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Laura Young
Pace University School of Law

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I. Introduction: Seeing the TRAP for what it is

In July 2012, a federal judge in Mississippi granted a temporary restraining order against enforcement of new abortion-related state legislation.[1] The proposed legislation required all physicians associated with abortion clinics in Mississippi to maintain admitting and staff privileges at any nearby hospital.[2] If immediate enforcement of the legislation had been permitted, the last remaining abortion clinic in Mississippi would have been forced to close.[3] The bill exposed doctors and clinics without the requisite hospital privileges to immediate criminal penalty, in the form of a $1,000-per-offense misdemeanor fine.[4] Continuing to operate throughout the

* J.D. Candidate (May, 2014), Pace University School of Law; B.A. (May, 2007), Mount Allison University. With gratitude for the support of my family and friends.

1. Jackson Women's Health Org. v. Currier (*JWHO I*), 878 F. Supp. 2d 714, 720 (S.D. Miss. 2012). In April 2013, the clinic moved for a preliminary injunction to challenge the State's revocation of the clinic's license. Jackson Women's Health Org. v. Currier (*JWHO II*), 940 F. Supp. 2d 416 (S.D. Miss. 2013). The clinic had attempted (unsuccessfully) to comply with Mississippi House Bill 1390 following District Judge Jordan's 2012 decision in *JWHO I*. *JWHO II*, 940 F. Supp. 2d at 417-18 (finding that Jackson Women's Health Organization had met its burden, and granting preliminary injunction against state licensure revocation).

2. *JWHO I*, 878 F. Supp. 2d at 715; *see also* H.B. 1390, 2012 Leg., 127th Sess. (Miss. 2012) (codified at MISS. CODE. ANN. § 41-75-1 (2013)).

3. *JWHO I*, 878 F. Supp. 2d at 715.

4. *Id.* at 718 ("[A]ny violation of any provision of this chapter . . . [shall constitute a misdemeanor and] shall be punishable by a fine not to exceed One Thousand Dollars ($1,000.00) for each such offense." (quoting MISS. CODE. ANN. § 41-75-26 (2013))).

administrative process associated with the granting of hospital admitting privileges would have been prohibitive, as the clinic would have had to pay ongoing fines until it was in compliance.[5] The legislation thus placed Jackson Women's Health Organization ("JWHO") in an untenable position: few if any abortion clinics can continue to provide abortion services with operating costs increased by $1,000 per practitioner per day. Furthermore, the attendant criminal liability would have acted as a severe disincentive to abortion practitioners operating out of the clinic: although the State promised that it would not enforce the criminal aspect of the law until a specific period of time had lapsed in order to provide time for the doctors to acquire privileges, there was no guarantee.[6] This lack of guarantee made doctors understandably nervous about continuing to provide abortion services without obtaining admitting privileges.[7]

Yet despite these concerns, the proposed regulation appears to pass the 'undue burden' test promulgated in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[8] because it does not seem to have the purpose or effect of restricting a woman's reproductive autonomy in and of itself.[9] Moreover, it is defensible because it is rationally related to the recognized legitimate state concern for maternal health.[10] However, the maternal health consequences of non-compliance in this instance are minimal.[11] Other abortion clinics in

5. *Id.* ("Each day of continuing violation shall be considered a separate offense." (quoting MISS. CODE. ANN. § 41-75-26 (2013))).

6. Id. at 719-20.

7. *Id.* at 719-20; *see also* Amended Complaint, *JWHO I*, 878 F. Supp. 2d 714 (S.D. Miss. 2012) (No. 3:12-CV-00436), 2012 WL 3234936.

8. 505 U.S. 833 (1992).

9. *Id.* at 877 (defining 'unduly burdensome' legislation as regulation with the "purpose or effect" of putting a significant obstacle in a women's path to obtaining an abortion).

10. Gonzales v. Carhart, 550 U.S. 124, 158 (2007) (announcing that in order to be deemed constitutional, laws restricting types of abortion available to a woman need only be rationally related to a legitimate state interest,,as distinct from the compelling state interest in marital privacy previously discussed in relation to contraceptive use under *Griswold v. Connecticut*, 381 U.S. 479, 496-98 (1965) (Black, J., dissenting)).

11. Campbell Robertson, *Judge Maintains Injunction Against Mississippi Law on Abortion Clinics*, N.Y. TIMES, July 11, 2012, http://www.nytimes.com/2012/07/12/us/mississippi-abortion-law-injunction-is-

Mississippi have been regulated out of existence in similar ways,[12] reflecting a United States-wide trend[13] that American pro-choice lobbyists have labeled 'Targeted Regulation of Abortion Providers' ("TRAP").[14]

TRAP regulations are identifiable in the following three ways: (1) a TRAP regulation may be a new measure that singles out abortion providers for medically unnecessary standards (including building and personnel requirements); (2) a TRAP regulation may needlessly address the licensing of the clinic and/or charge a fee for licensure that exceeds the reasonable amount charged to other less-politically-fraught medical clinics; or, (3) a TRAP regulation may unnecessarily regulate the place in which abortions may be performed (i.e. require that abortions be provided only by hospitals, or designate abortion clinics as ambulatory surgical centers, thereby subjecting them to heightened standards not necessary to ensure the safety of an abortion).[15]

Current United States Supreme Court jurisprudence permits legislatures to take into account the health of the mother when passing abortion-related legislation; however, it also imposes an 'undue burden' ceiling on such legislation.[16]

extended.html ("[Legislators] say that such a rule . . . is a necessary precaution in case complications occur during a procedure. . . . Jackson Women's Health Organization[] has responded that such complications are extremely rare and says that in any case it already has a standing transfer agreement with a local hospital . . . ."). Additionally, abortion clinics are already regulated at the federal level to ensure maternal health. *See*, *e.g.*, Clinical Laboratory Improvement Amendments of 1988, Pub. L. No. 100-578, 102 Stat. 2903 (codified as amended at 42 U.S.C. § 263a (2012)); Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936; Occupational Safety and Health Administration Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590.

12. *Abortion Laws: And Then There Was One*, ECONOMIST, Sept. 8, 2012, http://www.economist.com/node/21562215.

13. Thomas Kaplan, *Cuomo Bucks Tide with Bill to Ease Limits on Abortion*, N.Y. TIMES, Feb. 16, 2013, http://www.nytimes.com/2013/02/17/nyregion/cuomo-bucks-tide-with-bill-to-lift-abortion-limits.html.

14. Lisa M. Brown, *The TRAP: Targeted Regulation of Abortion Providers*, NAT'L ABORTION FED'N 1 (2007), http://www.prochoice.org/pubs_research/publications/downloads/about_abortion/trap_laws.pdf.

15. Id.

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

The challenge presented by TRAP regulations is that, when each regulation is considered individually, they will not constitute 'undue burdens' directly restricting a woman's ability to obtain an abortion. Considered in isolation from one another, these regulations are even readily defensible, as they are ostensibly promulgated to protect maternal health, which is a legitimate state interest.[17] According to Supreme Court jurisprudence, these regulations are therefore constitutionally sound.

This situation raises a significant question: is 'undue burden' analysis sufficient to protect women's reproductive autonomy (right to choose)? Examining this question through the prism of the *Jackson Women's Health Organization v. Currier* injunction decisions,[18] I conclude that the capacity of the 'undue burden' analysis to protect women's right to choose is more limited than previously thought. This conclusion stems from three distinct loopholes in Supreme Court abortion jurisprudence. First, 'undue burden' analysis focuses on individual regulations, which might each be constitutionally valid when considered in isolation, but which in aggregate create an abortion regime that unduly burdens a woman's access to abortion and thereby impinges on her right to reproductive autonomy. Second, 'undue burden' analysis focuses on protecting the demand side of the abortion business (i.e. maintaining access from the perspective of the woman seeking an abortion) without devoting equal attention to protecting the supply side of the abortion economy (i.e. the ability of abortion providers to stay in business). This demand-side emphasis on a woman's ability to access abortion dominates Supreme Court jurisprudence and limits the 'undue burden' analysis on which women's reproductive autonomy relies.[19] In response, opportunistic state legislatures have shifted from imposing burdens directly on a woman seeking an

17. *Id.* at 877-78.

18. *JWHO I*, 878 F. Supp. 2d 714, 715 (S.D. Miss. 2012); *JWHO II*, 940 F. Supp. 2d 416, 417 (S.D. Miss. 2013). These decisions, which relate to the granting of an injunction rather than to the constitutionality of the Mississippi law itself, are tangentially related as examples of TRAP and the challenges courts confront when dealing with such legislation.

19. *See* Theodore Joyce, *The Supply-Side Economics of Abortion*, 365 NEW ENG. J. MED. 1466 (2011).

abortion to imposing burdens on the clinics and individuals providing abortions—the supply-side of the abortion economy.[20] Although the effect is the same in that women's right to choose is unduly burdened, there is little within current 'undue burden' jurisprudence to limit these supply-side regulations.[21] Finally, the development of new medical technologies is leading to regulations that do not themselves constitute 'undue burdens' but that nevertheless put pressure on women to make pro-life choices.[22] New technology is also changing the meaning of existing law. For example, technological advancements are making it possible for fetuses to survive outside the womb at younger and younger ages, shifting viability from the *Wade*-envisioned twenty-eight week benchmark to twenty weeks or less.[23]

20. Joyce, *supra* note 19, has identified an emerging division between treatment of the demand side and the supply side of the abortion regulatory regime ("[A]bortion opponents have turned to supply-side restrictions, focusing on providers of abortion services.").

