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Salvaging the Undue Burden Standard—Is It a Lost Cause? The Undue Burden Standard and Fundamental Rights Analysis

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SALVAGING THE UNDUE BURDEN STANDARD—IS IT A LOST CAUSE? THE UNDUE BURDEN STANDARD AND FUNDAMENTAL RIGHTS ANALYSIS

I. INTRODUCTION

In *Casey v. Planned Parenthood of Southeastern Pennsylvania*,[1] three members of the United States Supreme Court announced a new "undue burden" standard for evaluating state abortion regulations.[2] Critics from both sides of the abortion debate immediately denounced the new constitutional standard as unsatisfactory, but these groups disagreed as to which political position the undue burden standard furthered. For example, a conservative commentator criticized the undue burden standard as "infinitely malleable" in the hands of judges,[3] while a progressive commentator regarded it as a moderate "seed" deliberately planted for courts to cultivate into more conservative results in the future.[4] Justice Scalia bitterly accused the Justices who adopted the undue burden standard of decorating a value judgment and concealing a political choice.[5] Yet Justice Blackmun suggested that the undue burden standard may not lie far from Justice Scalia's position.[6]

This Note seeks to clear the confusion surrounding the undue burden standard by locating it within the traditional realm of constitutional analysis and then exposing the possibility that use of the standard will subtly

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1. 112 S. Ct. 2791 (1992).

2. *Id.* at 2819-32.

3. *The Case Against* Casey, NEW REPUBLIC, July 27, 1992, at 7.

4. Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 111 (1992). Both pro-choice and pro-life leaders viewed the *Casey* decision as a loss for their side. *Compare* Janet Benshoof, Planned Parenthood v. Casey: *The Impact of the Undue Burden Standard on Reproductive Health Care*, JAMA, May 5, 1993, at 2249 (discussing the negative effects that may result from *Casey*'s undue burden standard) *with* Steven R. Helmer et. al, *Abortion: A Principled Politics*, NAT'L REV., Dec. 27, 1993, at 40 (advocating adoption of a framework more conservative than *Casey*'s).

5. *Casey*, 112 S. Ct. at 2875. (Scalia, J., dissenting). Commentators have echoed Justice Scalia's criticism. *See The Case Against* Casey, *supra* note 3, at 7 ("[The Court's] only justification for treating abortion differently [than other fundamental rights] is their purely personal and legislative judgment that the state's interest in discouraging abortions is somehow different than its interest in restricting other protected rights.").

6. 112 S. Ct. at 2854 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

undermine fundamental rights protection.[7] This Note proposes that courts salvage the undue burden standard by adding a second step of analysis that directly confronts the standard's ability to dilute fundamental rights. Part II traces the development of the undue burden standard in abortion cases as well as other fundamental rights cases. Part III examines the *Casey* formulation of the undue burden standard and then discusses the negative implications of that formulation for abortion rights and fundamental rights generally. Part IV proposes a modified undue burden standard that includes an inquiry into legislative motive. Part V uses three case examples to demonstrate how the proposed undue burden standard differs from the *Casey* undue burden standard. Finally, Part VI argues that the Supreme Court and lower courts should adopt the proposed undue burden standard to stop the further erosion of fundamental rights protection.

II. PRE-*CASEY* DEVELOPMENT OF THE UNDUE BURDEN STANDARD

A. Initial Use of the Undue Burden Standard Within the Abortion Context

Prior to the United States Supreme Court's first use of the undue burden standard, *Roe v. Wade*[8] defined Supreme Court abortion jurisprudence. In *Roe*, the Supreme Court announced that a woman, prior to the point at which her fetus attains viability, possesses a fundamental right to choose whether to have an abortion.[9] The fundamental character of the right to choose to have an abortion triggered the Court's application of the traditional "strict scrutiny" test to the Texas abortion regulations at issue in

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7. This Note focuses upon the case history and constitutional framework of the actual undue burden standard. It does not comment in detail upon the Supreme Court's abortion jurisprudence or the *Casey* opinion itself. For commentary focusing on these aspects of *Casey*, see Jon D. Anderson, Note, *Abortion: State Regulations*—Planned Parenthood v. Casey, 76 MARQ. L. REV. 317 (1992); Kenneth R. Farrow, Roe v. Wade *and the Future of a Woman's Right to an Abortion*, 14 WHITTIER L. REV. 695 (1993); John L. Horan, *A Jurisprudence of Doubt:* Planned Parenthood v. Casey, 26 CREIGHTON L. REV. 479 (1993); C. Elaine Howard, *The* Roe*'d to Confusion:* Planned Parenthood v. Casey, 30 HOUS. L. REV. 1457 (1993); William G. Peterson, *Splintered Decisions, Implicit Reversals and Lower Federal Courts:* Planned Parenthood v. Casey, 1992 B.Y.U. L. REV. 289; Rachael K. Pirner & Laurie B. Williams, Roe *to* Casey*: A Survey of Abortion Law*, 32 WASHBURN L.J. 166 (1993); Mark H. Woltz, Note, *A Bold Reaffirmation?* Planned Parenthood v. Casey *Opens the Door for States to Enact New Laws to Discourage Abortion*, 71 N.C. L. REV. 1787 (1993).

8. 410 U.S. 113 (1973).

9. *Id.* at 163. The Court grounded the abortion right in its privacy jurisprudence. *Id.* at 152-54.

Roe.[10] Under strict scrutiny, a state must prove that its legislature "narrowly" drew its enactment to meet a "compelling" state interest.[11] The *Roe* Court found that prior to viability, only the state interest in regulating a mother's health proved compelling.[12] Thus, the state could impose regulations intended to address concerns regarding a woman's health, but the state could not impose regulations designed solely to discourage or stop a woman from having an abortion.[13] After a fetus reaches viability, however, the state interest in potential life becomes compelling, and the state can use regulations to influence or completely negate a woman's decision.[14] Notably, the Court rejected consideration of any moral or theological theory of life in making its determination that the state interest in protecting potential life is compelling.[15] Instead, it grounded its finding of a compelling state interest in "logical and biological justifications."[16]

The Supreme Court first explicitly used the undue burden standard within the abortion context in a line of cases concerning government funding of abortions.[17] In *Maher v. Roe*,[18] the Court held that a state's refusal to use

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10. *Id.* at 155. The *Roe* Court considered Articles 1191-1194 and 1196 of the Texas Penal Code, which made it a crime to attempt or to procure an abortion, except where necessary to save the life of the mother. *Id.* at 117-19.

11. *Id.* This mode of substantive due process analysis comprises the upper tier of the Supreme Court's "two-tier scrutiny." Under two-tier scrutiny, the Court will subject governmental regulations affecting fundamental rights to the most exacting scrutiny, strict scrutiny. Strict scrutiny asks whether a regulation is "necessary" to promote a "compelling" state interest. The Court scrutinizes regulations affecting nonfundamental liberty and property interests under the less stringent rational relation test. Under the rational relation test, the state must show that regulations are "rationally" related to "legitimate" government purposes. *See* Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 314-15 (1993).

12. *Roe*, 410 U.S. at 163.

13. *Id.* The Court gave examples of permissible health regulations, including regulations governing the qualifications or licensure of the person performing the abortion and the type of facility in which the procedure should take place. *Id.* Further, the Court stated that during this previability period a physician and patient remain "free to determine, without regulation by the state," whether the patient should have an abortion. *Id.*

14. *Id.* at 163-64.

15. The *Roe* Court repeatedly refused to accept Texas' assertion that life begins at conception. *Id.* at 150 ("[A] legitimate state interest in this area need not stand or fall on acceptance of the belief that life begins at conception . . . ."); *id.* at 159 ("When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary . . . is not in a position to speculate as to the answer."); *id.* at 162 ("[W]e do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake.").

16. *Id.* at 163.

17. The most well-known cases are Maher v. Roe, 432 U.S. 464 (1977); Poelker v. Doe, 432 U.S. 519 (1977); Beal v. Doe, 432 U.S. 438 (1977); Harris v. McRae, 448 U.S. 297 (1980); and Williams v. Zbaraz, 448 U.S. 358 (1980). These cases will be referred to collectively as the abortion-funding cases throughout the remainder of this Note.

18. 432 U.S. 464 (1977).

state Medicaid benefits to fund nontherapeutic abortions did not violate the Constitution.[19] Three years later, in *Harris v. McRae*,[20] the Court applied the *Maher* rationale to uphold the Hyde Amendment's[21] prohibition on the use of Social Security funds for nontherapeutic and therapeutic abortions.[22] In both *Maher* and *McRae*, the Court found that a government's denial of abortion funds did not create an "undue burden" on the abortion right established in *Roe*.[23]

The use of the term "undue burden" in *Maher* and *McRae* initially appeared to change the basic test for the application of strict scrutiny laid out in *Roe*. In *Maher*, the Court stated that the right recognized in *Roe* depended both on the nature of the woman's interest and the state's interference with that interest.[24] Although the Court reaffirmed that the woman's right to an abortion was fundamental,[25] it appeared to condition the protection of her fundamental right on the quantity of state interference with that right.[26] Only if the amount of state interference with a fundamental right rose to the level of "unduly burdensome" would the Court recognize an "impingement" on that right and apply strict scrutiny.

Under this reading of *Maher* and *McRae*, the Court seemed to have introduced a new threshold requirement for strict scrutiny. That is, the Court would apply strict scrutiny to state action that interferes with a fundamental right only if the state action creates an undue burden on the fundamental right. The addition of this threshold requirement would constitute a significant change in the *Roe* analysis. In *Roe*, the Court looked solely to the nature of the individual right at stake. If the state interfered with a fundamental right, no matter the level of interference, the Court would apply strict scrutiny.[27]

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19. *Id.* at 474.

20. 448 U.S. 297 (1980).

21. The Court described the Hyde Amendment as a congressional prohibition on the use of federal funds to reimburse the cost of abortions under the Medicaid program, except in limited circumstances. *Id.* at 302.

22. *Id.* at 315.

23. *Maher*, 432 U.S. at 474; *McRae*, 448 U.S. at 315.

24. *Maher*, 432 U.S. at 473.

25. *Id.* at 471.

