis review.”\(^\text{139}\) The Fifth Circuit refuses to consider the strength of the state’s justification for regulating as part of the undue burden inquiry.\(^\text{140}\)

As Judge Jennifer Elrod explains in the Fifth Circuit’s subsequent opinion in *Whole Women’s Health v. Lakey*\(^\text{141}\) admonishing the District Court for “evaluat[ing] whether the ambulatory surgical center provision would actually improve women’s health and safety,” “[i]n our circuit we do not balance the wisdom or effectiveness of a law against the burdens the law imposes.”\(^\text{142}\) Objecting that examining the factual basis of the state’s claim to be protecting women’s health would “rachet[] up rational basis review into a pseudo-strict-scrutiny approach by examining whether the law advances the State’s asserted purpose,” she reasons, “[u]nder our precedent, we have no authority by which to turn rational basis into strict scrutiny under the

\(^{138}\) See supra text accompanying notes 115-130.

\(^{139}\) Id. at 594 (quoting FCC v. Beach Commc’ns, Inc., 508 U.S. 307, 315 (1993), a rational basis case involving an equal protection challenge to a provision of the Federal Communications Act by a regulated party complaining of market inequities).

\(^{140}\) See also Planned Parenthood of Greater Tex. Surg. Health Servs. v. Abbott (Abbott I), 734 F.3d 406, 411 (5th Cir. 2013) (staying District Court judgment) (“The district court’s finding to the contrary is not supported by the evidence, and in any event, ‘a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.’” (quoting F.C.C. v. Beach Commc’ns, Inc., 508 U.S. 307, 315 (1993))).

\(^{141}\) 769 F.3d 285 (5th Cir. 2014) (overturning District Court injunction against Texas ambulatory-surgical-center requirement), vacated in part, 135 S. Ct. 399 (2014).

\(^{142}\) Id. at 297 (emphasis added).
guise of the undue burden inquiry. The Fifth Circuit has recently reaffirmed this line of cases applying rational basis review to the claim that Texas’s interest in protecting women’s health justified enacting the law.

C. Returning to Casey/Carhart

Is a court required to examine the factual basis of a health-related regulation, or is it forbidden from doing so? A circuit split has now appeared among the cases we have described raising this very question. Casey and Carhart offer a clear answer to the question. In what follows we show how fundamentally the Fifth Circuit has misapplied those decisions.

The Fifth Circuit has collapsed the Casey/Carhart framework into a form of rational basis review that accords virtually no protection to the abortion decision as a constitutionally protected right. We show, first, that the Fifth Circuit’s use of rational basis review is inconsistent with the Court’s reasoning in Carhart. Next we show that the Fifth Circuit’s use of rational basis review destroys the distinction between the state’s interests in protecting potential life and women’s health, and in so doing, permits states to violate the restrictions Casey imposes on the means by which the state may protect unborn life. Finally, we show that the weighted balancing test employed by the Seventh and the Ninth Circuits is faithful to constitutional values underlying the Casey/Carhart framework, as the Fifth Circuit’s rational basis review is not.

1. Rational Basis and the Casey/Carhart Framework

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143 Id (emphasis added).
144 Whole Woman’s Health v. Cole, 790 F.3d 563, 584 (5th Cir. 2015) (affirming the rational basis reasoning of Abbott II), mandate stayed pending cert. decision by 135 S. Ct. 2923 (June 29, 2015) (No. 14A1288).
145 See infra Part I.B.
The Fifth Circuit’s claims about rational basis are not entirely clear. In *Abbott II*, Judge Jones initially acknowledges that *Carhart* applied the undue burden framework,\(^{146}\) but she thereafter characterizes the undue burden framework as a rational basis test,\(^{147}\) as does Judge Elrod in *Whole Woman’s Health v. Lakey*.\(^{148}\) The Fifth Circuit’s recent *per curiam* decision in *Whole Woman’s Health v. Cole*\(^{149}\) again goes out of its way to reaffirm *Abbott II*’s rational basis reasoning.\(^{150}\) Sometimes the Fifth Circuit treats only the question whether an abortion restriction serves the interests of women’s health as subject to rational basis review.\(^{151}\) At other times, the Circuit makes a broader claim: that the entirety of the undue burden framework is a form of rational basis review.\(^{152}\) Whichever account the Circuit embraces, its rational-basis claims flout *Casey* and *Carhart* both.