21. *See, e.g.*, Women's Med. Prof'l Corp. v. Baird, 438 F.3d 595, 598-602 (6th Cir. 2006) (determining whether a permanent injunction should be vacated in a case where a clinic sought a waiver of a transfer agreement).

22. E.g., Paula Abrams, The Scarlet Letter: The Supreme Court and The Language of Abortion Stigma, 19 MICH. J. GENDER & L. 293, 295 (2013); John A. Robertson, Abortion and Technology: Sonograms, Fetal Pain, Viability, and Early Prenatal Diagnosis, 14 U. PA. J. CONST. L. 327 (2011) (discussing mandated sonograms and studies of fetal capacity for pain that suggest an earlier threshold than previously thought).

23. Robertson, *supra* note 22, at 331. However, developments in technology have also led to earlier and earlier detection of pregnancy, and thus to earlier and earlier abortion procedures. It is also leading to calls for a 20-week abortion ban in some states. *See Abortion: The 20-Week Limit*, ECONOMIST, Mar. 8, 2014, http://www.economist.com/news/united-states/21598684-new-curbs-abortion-are-spreading-20-week-limit. The 20-week ban is supported by proponents who assert that there is not much difference between ability to survive outside the fetus at 20 weeks as compared to 24 weeks. *Quaere* whether pro-life arguments will subsequently focus on how little difference there is between 18 weeks and 20. The other problem with this, as highlighted by THE ECONOMIST, is that there are situations in which the fetus's fatal or otherwise severe disabilities may not be revealed to the parents—through amniocentesis or otherwise—until after the 20-week benchmark that pro-life advocates support. The morality of determining whether to 'keep' a child on the basis of his or her ability level is beyond the scope of this paper; however, it is worth noting here that moving the choice-deadline up does raise other significant questions regarding the availability of abortion where fetal health or even survival are determined after the proposed 20-week deadline. This calls into even deeper question the *Casey* Court's rationale that "[t]he viability line . . . has . . . an element of

The conclusion that 'undue burden' analysis is inadequate to protect women's right to choose requires that alternate solutions to the TRAP problem be proposed. Although Congress has used its Commerce Clause powers to protect access to abortion from pro-life protestors,[24] it is increasingly unlikely that Congress will act further in such a politically-fraught area of law.[25] If we are to have protection for abortion clinics and the women who require their services, it will have to evolve through judicial decision-making.[26] The Supreme Court has hinted that the right to choose might be protected by a 'purpose and effect' analysis,[27] which echoes Supreme Court jurisprudence in the realm of racial discrimination.[28] However, this solution appears to be equally limited. It seems that looking to other areas of law may be required to explore

fairness. In some broad sense, it might be said that a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child." Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 870 (1992). The Court notes that "[w]e have seen how . . . advances in neonatal care have advanced viability to a point somewhat earlier." *Id.* at 860. Yet, despite this recognition, the Court maintained that viability was the point at which the state's interests become compelling. *Id.* at 870; *see also* Carole Joffe, Roe v. Wade *at 30: What are the Prospects for Abortion Provision?* 35 PERSP. ON SEXUAL & REPROD. HEALTH 29 (2003), *available at* http://www.guttmacher.org/pubs/journals/3502903.html. Additionally, a decision from the Ninth Circuit held that a 20-week ban on abortion violated the Constitution. Isaacson v. Horne, 716 F.3d 1213 (9th Cir. 2013). Judge Kleinfield reluctant concurrence in *Isaacson* is worth noting both for its recognition that the viability benchmark is an "odd rule" and for its interesting analogy to death penalty anesthetization as a possible solution to the fetal pain alleged in post-20 week abortions. *Id.* at 1231-34 (Kleinfield, J. concurring).

24. *See, e.g.*, Freedom of Access to Clinic Entrances Act (FACE Act), 18 U.S.C. § 248 (2012).

25. Particularly given Congress's current difficulties in coming to any consensus on any topic. *But see* Peter Baker, *In Speech to Planned Parenthood, Obama Criticizes New Abortion Laws*, THE CAUCUS (Apr. 26, 2013, 1:27 PM), http://thecaucus.blogs.nytimes.com/2013/04/26/in-speech-to-planned-parenthood-obama-criticizes-new-abortion-laws/?src=rechp.

26. The Court appears reluctant to re-open the abortion debate. *See In re* Initiative Petition No. 395, State Question No. 761, 286 P.3d 637 (Okla. 2012), *cert. denied sub nom.* Personhood Oklahoma v. Barber, 133 S. Ct. 528 (2012) (denying certiorari in a case seeking to change the definition of personhood).

27. *See* Casey, 505 U.S. at 877.

28. *See* Washington v. Davis, 426 U.S. 229 (1976); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977).

solutions to this problem.

This Comment will first examine existing Supreme Court abortion and reproductive autonomy jurisprudence before seguing into an exploration of the limits of the 'undue burden' analysis through the *Jackson Women's Health Organization v. Currier* temporary and preliminary injunction decisions. The final section of this Comment explores potential solutions from other areas of constitutional law, and proposes that some techniques for limiting the reach of state regulatory power might be imported from environmental law,[29] which frequently must deal with interactions amongst complex regulatory regimes.

II. Setting the TRAP: Evolving Supreme Court abortion jurisprudence of 'undue burden'

Prior to the 1973 landmark Supreme Court abortion case *Roe v. Wade*,[30] states were free to regulate abortion providers however they saw fit—including banning the procedure completely.[31] Texas law criminalized abortions unless they were performed to save the life of a pregnant woman.[32] *Roe v. Wade* arose when Jane Roe, pregnant and unmarried, sought a safe abortion in Texas.[33] As a result of her inability to find a safe and legal abortion provider, Jane Roe brought suit challenging the constitutionality of the Texas law, "on behalf of herself and all other women similarly situated."[34] She challenged the law as void for vagueness, and as a violation of

29. Although initially this may seem to be a stretch, there are similarities in the challenges confronting both areas of law. At the moment, much of environmental law is generally cast as in terms of an ethical dilemma. *See* RICHARD J. LAZARUS, THE MAKING OF ENVIRONMENTAL LAW (2004). This is also true of the abortion debate; the possibilities for opportunism in state action are also paralleled in environmental law. *See infra*, Part V.B.

30. 410 U.S. 113 (1973).

31. *Abortion Laws: And Then There Was One*, supra note 12.

32. *Wade*, 410 U.S. at 117-18.

33. *Id.* at 120. Legalized abortions are generally considered safer, since legalization comes with regulatory requirements around cleanliness and standards of care. *See* Mark A. Graber, *The Ghost of Abortion Past: Pre*-Roe *Abortion Law In Action*, 1 VA. J. SOC. POL'Y & L. 309, 367 (1994).

34. *Wade*, 410 U.S. at 120 (internal quotation marks omitted).

her right to privacy.[35] In a much-anticipated decision, the

35. Jane Roe argued that the laws were void for vagueness and that they impinged on her right of personal privacy, specifically alleging violations of her First, Fourth, Fifth, Ninth and Fourteenth Amendment rights. *Id.* at 120. The question of standing in the context of this case and similar cases is an interesting side-note:

Here, although Roe's challenge was joined at the District Court level by an intervenor (Dr. Halford, who provided illegal abortions to Texasn women in need), and by a childless, non-pregnant couple (the Does, who asserted that the statute criminalizing abortion constituted a potential threat to Mrs. Roe's health— – that she had received medical advice urging her not to become pregnant, to stop taking birth control, and to terminate any pregnancy that might arise), the District Court found that only Roe, members of her class, and Halford had standing. *Id.* at 120-22, 125-29.

In contrast, the Supreme Court determined on appeal that the Does did not have standing because their alleged injury was speculative. *Id.* at 129. It found that Halford also did not have standing as an intervenor, and for a similar reason: he made no allegations of any "substantial and immediate threat," and no claim of "harassment or bad-faith prosecution" that would enable the Court to find Article III standing, as were required. *Id*. at 126. Dr. Halford had challenged the constitutionality of the Texas law solely as a doctor who had previously been arrested for violating Texas abortion laws. *Id.* at 125-26; *see also* Diamond v. Charles, 476 U.S. 54, 64-67 (1986) (physician did not have standing because he did not allege a specific injury; he could not claim standing existed as general defender of unborn, nor as father, nor as physician.) Standing does exist where "[a] physician . . . challenge[s] an abortion law that poses for him a threat of criminal prosecution." *Diamond*, 476 U.S. at 65. A physician has standing when he asserts the constitutional rights of others who cannot assert their rights themselves, provided that he "demonstrate[] that abortion funding regulations have a direct financial impact on his practice." *Id.* at 65-66. Roe's standing was also questionable, because the duration of pregnancy is brief compared to the appellate process, and yet Article III requires that "an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated." *Wade*, 410 U.S. at 125 (collecting cases). Nonetheless, recognizing that the procedural rule is impractical in the context of a pregnant woman, the Court found that Roe had standing: her pregnancy (and pregnancies of women in her class), as well as the injury arising out of the Texas law criminalizing abortions was "capable of repetition, yet evading review." *Id.* (collecting cases). The Court thus brought constitutional challenges brought by pregnant women into an historical exception to the Article III standing requirement. *Id.* at 125 (citing S. Pac. Terminal Co. v. ICC, 219 U.S. 498, 515 (1911)). Moreover, Roe had standing *even though* she had not claimed pregnancy at the time she filed suit and had terminated her pregnancy by the time her appeal came before the Supreme Court. *Id.* at 124. Nor does the Supreme Court's recent decision, *Hollingsworth v. Perry*, shed any light on this particular contradiction. 133 S. Ct. 2652, 2659 (2013) (dismissing Petitioners for lack of standing because they had not "suffered a concrete and particularized injury."). The *Hollingsworth* petitioners, who were the official proponents of a ballot initiative to amend California's constitution to redefine marriage as a union

Supreme Court announced an extension of women's right of privacy[36] to encompass their reproductive decisions to carry (or not carry) fetuses to term.[37] However, the Court also determined that there is a countervailing state interest in protecting both maternal health and fetal health, thus creating a sliding scale of constitutionally valid state regulation (and permissible state invasion into women's privacy rights) at each stage of a woman's pregnancy.[38]

Perhaps in the interests of simplifying things by using already-established medical benchmarks, the *Wade* Court created a trimester-based framework for assessing the

between opposite-sex couples, had appealed the lower court's decision although the State of California did not. *Id.* at 2659-60.