26. *Id.* at 473-74. The Court stated: "*Roe* did not declare an unqualified 'constitutional right to an abortion,' as the District Court seemed to think. Rather, the right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy." *Id.*

27. See *supra* notes 8-16 and accompanying text for a discussion of the analysis in *Roe*. Because *Roe* follows the Supreme Court's traditional substantive due process analysis, this potential addition of an undue burden analysis would deviate from at least forty-five years of Supreme Court decisions. "In

However, closer analysis indicates that the Court in *Maher* and *McRae* did not add a threshold requirement to the *Roe* analysis. Rather, the Court equated the term undue burden with the concept of an obstacle in the path of a woman seeking an abortion. The Court drew a distinction between such obstacles, which will almost always constitute an undue burden,[28] and state funding decisions. According to the Court, the denial of government funds "place[d] no obstacles absolute or otherwise in the pregnant woman's path to an abortion."[29] That is, the state's denial of funds placed indigent pregnant women in no worse position than they otherwise would have been.[30] Because the state merely withheld funds, as opposed to placing affirmative restrictions on abortion, the *Maher* Court found that the state did not unduly interfere with the fundamental right to abortion. In turn, if a state act does not unduly interfere with a fundamental right, the state act does not "impinge" upon the right.[31] And, consistent with *Roe*, if state action does not impinge upon a fundamental right, the Court will apply a rational relation analysis, not strict scrutiny.[32] Therefore, although the Court in *Maher* and *McRae* used the term undue burden, it did so only within the context of a state's denial of funds for abortion, rather than a state's affirmative regulation of abortion. As such, it did not change the basic *Roe* analysis for state abortion regulations.[33]

1945, the Supreme Court stated that 'it is the character of the right, not of the limitation, which determines what [judicial] standard governs the [legislative] choice.'" Susan Frelich Appleton, *Beyond the Limits of Reproductive Choice: The Contributions of the Abortion-Funding Cases to Fundamental-Rights Analysis and the Welfare-Rights Thesis*, 81 COLUM. L. REV. 721, 746 (1981) (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).

28. *Maher*, 432 U.S. at 472. The Court noted that the state's imposition of criminal penalties in *Roe* constituted one such impermissible obstacle to abortion. *Id.*

29. *Id.* at 474.

30. *Id.*

31. *Id.* at 473-74. The Court stated:

> [T]he [Roe] right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy . . . . The Connecticut regulation before us is different in kind from the laws invalidated in our previous abortion decisions. The Connecticut regulation places no obstacles absolute or otherwise in the pregnant woman's path to an abortion . . . . The State may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there . . . . We conclude that the Connecticut regulation does not impinge upon the fundamental right recognized in Roe.

Id.

32. *See id.* at 478; *supra* notes 8-16 and accompanying text.

33. The *Maher* Court acknowledged that it did not change the *Roe* analysis:

> Our conclusion signals no retreat from *Roe* or the cases applying it. There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy. Constitutional concerns are greatest

Because a state's denial of funds triggers only rational basis review, however, the state does not have to justify its denial of funding with a "compelling" interest. Under the rational relation standard, a state can implement its value judgment favoring childbirth over abortion. Thus, the abortion-funding cases show that while the government cannot impose its will through direct legislative obstacles that inhibit fundamental rights, it can impose its will through the selective disbursement of taxpayer funds.[34]

The Court used a similar analysis in two cases involving the right of a minor to obtain an abortion. In the two related cases of *Bellotti v. Baird* (*Bellotti I*[35] and *Bellotti II*[36]), the Court considered the constitutionality of state statutes that created procedural hurdles for minors seeking an abortion.[37] The Court's analysis differed from that in *Roe* in two ways. First, in *Bellotti I*, the Court found that a state may impose more stringent regulations on a minor who seeks an abortion than on an adult.[38] In addition, in both *Bellotti I* and *Bellotti II*, the Court implied that abortion

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when the State attempts to impose its will by force of law; the State's power to encourage actions deemed to be in the public interest is necessarily far broader.

432 U.S. at 475-76 (citations omitted).

34. The dissent in both *Maher* and *McRae* argued that the Court's distinction between affirmative government regulation and spending decisions allowed the legislature to impose incrementally a majoritarian moral view on a protected fundamental right. *Maher*, 432 U.S. at 484-85 (Brennan, J., dissenting); *McRae*, 448 U.S. at 332 (Brennan, J., dissenting). Justice Brennan stated:

> [T]he Hyde Amendment is a transparent attempt by the Legislative Branch to impose the political majority's judgment of the morally acceptable and socially desirable preference on a sensitive and intimate decision that the Constitution entrusts to the individual. Worse yet, the Hyde Amendment does not foist that majoritarian viewpoint with equal measure upon everyone in our Nation, rich and poor alike; rather, it imposes that viewpoint only upon that segment of our society which, because of its position of political powerlessness, is least able to defend its privacy rights from the encroachment of state-mandated morality.

McRae, 448 U.S. at 332 (Brennan, J., dissenting).

The Court reaffirmed the state's right to impose its will through its spending choices in *Maher's* companion case, Beal v. Doe, 432 U.S. 438, 446 (1977) (holding that a state may further its interest in encouraging normal childbirth by denying Medicaid funds for nontherapeutic abortions). In Poelker v. Doe, 432 U.S. 519 (1977), the Court extended this rationale to a municipal government's spending decisions and held that the city of St. Louis could refuse to provide publicly funded hospital services for nontherapeutic abortions. *Id.* at 521.

35. 428 U.S. 132 (1976).

36. 443 U.S. 622 (1979).

37. In *Bellotti I*, the Court declined to hold unconstitutionally vague a Massachusetts statute requiring parental consent before an unmarried woman under the age of 18 could obtain an abortion. 428 U.S. at 147. In *Bellotti II*, the Court held unconstitutional a judicial bypass procedure because it did not allow a minor to avoid parental consultation by showing either maturity or that the abortion decision reflected her best interest. 443 U.S. at 646-48.

38. *Bellotti II*, 443 U.S. at 635. The Court noted that minors lack the experience, perspective, and judgment that adults possess to recognize and avoid choices that could harm them. *Id.*

regulations must not "unduly burden" a minor's right to an abortion.[39]

In *Bellotti I* and *II*, the Court used a different undue burden analysis than it had in the abortion-funding cases. In the abortion-funding cases, the Court implied that virtually any affirmative regulation of abortion constituted an obstacle to a woman's exercise of her abortion right and, thus, created an undue burden which triggered strict scrutiny. However, in *Bellotti I* and *II*, even though affirmative regulations were involved, the Court appeared to weigh the amount that the regulation interfered with the right to abortion.[40] Thus, the Court used the term undue burden in a sense that is more consistent with the phrase itself—it weighed the amount of state interference with a fundamental right and determined whether the interference rose to the level of an undue burden.

B. Use of the Undue Burden Standard Beyond the Abortion Context

In two cases not involving a woman's right to have an abortion, the Court also used phrases suggestive of an undue burden analysis. In *San Antonio v. Rodriguez*,[41] the Court found that, even if education constituted a fundamental right, Texas' system of financing public elementary and secondary schools did not impermissibly interfere with that right.[42] The *Rodriguez* Court found that Texas' educational financing system did not impose an undue burden on the right to receive an education because the financing system, in the Court's view, constituted an "affirmative and reformatory" governmental measure,[43] rather than a deprivation or

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39. *Bellotti I*, 428 U.S. at 147 (dicta) ("Without holding that a requirement of a court hearing would not unduly burden the rights of a mature adult . . . ."); *Bellotti II*, 443 U.S. at 640 ("The question before us . . . is whether § 12S . . . does not unduly burden the right to seek an abortion.").

40. *See Bellotti I*, 428 U.S. at 148 ("Nor need we determine what factors are impermissible or at what point review of consent and good cause in the case of a minor becomes unduly burdensome.") (dicta); *Bellotti II*, 443 U.S. at 646-48 (holding that a parental notification requirement without exception constitutes an undue burden but the same procedure with a judicial bypass does not).

41. 411 U.S. 1 (1973). Even though *Rodriguez* concerned the Equal Protection Clause of the Fourteenth Amendment, the Court's discussion of fundamental rights also applies to cases involving Fourteenth Amendment substantive due process. *See generally* Virginia L. Hardwick, Note, *Punishing the Innocent; Unconstitutional Restrictions on Prison Marriage and Visitation*, 60 N.Y.U. L. REV., 275, 303 (1985) (describing the Court's often interchangeable substantive due process and equal protection fundamental rights analysis).

42. 411 U.S. at 35-38. The *Rodriguez* Court found that education did not constitute a fundamental right. *Id.* at 35. Nonetheless, the Court held that, even if education did constitute a fundamental right, the Texas system did not interfere with that right to the extent necessary to constitute an unconstitutional deprivation. *Id.* at 36-38.

43. *Rodriguez*, 411 U.S. at 39. The Court likened the educational system to the federal law that it considered in Katzenbach v. Morgan, 384 U.S. 641 (1966). The *Rodriguez* Court noted that the law

interference with a fundamental right.[44]

Similarly, in *Zablocki v. Redhail*,[45] the Court found that an affirmative state regulation that restricted the right to marry "directly and substantially" interfered with the right to marry.[46] Although the language used by the *Zablocki* Court suggested that the Court weighed the amount of interference created by the regulation,[47] the Court drew the same distinction as it had in the abortion-funding cases between affirmative state regulation and the denial of state funds.[48] While a denial of Social Security benefits upon marriage was not a "direct legal obstacle" in the path of a person seeking marriage,[49] a state law that forbade marriage to persons who owed child support payments was.[50]

Thus, as in *Maher* and *McRae*, the Court in *Rodriguez* and *Zablocki* recognized that a state can dissuade its citizens from exercising their fundamental rights if such interference consists of the deprivation of government benefits. In contrast, where a state enacts regulations that affirmatively limit the exercise of a fundamental right, the state must prove that its act serves a compelling end.

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in *Katzenbach* extended a right to persons otherwise denied that right by state law. *Rodriguez*, 411 U.S. at 38-39. Thus, the *Rodriguez* Court reasoned that where a government reform or benefit affects a fundamental right, the government may extend the benefit or effect the reform in progressive stages rather than all at one time. *Id.* at 39 (citing *Katzenbach*, 384 U.S. at 646-47).