The *Casey* framework is not rational basis. As we have observed, rational basis was the standard of review championed by the dissenting justices in *Casey*.\(^{153}\) Nor did the Court’s ensuing decision in *Carhart* collapse the undue burden framework into rational basis review. Without a doubt, the *Carhart* decision bitterly disappointed the Justices who most fervently defended the abortion right.\(^{154}\) That said, Justice Kennedy wrote *Carhart* to uphold the Partial Birth Abortion Ban Act on terms that accepted the continuing authority of *Casey*’s undue burden framework and the protection it provides for first and second-trimester abortions.\(^{155}\)

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\(^{146}\) See supra text accompanying note 133 (quoting Judge Jones quoting *Carhart*).

\(^{147}\) See supra text accompanying notes 132-136.

\(^{148}\) See supra text accompanying note 143.

\(^{149}\) *Whole Woman’s Health v. Cole*, 790 F.3d 563 (5th Cir. 2015), mandate stayed pending cert. decision by 135 S. Ct. 2923 (June 29, 2015) (No. 14A1288).

\(^{150}\) Id.

\(^{151}\) See supra text accompanying note 137.

\(^{152}\) See supra text accompanying notes 135, 143.

\(^{153}\) See supra text at notes 21-22.


\(^{155}\) See id. at 146 (reaffirming undue burden and observing “Casey, in short, struck a balance. The balance was central to its holding. We now apply its standard to the case at bar”); id. at 153-54 (construing the statute to avoid constitutional questions and protect ordinary second-trimester abortions).
It is true that the *Carhart* Court refers to rational basis—as we have seen, in the very sentence in which the Court expressly invokes the undue burden framework.\(^\text{156}\) Whatever *Carhart*’s reference to “rational basis” means, it is not directing extravagant deference to the legislature of the kind the Fifth Circuit requires. In *Carhart* itself, the Court does not simply defer to Congress. In upholding the Partial Birth Abortion Ban Act, Justice Kennedy observes, “The Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake. . . . Uncritical deference to Congress’ factual findings in these cases is inappropriate.”\(^\text{157}\) The *Carhart* Court probes and, in two instances, rejects congressional findings that the government invoked as reasons for enacting the Partial Birth Abortion Ban Act.\(^\text{158}\) This probing of Congress’s reasoning in enacting the challenged statute is not rational basis review of the kind the Fifth Circuit mandates—as when the Circuit observes that “[a] law ‘based on rational speculation unsupported by evidence or empirical data’ satisfies rational basis review.”\(^\text{159}\)

In *Carhart* the Court does employ a form of deference—though not rational basis review that swallows or supplants *Casey*’s undue burden framework. In *Carhart* the Court rejects the argument Congress was obliged to provide a health exception to the banned procedure, concluding that the statute withstood at least a facial challenge. The Court grounds this

\(^{156}\) See Planned Parenthood of Greater Tex. Surg. Health Servs. v. Abbott (*Abbott II*), 748 F.3d 583, 590 (5th Cir. 2014) (characterizing *Carhart* as “holding that the State may ban certain abortion procedures and substitute others provided that ‘it has a rational basis to act, and it does not impose an undue burden’” (quoting Gonzales v. Carhart, 550 U.S. 124, 158 (2007))).

\(^{157}\) Gonzales v. Carhart, 550 U.S. 124, 165 (2007) (“In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function.”) (quoting Crowell v. Benson, 285 U.S. 22 (1932)); cf. Planned Parenthood Ariz., Inc. v. Humble, 753 F.3d 905, 913 (9th Cir. 2014) (following these passages of *Carhart*).

\(^{158}\) *Carhart*, 550 U.S. at 165-66 (drawing on evidence presented in the district courts to reject the claim that no medical schools provided training in the abortion method, the statute banned and the claim that “the prohibited procedure is never medically necessary”).