36. The Supreme Court first recognized a right of privacy with respect to reproductive decision-making in its plurality decision, *Griswold v. Connecticut*. 381 U.S. 479, 485-86 (1965). In that decision, Justice Goldberg (joined by Chief Justice Warren and Justice Brennan) appeared to consider that this right could be abridged by the state only on a demonstration of a compelling state interest in so doing. *Id.* at 497-98 (Goldberg, J., concurring). Petitioners in that case challenged a Connecticut birth control law that prohibited the provision of birth control to married (and unmarried) couples. *Id.* at 480 (opinion of the Court). This decision was based on an inferred right of privacy, originating in the Bill of Rights: "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." *Id*. at 484. Privacy, the Court maintained, was just such a right. *Id.* at 485. However, the Court also recognized that there had, to that point, been numerous controversies over the recognition of privacy as a fundamental right. *Id.* at 485 (collecting cases). This raises a question about the firmness of the footing on which abortion law has been built. The language used by the Court in its affirmation of privacy as a constitutionally-protected right—"penumbras, formed by emanations"—creates only the most tenuous link to the Constitution. *Id*. at 484. Is reproductive autonomy threatened by the erosion of personal privacy in other areas of law, for example, the erosion of personal privacy in response to perceived terrorist threats? *See* Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138 (2013). Alternately, current events may require the Court to re-examine this link and perhaps forge a stronger protection for privacy generally. *See*, *e.g.*, Jill Lepore, *The Prism: Privacy in an Age of Publicity*, NEW YORKER, June 24, 2013, http://www.newyorker.com/reporting/2013/06/24/130624fa_fact_lepore. Whether that stronger link will be one that is generally applicable, thereby protecting abortion choices, or contextual, will naturally be a question the Court will eventually have to confront should it review and re-define privacy rights.

37. *Wade*, 410 U.S. at 152-56.

38. *Id.* at 154 ("The privacy right involved, therefore, cannot be said to be absolute."); *see also supra* note 37.

constitutionality of abortion-related state regulation.[39] According to *Wade*, the end of the first trimester was the 'compelling point' at which the State might regulate abortion in a manner "reasonably relate[d] to the preservation and protection of maternal health."[40] The Court identified a second 'compelling point' at viability: "the State . . . may go so far as to proscribe abortion [after viability], except when it is necessary to preserve the life or health of the mother."[41] In its decision, the Court focused on *Jane Roe*'s right of privacy, and on *Jane Roe*'s ability to access abortion,[42] emphasizing the demand side of the abortion economy in this and subsequent decisions.

On the supply side, the *Wade* Court provided guidance to states seeking to regulate abortion providers by listing types of legislation that it considered permissible under its holding. Thus, the following types of regulation are, under *Wade*, constitutional actions that a state may take with respect to the abortion economy:

> [R]equirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like.[43]

Within reason, these criteria are calculated to protect maternal health. Exploitation of the loopholes this language provides, however, has led to the TRAP regulations seen across the United States today.

In 1992, in the face of significant pressure from the United States,[44] the Court broadened its definition of permissible

39. *Id.* at 164-66.
40. *Id.* at 163.
41. *Id.* at 163-64.
42. See generally id.
43. *Id.* at 163.
44. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 844 (1992) ("Joining the respondents as *amicus curiae*, the United States, as it has done in five other cases in the last decade, again asks us to overrule *Roe*.").

supply-side regulations while re-affirming its demand-side commitment to women's reproductive autonomy in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[45] In *Casey*, the Court introduced the term 'undue burden' and clarified its holding in *Wade* by eliminating the trimester framework in favor of a viability benchmark.[46] In so doing, the Court explicitly stated that "the trimester framework . . . undervalues the State's interest in potential life."[47] The decision thus shifted the balance away from protecting a pregnant woman's right of privacy and toward a state's ability to impinge on that right.

The challenge in *Casey* centered on a series of consent-related requirements within Pennsylvania law.[48] These provisions included a requirement that women give 'informed consent' prior to abortion procedures.[49] 'Informed consent' meant notifying women of the developmental progress of the fetus immediately prior to performing the abortion, informing them about the potential for paternal liability, and offering other state-approved alternatives to abortion (such as adoption, etc.).[50] Minors could have abortions only with the consent of a parent, although judicial exemptions were to be provided in exceptional circumstances.[51] Married women had to confirm that they were seeking the procedure with the consent of their husbands.[52]

The Court determined that these provisions—with the sole exception of the marital consent provision—did not inflict an 'undue burden' on women's reproductive autonomy.[53] The Court went on to define unduly burdensome regulation as "state regulation ha[ving] the purpose *or* effect of placing a substantial obstacle in the path of a woman seeking an

45. See generally id.

46. *Id.* at 873 ("We reject the trimester framework, which we do not consider to be part of the essential holding of *Roe*.") (citations omitted).

47. *Id.* at 873.

48. *Id.* at 844; *see also* 18 Pa. Cons. Stat. §§ 3203-3220 (1990).

49. *Casey*, 505 U.S. at 844.

50. *Id.* at 844, 881.

51. *Id*. at 844.

52. *Id.*

53. *See generally id*. at 879-901 (discussing each of the challenged provisions).

abortion of a nonviable fetus."[54] Note that the Court again emphasizes the woman's access to abortion—the demand side of the economy—rather than the supply side, *i.e.* a clinic's ability to provide an abortion.

The Court also used the *Casey* decision as an opportunity to eliminate the *Wade* trimester framework, focusing instead on viability[55] as the critical point at which states' interests might become burdensome on a woman while remaining constitutionally valid: "[b]efore viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to women's effective right to elect the procedure."[56] The Court upheld the *Wade* determination that states could proscribe abortion after viability, but required that such laws contain maternal-health exemptions.[57] Additionally, the Court confirmed that the state has an interest in both maternal health and the life of the unborn fetus from conception.[58] These statements seemed reasonable; however, the Court went on to discuss state-legislated regulations:

> Numerous forms of state regulation might have the incidental effect of increasing the cost or decreasing the availability of medical care, whether for abortion or any other medical procedure. *The fact that a law which* [sic] *serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it*. Only where 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.[59]

54. *Id.* at 837.

55. Viability is the point at which the fetus can survive outside of the womb. *Id.* at 870.

56. *Id*. at 846.

57. *Id*.

58. *Id*.

59. *Id.* at 874 (emphasis added) (citations omitted).

This language, particularly the italicized language, signaled a shift away from an objective standard and toward a legislative-purpose-based or intent-based subjective standard that renders the infliction of 'undue burden' more difficult to prove. The Court additionally determined that

> Regulations which [sic] do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose. Unless it has that effect on her right of choice, a state measure designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal.[60]

Taken together, these sections of the *Casey* decision condone state legislation that severely constricts women's access to abortions, either physically (through TRAP regulations) or emotionally (through mandated sonograms and other 'informed consent' devices that might create doubt, shame, or guilt in an otherwise resolved woman seeking the procedure),[61] so long as the creation of an 'undue burden' is not an explicit purpose of the legislation and so long as there is no evident, unduly burdensome effect.

Following the *Casey* decision, a series of cases out of Nebraska forced the Court to refine its definition of 'undue burden.' In these decisions, the Court further retrenched the power of its *Wade* holding. In 2000, the Court was confronted with a Nebraska law that banned two common types of late-

60. *Id.* at 877-78 (internal citation omitted).

61. *See* Abrams, *supra* note 22, at 295 ("Laws mandating invasive ultrasounds, biased counseling sessions, and onerous waiting periods, along with fetal ""personhood"" and fetal pain laws, are intended to shame and punish women who seek abortions."). Abortions are already "something most women would rather forget," according to Dr. Willie Parker, who performs abortions at the Jackson Women's Health Organization Abortion Clinic. Alissa Quart, *Will Mississippi Close Its Last Abortion Clinic?*, ATLANTIC (Jan. 22, 2013), http://www.theatlantic.com/national/archive/2013/01/will-mississippi-close-its-last-abortion-clinic/267352/.

pregnancy abortions, dilation and evacuation[62] ("D & E") and dilation and extraction[63] ("D&X").[64] The statute severely restricted second-trimester abortion options for all women, including those whose health and safety were threatened by their later-term pregnancies; worse, it had no maternal health exemption.[65] The Court found the statute unduly burdensome and void for vagueness.[66]

In 2003, a group of physicians who interpreted this decision as requiring a maternal health exception in all abortion-proscribing legislation challenged Nebraska's Partial-Birth Abortion Ban Act ("Nebraska Act") on the grounds that it did not contain such an exception.[67] The Supreme Court reviewed the Nebraska Act, along with a similar challenge out of the Ninth Circuit, in its *Gonzales v. Carhart* decision.[68] Despite the Act's failure to include a maternal health exception, the Supreme Court upheld that legislation as a constitutional expression of state concern over maternal health. In making this determination, the Court applied what it considered the *Casey* balancing test—assessing the permissible expression of a state's "profound respect for the life of the unborn" on the one hand, and the impermissible 'undue burden' that a state's exercise of regulatory authority might impose on a woman's right to choose on the other hand.[69]

62. "D[ilation] & E[vacuation] involves (1) dilation of the cervix; (2) removal of at least some fetal tissue using nonvacuum instruments; and (3) (after the 15th week) the potential need for instrumental disarticulation or dismemberment of the fetus or the collapse of fetal parts to facilitate evacuation from the uterus." Stenberg v. Carhart, 530 U.S. 914, 925 (2000).