44. *Rodriguez*, 411 U.S. at 38. The Court distinguished the Texas funding system from a state act which "deprive[s], infringe[s], or interfere[s] with the free exercise of . . . [a] fundamental personal right or liberty." *Id.*

45. 434 U.S. 374 (1978).

46. 434 U.S. at 387.

47. *Id.* at 386. The Court stated:

> By reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed.

Id.

48. *Id.* at 386-87.

49. *Id.* at 387.

50. *Id.* Interestingly, the *Zablocki* Court suggested that even if members of the class affected by the statute were not "sufficiently burdened" by the statute, the statute was still problematic because the members would "suffer a serious intrusion into their freedom of choice in an area in which we have held such freedom to be fundamental." *Id.* This suggests that where affirmative state regulations are involved, weighing the amount of burden created is unnecessary; that is, *any* affirmative regulations which bear upon a fundamental right constitute a direct and substantial interference which triggers strict scrutiny.

C. *The Precedential Value of the Undue Burden Standard*

The Court's use of the undue burden standard in the abortion-funding cases and in the other fundamental rights cases discussed above created only a limited precedent for the extension of the undue burden standard in later cases involving affirmative state abortion regulations. In the abortion-funding cases, *Rodriguez*, and *Zablocki*, the Court used the phrase undue burden to mean an obstacle in the path of a person exercising a fundamental right. Under this usage, all affirmative regulations constitute undue burdens. In the *Bellotti* cases, which involved the abortion rights of minors, the Court used the phrase undue burden to weigh the amount of intrusion created by an affirmative regulation. However, state regulations inhibiting the abortion rights of minors arguably should be subjected to a lower level of scrutiny.[51] Thus, before *Casey*, the Supreme Court did not use the undue burden standard to weigh the amount of intrusion on an adult's fundamental right, and, accordingly, it did not condition the application of strict scrutiny on a threshold level of interference.

D. *Justice O'Connor's Adoption of the Undue Burden Standard*

Despite the limited precedential support for the undue burden standard, almost a decade before *Casey* Justice O'Connor began to advocate changing the standard of review in all abortion cases from traditional two-tier scrutiny[52] to the undue burden standard. In *City of Akron v. Akron Center for Reproductive Health (Akron I)*[53] and *Thornburgh v. American College of Obstetricians and Gynecologists*,[54] a majority of the Court used strict scrutiny to strike down state abortion regulations, including a second-trimester hospitalization requirement,[55] informed consent provisions,[56] a state reporting requirement,[57] and a printed information requirement.[58]

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51. *See supra* notes 35-39 and accompanying text for a discussion of the *Bellotti* cases. In *Bellotti II*, the Court noted that "even where there is an invasion of protected freedoms 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults.'" 443 U.S. at 636 (quoting Ginsberg v. New York, 390 U.S. 629, 638 (1968) (quoting Prince v. Massachusetts, 321 U.S 158, 170 (1944))); *see also* H.L. v. Matheson, 450 U.S. 398, 411 (1981) (discussing additional power of the state over minors).

52. See *supra* note 11 for an explanation of traditional two-tier scrutiny.

53. 462 U.S. 416 (1983).

54. 476 U.S. 747 (1986).

55. *Akron I*, 462 U.S. at 442-33.

56. *Id.* at 443-44; *Thornburgh*, 476 U.S. at 760-64.

57. *Thornburgh*, 476 U.S. at 765-68.

58. *Id.* at 762-63.

Justice O'Connor dissented from both cases and found the regulations constitutional because they did not impose an undue burden on a woman seeking an abortion.[59]

In extrapolating the "undue burden" test,[60] Justice O'Connor looked to the abortion-funding cases,[61] *Bellotti I*,[62] and various other fundamental rights cases, including *Rodriguez*.[63] O'Connor found the undue burden test particularly appropriate in the context of abortion rights, because she viewed the abortion right as more limited in nature and scope than other fundamental rights.[64]

In both *Akron I* and *Thornburgh*, Justice O'Connor differed strikingly from the Court majorities on the question whether a state may attempt to influence a woman's abortion decision prior to viability. The majority in

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59. *See Akron I*, 462 U.S. at 452 (O'Connor, J., dissenting); *Thornburgh*, 476 U.S. at 814 (O'Connor, J., dissenting). In *Akron I*, Justice O'Connor stated that, because abortion does not constitute an absolute right, a state may constitutionally "inhibit" abortions. 462 U.S. at 461-62 (O'Connor, J., dissenting).

60. *See Akron I*, 462 U.S. at 453, 461-65 (O'Connor, J., dissenting).

61. *Id.* at 461-62 n.8. See *supra* notes 17-34 and accompanying text for a discussion of the abortion-funding cases. Justice O'Connor stated that the unduly burdensome standard applied in the abortion-funding cases also directly applies to cases involving affirmative state abortion regulations. *Akron*, 462 U.S. at 461-65 (O'Connor, J., dissenting). In doing so, she ignored the context in which the undue burden standard was applied. In the abortion-funding cases, the Court considered whether the state's decision to withhold funds from indigent women seeking abortions created an undue burden on their right to abortion. In those cases, the Court explicitly recognized that the withholding of funds is state action different in character than affirmative regulations with accompanying criminal penalties. *See supra* notes 28-33 and accompanying text. A majority of the Court has not applied the undue burden standard where affirmative state abortion regulations are at issue. Justice Scalia noted this distinction in *Casey* when he stated that Justice O'Connor's reliance on the abortion-funding cases "is entirely misplaced, since those cases did not involve regulation of abortion but mere refusal to fund it." *Casey*, 112 S. Ct. at 2877 (Scalia, J., dissenting).

Professor Appleton correctly predicted this expansion of the unduly burdensome requirement from cases involving the positive right to obtain an abortion at the government's expense to the negative right to be free from government interference in obtaining an abortion. Appleton, *supra* note 27, at 750-51. She stated, "The doctrine may reach beyond demands for what amount to positive rights, to uphold—without the demonstration of a compelling state interest—active state interference producing only (so-called) 'slight' intrusions held not to constitute impingements, on protected negative rights." *Id.* at 750 (citations omitted).

62. See *supra* notes 35-39 and accompanying text for a discussion of *Bellotti I*.

63. See *supra* notes 41-44 and accompanying text for a discussion of *Rodriguez*. Justice O'Connor also cited Justice Powell's concurring opinion in Carey v. Population Services International, 431 U.S. 678, 703 (1987), as precedent for applying the undue burden standard in *Akron I*. *Akron I*, 462 U.S. at 462 n.8 (O'Connor, J., dissenting). However, the *Carey* majority did not adopt the standard explicitly, and Justice Powell later criticized the undue burden test. *Zablocki*, 434 U.S. at 397 (Powell, J., concurring) ("[T]he degree of 'direct' interference with the decision to marry or to divorce is unlikely to provide either guidance for state legislatures or a basis for judicial oversight.").

64. *Akron I*, 462 U.S. at 463-64 (O'Connor, J., dissenting).

both cases cautioned states against the adoption of religious views in regulating the exercise of the right to abortion.[65] In contrast, Justice O'Connor trusted the collective morality reflected in state legislative actions to guide a woman's abortion decision, even to the point where such guidance restricts her range of choices.[66] Justice O'Connor's analysis would allow the state to purposely dissuade a woman from exercising her fundamental right to have an abortion by creating regulatory barriers that make the exercise of that choice more difficult.[67]

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65. *Id.* at 443-45. *Thornburgh*, 476 U.S. at 777-82 (Stevens, J., dissenting). In *Akron I*, the majority struck down an informed consent provision because it attempted to dissuade women from obtaining an abortion prior to viability. The court found that the provision was beyond the scope of the health interest recognized in *Roe*. *Akron I*, 462 U.S. at 444. The Court stated, "[A] State may not adopt one theory of when life begins to justify its regulation of abortions." *Id.* at 444 (citing Roe v. Wade, 410 U.S. 113, 159-62 (1973)). Similarly, the majority in *Thornburgh* found that the regulations in that case reflected a disguised attempt by the state to "intimidate women into continuing pregnancies." 476 U.S. at 759. In his concurrence, Justice Stevens rejected the state's assertion of authority to influence a woman's decision, noting that "[t]he Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government." *Id.* at 772 (Stevens, J., concurring). Justice O'Connor criticized this wholesale prohibition on any state regulation which might influence a woman's decision whether to have an abortion, calling it a "prophylactic test." *Id.* at 829 (O'Connor, J., dissenting).

66. Justice O'Connor did acknowledge a limit to the amount of permissible state interference, conceding that states could not impose an absolute obstacle or coercive restraint. *Akron I*, 462 U.S. at 464 (O'Connor, J., dissenting). However, she found mere "inhibit[ion]" of the abortion right acceptable. *Id.* Justice O'Connor stated:

> [W]e must keep in mind that when we are concerned with extremely sensitive issues, such as the one involved here, "the appropriate forum for their resolution in a democracy is the legislature. We should not forget that 'legislatures are the ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.'"

Id. at 465 (quoting *Maher*, 432 U.S. at 479-80 (citation omitted)).

Justice Stevens took the opposite view:

> [I]t is far better to permit some individuals to make incorrect decisions than to deny all individuals the right to make decisions that have a profound effect upon their destiny. Arguably a very primitive society would have been protected from evil by a rule against eating apples; a majority familiar with Adam's experience might favor such a rule. But the lawmakers who placed a special premium on the protection of individual liberty have recognized that certain values are more important than the will of a transient majority.

Thornburgh, 476 U.S. at 781-82 (Stevens, J., concurring).