\(^{159}\) *Abbott II*, 748 F.3d at 594 (citations omitted).
conclusion in the District Courts’ findings that medical opinion was divided on the need for such an exception, \(^{160}\) reasoning that “[t]he Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty.”\(^{161}\) The condition of medical uncertainty is established through judicial review—in *Carhart* itself, through the fact finding of the District Courts.

In *Whole Woman’s Health v. Cole*, the Fifth Circuit seizes on this language as additional warrant for judicial deference, asserting that “medical uncertainty underlying a statute is for resolution by legislatures, not the courts.”\(^ {162}\) The Circuit is wrong to rely on this language as it does. The medical uncertainty of which the Court spoke in *Carhart* was anchored in the fact-finding of the two District Courts whose judgments were on review. By contrast, the Fifth Circuit finds uncertainty by *rejecting* the fact-finding of the District Court. In the Texas case, the District Court probed the justification of the legislature for enacting H.B. 2 and found no credible evidence to support either the admitting-privilege requirement or the ambulatory-surgical-center requirement; the Fifth Circuit found uncertainty in the record, rejecting the District Court’s findings and instead crediting the State’s contrary assertions.\(^ {163}\) Throughout, the Circuit Court chastised the District Court, admonishing that “‘[i]t is not the courts’ duty to second guess legislative factfinding, improve on, or cleanse the legislative process by allowing relitigation of the facts that led to the passage of a law.’”\(^ {164}\) In short, the “uncertainty” the Fifth Circuit finds to

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\(^{160}\) *See Carhart*, 550 U.S. at 143-44.

\(^{161}\) *Id.* at 163.

\(^{162}\) *Whole Woman’s Health v. Cole*, 790 F.3d 563, 587 (5th Cir. 2015) (chastising the trial court for “substituting its own judgment for that of the legislature”), mandate stayed pending cert. decision by 135 S. Ct. 2923 (June 29, 2015) (No. 14A1288).

\(^{163}\) On admitting privileges, see *Cole*, 790 F.3d at 587 (explaining why *Abbott II* “disavowed the inquiry employed by the district court”). On the ambulatory-surgical-center requirement, see *id.* at 584-86.

\(^ {164}\) *Id.* at 587 (quoting *Abbott II*, 748 F. 3d at 594); see also *id.* (“The district court erred by substituting its own judgment for that of the legislature . . . .”).
warrant deference to the legislature is produced in significant part by deferring to the legislature. If appellate courts can justify deference to legislature by invoking medical uncertainty that is untethered from facts found and credibility determinations made by the trial court,\footnote{The District Court found that the testimony of the state’s key expert witnesses lacked “the appearance of objectivity and reliability” because a non-physician third party exerted “considerable editorial . . . control” over the contents. Whole Woman’s Health v. Lakey, 46 F. Supp. 3d 673, 680 n.3 (D. Tex. 2014) (quoted supra text accompanying note 112), aff’d in part, vacated in part, rev’d in part sub nom. Whole Woman’s Health v. Cole, 790 F.3d 563 (5th Cir. 2015), mandate stayed pending cert. decision by 135 S. Ct. 2923 (June 29, 2015) (No. 14A1288). In finding “medical uncertainty,” the Fifth Circuit rejected the findings of the District Court and endorsed the state’s evidence without ever mentioned the adverse credibility findings made by Judge Yeakel. See Cole, 790 F.3d 563, 585 (5th Cir. 2015).} they can easily erode protections for constitutional rights. Whatever deference Carhart might be read to warrant, it cannot be the extravagant deference to the legislature that the Fifth Circuit practices here.

2. How Review of Health-Justified Restrictions Protects the Decisional Right Casey Recognizes

At root, the Fifth Circuit’s extravagantly deferential “rational basis” decisions err in reasoning about the regulation of abortion as ordinary social and economic legislation unconnected to constitutional rights. The circuit fails to protect the decisional right the Casey/Carhart framework recognizes. States may have a right to regulate the practice of abortion, but, even after Carhart, that prerogative is by no means unconstrained or absolute. In Carhart, the Court emphasized that Casey’s undue burden standard “struck a balance” between protecting “the woman’s exercise of the right to choose” and the ability of the state to “express profound respect for the life of the unborn.”\footnote{Gonzales v. Carhart, 550 U.S. 124, 146 (2007).} To preserve this balance and protect a woman’s right to make “the ultimate decision”\footnote{Gonzales v. Carhart, 550 U.S. 124, 146 (2007).} about whether to carry a pregnancy to term, Casey imposed constitutional limits on the means by which the state could vindicate its interest in
protecting potential life. Government must persuade women to continue a pregnancy; it cannot obstruct women’s access to abortion.