63. "The breech extraction version of the intact D & E is also known commonly as "dilation and extraction,' or D & X.' In the late second trimester, vertex, breech, and transverse/compound (sideways) presentations occur in roughly similar proportions." *Id.* at 927 (citing Carhart v. Stenberg, 11 F. Supp. 2d 1099, 1108, 1112 (D. Neb. 1998); Maureen Paul et al., A CLINICIANS GUIDE TO MEDICAL AND SURGICAL ABORTION 135 (1999)).

64. *See also* Gonzales v. Carhart, 550 U.S. 124, 135 (2007) (explaining that D&E, of which D&X is a sub-category, is the most common second-trimester abortion technique).

65. *See generally Stenberg*, 530 U.S. at 920-31 (discussing the challenged provisions).

66. *Id.* at 937-38.

67. *Gonzales*, 550 U.S. at 132-33.

68. *See id.*

69. *Id.* at 146 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S.

Because the Nebraska Act only proscribed one type of late-pregnancy abortion procedure, and did so with great specificity, the Court opined that it was neither void for vagueness nor did it unduly burden a woman's reproductive autonomy.[70]

The Court also used its *Gonzales* decision to explain that pre-viability states may regulate abortion so long as the regulations are *rationally related* to the state interest in maternal health, and provided that the regulation does not impose an 'undue burden' on a woman's right to choose.[71] Since rational basis review is the least stringent standard of constitutional review, this decision grants states significant latitude in pre-viability regulation of abortion procedures: any regulation related to maternal health—no matter how remote the relationship may be—is likely to be upheld under this standard. This language represented a substantial departure from the 'narrow tailoring' to meet a 'compelling state interest' language of *Griswold*.[72] The Court's indication that regulations will henceforth be subject only to rational basis and undue burden review has led to a proliferation of state regulations that target abortion providers, shifting legislative undue burdens onto the supply-side of the abortion economy. Furthermore, the Court's definition limits 'undue burden' analysis to individual regulations. The Court repeatedly used the phrase "*a* state regulation"[73] when describing what

833, 877-78 (1992)).

70. *Id*. at 146-47.

71. *Id.* at 158. ("Where it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power . . . in furtherance of its legitimate interest . . . to promote respect for life, including the life of the unborn." *See also id.*, 186-87 (Ginsburg, J dissenting). Rational basis review permits significant over- or under-inclusiveness in the tailoring of a given law. *See, e.g.*, Ry. Express Agency v. New York, 336 U.S. 106 (1949) (upholding a law limiting New York City advertisers to using only their own trucks for promotional purposes in the interest of preventing driver distraction. The law was substantially under-inclusive but upheld under rational basis review nonetheless); *cf.* N.Y. City Transit Auth. v. Beazer, 440 U.S. 568 (1979) (upholding a law prohibiting Methadone users and those in rehab from being hired by the Metro Transit Authority when only users were considered to pose a substantial danger to public health. The law was substantially over-inclusive but upheld under rational basis review nonetheless).

72. Griswold v. Connecticut, 381 U.S. 479, 497-498 (1965).

73. *Casey*, 505 U.S. at 877 (emphasis added); *see also* Okpalobi v. Foster,

constitutes an unduly burdensome law—a grammatical subtlety seized upon by opportunistic state law-makers, who have since used individually constitutional regulations to develop unconstitutional abortion regimes. These regulations are individually constitutional because they masquerade as being related to the protection of maternal health and because individually they do not appear to pose a threat to women's ability to access abortion. The aggregate effect of these supply-side regulations, however, is to drive clinics out of business, resulting in significant demand-side barriers to abortion.[74]

190 F.3d 337, 357 (5th Cir. 1999), *rev'd en banc on other grounds*, 244 F.3d 405 (5th Cir. 2001) ("*A* measure that has the effect of forcing all or a substantial portion of a state's abortion providers to stop offering such procedures creates a substantial obstacle to a woman's right to have a pre-viability abortion, thus constituting an undue burden under *Casey*." (citing Planned Parenthood, Sioux Falls Clinic v. Miller, 63 F.3d 1452, 1465 (8th Cir. 1995))) (emphasis added).

74. These significant barriers to abortion predominantly affect economically marginalized women, for whom abortion may already be costly (up to $450, and largely uncovered by Medicaid; private coverage is also often limited), and who cannot travel out-of-state as readily for a variety of reasons, or who lack the resources to understand that such an option is available. One survey has found that 38 percent of all reproductive-age women live in counties without abortion clinics. Dana Liebelson & Molly Redden, *The Abortion Rate Hits a 30-Year Low*, MOTHER JONES (Feb. 3, 2014, 4:00 AM), http://www.motherjones.com/politics/2014/02/abortion-rate-record-decline-map. Such limited access is exacerbated by many states' mandatory waiting period (up to 72 hours between the initial abortion 'counseling' session and the procedure itself). *See* Quart, *supra* note 61; *see also* Barry Yeoman, *The Quiet War on Abortion*, BARRYYEOMAN.COM (Sept. 1, 2001), http://barryyeoman.com/2001/09/the-quiet-war-on-abortion/ ("But many women in outlying areas can't afford the extra travel or hotel costs—not to mention lost wages and childcare expenses—involved in a two-day trip to obtain an abortion."). Recently, news sources have trumpeted a decline of nearly 13 percent in abortions in the period from 2008-2011—a return to pre-*Wade* numbers. *Abortion: The 20-Week Limit*, *supra* note 23. In that same period, however, abortion providers have decreased by 4 percent as determined by a study released by the Guttmacher Institute. Liebelson & Redden, *supra* note 74. The study also shows that, "[a]bortion clinics . . . account for only 19 percent of the facilities that offer abortions, but provide 63 percent of abortions." *Id.* Thus, an apparently negligible 4 percent decline in clinic numbers represents a not-negligible decline in actual appointments available, and may consequently have a substantial effect on women's ability (let alone right) to choose. There is a significant paucity of cases discussing whether out-of-state travel constitutes an 'undue burden' on a woman's right to choose pre-viability. *See* Women's Med. Prof'l Corp. v. Baird, 438 F.3d 595, 603 (6th Cir. 2006).

III. TRAPpped: Constitutionally-valid State regulations of abortion providers

Every state except Oregon currently imposes some sort of restriction on access to abortion.[75] A large number of these states restrict access by imposing needless regulations on or by over-regulating the demand-side of the abortion economy (clinics and providers).[76] For example, in August 2012, the Fifth Circuit allowed Louisiana to revoke abortion licenses immediately following discovery of any regulatory violation, dismissing a challenge to these regulations for lack of ripeness because the plaintiff-clinic and associated doctors had not yet been subjected to any revocation of license for minor regulatory infractions.[77] Previously, in March of 2001, the Fifth Circuit determined that a Louisiana statute permitting private action in tort for emotional distress could be brought against abortion providers.[78] Abortion providers challenged the statute, alleging injury arising out of the chilling effect such legislation would have on them.[79] The Fifth Circuit dismissed the challenge for lack of standing, holding that the plaintiffs failed to carry their burden of proving actual injury.[80] Louisiana may be the 'incubator'[81] for TRAP regulation, but it is far from alone in promulgating such discriminatory legislation.

According to Remapping Debate,[82] Oklahoma imposes the

75. Sarah Kliff, *All States Except Oregon Now Limit Abortion Access*, WONKBLOG, WASH. POST (Jan. 31, 2013, 10:26 AM), http://www.washingtonpost.com/blogs/wonkblog; *see also* Mike Aberti, *Dozens of New State Limits on Abortion Added in 2012*, REMAPPING DEBATE (Jan. 30, 2013), http://www.remappingdebate.org/map-data-tool/dozens-new-state-limits-abortions-added-2012.

76. *See* Aberti, *supra* note 75.

77. Choice Inc. of Tex. v. Greenstein, 691 F.3d 710, 714-16 (5th Cir. 2012).

78. *Opkalbi*, 244 F.3d at 409-10.

79. *Id.* at 410 ("[T]he Act will force physicians in Louisiana to cease providing abortion services to women because of the potential exposure to civil damage claims authorized by the Act. . . . [And] if they are forced to discontinue providing their services, the State may have achieved in practical terms what it could not constitutionally do otherwise—eliminate abortions in Louisiana.").

80. *Id.* at 425-26.