67. Between 1989 and 1992, it appeared that Justice O'Connor was not alone in her dissatisfaction with the Court's use of strict scrutiny to review state abortion regulations. However, the justices who sought to abandon strict scrutiny continued to adhere to the same basic fundamental rights analysis employed in *Roe*. They simply argued for rational basis review of abortion regulations. In Webster v. Reproductive Health Services, 492 U.S. 490 (1989), a majority of the court, for the first time since *Roe*, failed to employ strict scrutiny analysis in an abortion case. The Missouri statute at issue in *Webster* required viability testing and prohibited the use of public funds, employees, or facilities to perform abortions. *Id.* at 501. While four members of the Court applied rational basis review to uphold the statute, *id.* at 520, Justice O'Connor applied the undue burden test to reach the same result. *Id.* at 530 (O'Connor, J., concurring). Justice Scalia, an advocate of rational basis review, criticized Justice

III. THE *CASEY* ADOPTION OF THE UNDUE BURDEN STANDARD AND ITS BROADER IMPLICATIONS

A. The Casey *Opinion*

In *Casey v. Planned Parenthood of Southeastern Pennsylvania*,[68] Justice O'Connor seized the opportunity to change the standard of review in all abortion cases from traditional strict scrutiny to the "undue burden" standard. Because a majority of the Court stood firmly divided on the issue of the correct standard of scrutiny,[69] a moderate three-member plurality[70] signed on to the compromise of applying the "undue burden" standard to uphold five out of six Pennsylvania abortion restrictions.[71]

The joint opinion reaffirmed the basic holding in *Roe* that a woman does have a right to resolve the difficult question whether to abort her pregnan-

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O'Connor's use of the undue burden standard: "I know of no basis for determining that this particular burden (or any other for that matter) is 'due.' One could with equal justification conclude that it is not." *Id.* at 526 n.* (Scalia, J., concurring).

Justice Blackmun's opinion in *Webster* foreshadowed the subtle transition from a denial of positive rights to a denial of negative rights:

> Missouri has brought to bear the full force of its economic power and control over essential facilities to discourage citizens from exercising their constitutional rights, even where the State itself could never be understood as authorizing, supporting, or having any other positive association with the performance of an abortion (citation omitted) . . .
> The difference is critical . . . . Even if the state may decline to subsidize . . . the exercise of woman's right to terminate a pregnancy, . . . it may not affirmatively constrict the availability of abortions . . . .

Id. at 540 n.1 (Blackmun, J., concurring in part and dissenting in part).

The Court also began to give states more leeway with respect to abortion regulations for minors. In Hodgson v. Minnesota, 497 U.S. 417 (1990), the Court upheld a statute that required a minor to give both parents notice of the abortion. The Minnesota statute provided for a judicial bypass exception. *Id.* at 422-27. In Akron v. Center for Reproductive Health, 497 U.S. 502 (1990) (*Akron II*), the Court upheld a judicial bypass provision for minors under which a minor had to prove maturity by clear and convincing evidence.

68. 112 S. Ct. 2791 (1992) (plurality opinion).

69. Justices Rehnquist, Scalia, Thomas, and White anchored the conservative end of the court, while Justices Blackmun and Stevens spoke for the liberal end.

70. 112 S. Ct. at 2803. Justices O'Connor, Kennedy, and Souter signed on to the joint opinion written by Justice O'Connor. *Id.*

71. *Id.* The provisions upheld include: (1) a requirement of informed consent and notice of state-provided materials encouraging childbirth; (2) a twenty-four-hour waiting period; (3) parental consent for women under eighteen, including a judicial bypass; (4) a state recordkeeping requirement; and (5) a "medical emergency" provision exempting compliance with the detailed requirements. *Id.* at 2821-26, 2832. The Court found unconstitutional a provision requiring spousal consent. *Id.* at 2826-31.

cy.[72] However, it also found that a state may persuade a woman not to have an abortion so long as, in so doing, it does not go too far.[73] Thus, while a state may not calculate to hinder a woman's choice,[74] "strike at the right itself,"[75] or deprive the woman of all choice in the matter,[76] it may express a preference[77] for normal childbirth by attempting to ensure that a woman makes a thoughtful and informed choice[78] and knows the philosophical and social arguments in favor of continuing her pregnancy.[79]

Justices Stevens and Blackmun, in their individual opinions, shared the view that, because abortion falls within the realm of fundamental rights, a state may never use regulations to persuade a woman to abandon her

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72. 112 S. Ct. at 2816-17. The joint opinion reaffirms the fundamental right to privacy, noting that each person enjoys "a realm of personal liberty" which the government may not enter and which includes "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life" free of compulsion by the state. *Id.* at 2807. Yet, the joint opinion avoids explicitly classifying the right to have an abortion as a fundamental privacy right. The authors of the joint opinion noted: "[I]n some critical respects the abortion decision is of the same character as the decision to use contraception." *Id.* at 2805-06. However, they also distinguished the right to abortion from other privacy rights:

> These [privacy] considerations begin our analysis of the woman's interest in terminating her pregnancy but cannot end it, for this reason: though the abortion decision may originate within the zone of conscience and belief, it is more than a philosophic exercise. Abortion is a unique act. It is an act fraught with consequences for others . . . .

Id. at 2807.

73. This standard may seem reminiscent of the infamous standard for judging obscenity—"I know it when I see it"—suggested by Justice Stevens in Smith v. United States. 431 U.S. 291, 313-14 n.9 (1977) (citing Jacobellis v. Ott, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)). The joint opinion's authors found that *Roe* and the cases following it overstated the right to an abortion, because those cases held that a state could not attempt to influence a woman's decision prior to viability. *Casey*, 112 S. Ct. at 2819-20. The joint opinion advocates the undue burden standard because it allows the state to influence a woman while simultaneously allowing a woman to choose whether to have an abortion. *Id.* at 2820-21. Others criticize this balancing act as illogical. *See id.* at 2877 (Scalia, J., dissenting) ("*Any* regulation of abortion that is intended to advance what the joint opinion concedes is the State's 'substantial' interest in protecting unborn life will be 'calculated [to] hinder' a decision to have an abortion."); *Washington Brief: Will the Justices Answer the Abortion Question?*, NAT'L L.J., Feb. 3, 1992, at 7 (quoting Roger Evans, director of litigation for Planned Parenthood Federation) ("It is either a fundamental right or not. If the Court announces a middle-of-the-road position, it has done an extraordinary thing; it has demoted a fundamental right. It's taken away, whether by meat cleaver or whittling knife.").

74. *Casey*, 112 S. Ct. at 2820.

75. *Id.* at 2819.

76. *Id.* at 2806.

77. *Id.* at 2818.

78. *Id.*

79. *Id.*

abortion decision.[80] Justice Blackmun acknowledged that, under *Roe*, a state may interfere with a fundamental right in order to pursue important, value-neutral health objectives.[81] However, he maintained that such interference may constitute only a de minimis burden, a lesser burden than the joint opinion found permissible.[82] Similarly, Justice Stevens distinguished permissible value-neutral state regulations from those that wrongfully attempt to persuade a woman not to abort a fetus.[83] Stevens and Blackmun agreed that, while a state may freely encourage childbirth through its allocation of public funds, a state may not use direct regulations to "inject [its moral view] into a woman's most personal deliberations."[84]

Justices Scalia and Rehnquist, in their respective individual opinions, advocated overruling *Roe* completely and sending the abortion issue back to state legislatures.[85] They agreed that active state interference with a fundamental right potentially undermines the protection that fundamental rights have traditionally afforded the individual.[86] Both Justices warned that the undue burden standard would allow lower court judges to adjudicate based upon their own moral judgments about abortion.[87] Justice

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80. *Casey*, 112 S. Ct. at 2849 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part); *id.* at 2840 (Stevens, J., concurring in part and dissenting in part).

81. *Id.* at 2847 n.5 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

82. *Id.*

83. *Id.* at 2840-41 (Stevens, J., concurring in part and dissenting in part).

84. *Id.* at 2849 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) (quoting Stevens, J., at 2840).

85. *Id.* at 2865, 2873 (Rehnquist, J., concurring in the judgment in part and dissenting in part). Justice Scalia stated that the democratic process should decide the abortion question, because the current national rule does not afford some participants "a fair hearing and an honest fight." *Id.* at 2885 (Scalia, J., concurring in the judgment in part and dissenting in part).

86. *See id.* at 2878 (Scalia, J., concurring in the judgment in part and dissenting in part); *Id.* at 2860 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). Justice Rehnquist commented that although the rule established in *Roe* still exists in theory, it exists only in the sense that a Western movie set exists: "a mere facade to give the illusion of reality." *Id.* Justice Scalia recognized the danger that the undue burden standard presents to fundamental rights protection. Although he agreed with Justice Blackmun that fundamental rights may tolerate incidental burdens without triggering strict scrutiny, he called the undue burden threshold of toleration a "quite different (and quite dangerous) proposition" through which the authors of the joint opinion "place all constitutional rights at risk." *Id.* at 2878 (Scalia, J., concurring in the judgment in part and dissenting in part).

87. *Id.* at 2866 (Rehnquist, J., concurring in the judgment in part and dissenting in part); *id.* at 2877 (Scalia, J., concurring in the judgment in part and dissenting in part). Justice Rehnquist predicted that the standard will allow judges to "'roam at large in the constitutional field,' guided only by their personal views," *id.* at 2866 (citation omitted), and Justice Scalia called the standard "inherently manipulable and . . . hopelessly unworkable in practice." *Id.* at 2877.

Scalia, in particular, criticized Justice O'Connor's standard as inconsistent[88] and unwarranted.[89]

B. *Implications of* Casey *for Abortion and Other Fundamental Rights*

1. *Abortion*

Casey altered the standard of review for all abortion cases by extending the undue burden standard to cases involving the affirmative regulation of abortion. Before *Casey*, in determining which standard of review to apply to a state's direct regulation of the abortion right, lower courts did not consider the amount of interference that a regulation created. Rather, under *Roe*, courts automatically found that the fundamental character of the individual right at stake warranted strict scrutiny. Under that standard, any state attempt to persuade a woman to abandon her choice violated the Fourteenth Amendment.[90] Following *Casey*, a lower court now must determine the extent to which a potentially coercive regulation inhibits a woman's right to have an abortion. If the regulation does not create an undue burden, the court must apply the more lenient rational basis review to the regulation.[91] Under *Casey*, this "undue burden" analysis applies even if the state regulation reflects moral coercion.[92]

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88. *Id.* at 2876-79 (Scalia, J., concurring in the judgment in part and dissenting in part). The joint opinion defines an 'undue' burden as a state action that "merely imposes a substantial obstacle." Yet, Justice Scalia noted that this definition contradicts Justice O'Connor's previous opinions which define a more narrow set of "undue" burdens: those which impose "*absolute* obstacles or *severe* limitations on the abortion decision." *Id.* at 2878 (citations omitted).