As we have shown, protecting the woman’s exercise of the right to choose requires judges sharply to distinguish restrictions on abortion asserted to protect women’s health from those asserted to protect unborn life in order to ensure that state efforts to protect unborn life remain dissuasive in form, as *Casey* requires. Judicial review that probes the factual basis of the state’s claim to restrict abortion in the interests of protecting women’s health thus protects exercise of the decisional right *Casey* recognizes.

The Texas law demonstrates how a state can enact weakly justified health restrictions on abortion that obstruct women’s efforts to end a pregnancy in ways that do not involve reasoning with women or dissuading them as *Casey* requires. Strikingly, as it defended the Texas statute, the state offered a series of different characterizations of its underlying justification, over time coming to describe the admitting-privileges and ambulatory-surgical-center laws as protecting both women’s health and unborn life. Judge Yeakel criticized the state for attempting to

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168 *See supra* text accompanying notes 27 (quoting *Casey*).

169 *See supra* note 90 (discussing the state’s shifting characterization of its interests in enacting the admitting-privileges and ambulatory-surgical-center requirements in *Abbott* and *Cole*).

In *Abbott I* the state began by defending the admitting-privileges requirement as protecting women’s health, *see supra* note 90, but in arguing the case, the State’s Solicitor General invoked both women’s health and fetal life as rationales:

The plaintiffs’ arguments in this case rest on a mistake in premise, that the challenged provisions of House Bill 2 were enacted exclusively for the purpose of protecting the health and safety of abortion patients. House Bill 2 was indeed enacted for that purpose. But the hospital admitting privileges requirement and the regulations on abortion-inducing drug also served to advance the State’s interest in protecting fetal life, an interest that the plaintiffs never acknowledge in any of their briefing. . . . It’s important to consider our disagreements with the plaintiffs in light of these dual interests at stake – the State’s interest in promoting maternal health and the State’s interest in protecting the life of the unborn child. . . . First, these laws were not enacted solely to advance the State’s interest in maternal health. They were also enacted to advance the State’s interest in promoting and protecting fetal life. A law that is enacted to advance the State’s interest in the life of the unborn need not be medically necessary to survive constitutional challenge.”
supplement health-protective justifications with fetal-protective justifications, reasoning that under *Casey* it was unconstitutional for the state to protect unborn life by creating “obstacles to previability abortion” rather than by counseling against the decision to seek an abortion:

The primary interest proffered for the act’s requirements relate to concerns over the health and safety of women seeking abortions in Texas. To the extent that the State argues that the act’s requirements are motivated by a legitimate interest in fetal life, the court finds those arguments misplaced. In contrast to the regulations at issue in *Casey*, the act’s challenged requirements are solely targeted at regulating the performance of abortions, not the decision to seek an abortion. Here, the only possible gain realized in the interest of fetal life, once a woman has made the decision to have a previability abortion, comes from the ancillary effects of the woman’s being unable to obtain an abortion due to the obstacles imposed by the act. *The act creates obstacles to previability abortion. It does not counsel against the decision to seek an abortion.*

Judge Yeakel thus understood that preserving *Casey*’s framework requires distinguishing fetal-protective and health-protective justifications for abortion restrictions, and probing the factual basis of health-justified restrictions to ensure they serve health-related ends.

In reversing Judge Yeakel and rebuking him for examining the evidence that supported the state’s claim to restrict abortion in the interests of protecting women’s health, Judge Elrod never responded to his objection that Texas was protecting potential life by nondissuasive means,

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In closing argument, the State’s Deputy Solicitor General also invoked both interests to justify the admitting-privileges law.

Well, Your Honor, abortion is unique in the sense that there are competing interests that are at stake that are not just maternal health. As we have explained, there’s an ample maternal health justification for the provision, but there’s also the fetal life interest that the State has. So the fact that there are both of those interests makes it a little bit different than having an outpatient tonsillectomy or something.