81. Yeoman, *supra* note 74.

82. Sponsored by the Anti-Discrimination Center, Remapping Debate

largest number of abortion restrictions of any state.[83] Most recently, Oklahoma added new questions to an abortion questionnaire women must complete when they seek an abortion.[84] Republican Doug Cox, a doctor, criticized the addition of these new questions as "an attempt to overburden and intimidate abortion providers," whose administrative costs will rise as these new questions are incorporated into their practice.[85]

In 2011, Kansas promulgated new regulations for abortion clinics that stipulate, among other things, room temperature and dimensions.[86] These discriminatory regulations have not been imposed on hospitals in the state, yet must be met by abortion clinics if they wish to retain their licenses.[87] The legislation has been challenged in court: the timeline for conformity is short, and the clinic is unlikely to meet its deadline.[88]

Meanwhile, Virginia's Health Commissioner resigned in October 2012, protesting the enactment of a law that will force existing abortion clinics in that state to comply with the same

operates out of New York City and "is committed to covering the full spectrum of domestic public policy issues." *About Remapping Debate*, REMAPPING DEBATE.COM, http://www.remappingdebate.org/about/ (last visited April 3, 2014).

83. Aberti, *supra* note 75.

84. These questions make the questionnaire longer and more invasive. *See* H.B. 2015, 54 Leg., 1st Reg. Sess. (Okla. 2013) (codified at OKLA. STAT. ANN. tit. 63, § 1-738k (West 2013)).

85. Sean Murphy, *Panel OKs Parental Notification Abortion Bills*, 10TV.COM (Feb. 12, 2013), http://www.10tv.com/content/stories/apexchange/2013/02/12/ok--abortion-parental-notification.html.

86. The new regulations were promulgated under S.B. 36, 2011 Leg., Reg. Sess. (Kan. 2011), which required the Kansas Department of Health and Environment to adopt rules similar to those mentioned above. See Hodes & Nauser, MDs, P.A. v. Moser, No. 2:11-CV-02365-CM-KMH, 2012 WL 1831549, at *1 (D. Kan. May 18, 2012); *see also* Complaint ¶¶ 1-3, 28-53, Hodes & Nauser, MDs, P.A. v. Moser, (No. 11-2365) (D. Kan. argued July 1, 2011), 2011 WL 2582856; Joyce, *supra* note 19, at 1466. For the temperature regulations, see KAN. ADMIN. REGS. § 28-34-134 (2014).

87. *See* Complaint, *supra* note 86, ¶ 46.

88. *See id.* ¶¶ 1-3, 28-75; *see also* John Hanna, *Kansas' Abortion Clinic Law Maps Out Details*, WICHITA EAGLE (June 28, 2011), http://www.kansas.com/2011/06/28/1911589/abortion-clinic-law-maps-out-details.html.

regulations that will be imposed on new hospitals.[89] Most Virginia clinics will have to undergo extensive, costly renovation to come into compliance—or, as is more likely, the clinics will close for lack of funds to support such remodeling.[90]

In Texas, a 2003 regulation required that abortions at sixteen weeks or later be performed in hospitals and surgery centers—well before the *Wade*-envisioned viability benchmark of twenty-four weeks.[91] Few hospitals in Texas offered abortion services when the law took effect, and no abortion clinics within the state qualified as surgery centers.[92] Women past sixteen weeks pregnant were thus severely restricted in their options and forced to travel, presumably at additional expense, to seek abortions. Furthermore, there is currently a TRAP-style bill advancing through the Texas legislature that will likely result in the closure of thirty-seven of the state's forty-two clinics, largely because of new requirements imposed solely on abortion providers mandating door sizes and room dimensions, anesthetic pipelines, and other questionable 'safety' stipulations.[93]

In North Dakota, Governor Jack Dalrymple recently "signed extreme laws . . . centering on a brazenly unconstitutional ban on nearly all abortions once a fetal heartbeat is 'detectable[]' . . . as early as six weeks into pregnancy . . . ."[94] Women may not even be aware that they are pregnant at that point.[95] The New York Times Editorial Board

89. Olympia Meola, *Va. Health Commissioner Resigns, Citing Abortion Clinic Rules*, RICHMOND TIMES-DISPATCH, http://www.timesdispatch.com/news/va-health-commissioner-resigns-citing-abortion-clinic-rules/article_099db45c-4a2e-5b4b-82e2-56544518789d.html (last updated Jan. 16, 2013).

90. *Id.*

91. TEX. HEALTH & SAFETY CODE ANN. § 171.004 (West 2003).

92. Alan Bavley, *Supply-Side Economics and Abortion*, KANSAS CITY STAR (Dec. 28, 2011), http://www.kansascity.com/2011/12/27/3340488/supply-side-economics-and-abortion.html.

93. Becca Aaronson, *Critics of State Bill Say It Would Restrict Abortions*, N.Y. TIMES, Mar. 23, 2013, http://www.nytimes.com/2013/03/24/us/foes-of-texas-bill-say-it-would-restrict-legal-abortions.html?_r=0.

94. Editorial, *The Campaign to Outlaw Abortion*, N.Y. TIMES, Mar. 29, 2013, http://www.nytimes.com/2013/03/30/opinion/the-campaign-to-outlaw-abortion.html.

95. *Id.*

hypothesizes that the laws were signed into effect to force a challenge to *Wade* to come before the currently "conservative-dominated Supreme Court."[96]

In Arizona, plaintiffs recently challenged a law that would prohibit abortions after only twenty weeks of gestation; the law was upheld at the district court level,[97] but subsequently reversed by the United States Court of Appeals for the Ninth Circuit.[98]

In Michigan, Governor Rick Snyder recently passed a law establishing a screening protocol with the stated purpose of "making sure a pregnant person is not being coerced into a decision."[99] It is not apparent that any woman has undergone a coerced abortion in the state. Pro-choice lobbyists call the bill a transparent attempt to "make a difficult decision even more difficult" by subjecting women "to a type of interrogation."[100] The bill includes physical requirements for clinics that will likely result in the closure of rural abortion clinics, thereby reducing accessibility for rural women.[101] Other states are confronted with similar laws.[102]

These state regulations target surgical abortions; however, many states also impose regulations on medical abortion. This is another type of demand-side restriction. Medical abortion typically involves the prescription of the abortion drug, RU-486.[103] Some states mandate when and how a doctor may

96. *Id*.

97. Isaacson v. Horne, 884 F. Supp. 2d 961, 962-64, 972 (D. Ariz. 2012).

98. Isaacson v. Horne, 716 F.2d 1213, 1217 (9th Cir. 2013).

99. James B. Kelleher, *Governor Signs New Law for Abortion Clinics in Michigan*, REUTERS (Dec. 28, 2012, 7:39 PM), http://www.reuters.com/article/2012/12/29/us-usa-abortion-michigan-idUSBRE8BS00N20121229.

100. *Id.* The bill requires women to disclose whether their abortion is voluntary, amongst other details.

101. *Id*.

102. For a comprehensive overview of state-imposed abortion regulations, see GUTTMACHER INST., STATE POLICIES IN BRIEF: AN OVERVIEW OF ABORTION LAWS, *available at* http://www.guttmacher.org/statecenter/spibs/spib_OAL.pdf (last updated Apr. 1, 2014); *see also Map - State Regulation of Abortion*, PBS, http://www.pbs.org/wgbh/pages/frontline/clinic/etc/map.html (last updated June 6, 2006); Aberti, *supra* note 75.

103. RU-486, also known as mifepristone, is a Food & Drug Administration ("FDA")-approved chemical compound delivered in pill form.

provide a prescription, including a requirement that the woman seeking the drug be physically present when the doctor prescribes it.[104] Under some states' regulations, the prescribing doctor must also expose the woman to a sonogram and a state-scripted 'informed consent' speech that notifies her of the state's preference for alternatives to abortion.[105]

This sampling of state laws illustrates an emerging trend: a shift away from targeting demand-side abortion seekers[106] toward regulating the supply-side—clinics and providers—in newly restrictive ways, by limiting physicians' ability to provide abortions rather than women's access to abortion

Access to RU-486, N.Y. TIMES (Sept. 30, 2000), http://www.nytimes.com/2000/09/30/opinion/access-to-ru-486.html; *see also* Planned Parenthood Sw. Ohio Region v. DeWine, 696 F.3d 490, 493 (6th Cir. 2012). It induces abortion in women up to nine weeks pregnant by interfering with hormones critical to early pregnancy. *Access to RU-486*, *supra* note 103. It is not to be confused with the "morning after" pill.

104. Fourteen states currently require patients and doctors to be in one another's physical presence in order for an RU-486 prescription to proceed: Alabama, Arizona, Indiana, Kansas, Louisiana, Michigan, Mississippi, Missouri, Nebraska, North Carolina, Oklahoma, South Dakota, Tennessee, and Texas. GUTTMACHER INST., STATE POLICIES IN BRIEF: MEDICATION ABORTION, *available at* http://www.guttmacher.org/statecenter/spibs/spib_MA.pdf (last updated Apr. 1, 2014).

105. Chinué Turner Richardson & Elizabeth Nash, *Misinformed Consent: The Medical Accuracy of State-Developed Abortion Counseling Materials*, 9 GUTTMACHER POL. REV. 4 (Fall 2006), *available at* http://www.guttmacher.org/pubs/gpr/09/4/gpr090406.html.