89. *Id.* at 2876-77 & n.3. Scalia launched a vigorous attack on O'Connor's attempt to ground the undue burden standard in the Court's fundamental rights jurisprudence. Scalia's criticism rests on three points: first, that the Court's undue burden language in *Bellotti I* reflects a mere "passing use"; second, that while Justice Powell did use a form of the standard in a few, nonmajority opinions, he later rejected it; and third, that the abortion-funding cases did not serve as adequate precedent, because those cases involved government benefits. *Id.* at 2876 n.3.

Scalia even quipped: "I should be grateful, I suppose, that the joint opinion does not claim that I, too, have adopted the undue burden test." *Id.* at 2877 n.4. He continued: "The 'undue burden' standard is not at all the generally applicable principle the joint opinion pretends it to be; rather, it is a unique concept created specially for this case, to preserve some judicial foothold in this ill-gotten territory." *Id.* at 2878.

90. See *supra* notes 8-16 and accompanying text for a discussion of *Roe*.

91. See *supra* notes 68-89 and accompanying text for a discussion of *Casey*. Interestingly, Professor Appleton points out that, because the failure to meet the unduly burdensome standard means that the state action at issue does not implicate the Fourteenth Amendment, one might ask, "[w]hy must *any* constitutional standard of review apply?" Appleton, *supra* note 27, at 748.

92. Under traditional fundamental rights analysis, strict scrutiny would be triggered; thus, the court would require the state to prove a compelling purpose other than moral suasion. *See infra* notes 119-22.

In practice, the use of the undue burden standard presents three problems for women who wish to exercise their right to have an abortion. First, the undue burden standard has a disparate impact upon low-income women, women in rural areas, women of color, and young or battered women, because such women typically have the least resources to overcome the procedural hurdles tolerated under the undue burden standard.[93] Second, several lower courts across the United States have denied facial challenges to newly enacted abortion regulations simply because the regulations mirror those in *Casey*.[94] The type of regulations upheld in *Casey*, however, may create a greater burden on certain women depending upon the availability of abortion services in a particular location.[95] Thus, the regulation may

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93. *See* Benshoof, *supra* note 4, at 2249-50. Benshoof noted the cumulative effects of the procedural hurdles surrounding abortion: (1) an impression of state disapproval; (2) health risks and increased travelling costs resulting from the 24-hour delay; (3) increased abortion costs resulting from mandatory physician counseling; (4) extended exposure to harassment at clinics resulting from the 24-hour delay requirement; (5) delays for minors resulting from court procedures; (6) time lost and extra costs imposed on parents who accompany a minor to an informed consent session; and (7) negative doctor publicity and harassment resulting from state reporting requirements. *Id.*

The undue burden standard presents the danger that courts may not fully consider such cumulative effects, because the standard allows courts to consider obstacles to abortion one at a time. Taken as a whole, however, these obstacles will prevent many women from obtaining abortions, and thus will constitute an undue burden upon the right to have an abortion. *See Abortion Decisions*, NAT'L L.J., Dec. 21, 1992, at 5.

Some commentators argue that *Casey* will have a particularly harsh impact on minors who seek an abortion. Although the *Casey* Court struck down a spousal consent requirement, 112 S. Ct. at 2826-31, the Court's reasons for finding that spousal consent constitutes an undue burden should apply equally to minors. *See* Benshoof, *supra* note 4, at 2249. Many minors face the same sort of domestic abuse confronted by adult women; yet, the effects of a consent requirement may burden minors more. *Id.*; *see also The Supreme Court, 1991 Term Leading Cases*, 106 HARV. L. REV. 163, 201-10 (1992). Domestic abuse often has a more devastating effect on minors than on adult women, because minors will encounter more developmental setbacks from the abuse, and they have lower occupational skills and depend more on their parents for financial support. *Id.* at 207. Moreover, if a minor is denied an abortion, intergenerational poverty and its related social effects likely will be perpetuated. *Id.* at 207. The judicial bypass procedure does not solve these problems because it also creates fear, trauma, expense, and delays. *Id.*; *see, e.g.*, Hodgson v. Minnesota, 497 U.S. 417, 441-44 (1990) (recounting testimony of teens' trauma and judges' disapproval of the judicial bypass procedure).

94. *See, e.g.*, Barnes v. Mississippi, 992 F.2d 1335 (5th Cir.), *cert. denied*, 114 S. Ct. 468 (1993); Barnes v. Moore, 970 F.2d 12 (5th Cir.), *cert. denied*, 113 S. Ct. 656 (1992). However, Justices O'Connor, Souter, Blackmun, and Stevens have each separately indicated that they disapprove of this approach. *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 114 S. Ct. 909, 911 (1994) (Souter, J.) (denying stay of Third Circuit's refusal to reopen record on facial constitutional challenge: "[L]itigants are free to challenge similar restrictions in other jurisdictions."); Fargo Womens Health Org. v. Schafer, 113 S. Ct. 1668 (1993) (O'Connor, J., concurring, joined by Souter, J.); *id.* at 1669 (Blackmun, J., and Stevens, J., dissenting).

95. For example, Pennsylvania has thirteen abortion clinics and dozens more doctors who perform abortions, while North Dakota's sole abortion doctor performs abortions only on a part-time basis. *A*

actually create an undue burden, stopping some women from choosing to have an abortion, at least until challengers gather enough evidence for an as-applied challenge.[96] Finally, the undue burden standard will likely change with the varying political composition of a court because the standard falls subject to a wide range of possible interpretations.[97]

Justice Removes the Last Barrier to Pennsylvania's Limits on Abortion, N.Y. TIMES, Feb. 9, 1994, at A8.

96. When lower courts do not allow challengers to present evidence showing that a *Casey*-like statute presents, on its face, an undue burden in their particular region, the challengers must then wait to gather evidence of the statute's impact. In the interim, if the statute actually does create an undue burden, many women will be denied their constitutional right to decide whether to have an abortion. Thus, the courts' evidentiary requirement will cause a complete denial of the right to choose an abortion without undue burden. Although the requirement of an "as applied" challenge may appear merely procedural, in fact, it drastically limits constitutional review of abortion regulations.

97. A major problem with the undue burden standard lies in its "rootless" nature. *See Casey*, 112 S. Ct. at 2878 (Scalia, J., concurring in the judgment in part and dissenting in part). Anti-abortion activists plan to push for the most restrictive laws possible in states with the best prospects for such laws passing under the undue burden standard. Rorie Sherman, *The War to Heat Up: Anti-Abortion Activists Are Going to Reignite the Battles in the States*, NAT'L L.J., Nov. 30, 1992, at 1 [hereinafter Sherman, *The War to Heat Up*]; Rorie Sherman, *Focus on Abortion War Shifts to the States*, NAT'L L.J., Apr. 19, 1993, at 10. Because the undue burden standard requires an intensely fact-bound, local appraisal of abortion restrictions, courts will have substantial power to decide whether a particular regulation constitutes an undue burden. *See* Pamela S. Karlan, *Individual Rights Upheld*, NAT'L L.J., Aug. 31, 1992, at 12. In addition, the Supreme Court's current "fragile" composition creates uncertainty about whether the Court would uphold a state regulation which differs from those upheld in *Casey*. *See* Sherman, *The War to Heat Up*, *supra*, at 12. Rachel Pine of the Center for Reproductive Law and Policy predicts that, eventually, all new anti-abortion regulations will come before the Court one at a time. *Id.*

One commentator's solution to the effects of the new undue burden standard includes the following: increasing the number of physicians providing abortions; increasing the number of medical schools that teach abortions; encouraging more frequent discussion of abortion in medical journals and at meetings; forming a medical providers' lobby for abortion; and expanding the class of abortion providers to include nurse-practitioners, midwives, and physicians' assistants. *See* Benshoof, *supra* note 4, at 2249.

Another solution involves seeking redress under state constitutions. For example, the California Supreme Court has consistently construed the right to privacy granted by the California Constitution as broader than the federal right to privacy. *See* Planned Parenthood of Shasta-Diablo v. Williams, 16 Cal. Rptr. 2d 540, 546 (Ct. App. 1993) (citing several California Supreme Court decisions and applying strict scrutiny after *Casey*), *aff'd*, 873 P.2d 1224 (Cal.), *vacated*, 115 S. Ct. 413 (1994) (remanding for further consideration of First Amendment issues in light of Madsen v. Women's Health Center, Inc., 114 S. Ct. 2516 (1994)); Commission to Defend Reproductive Rights v. Meyers, 625 P.2d 779, 798 (Cal. 1981) (holding that government restrictions on abortion funding violate a woman's right to decide whether to have an abortion "uncoerced by governmental intrusion"). Justice Brennan argued for increased reliance on state constitutions, by litigants and the judiciary, in his 1977 *Harvard Law Review* article, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). Currently, ten states have constitutions which explicitly protect privacy. Mark Silverstein, *Privacy Rights in State Constitutions: Models for Illinois?*, 1989 U. ILL. L. REV. 215, 296 n.14 (citing constitutions of Illinois, Louisiana, South Carolina, Alaska, California, Montana, Hawaii, Florida, Washington, and Arizona).

2. Fundamental Rights

The authors of the joint opinion in *Casey* probably did not intend for courts to apply the undue burden standard in nonabortion fundamental rights cases.[98] However, the reasoning that supported the undue burden standard in *Casey* applies equally to nonabortion fundamental rights.[99] Furthermore, the undue burden standard provides a tempting escape route for a judge who wants to avoid applying strict scrutiny to a state law. In fact, courts have already adapted the undue burden standard to cases involving nonabortion fundamental rights,[100] including the right to parent,[101] the right to die,[102] and the right of familial association.[103] In *Casey*, Justice Scalia warned of this expansion when he called the undue burden standard a "quite dangerous proposition" that "places all constitutional rights at risk."[104]

Thus, by applying the undue burden standard rather than the standard

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98. *See Casey*, 112 S. Ct. at 2807-08. The authors of the joint opinion distinguished the right to abortion from the Supreme Court's other recognized privacy rights. *Id.* at 2807. The authors stated:

> Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education . . . .
>
> . . . These considerations begin our analysis . . . but cannot end it, for this reason: [a]bortion is a unique act . . . the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law.