170 *Lakey*, 46 F. Supp. 3d at 684 (emphasis added).

171 Whole Woman’s Health v. Lakey, 769 F.3d 285, 297 (“In our circuit we do not balance the wisdom or effectiveness of a law against the burdens the law imposes.”), *vacated in part*, 135 S. Ct. 399 (2014).
and so was violating *Casey*’s protection for women’s decisional autonomy. The Fifth Circuit’s hyper-deferential practice of rational basis review expressly sanctions this fusion and scrambling of rationales.

One could explain the Fifth Circuit’s failure to protect women’s decisional autonomy as an expression of deference to the state’s interest in protecting potential life. But one could also explain the Fifth Circuit’s failure to protect women’s decisional autonomy as an expression of a very particular view of women, one that elevates their reproductive capacity over other attributes of personhood in an explicit manner not seen in a judicial opinion for many years. When the parties in *Abbott II* called upon the Fifth Circuit to differentiate review of abortion laws enacted to protect potential life and to protect women’s health, Judge Jones refused, reasoning that “no such bifurcation has been recognized by the Supreme Court.”172 She then asserted that the two interests *cannot* be bifurcated because laws that protect a woman’s health protect her as a childbearer: “the state’s regulatory interest cannot be bifurcated simply between mothers’ and children’s health; 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.”173

As the Ninth Circuit understands but the Fifth Circuit does not, *Casey*’s undue burden framework *requires* differentiating the state’s interests in protecting potential life and women’s

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173 Id. We observe that in its most recent decision the Fifth Circuit seems to have retreated from this position. It there characterizes the purpose of the Texas law as protecting “the health and welfare of women seeking abortions.” Whole Woman’s Health v. Cole, 790 F.3d 563, 584 (5th Cir. 2015) (citing the state senate committee’s bill analysis), mandate stayed pending cert. decision by 135 S. Ct. 2923 (June 29, 2015) (No. 14A1288).
health. In protecting women’s health, government is not protecting potential life, as the Fifth Circuit suggested in *Abbott II*, and the Fourth Circuit suggested in *Greenville*. The government has long regulated women’s conduct on the view that women are defined by their role in childbearing, an understanding the Court endorsed more than a century ago in *Muller v. Oregon*. But *Casey* rejects this traditional view of women, and instead insists that respect for women’s dignity requires giving women control over the decision whether to become a mother. That is why the undue burden test restricts the means by which government may protect unborn life; government cannot prevent women from obtaining an abortion but instead must, if it chooses, seek to persuade women to bring a pregnancy to term through the provision of truthful, non-misleading information.

### 3. Comparing Review of Health-Justified Restrictions Across Circuits

As courts outside the Fifth Circuit understand, judicial review that differentiates between the state’s interest in protecting potential life and the state’s interest in protecting women’s health

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174 For the Ninth Circuit’s insistence on separating review of legislation protecting potential life and protection women’s health, see *supra* note 126 and accompanying text.

175 *Greenville Women’s Clinic v. Bryant*, 222 F. 3d 157, 205 (4th Cir. 2000) (discussed *supra* text accompanying notes 75-77). The Texas Solicitor General’s office also embraces the dual-interest account of its own health restrictions, see *supra* note 169, or what we have termed “abortion exceptionalism.” See *supra* note 77 and accompanying text.

176 *See* 208 U.S. 412, 422 (1908) (“Even though all restrictions on political, personal, and contractual rights were taken away, and she stood, so far as statutes are concerned, upon an absolutely equal plane with him, it would still be true that she is so constituted that she will rest upon and look to him for protection; that her physical structure and a proper discharge of her maternal functions—having in view not merely her own health, but the well-being of the race—justify legislation to protect her from the greed as well as the passion of man.”).

177 The portion of the *Casey* decision attributed to Justice Kennedy rejects this traditional understanding of women’s role precisely as it affirms women’s liberty interest in deciding whether to become a mother, free of government control. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 852 (1992):

[A woman’s] suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman’s role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.