106. Constitutionally valid demand-side regulations include: parental and judicial consent requirements for minors, public funding restrictions (no funding unless the pregnancy was the result of rape or incest), private insurance restrictions, and 'informed consent' schemes in which clinicians must describe the fetus to the pregnant woman and must perform a sonogram so that she can hear the fetus's heartbeat. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 844, 881 (1992); Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 507-08 (1990); Maher v. Roe, 432 U.S. 464, 465-66 (1977); *see also* NAT'L COMM. FOR A HUMAN LIFE AMENDMENT, NCHLA FACT SHEETS: HYDE AMENDMENT, (Apr. 22, 2008), http://www.nchla.org/datasource/ifactsheets/4FSHydeAm22a.08.pdf; Lori Montgomery & Shailagh Murray, *In Deal With Stupak, White House Announces Executive Order on Abortion*, WASH. POST (Mar. 21, 2010), http://voices.washingtonpost.com/44/2010/03/white-house-announces-executiv.html?wprss=44. The Stupak-Pitts Amendment will persist even after the Patient Protection and Affordable Care Act takes effect. *See* Murray, *supra* note 106.

services.[107] These regulations have all severely limited abortion options for women, but each has done so under the auspices of maternal health, and each has initially targeted the supply-side of the abortion economy rather than the demand-side, thus circumventing the 'undue burden' analysis proposed by *Casey* and assumed in its progeny. In the longer run, the effect is the same: in states served by few (or no) abortion clinics as a result of these regulations, women are forced to travel out-of-state.[108] This inflicts a greater cost on women seeking abortions, thereby imposing a burden on their ability to access the services they are supposed to be guaranteed (albeit in a qualified manner) under *Roe v. Wade*[109] and subsequent decisions.[110] These women, often already economically marginalized,[111] must travel further distances and spend more money (generally not reimbursed by insurance[112]) to acquire the abortion services to which they are entitled.[113] The burden that legislatures are imposing on the supply-side abortion economy thus shifts to the demand-side. The result is tangible: as TRAP-induced clinic closures increase, many women seem to be foregoing abortion entirely.[114] The *Jackson Women's Health*

107. Joyce, *supra* note 19, at 1466.

108. *Id.* at 1468; *see also* Kliff, *supra* note 75; Aberti, *supra* note 75.

109. 410 U.S. 113 (1973).

110. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992). *But see* Webster v. Reprod. Health Servs., 492 U.S. 490, 509 (1989) ("[A] [s]tate's decision . . . to use public facilities and staff to encourage childbirth over abortion 'places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy.'" (quoting Harris v. McRae, 448 U.S. 297, 315 (1980))).

111. *See, e.g.*, Quart, *supra* note 61.

112. Frequently, this is due to state-mandated limits on insurance coverage for abortion procedures. Stanley K. Henshaw & Lawrence B. Finer, *The Accessibility of Abortion Services in the United States*, *2001*, 35 PERSP. ON SEXUAL & REPROD. HEALTH 16, (2003) ("[F]our states of the 34 that do not fund abortions under Medicaid had legislation prohibiting private insurance from covering abortions except under an optional rider at additional cost . . . ."). Such limits are constitutionally valid, including those contemplated by the Hyde Amendment. *See Harris*, 448 U.S. at 326-27. The National Abortion Federation may be applied to for financial assistance. *See* Quart, *supra* note 61.

113. *See* Joyce, *supra* note 19.

114. Bonnie Scott Jones & Tracy A. Weitz, Legal Barriers to Second-Trimester Abortion Provision and Public Health Consequences, 99 AM. J. PUB. HEALTH 623, 623 (2009); see also Marshall H. Medoff, State Abortion

Organization v. Currier injunction decisions represent the first cases in which these issues have been directly addressed by courts in underserved states.[115]

IV. The Mississippi TRAP & the *Jackson Women's Health Organization* Decisions

A. *Background*

Plaintiffs in *Jackson Women's Health Organization v. Currier* are the clinic itself and associated doctors, contesting a proposed law ("Regulation") that requires physicians working in abortion clinics to maintain admitting and staff privileges at local hospitals.[116] The Regulation also requires that the physicians be certified obstetricians or gynecologists ("OB/GYN").[117] (Despite the World Health Organization's acknowledgement that non-OB/GYNs, including even those who are not physicians, are equally capable of providing safe abortions.)[118] Only one of the doctors at the JWHO clinic had

Policies, Targeted Regulation of Abortion Provider Laws, and Abortion Demand, 27 REV. POL'Y RES. 5, 577, 578-79 (2010). The undesirability of such an outcome is beyond the scope of this paper.

115. *JWHO I*, 878 F. Supp. 2d 714, 715 (S.D. Miss. 2012); *JWHO II*, 940 F. Supp. 2d 416, 417 (S.D. Miss. 2013).

116. *JWHO I*, 878 F. Supp. 2d at 715.

117. *Id.*

118. Not only is it unnecessary for abortion providers to be OB/GYN-specialized, but there is significant literature supporting the contention that abortions may be safely and effectively provided even by non-physicians:

> For many years now, since first-trimester abortion techniques have become so straightforward, it has been technically feasible for health professionals *other than physicians* to carry out first-trimester aspiration abortions, to provide medication to women for medical abortion, and, in both types of procedure, to monitor and follow-up [sic] the process to a safe conclusion[] . . . midwives, nurse practitioners, clinical officers, physician assistants and others [can safely provide these abortions].

Marge Berer, *Provision of Abortion by Mid-Level Providers: International Policy, Practice and Perspectives,* 87 WORLD HEALTH ORG. BULLETIN 58 (2009) (emphasis added), *available at* www.who.int/bulletin/volumes/87/1/07-050138/en/ (collecting sources); see also Amended Complaint, ¶¶ 17-34,

admitting privileges and was certified for private OB/GYN practice when the Regulation was proposed, and he did not participate in the majority of the abortions performed at the clinic.[119] Plaintiffs had applied for and received a temporary restraining order ("TRO"), effective on the date the Regulation was to come into force.[120] However, before the TRO and related Regulation took effect, the state adapted the Regulation to meet the terms of the initial TRO.[121] Plaintiffs therefore petitioned for a new TRO given the altered parameters of the proposed Regulation, which still threatened the clinic's ability to remain open and the physicians' abilities to provide abortions without fear of criminal sanction.[122] Subsequent to the granted TRO, the clinic sought to comply with the proposed Regulation and failed, leading to its petition in 2013 for a preliminary injunction.[123]

At the time of the decisions regarding the TROs sought by plaintiffs, JWHO was the only abortion clinic remaining in Mississippi, largely as a result of a strict regulatory regime that had eroded other clinics' ability to stay in business over time.[124] The Regulation[125] at issue within the JWHO case would have resulted in temporary closure of the clinic while physicians acquired hospital privileges, which meant that women within Mississippi would, for a time at least, have to travel out-of-state for abortions.[126] The plaintiffs in the case sought a temporary injunction against the Regulation, which

JWHO I, 878 F. Supp. 2d 714 (S.D. Miss. 2012) No. 3:12-CV-00436-DPJ-FKB, 2012 WL 3234936. There is "no difference in complication rates according to the provider" and "services provided by experienced physician assistants [are] comparable in safety and efficacy to those provided by physicians." Berer, *supra* note 118, at 59.

119. *JWHO I*, 878 F. Supp. 2d at 715.

120. *Id.* at 716.

121. *Id.*

122. *Id.* The changes to the Regulation had an effect on the factors balanced in granting a TRO, and ultimately, the court modified its earlier ruling. *Id.* at 715.

123. *JWHO II*, 940 F. Supp. 2d 416, 417 (S.D. Miss. 2013).

124. *E.g.,* MISS. CODE ANN. § 97-3-3 (2013) (criminal prosecution of non-physicians performing abortions; criminal prosecution for physicians performing abortions in the absence of compliance with other regulations).

125. *See* H.B. 1390, 2012 Leg., 127th Sess. (Miss. 2012) (codified at MISS. CODE. ANN. § 41-75-1 (2013)).

126. *JWHO I*, 878 F. Supp. 2d at 719-20.

the court granted in part: Judge Jordan's decision, handed down in July of 2012, permitted the Regulation itself to go into effect, but stays the enforcement aspect.[127] In 2013, Judge Jordan enjoined the state from enforcing the law when physicians at the clinic failed to come into compliance because, despite applying for admitting privileges at every hospital, they could not obtain them.[128]

B. *The Court's Analyses*

In its 2012 temporary injunction decision ("2012 decision" or "temporary injunction decision"), the Southern District of Mississippi (Jordan, J.) performed a classic injunction balancing test, requiring the plaintiffs to prove: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury to the plaintiff; (3) that the potential injury to the plaintiff outweighs any harm that granting the injunction might cause the defendant; and, (4) that the injunction would be in the public's interest.[129] The same criteria were re-examined in the same court's 2013 preliminary injunction decision ("2013 decision" or "preliminary injunction decision").[130]

In 2012, Plaintiffs proved irreparable injury by highlighting their uncertainty over whether their continued work at the clinic throughout the administrative process would result in criminal prosecution.[131] Although the State had promised not to prosecute in the present, it had not promised to withhold from future prosecution in the period between the Law's effective date and the physicians' licensure.[132] In 2013, when it became apparent that the clinic could not comply with the law because the physicians could not obtain the required hospital admitting privileges,[133] the Southern District of

127. *Id*.
128. *JWHO II*, 940 F. Supp. 2d at 417.
129. *JWHO I*, 878 F. Supp. 2d at 716.
130. *JWHO II*, 940 F. Supp. 2d at 418.
131. *JWHO I*, 878 F. Supp. 2d at 717-19.
132. *Id*. at 718.
133. Physicians sought privileges "at every local hospital"; however, "[t]wo hospital [sic] refused to provide applications, and all others rejected

Mississippi enjoined the State from enforcing the law.[134]

In 2012, the court had declined to grant an injunction on purely constitutional grounds.[135] Instead, the court rested its 2012 decision on a finding of non-speculative harm that was "actual and imminent."[136] (For a TRO to be granted, the plaintiff must prove a non-speculative injury).[137] In particular, the court noted at the time that the "public interest" language contained in the supporting administrative law ("the Code")[138] was vague and presented a possibility of capricious interpretation that substantially "chill[ed] . . . [p]laintiffs' willingness to continue operating the Clinic until they obtained the necessary privileges."[139] This analysis recognized that abortion law encompasses a contentious issue that is uniquely vulnerable to politicians' re-interpretation.[140] The relevant portion of the Code for revoking licensure within Mississippi states, that "the status quo shall be preserved 'except as the court otherwise orders in the public interest.'"[141] Contemplating that abortion access in particular is affected by sudden shifts in what constitutes 'public interest,' the court held that this language was too vague to provide the plaintiffs with peace of mind as they continued to practice in the JWHO clinic.[142] The TRO was therefore granted, enjoining defendants from using the override discussed *supra* within the Code, and enjoining defendants from enforcing the Regulation throughout the administrative process.[143] The TRO did not preclude the state

the doctors' applications because they perform elective abortions." *JWHO II*, 940 F. Supp. 2d at 418.