Id.

99. Take, for example, the fundamental right to raise one's child as one sees fit, *see, e.g.*, Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (recognizing the fundamental parental right to "establish a home and bring up children"), and a hypothetical state law through which a state attempts to persuade parents to send their children to public schools. Under the law, before parents may send their children to private schools, they must complete the following requirements: (1) a detailed application explaining their choice; (2) a one-year waiting period to encourage a carefully deliberated choice; (3) counseling sessions to discuss the benefits of public schools; and (4) submission of the child's complete educational records to the state. Although the state regulation may "inhibit" the right to raise one's child as one sees fit, a court could easily find that each procedure, taken alone, does not rise to the level of an undue burden.

100. *See infra* notes 101, 103, 209.

101. *See* Herndon v. Tuhey, 857 S.W.2d 203 (Mo. 1993) (en banc) (upholding a grandparent visitation statute as constitutional). See also *infra* notes 159-93 and accompanying text for a discussion of *Herndon*.

102. *See infra* note 209.

103. *See* Griffin v. Strong, 983 F.2d 1544 (10th Cir. 1993) (holding, in § 1983 suit, that police officer and social worker did not unduly burden plaintiff's right to familial association in conducting child abuse investigation); *see also* Hill v. National Collegiate Athletic Ass'n, 865 P.2d 633, 650, 653 (Cal. 1994) (using *Casey* to justify the nonapplication of strict scrutiny in a privacy case).

104. *Casey*, 112 S. Ct. 2791, 2878 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part).

used by the Third Circuit below,[105] the Court sparked a new method of fundamental rights analysis. Before *Casey*, the Supreme Court consistently defined fundamental rights as those that remain insulated from the continually shifting political majority.[106] The undue burden standard, however, subtly undermines the protective barrier surrounding any fundamental right. It allows the current political majority to actively interfere with its citizens' exercise of their fundamental rights, so long as such interference does not amount to an undue burden. Because it allows such interference, the undue burden standard appears irreconcilable with traditional fundamental rights protection.

IV. PROPOSAL—MODIFICATION OF THE UNDUE BURDEN STANDARD TO INCLUDE A SOCIAL MEANING TEST

The main problem with the *Casey* undue burden standard lies in its potential to slowly chip away at fundamental rights protection.[107] This problem does not necessarily stem from the quantity of the infringement allowed under the standard.[108] Rather, the problem lies in the test's failure to guarantee a finding of an undue burden when a state enacts a law designed to discourage people from exercising their fundamental rights.[109]

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105. *See* Peterson, *supra* note 7. Peterson argued that the Third Circuit used the correct standard of review after applying the two rules of Marks v. United States, 430 U.S. 188 (1977): "(1) a legal standard ceases to become law when a majority of the court does not apply it; and (2) the narrowest concurring opinion becomes the law when the court issues a splintered decision." Peterson, *supra* note 7, at 297-310.

106. *See* Hodgson v. Minnesota, 497 U.S. 417, 435 (1990) ("[T]he regulation of constitutionally protected decisions . . . must be predicated on legitimate state concerns other than the disagreement with the choice the individual has made . . . . Otherwise, the interest in liberty protected by the Due Process Clause would be a nullity.") (citations omitted); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) ("One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.").

107. *See supra* notes 98-106 and accompanying text.

108. If properly applied, the undue burden test would allow only an indirect or de minimis burden on the exercise of a fundamental right. *See Casey*, 112 S. Ct. at 2878 (Scalia, J., concurring in the judgment in part and dissenting in part) ("I agree, indeed I have forcefully argued, that a law of general applicability which places only an incidental burden on a fundamental right does not infringe upon that right . . . ."); *id.* at 2847 n.5 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("To say that restrictions on a right are subject to strict scrutiny is not to say that the right is absolute. Regulations can be upheld if they have no significant impact . . . .").

109. Supreme Court justices have repeatedly warned that a state may not use its coercive powers to discourage the exercise of the right to abortion. *See* Webster v. Reproductive Health Servs., 492 U.S. 490, 540 n.1 (1989) (Blackmun, J., concurring in part and dissenting in part) ("Missouri has brought to bear the full force of its economic power and control over essential facilities to discourage its citizens

To solve this problem, a court using the undue burden standard should modify the analysis outlined by Justice O'Connor. In addition to considering the extent to which a state regulation infringes upon a fundamental right, courts should examine the social meaning of the state regulation. Under this modified undue burden standard, a court will examine the regulation under strict scrutiny for either of two reasons: if an impermissible amount of interference with a fundamental right exists or if the regulation reflects a state attempt to achieve moral conformity.[110]

A. Lawmakers May Not Attempt to Foster Moral Conformity

Legislative acts motivated by racial bias,[111] gender bias,[112] religious

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from exercising their constitutional rights . . . ."); Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 762 (1986) ("[This is] nothing less than an outright attempt to wedge the Commonwealth's message discouraging abortion into the privacy of the informed-consent dialogue between the woman and her physician."); City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 444 (1983) ("[A] state may not adopt one theory of when life begins to justify its regulation of abortions."); Harris v. McRae, 448 U.S. 297, 330 (1980) (Brennan, J., dissenting) ("[T]he state must refrain from wielding its enormous power and influence in a manner that might burden the . . . freedom to choose . . . ."); Zablocki v. Redhail, 434 U.S. 374, 385 (1978) (disapproving of the fact that "[people] will in effect be coerced into forgoing their right to marry").

110. Several states currently employ a similar principle of neutrality based upon the privacy right established in their state constitutions. *See* Katheryn Kolbert & David H. Gans, *Responding to* Planned Parenthood v. Casey*: Establishing Neutrality Principles in State Constitutional Law,* 66 TEMP. L. REV. 1151 (1993). For example, in Moe v. Secretary of Administration and Finance, 417 N.E.2d 387 (Mass. 1981), the Massachusetts Supreme Court held that the state must act impartially when it distributes Medicaid benefits that affect fundamental rights. *Id.* at 402. The court stated: "[O]nce [the state] chooses to enter the constitutionally protected area of choice, it must do so with genuine indifference . . . . [I]n this area, government is not free to 'achieve with carrots what [it] is forbidden to achieve with sticks.'" *Id.* (quoting LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-10, at 933 n.77 (1978)).

111. *See, e.g.*, Hunter v. Underwood, 471 U.S. 222 (1985) (holding statute unconstitutional even though racially motivated drafting occurred eighty years earlier); Strauder v. West Virginia, 100 U.S. 303 (1879) (striking down law barring black men from jury duty); City of Mobile v. Bolden, 446 U.S. 55 (1980) (extending discriminatory purpose test to the Fifteenth Amendment); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977) (suggesting evidentiary sources for discriminatory intent); Washington v. Davis, 426 U.S. 229 (1976) ("[T]he invidious quality of a law ultimately must be traced to a racially discriminatory purpose.").

112. *See, e.g.*, Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) (holding state all-female nursing school unconstitutional as based on stereotypes about gender in nursing); Personnel Adm'r of Massachusetts v. Feeney, 442 U.S. 256 (1979) (upholding a veterans' preference in civil service jobs because decisionmaker had no discriminatory purpose); Craig v. Boren, 429 U.S. 190 (1976) (holding unconstitutional statute prohibiting the sale of beer to underage males only); Weinberger v. Weisenfeld, 420 U.S. 636 (1975) (invalidating Social Security Act provision giving survivor's benefits to females only); Frontiero v. Richardson, 411 U.S. 677 (1973) (holding unconstitutional dependency presumption for female spouses only); Reed v. Reed, 404 U.S. 71 (1971) (invalidating Idaho law preferring males as estate administrators).

bias,[113] or the desire to harm a politically unpopular group[114] are not constitutionally acceptable. Such motivation violates the Equal Protection Clause of the Fourteenth Amendment[115] and the Free Exercise and Establishment Clauses of the First Amendment.[116] Likewise, moral bias may not motivate legislative acts which affect fundamental rights. Such moral motivation violates the fundamental right to privacy[117] grounded in various sections of the Constitution.[118]

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113. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38 (1985) (striking down Alabama law mandating a period of silence for prayer or meditation); Stone v. Graham, 449 U.S. 39 (1980) (per curiam) (striking down Kentucky statute requiring posting of Ten Commandments in every public school classroom); Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (establishing secular purpose requirement for state action); Epperson v. Arkansas, 393 U.S. 97 (1968) (holding that absence of secular purpose for statute prohibiting teaching of evolution constitutes violation of Establishment Clause).

114. *See* United States Dept. of Agric. v. Moreno, 413 U.S. 528, 534 (1973) ("[I]f the constitutional conception of the 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.").

115. U.S. CONST. amend. XIV, § 1.

116. U.S. CONST. amend. I.

117. The doctrine of privacy includes both an "individual interest in avoiding disclosure of personal matters" and an "interest in independence in making certain kinds of important decisions." Whalen v. Roe, 429 U.S. 589, 599-600 (1977). The right to make certain important decisions means that the state may not homogenize the beliefs and attitudes of its citizens. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 152-54 (1973) (defining the abortion decision as included in the right to privacy); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."); Stanley v. Georgia, 394 U.S. 557, 565-66 (1969) (noting that state attempt to "control the moral content of a person's thoughts" violates the right to privacy); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (establishing privacy right of married couple to decide whether to bear a child); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925) (noting that a state may not "standardize its children," for a child is not "the mere creature of the state"); Meyer v. Nebraska, 262 U.S. 390, 402 (1923) (noting that a state may not attempt to "foster a homogenous people"); Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) ("[The framers of the Constitution] sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone . . . .").

For recent discussions of the right to privacy, see Lackland H. Bloom, Jr., *The Legacy of* Griswold, 16 OHIO N.U. L. REV. 511 (1989); Ken Gormly, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335; Jeffrey S. Koehlinger, *Substantive Due Process and the Lockean Liberal Tradition: Rethinking the Modern Privacy Cases*, 65 IND. L.J. 723 (1990); Linda C. McClain, *The Poverty of Privacy?*, 3 COLUM. J. GENDER & L. 119 (1992); Stephen J. Schnably, *Beyond* Griswold*: Foucauldian & Republican Approaches to Privacy*, 23 CONN. L. REV. 861 (1991); David M. Smolin, *The Jurisprudence of Privacy in a Splintered Supreme Court*, 75 MARQ. L. REV. 975 (1992).