178 See *supra* note 32 and accompanying text.
secures Casey’s protection for women’s decisional autonomy. Ensuring that health-justified restrictions actually and effectively serve health-related ends is, of course, also required by Casey’s language prohibiting “unnecessary” health laws that impose “undue burdens.”

Outside the Fifth Circuit, judicial review of this kind takes at least two forms. There are trial court opinions that find violations of the undue burden standard’s purpose prong. For example, in Wisconsin, Judge Conley ruled that state’s admitting-privileges law was enacted for the improper purpose of imposing a substantial obstacle to obtaining an abortion. He rested this judgment on classic indicia of pretext: the state introduced no evidence in support of the admitting-privileges law, imposed the requirement with one weekend’s notice, and targeted abortion providers only, exempting procedures of greater risk.

Yet proof of collective purpose is difficult—even when purpose is not defined by difficult-to-satisfy liability rules of the kind that prevail in the equal protection area—because judges are generally reticent to accuse state legislators of bad faith. This problem seems especially acute in the abortion context. Even if the legislators who enact a health-justified

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179 See supra text accompanying note 52.
180 Casey, of course, invites this inquiry into improper purpose when it explains that “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.” Casey, 505 U.S. at 877 (1992).
182 See Van Hollen, 2015 U.S. Dist. LEXIS 35389, at *38-39. For another example of a trial judge finding improper purpose under the undue burden framework, see Whole Woman’s Health v. Lakey, 46 F. Supp. 3d 673, 685 (W.D. Tex. 2014) (concluding “that the ambulatory-surgical-center requirement was intended to close existing licensed abortion clinics”), aff’d in part, vacated in part, rev’d in part sub nom. Whole Woman’s Health v. Cole, 790 F.3d 563 (5th Cir. 2015), mandate stayed pending cert. decision by 135 S. Ct. 2923 (June 29, 2015) (No. 14A1288).
183 For evolution of the standards for proving discriminatory purpose toward an increasingly difficult to satisfy liability rule, see Reva B. Siegel, The Supreme Court, 2012 Term—Foreword: Equality Divided, 127 HARV. L. REV. 1, 12-23 (2013).
184 See, e.g., Planned Parenthood of Wis., Inc. v. Van Hollen, 738 F.3d 786, 791 (7th Cir. 2013): Discovering the intent behind a statute is difficult at best because of the collective character of a legislature, and may be impossible with regard to the admitting-privileges statutes. Some Wisconsin legislators doubtless voted for the statute in the hope that it would reduce the abortion rate, but others may have voted for it because they considered it a first step toward making invasive outpatient procedures in general safer.
restriction on abortion publicly announce their aim to limit access to the procedure, judges are likely to understand such legislators to act for benign rather bigoted ends, a difference that, for many, mitigates the legislators’ choice of means—especially if the purpose of the law is considered without attention to its impact on women.

The weighted balancing test that Judge Richard Posner employed in applying the undue burden framework to health-justified restrictions in Van Hollen can be understood as smoking out unconstitutional motivation without ever requiring judges to identify direct evidence of illicit purpose. The framework obviates the need squarely to decide the purpose question: “The feebler the medical grounds, the likelier the burden, even if slight, to be ‘undue’ in the sense of disproportionate or gratuitous.” A weighted balancing test of this kind seems faithfully to implement Casey’s directions to judges to distinguish between necessary and “unnecessary” health regulations. The weight of the health justification for a law is thus relevant to the effects as well as the purpose prongs of the Casey inquiry: as Judge Posner observed, if the state’s showing of health need is weak, a judge has more warrant to find the law’s impact on access to be “undue.” This method of incorporating the evidence in support of a health-justified restriction on abortion into the undue burden inquiry seems to us unquestionably correct. Undue