134. *Id.* at 417.

135. *JWHO I*, 878 F. Supp. 2d at 716 ("Even if an act is unconstitutional, it will not be preliminarily enjoined unless the plaintiff proves an irreparable harm.").

136. *Id.*

137. Manning v. Hunt, 119 F.3d 254, 263 (4th Cir. 1997) (quoting Tucker Anthony Realty Corp. v. Schlesinger, 888 F.2d 969, 975 (2d Cir. 1989)).

138. MISS. CODE ANN. § 41-75-23 (2013).

139. *JWHO I*, 878 F. Supp. 2d at 719.

140. *Id.* ("Given the highly charged political context of this case and the ambiguity still present . . . .").

141. *Id.* (quoting § 41-75-23).

142. *JWHO I*, 878 F. Supp. 2d at 719.

143. *Id.* at 720.

from enacting the Regulation.[144]

In 2013, however, the Southern District of Mississippi performed a deeper constitutional analysis. Judge Jordan used the *Casey* 'undue burden' test in what he called an "'as-applied challenge' because the law affects only this clinic and will force its closure."[145] For reasons covered elsewhere in this Comment, this is a test that I believe is significantly more likely to arrive at a constitutionally-sound outcome, supportive of women's right to choose, than would be the 'facial context' approach that the Southern District forewent in its 2013 decision.[146] In the 2013 decision, the Southern District also quoted *Ayotte v. Planned Parenthood of Northern New England*, stating, that "[i]t is axiomatic that a statute may be invalid as applied to one state of facts and yet valid as applied to another."[147]

Judge Jordan confronted a situation that has not been explicitly addressed by the Supreme Court: whether forcing women seeking abortions to travel out-of-state constitutes an 'undue burden' on a woman's right to choose. The situation provided him with an opportunity to lay groundwork predicated on sound constitutional analysis for courts to follow in future cases arising out of comparable facts, in state systems that are increasingly antagonistic towards those who seek abortion and those who perform it.[148]

C. *Analyzing the Court's Decisions*

The Southern District of Mississippi examined the injury to the plaintiffs in this case in a unique way because JWHO is the only abortion clinic in the state.[149] Atypically, the court

144. *Id.*

145. *JWHO II*, 940 F. Supp. 2d 416, 419-20 (S.D. Miss. 2013).

146. *Id.*

147. *Id.* at 419 (quoting Ayotte v. Planned Parenthood of N. New England, 546 U.S. 320, 329 (2006)) (alteration in original).

148. This note was completed prior to the decision in *Planned Parenthood Se. v. Strange*, which directly addresses this question and, in fact, relies in part on JWHO I and II. ____ F. Supp. 2d ___, 2014 WL 1320158, M.D. Ala, Mar. 31, 2014.

149. *Id.* at 417.

recognized that this factor would heighten the degree of injury plaintiffs might suffer.[150] In the temporary injunction decision, Judge Jordan hinted that an 'undue burden' analysis of the sort advocated under *Planned Parenthood of Southeastern Pennsylvania v. Casey* and *Gonzales v. Carhart* might be warranted with respect to this Regulation *and* the context in which it would operate.[151] The clinic's status as sole provider within the state also affected the public utility balancing inherent to the third and fourth criteria considered when granting or rejecting a request for injunction. The preliminary injunction decision made in 2013 explored 'undue burden' analysis in greater depth as part of the first prong considered in injunction cases ("substantial likelihood of success on the merits").[152]

In defense, the State supported its contention that the law was valid simply because it was rationally related to its legitimate interest with language from *Gonzales*,[153] which, as noted *supra*, does appear to support this interpretation.[154] Judge Jordan, noting that 'undue burden' analysis has been the standard despite the *Casey* decision being a plurality opinion, dismissed the rational basis argument as well, by quoting the full section of text on which the State sought to rely:

150. In the 2013 decision, the court notes that such an issue has not confronted courts since the "'undue burden'" analysis was promulgated in *Casey*. *Id.* at 420-22. The court notes that the closest case is *Mazurek v. Armstrong*, a decision in which the Supreme Court determined that since "the disputed law would not require women to travel to a different facility than was previously available," there was no "'undue burden'" on a woman's right to choose. *Id.* at 421 (quoting Mazurek v. Armstrong, 520 U.S. 968, 974 (1997)) (internal quotation marks omitted).

151. *JWHO I*, 878 F. Supp. 2d 714, 717-18. *Casey* and *Gonzales* appear to extend the *Washington v. Davis* and *Village of Arlington Heights v. Metropolitan Housing Development Corporation* investigations of facially neutral laws that are unconstitutionally racially discriminatory to the realm of abortion law. *Compare* Gonzales v. Carhart, 550 U.S. 124 (2007), *and* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992), *with* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977), *and* Washington v. Davis, 426 U.S. 229 (1976). For additional discussion see, *infra* Part V.B.

152. *JWHO II*, 940 F. Supp. 2d at 421-23.

153. *Id.* at 418-19.

154. *See supra* notes 68-74 and accompanying text.

> Where it has rational basis to act, *and* it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including the life of the unborn.[155]

As Judge Jordan notes, this means that there is a two-part test required when analyzing the constitutionality of any abortion-related law: (1) the law must be rationally related to a legitimate state interest (a low threshold to pass); and (2) the law cannot impose an undue burden on women's right to choose.[156] If the law is not rationally related, then the law is unconstitutional under current Supreme Court precedent. If the law imposes an undue burden pre-viability, the law is also unconstitutional.

Some might argue that Judge Jordan conflated the plaintiffs in the case—the clinic itself, and associated doctors—with women seeking abortions. Such an argument overlooks the fourth factor that must be considered in granting injunctions: the public interest factor. Here, the public interest factor is so significant—and, moreover, is constitutionally based—that women seeking abortions may in fact be considered 'silent' plaintiffs. In this context, the 'undue burden' analysis becomes a vital part of the decision, particularly because there are no other in-state clinics to accommodate displaced patients.

Unfortunately, limiting the TRO to the enforcement aspect of the proposed Regulation while still permitting it to come into effect did not address the ultimate issue highlighted by this case: the targeted but piece-meal regulation of abortion providers that is sweeping states' legislatures. Nor did the preliminary injunction decision of 2013 broach this issue, although it did come closer. Admittedly, anything further addressing TRAP laws would be beyond the scope of an injunction decision. Nonetheless, Judge Jordan does come

155. *Id.* at 419 (quoting *Gonzales*, 550 U.S. at 158).
156. *Id.* at 420.

tantalizingly close to addressing this concern in his brief foray into 'undue burden' analysis.[157] It is possible that this section of the decision will pave the way for future decisions centering on potential TRAP laws, particularly if judges recognize, as Judge Jordan did here, that the constitutionality of these laws must be examined within the context of a given state's entire abortion regime rather than as a stand-alone regulation. If thus applied, the *Casey/Gonzales* 'purpose and effect' analysis that Judge Jordan glossed over may provide a means to counter this emerging threat to women's reproductive rights.

V. Springing the TRAP: Solutions from Constitutional and other areas of law

A. *Solutions from Abortion Law: The Freedom of Access to Clinic Entrances ("FACE") Act—a Commerce Clause-based solution to TRAP?*

Targeting the supply side of the abortion economy is not a new strategy in the abortion protest movement. Pro-life advocates have been doing it for years, using threats and outright violence to draw attention to their cause.[158] The Freedom of Access to Clinic Entrances Act ("FACE")[159] is a federal statute designed to ensure that protestors do not hinder women's access to reproductive health services.[160] Enacted in

157. Recognizing that a full "'undue burden'" analysis was beyond the scope of his decision, Judge Jordan began a brief survey of the case law nonetheless, with this disclaimer: "Without delving too deeply into the analysis at this point." *JWHO I*, 878 F. Supp. 2d 714, 717 (S.D. Miss. 2012). This not only accepts the parameters of the TRO analysis to which he was limited, but also indicated his anticipation that this case would make its way back to the court.

158. *See NAF Violence and Disruption Statistics: Incidents of Violence & Disruption Against Abortion Providers in the U.S. & Canada*, NAT'L ABORTION FED'N, http://www.prochoice.org/about_abortion/violence/documents/Stats_Table2011.pdf (last visited Apr. 4, 2014) [hereinafter *NAF Violence and Disruption Statistics*].