118. *See Roe*, 410 U.S. at 152-53 (grounding privacy in "liberty" protected by the Due Process Clauses of the Fifth and Fourteenth Amendments); *Griswold*, 381 U.S. at 484-85 (grounding privacy in the penumbras of the First, Third, Fourth, and Fifth Amendments); *id.* at 486-89 (Goldberg, J., concurring) (grounding privacy in the Ninth Amendment).

Under traditional fundamental rights analysis,[119] courts applying strict scrutiny usually invalidate laws motivated by the desire for moral conformity. Once a court finds that a legislative act affects a fundamental right, the state must demonstrate a "compelling" purpose for the act.[120] Morality does not constitute a compelling purpose.[121] Therefore, the state

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119. See *supra* note 11 for a discussion of traditional fundamental rights analysis.

120. Roe v. Wade, 410 U.S. 113, 155 (1973).

121. Although the Supreme Court has never explicitly held that morality does not constitute a compelling purpose, the Court has implicitly supported this conclusion in Loving v. Virginia, 388 U.S. 1 (1967), Stanley v. Georgia, 394 U.S. 557 (1969), and *Roe*, 410 U.S. 113.

In *Loving*, the Court struck down a Virginia anti-miscegenation statute as violative of the fundamental right to marry. 388 U.S. at 12. Virginia offered the following purposes for the statute: "'to preserve the racial integrity of its citizens,' and to prevent the 'corruption of blood,' a 'mongrel breed of citizens,' and 'the obliteration of racial pride.'" *Id.* at 7 (quoting Naim v. Naim, 87 S.E.2d 749 (Va. 1955)). The trial judge upheld the law on the grounds that:

> Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.

Id. at 3. The Supreme Court applied strict scrutiny to the statute and found that the state failed to offer an "overriding purpose" to justify the statute. *Id.* at 11.

In *Stanley*, the Court struck down a Georgia law prohibiting the private possession of obscene matter. 394 U.S. at 565-66. The Court recognized the plaintiff's First Amendment right to receive information and ideas and his Fourteenth Amendment right to privacy. *Id.* at 564-65. The Court found uncompelling Georgia's interest in "control[ling] the moral content of a person's thoughts." *Id.* at 565-66.

Finally, in *Roe*, the Court struck down a Texas statute prohibiting abortion as violating the right to privacy. 410 U.S. at 163-64. Texas asserted an interest in protecting prenatal life based on a theory that human life begins at the moment of conception. *Id.* at 159. The Court refused to accept this assertion as a valid state interest: "When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary . . . is not in a position to speculate as to the answer." *Id.* Instead, the Court recognized Texas' interest in potential life only after viability, on the basis of "logical and biological" justifications. *Id.* at 163.

Several lower courts have explicitly held that morality does not constitute a "compelling purpose." *See* Watkins v. United States Army, 875 F.2d 699, 730 (9th Cir. 1989) ("[E]qual protection doctrine does not permit notions of majoritarian morality to serve as compelling justification for laws that discriminate . . . ."), *cert. denied*, 498 U.S. 957 (1990); Baker v. Wade, 553 F. Supp. 1121, 1145 (N.D. Tex. 1982) ("But even if there is widespread public distaste [for homosexuality], this would not be . . . a 'compelling state interest' to justify a denial of the right of privacy."), *cert. denied*, 478 U.S. 1022 (1986); Roe v. Norton, 408 F. Supp. 660 (D. Conn. 1975) ("The State's unarticulated position on the morality of abortion cannot be considered a compelling state interest . . . ."), *rev'd on other grounds sub nom.* Maher v. Roe, 432 U.S. 464 (1977). In People v. Onofre, 415 N.E.2d 936 (N.Y. 1980), *cert. denied*, 451 U.S. 987 (1981), the court stated:

> [I]t is not the function of the Penal Law in our governmental policy to provide either a medium for the articulation or the apparatus for the intended enforcement of moral or theological values . . . . The community and its members are entirely free to employ theological teaching, moral suasion, parental advice, psychological and psychiatric counseling and other non-coercive means to condemn the practice of consensual sodomy . . . . [But] [t]he

must prove that the legislature acted upon a morally neutral motive.[122] Thus, within the realm of fundamental rights,[123] the "compelling" purpose requirement provides a necessary check on legislative motives. In contrast, under the *Casey* undue burden standard, a state may avoid this strict appraisal of its legislative motive.[124] As long as a law does not create an undue burden on the exercise of a fundamental right, the law can permissibly coerce people into conforming to the majoritarian morality.[125]

This tolerance of state-mandated morality contradicts the theoretical basis underlying fundamental rights for two reasons. First, by definition, fundamental rights consist of those rights which "may not be submitted to vote" and which "depend on the outcome of no elections."[126] The undue burden standard, however, submits the exercise of fundamental rights to the current political majority. Second, the traditional requirement that a state remain morally neutral when addressing fundamental rights should not vary according to the amount of interference with a fundamental right. Certainly the requirement that a state remain neutral with respect to race, gender, religion, and politics[127] does not suddenly disappear if a law affects only a small number of people in a limited way. Accordingly, the requirement

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> narrow question before us is whether the Federal Constitution permits the use of the criminal law for that purpose.

Id. at 940 n.3.

122. For commentators arguing similarly, see Ronald Dworkin, *Unenumerated Rights: Whether and How* Roe *Should Be Overruled*, 59 U. CHI. L. REV. 381 (1992) (arguing that, while a state may encourage moral responsibility, it may not enforce moral conformity); Louis Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391 (1963) (arguing that (1) "morals" legislation has no place in rational, utilitarian government; and (2) "morals" legislation violates the Establishment Clause); Katheryn D. Katz, *Majoritarian Morality and Parental Rights*, 52 ALB. L. REV. 405 (1988) (arguing that morality does not constitute a compelling interest which overrides parental rights); D. Don Welch, *Legitimate Government Purposes and State Enforcement of Morality*, 1993 U. ILL. L. REV. 67 (arguing that morality should not constitute a legitimate or compelling purpose for state action). *But cf.* Michael J. Perry, 23 UCLA L. REV. 689 (1976) (arguing that a state may promote public morality so long as the contemporary culture views the moral issue as public in nature).

123. This discussion of moral neutrality does not apply to mere nonfundamental "liberty interests," because the Supreme Court recognizes morality as a "legitimate" state purpose. *See* Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (upholding Georgia's anti-sodomy statute as justified by state interest in public morality).

124. See *supra* text accompanying notes 90-92 for a discussion of the *Casey* undue burden standard. If a court does not find an undue burden, then the court will apply rational basis review. Under rational basis review, the state need only justify its act with a "legitimate" purpose.

125. Because morality does constitute a "legitimate" purpose, *see supra* note 121, statutes which do not create an undue burden allow the state to pursue moral conformity.

126. West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

127. See *supra* notes 111-14 and accompanying text for a discussion of the requirement of neutrality.

that a state remain morally neutral should not disappear because a law creates only a small burden on the exercise of a fundamental right.

B. The Social Meaning Test

In order to ensure state neutrality, the undue burden standard should include an examination into the motivation behind any legislative act that affects a fundamental right. Motivation analysis plays an important part in our jurisprudence. The Supreme Court regularly employs motivation analysis in cases involving the Establishment Clause,[128] race discrimination,[129] and gender discrimination.[130] Furthermore, motivation analysis provides a necessary check on the abuse of legislative power. The judicial invalidation of a law sends a warning signal that may convince a legislature to abandon a law completely.[131] Finally, upholding a law that carries an illicit motive merely legitimizes the legislature's disguised attempt to curtail fundamental rights.[132]

To ascertain legislative motive, a court can look either to the subjective intent of the legislature[133] or to the objective message that a legislative

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128. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38 (1985) (striking down an Alabama school prayer and meditation statute); Lynch v. Donelly, 465 U.S. 668 (1984) (upholding City of Pawtucket's display of Christmas creche).

129. *See, e.g.*, Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977) (upholding a governmental zoning decision because challengers failed to show racially discriminatory intent).

130. *See, e.g.*, Califano v. Goldfarb, 420 U.S. 199 (1977) (striking down federal statute because Court found it to be motivated by Congress' discriminatory stereotypes).

131. *See* Theodore Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36, 116 (1977).

132. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 822-23 (2d. ed. 1988) (noting that validating such a law would "serve to legitimate a transparent and potentially chilling abridgment of individual liberty"). Commentators criticize motivation analysis on several grounds. First, commentators argue that it is too difficult to ascertain legislative motives. Second, commentators argue that even if such motives are discovered, invalidation of a law is futile because lawmakers can simply pass similar legislation. *See* John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1212-17 (1970). This Note proposes a modified undue burden standard that answers these two grounds of criticism. The proposed test incorporates a social meaning test, which should more accurately assess legislative motives. Further, because the proposed test does not give any weight to the stated purpose of a law, lawmakers should find it difficult to mask a similar law with a new, contrived purpose.

Commentators also argue that disutility results from invalidating a statute that might have other, legitimate uses. *Id.* This Note proposes that the benefit of invalidating a statute that affects fundamental rights and reflects moral coercion outweighs the administrative difficulty of reenacting those parts of a statute which are morally neutral.

133. *See, e.g.*, Washington v. Davis, 426 U.S. 229 (1976).

act sends to the citizens of the state.[134] The first approach proves difficult for two reasons. First, a court must conduct an inquiry into the surrounding circumstances of a legislative act for often elusive evidence of any improper motive.[135] Second, a legislature may simply conceal its actual motive by articulating a permissible alternative motive.[136]

The second approach to ascertaining legislative motives, which Professor Laurence Tribe calls the "social meaning" test,[137] offers greater ease and more consistent results. This test considers the view of an objective observer familiar with the legislative history and application of the statute.[138] If that observer would perceive a legislative act as conveying an improper message or motive, then the act violates the Constitution.[139] Thus, the social meaning test prevents the legislature from concealing illicit motives behind contrived but permissible ones.