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185 See supra text accompanying notes 87-88.
186 Van Hollen, 738 F.3d at 798; cf. id. at 791 (discussing parties conflicting claims about legislative intent and asserting “[w]e needn’t take sides”).
187 See Casey, 505 U.S. at 878 (“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.”). The Ninth Circuit similarly justifies the weighted balancing test it employs to enforce Casey as following from the Court’s instructions to bar “undue” burdens and “unnecessary” health regulations. Planned Parenthood Ariz., Inc. v. Humble, 753 F.3d 905, 912 (9th Cir. 2014).
188 See supra text accompanying note 118. In reversing Judge Yeakel’s conclusion that Texas’s ambulatory-surgical-center requirement was enacted for the purpose of closing clinics, the Fifth Circuit dismissed the evidence on which the District Court judge focused as “purely anecdotal” and, citing Casey, reasoned that the plaintiffs “failed to prove that [the law] ‘serve[s] no purpose other than to make abortions more difficult.’” Whole Woman’s Health v. Cole, 790 F.3d 563, 585-86 (5th Cir. 2015) (citing Casey, 505 U.S. at 901), mandate stayed pending cert. decision by 135 S. Ct. 2923 (June 29, 2015) (No. 14A1288). But Casey does not only inquire into improper purpose. It asks judges to evaluate whether the evidence shows that health-justified abortion restrictions are “unnecessary.”
means unwarranted. Undue means disproportionate. Undue is a relative judgment. As the judges who employ the weighted balancing test understand, the question of what adverse effects are “undue” depends on the strength of the state’s demonstration of a health justification for the restriction on abortion—on whether a restriction is “unnecessary” to protect women’s health, hence imposes an “undue burden” on women’s access to abortion.

Precisely because undue means unwarranted or disproportionate, the judgment about which adverse effects are undue will vary across contexts. The proposition might seem unremarkable, but it stands dramatically at odds with the practice of courts that derive from Casey rules about the kinds of adverse effects that are licit under the undue burden test.

Exemplary are decisions of the Fifth Circuit that purport to derive from Casey rules of general application about driving distances and undue burdens. Consulting the record in Casey, Judge Priscilla Owen observed:

In Casey, the Supreme Court considered whether a Pennsylvania statute that de facto imposed a twenty-four-hour waiting period on women seeking abortions constituted an undue burden. The Court concluded that it did not, despite the fact that it would require some women to make two trips over long distances. An increase in travel distance of less than 150 miles for some women is not an undue burden on abortion rights.189

Judge Edith Jones approvingly affirmed and extended this reasoning. Because “the Supreme Court recognized that the 24-hour waiting period would require some women to make two trips over these [long] distances [and] nonetheless held that the Pennsylvania regulation did not

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189 Planned Parenthood of Greater Tex. Surg. Health Servs. v. Abbott (Abbott I), 734 F.3d 406, 415 (5th Cir. 2013) (footnote omitted). The joint opinion did not in fact establish any mileage limit below which a regulation might be immunized from undue burden review. It simply acknowledged that the waiting period might require “some women” to make a prior trip of some unspecified distance before obtaining an abortion on the second trip. Casey, 505 U.S. at 886-887. The District Court in Casey had found as a matter of fact that the nearest abortion clinic for women in 62 of the state’s 67 counties was at least one hour and as many as three hours away. Planned Parenthood of Se. Pa. v. Casey, 744 F. Supp. 1323, 1352 (E.D. Pa.1990), aff’d in part, rev’d in part, 947 F.2d 682 (3d Cir. 1991), aff’d in part, rev’d in part, 505 U.S. 833 (1992).
impose an undue burden, [w]e therefore conclude that *Casey* counsels against striking down a statute solely because women may have to travel long distances to obtain abortions."^{190}

Here, as elsewhere, the Fifth Circuit distorts *Casey*. The joint opinion evaluated the constitutionality of the driving distances in question as effects of a statute imposing a 24-hour waiting period;^{191} the joint opinion judged these burdens acceptable (not “undue”) *because they were an incident of the state’s effort to dissuade women from ending a pregnancy*. The opinion could not be clearer: “Because the informed consent requirement facilitates the wise exercise of [the abortion] right, it cannot be classified as an interference with the right *Roe* protects.”^{192} The form of the restriction mattered centrally to authors of the joint opinion as they determined what burdens on exercise of the right were undue:

> 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.^{193}

As these passages of *Casey* illustrate, the question of whether an adverse effect or burden is undue depends on the manner in which the state is vindicating its interest in regulating abortion. Burdens the joint opinion found acceptable as an incident of the state’s efforts to dissuade women from seeking an abortion do *not* represent a generally acceptable measure of the burdens the state may inflict on women by closing clinics for unnecessary or weakly supported health reasons.