159. Freedom of Access to Clinic Entrances Act (FACE Act), 18 U.S.C. § 248 (2012).

160. *Abortion Facts: Freedom of Access to Clinic Entrances ("FACE") Act*, NAT'L ABORTION FED'N,

direct response to increasingly threatening pro-life protest tactics,[161] FACE restrains demonstrators from protesting within a certain distance of any clinic providing abortion services.[162]

FACE is based in the Commerce Clause, which grants Congress authority to regulate the channels and instrumentalities of interstate commerce, "even though the threat may come only from intrastate activities."[163] Thus, "FACE, [which] directly regulates a commercial activity—the provision of reproductive health care services"[164] is a constitutionally sound exercise of Congress's regulatory power.[165] Under this logic, state-imposed rules and regulations targeting abortion clinics might be considered constitutionally infirm because they similarly discriminate against interstate commerce.[166]

Unfortunately, given the political tension inherent to the abortion debate, it is unlikely that Congress will exercise its commerce power in this area in a meaningful way. Targeting TRAPs would require a broad-reaching and versatile law that Congress is unlikely to be willing to pass. It seems far more likely that the abortion regime will develop over time through judicial decision-making.

http://www.prochoice.org/about_abortion/facts/face_act.html (last visited Apr. 4, 2014) [hereinafter *Abortion Facts*].

161. Including but not limited to murder, attempted murder, assault, kidnapping, arson, bombing, and anthrax threats of or to doctors who provide abortions. *See NAF Violence and Disruption Statistics*, *supra* note 158.

162. Rebecca A. Hart & Dana Sussman, *About FACE: Using Legal Tools to Protect Abortion Providers, Clinics and Their Patients*, AM. CONSTIT. SOC'Y BLOG (July 1, 2009), http://www.acslaw.org/acsblog/node/13687; *see also Abortion Facts*, *supra* note 160.

163. United States v. Lopez, 514 U.S. 549, 558 (1995) (citations omitted); *see also* U.S. CONST. art. I, § 8, cl. 3.

164. Planned Parenthood Ass'n of Se. Pa. v. Walton, 949 F. Supp 290, 295 (E.D. Pa. 1996).

165. *Id.*; *see also* United States v. Dinwiddie, 76 F.3d 913, 919-20 (8th Cir. 1996); United States v. Wilson, 73 F.3d 675, 683-84 (7th Cir. 1995); Cheffer v. Reno, 55 F.3d 1517, 1520-21 (11th Cir. 1995).

166. *See, e.g.* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Wickard v. Filburn, 317 U.S. 111 (1942). *But cf.* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012); *Lopez*, 514 U.S. at 549.

B. *Solutions from Constitutional Law: Discriminatory intent and 'purpose and effect' analysis*

Within current abortion jurisprudence, both the *Casey* and *Gonzales* decisions appear to extend the *Washington v. Davis* and *Village of Arlington Heights v. Metropolitan Housing Development Corporation* investigations of facially neutral laws that are unconstitutionally racially discriminatory to the realm of abortion law.[167]

Casey and *Gonzales* both posit that an undue burden might exist where a regulation's purpose *and* effect is to impede a woman's right to choose.[168] Similarly, *Davis* and *Village of Arlington Heights* posit that a facially neutral law might be discriminatory if it can be proved that its purpose *or* effect is to institutionalize racial discrimination.[169] The possibility of racially-inspired discriminatory intent warrants strict scrutiny. In situations where considerations of gender may have led to the passage of discriminatory law, the Court employs what appears to be an intermediate level of scrutiny.[170]

Yet no courts seem to have examined individual, innocuous-seeming TRAP regulations that in aggregate create a deliberately burdensome regime within either of these frameworks of purpose and effect. Indeed, the Court—as mentioned above—expressly stated that abortion regulation triggers rational basis review. However, discriminatory intent is apparent in abortion law: with regard to the Mississippi state-legislated requirement that physicians have admitting privileges at local hospitals, Republican Governor Phil Bryant has stated that "[his] goal of course is to shut [the clinic] down."[171] It seems likely that he will realize his ambition: all

167. *Compare* Gonzales v. Carhart, 550 U.S. 124 (2007), *and* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992), *with* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977), *and* Washington v. Davis, 426 U.S. 229 (1976).

168. *Casey*, 505 U.S. at 877; *Gonzales*, 550 U.S. at 146.

169. *Davis*, 426 U.S. at 241; *Arlington Heights*, 429 U.S. at 266.

170. *See, e.g.,* Craig v. Boren, 429 U.S. 190 (1976).

171. Tara Culp-Ressler, *Mississippi's Last Abortion Clinic Sends a Message: 'We're Here, And We're Not Going Anywhere,'* THINKPROGRESS (Jan. 31, 2013, 11:36 AM), http://thinkprogress.org/health/2013/01/31/1519841/mississippi-last-abortion-

seven local hospitals have so far denied licensure to the doctors practicing abortions out of JWHO.[172] It is difficult to imagine a more evident 'discriminatory' purpose or effect behind the enactment of burdensome legislation.

In order to be truly effective in combatting TRAP regulations, 'undue burden' analysis will have to look beyond the mere 'purpose and effect' of a single regulation being brought before the court to explore the regulation's purpose and effect in context. This will require a reframing of the abortion regulation discussion, toward a more holistic approach that may impose greater burdens on reviewing courts, as they will need to explore an entire regime rather than individual regulations in assessing those regulations' constitutionality. This solution may not, therefore, be the most judicially efficient—but it may be the only one possible.

This solution is reminiscent of certain solutions within the environmental law arena. Environmental law is one of the most 'holistic' areas of law today. Perhaps because of ecosystems' complexity and the largely-unmapped interrelationships between species, environmental law has been forced to explore consequences of human activity on a large scale.[173] This has required courts to expand their examinations of single actions to examine the broader context in which they are occurring.[174]

This expanded contemplation of the ramifications of single regulations or activities is most apparent within the National Environmental Policy Act of 1969 ("NEPA").[175] NEPA requires federal agencies seeking to undertake projects that will impact the environment to submit their plans for an environmental

clinic-message/.

172. *Id.* In rural areas and small towns, doctors' and hospitals' unwillingness to offer abortion due to its controversial nature limits access, and thereby potentially increases the stigma associated with deliberately terminating a pregnancy. *See* Amy Norton, *Few U.S. Ob-Gyns Provide Abortions: Study*, REUTERS (Sept. 1, 2011, 1:12 PM), http://www.reuters.com/article/2011/09/01/us-abortions-idUSTRE7804JN20110901.

173. *See* RICHARD J. LAZARUS, THE MAKING OF ENVIRONMENTAL LAW (2004).

174. *Id.*

175. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370h (2012).

impact assessment ("EIS").[176] As the program developed, however, the Environmental Protection Agency ("EPA"), which was charged with enforcing the statute,[177] found that developers were breaking up large projects that would have devastating environmental effects into smaller pieces.[178] The smaller pieces could pass through the EPA review process easily because their individual effects were minute.

The Tenth Circuit's solution to this problem, announced in *Wilderness Workshop v. U.S. Bureau of Land Management*,[179] was to require that each piece of the project being examined by EPA in the EIS process pass an 'independent utility test.'[180] The Tenth Circuit also acknowledged that NEPA requires that "connected actions" be considered when assessing the environmental impact of any given project.[181] Actions are considered "connected" for NEPA purposes if: (1) they trigger other actions that will require EIS's; (2) they "cannot or will not proceed unless other actions are taken previously or simultaneously"; or (3) they "are interdependent parts of a larger action and depend on the larger action for their justification."[182] Similarly, certain abortion regulations might be deemed discriminatory in purpose and effect when examined contextually, as federal activities must be under NEPA. This is, therefore, a solution that might be worth importing into the abortion 'undue burden' discourse.

176. *See* Utah Envtl. Cong. v. Richmond, 483 F.3d 1127, 1133 (10th Cir. 2007).

177. *Basic Information*, ENVTL PROT AGENCY, http://www.epa.gov/compliance/basics/nepa.html (last visited Apr. 4, 2014).

178. *See, e.g.*, Wilderness Workshop v. U.S. Bureau of Land Mgmt, 531 F.3d 1220, 1228 (10th Cir. 2008) ("The purpose of this requirement [determining whether an action is a connected action] is to prevent an agency from dividing a project into multiple actions, each of which individually has an insignificant environmental impact, but which collectively have a substantial impact." (quoting Great Basin Mine Watch v. Hankins, 456 F.3d 955,969 (9th Cir. 2006))).

179. *Id.* at 1220.

180. *See id.* at 1228-29.

181. *Id.* at 1128 (quoting 40 C.F.R. § 1508.25(a)(1) (2013)).

182. § 1508.25(a)(1).

VI. Conclusion

Current 'undue burden' analysis is inadequate not only for the subjectivity inherent to an examination of 'purpose and effect' but also for its failure to take into account the overall effect of a single law within the pre-existing abortion law framework within each state. Its focus on the demand side of the abortion economy renders it a weak tool in combatting TRAPs, and its utility is further eroded by the development of new technology that is changing our ability to track pregnancies and our ability to enable a fetus to survive outside the womb. The inadequacy of 'undue burden' analysis is a threat to women's right to reproductive autonomy—a threat that current constitutional law is not equipped to counter.

Given the political divisiveness of the abortion issue, Congress or the Supreme Court should consider adopting an analytical *procedural* technique (as opposed to a substantive pro-choice bill) that takes into consideration the effect of individually constitutional laws that may be designed to cumulatively suppress a woman's right to choose. This technique might be adapted from other areas of constitutional law, such as the 'purpose and effect' inquiry prompted by potentially discriminatory race-related legislation, or imported from the broader contextual/overall effect inquiry required by NEPA.