^{191} See *Casey*, 505 U.S. at 885-87 (“Because the informed consent requirement facilitates the wise exercise of [the abortion] right, it cannot be classified as an interference with the right *Roe* protects.”).

^{192} *Id.* at 887.

^{193} *Id.* at 877.
Beyond this, the deeper error of the Fifth Circuit’s reading of *Casey* is its claim to apply the undue burden standard—a standard that vindicates a constitutional value—as a context-insensitive rule. The Court embraced the undue burden framework as a way to protect women’s liberty, the conditions in which women would exercise their constitutionally protected choice whether to become a mother. 194 *Casey* protects women’s liberty by restricting the means by which government may protect potential life. If government chooses to protect potential life, it may not obstruct women’s access to abortion, but must persuade women to choose motherhood by means that respect women’s dignity.

In upholding a law that was enacted for the nominal purpose of protecting women’s health, yet would foreseeably shut down most abortion clinics in the state—leaving millions of Texas women to exercise the choice *Casey* protects by driving hundreds of miles, if they can195—the Fifth Circuit mocks *Casey*,196 if not the Constitution itself.

**Conclusion**

*Casey*’s language and *Casey*’s logic both point in the same direction. *Casey* requires judges to weigh the evidence supporting a health restriction on abortion against its impact on

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194 *See id.* at 874 (“Only where 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.”); *see also supra* note 32 and accompanying text (quoting Justice Kennedy’s opinion in *Casey*).

195 *See supra* notes 189-190 and accompanying text (discussing the kinds of burdens the Fifth Circuit claims that *Casey* allows government to impose on a woman deciding whether to become a mother).

196 In a state where public officials openly discuss a law that purports to protect women’s health as designed to close abortion clinics, *see supra* note 87-90 and accompanying text, the Fifth Circuit repeatedly reverses and rebukes a trial judge for examining the state’s justification for enacting the law, *see supra* notes 134, 142,171, and 182 and accompanying text. In so doing, the Fifth Circuit purports to apply *Casey* and *Carhart*, yet ignores language in those cases that directs a court to examine the factual basis of the state’s claim to protect women’s health. *See supra* text accompanying notes 51-54, 157-158.

women’s access, or “unnecessary health regulations” will erode constitutional protection for women’s choices. Respecting Casey’s compromise requires states to protect potential life by means that respect women’s dignity.

Casey is not the opinion either of us would have written. Each of us believes the Constitution rightly understood provides more substantial protections for a woman’s decision whether to become a mother, especially given the exclusionary ways this nation has treated those who bear and rear children.

That said, there are reasons for the Court to stand behind its quarter-century old decision that reach beyond stare decisis. We understand Casey to represent the Court’s good faith effort to pronounce the Constitution’s meaning for a divided nation. With Americans bitterly disagreeing about the abortion question, the Court invoked the Constitution as a ground on which they were united and on which they could be asked to recognize each others’ views. In Casey, the Court interpreted the Constitution in a “call[...] [for] the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.”197 The Court allowed the states more latitude to protect potential life if the states acted to protect potential life by means the Court understood to respect a women’s constitutionally protected decision whether to become a mother. As a nation divided, we need practices of mutual respect no less today than we did in 1992.

Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in Roe and those rare, comparable cases, its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court’s interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.
Casey did not authorize health-justified restrictions on abortion that are in fact unnecessary to protect women’s health and that obstruct women’s access to abortion. Judges who are willing to accept the Casey compromise understand this and strike down the regulations we have discussed here. Judges at war with the compromise defer to the states’ rationales in the face of overwhelming evidence that the health justifications for the restrictions offer a fig leaf for the expression of anti-abortion sentiment.

In this article, we have frequently referred to women’s dignity as a value that Casey sought to protect. At this crucial juncture in the never-ending abortion controversy, we suggest that courts must be attentive as well to another claim to dignity: the dignity of law itself. If the compromise achieved nearly a generation ago under an intense public spotlight can be so easily manipulated and discarded, among the victims of that failure will be not only the women of America, but the understanding that Casey affirmed: that constitutional law matters, and matters especially in those precincts where we most deeply disagree.