C. *A Modified Undue Burden Standard*

Courts applying the undue burden standard should incorporate the social meaning test as a second step of analysis to determine whether a law reflects moral neutrality. Thus, where a legislative act affects a fundamental right, a court employing the modified undue burden standard would ask two questions. First, does the state's act create a substantial obstacle to the exercise of the fundamental right? Second, would the reasonably well-informed observer perceive the act as endorsing or disapproving of the

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134. *See, e.g., Wallace*, 472 U.S. at 76 (O'Connor, J., concurring in the judgment); *see also* TRIBE, *supra* note 132, at 820-21.

135. In *Arlington Heights*, 429 U.S. at 267-68, the Court identified six potential sources of evidence of discriminatory intent: (1) historical background; (2) specific sequence of events leading up to the act; (3) departures from normal procedure; (4) departures from normal substance; (5) legislative or administrative history; and (6) testimony of individual legislators. *Id.*

136. *See id.* at 270-71 n.21. The legislature may show that it would have taken the same action notwithstanding the improper motive. *Id.* This allows the legislature, in afterthought, to conjure up a valid motive.

137. *See* TRIBE, *supra* note 132, at 820.

138. *See Wallace*, 472 U.S. at 76 (O'Connor, J., concurring in the judgment) ("The relevant issue is whether an objective observer, acquainted with the text, legislative history and implementation of the statute, would perceive it as a state endorsement . . . ."); *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring) (reiterating *Wallace* test); City of Memphis v. Greene, 451 U.S. 100, 147 (1981) (Marshall, J., dissenting) ("Respondents are being sent a clear, though sophisticated, message that because of their race, they are to stay out of [an] all-white enclave . . . ."); *see also* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (advocating the social meaning test in equal protection cases involving race).

139. *See, e.g., Wallace*, 472 U.S. at 70 (noting that government attempt to convey message of religious preference violates the religious liberty of nonadherents).

exercise of the fundamental right? If the court answers "yes" to either prong of this modified test, the act would constitute an undue burden.

This approach acknowledges that a state has certain value-neutral interests which may require a slight infringement upon a fundamental right. However, at the same time, it prevents the state from using the undue burden standard as a means to abrogate its citizens' exercise of their fundamental rights.[140]

V. APPLICATION OF THE MODIFIED UNDUE BURDEN STANDARD: THREE EXAMPLES

A. Abortion

In *Casey v. Planned Parenthood of Southeastern Pennsylvania*,[141] the Supreme Court upheld an abortion regulation including an informed consent requirement and a twenty-four-hour waiting period requirement.[142] Although the provisions survived under the undue burden standard applied in *Casey*,[143] the same provisions probably would not survive under the modified undue burden standard outlined above.[144]

1. The Informed Consent Requirement

Section 3205(a)(1) of the Pennsylvania penal code requires a physician to inform a woman of the medical risks of abortion and childbirth and of the probable gestational age of the unborn child.[145] Section 3205(a)(2)

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140. The requirement that a state remain morally neutral does not necessarily mean that a state may not encourage an atmosphere of moral responsibility. *See* Dworkin, *supra* note 122. Dworkin argues that while states may maintain a moral environment in which people take decisions about life, death, and abortion seriously, a state may not enforce a majoritarian view about the sanctity of human life. *Id.* at 426-28. However, he also expresses concern about the fine line between the legitimate goal of promoting responsibility and "the illegitimate goal of coercion." *Id.* at 432. The modified undue burden test would permit suggestions of moral responsibility, but not moral coercion. Under the test, a state can achieve neutrality *and* promote responsibility by communicating the strong arguments on both sides of a moral debate.

141. 112 S. Ct. 2791 (1992). See *supra* notes 68-89 and accompanying text for a detailed discussion of *Casey*.

142. 112 S. Ct. at 2821-26.

143. *See supra* Part III.A.

144. *See supra* Part IV.C.

145. Section 3205(a)(1) provides:

> (a) General rule.-No abortion shall be performed or induced except with the voluntary and informed consent of the woman upon whom the abortion is to be performed or induced. Except in the case of a medical emergency, consent to an abortion is voluntary and informed if and only if:

requires a physician to inform the woman about potential child support and medical benefits available to her should she choose to carry the pregnancy to term, and to offer the woman printed materials from the Pennsylvania Department of Health.[146] The materials include: detailed information about agencies which provide pregnancy, childbirth, and adoption assistance; the number for a twenty-four-hour hotline to call for assistance in locating an agency; and pictures of the probable anatomical and physiological characteristics of a fetus from the moment of conception.[147]

Using the original undue burden standard, the authors of the *Casey* joint opinion found both sections of the informed consent provision constitutional.[148] The joint opinion found that, in general, the provisions gave truthful, nonmisleading information about the nature and risks of the abortion procedure.[149] The joint opinion admitted that the Health Department materials displayed a state preference for childbirth, but found such a preference permissible[150] because it did not deprive a woman of the ultimate abortion decision.[151]

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(1) At least 24 hours prior to the abortion, the physician who is to perform the abortion or the referring physician has orally informed the woman of:
(i) The nature of the proposed procedure or treatment and of those risks and alternatives to the procedure or treatment that a reasonable patient would consider material to the decision of whether or not to undergo the abortion.
(ii) The probable gestational age of the unborn child at the time the abortion is to be performed.
(iii) The medical risks associated with carrying her child to term.

18 PA. CONS. STAT. ANN. § 3205(a)(1) (Supp. 1993).

146. Section 3205(a)(2) provides:

(2) At least 24 hours prior to the abortion, the physician who is to perform the abortion or the referring physician, or a qualified physician assistant, health care practitioner, technician or social worker to whom the responsibility has been delegated by either physician, has informed the pregnant woman that:
(i) The department publishes printed materials which describe the unborn child and list agencies which offer alternatives to abortion and that she has a right to review the printed materials and that a copy will be provided to her free of charge if she chooses to review it.
(ii) Medical assistance benefits may be available for prenatal care, childbirth and neonatal care, and that more detailed information on the availability of such assistance is contained in the printed materials published by the department.
(iii) The father of the unborn child is liable to assist in the support of her child, even in instances where he has offered to pay for the abortion. In the case of rape, this information may be omitted. . . .

18 PA. CONST. STAT. ANN. § 3205(a)(2) (Supp. 1993).

147. *See id.* § 3208(a) (Supp. 1993).

148. 112 S. Ct. at 2821-25.

149. *Id.* at 2823.

150. *Id.* at 2823-24.

151. *Id.* at 2819.

Under the modified undue burden standard, only section 3205(a)(1) of the informed consent provision would be upheld as constitutional. Applying the first prong of the modified undue burden standard, a court would find, as did the *Casey* court,[152] that the regulation does not create an impermissible amount of interference with the right to have an abortion. The provision involves the receipt of information rather than an economic or physical barrier to abortion. Although the information may make a woman feel pressure from the state not to have an abortion, it probably will not alter her decision. Thus, the provision probably does not create an undue amount of interference with the right to abortion.

Applying the second prong of the standard, a court would ask whether the reasonably well-informed, objective observer would view the provision as endorsing or disapproving of abortion? A court would probably find that section 3205(a)(1)[153] reflects a position of neutrality towards the abortion decision, and, therefore, a value-neutral interest in the health of the mother, because the required information parallels other medical informed consent provisions. On the other hand, a court would probably find that section 3205(a)(2)[154] reflects state disapproval of abortion. The second provision requires distribution of detailed information about childbirth benefits and assistance and, through pictures, implicitly reflects a theory that life begins at conception. In order to demonstrate a more neutral position than this, a state could offer additional information about the benefits of abortion for a woman in emotional, physical, or financial distress and about the absence of certain human characteristics in a fetus. Section 3205(a)(2) does not offer such balanced information. Thus, because a reasonable observer would probably perceive the informed consent provision as disapproving of abortion, a court would find that section 3205(a)(2) imposes an undue burden on a woman seeking to undergo an abortion.

2. The Twenty-Four-Hour Waiting Period

Sections 3205(a)(1) and (a)(2) also require a physician to provide informed consent counseling at least twenty-four hours before the abortion procedure. This requirement means that a woman must make two trips to an abortion clinic.[155] Under the *Casey* undue burden standard, a court

152. *Id.* at 2825-26.

153. See *supra* note 145 for the text of section 3205(a)(1).

154. See *supra* note 146 for the text of section 3205(a)(2).

155. The New York Times recently reported that some abortion clinics in Pennsylvania have begun using taped messages played to women over the telephone to meet the twenty-four-hour requirement.

might find that the twenty-four-hour delay creates an undue burden because a woman may incur additional financial and time costs, as well as twice the emotional trauma resulting from harassment by protestors at the abortion clinic.[156] Indeed, in *Casey*, the joint opinion acknowledged that the twenty-four-hour requirement presents a "closer question" than does the informed consent provision.[157] Nonetheless, the *Casey* Court found that the state may persuade a woman to choose childbirth by imposing upon her such additional costs and mental suffering.[158]

Under the modified undue burden standard, however, a court would ask a second question: Would the reasonably well-informed, objective observer view the delay as either encouraging or discouraging abortion? An observer might view the delay as neutral because it gives a woman more time to think through her decision. However, the observer might also question why the state does not require such a delay before other medical procedures, especially those which involve serious or life-threatening risks. Based on the additional costs to women seeking abortions and the risks of harassment by abortion protestors, as well as the state's unique treatment of the abortion procedure, the reasonable observer would probably conclude that the delay requirement reflects the state's disapproval of abortions. Thus, the court would find that the twenty-four-hour delay provision creates an undue burden as defined by the modified test.

B. Grandparent Visitation Statutes

In *Herndon v. Tuhey*,[159] the Supreme Court of Missouri extended the undue burden standard to the family law context[160] to uphold a grandparent visitation statute as constitutional.[161] Due to the high divorce rate and the increased political power of the elderly, most states have enacted some form of grandparent visitation statute.[162] Grandparent visitation statutes

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Although this strategy does meet the letter of Pennsylvania's abortion regulation, abortion opponents have already raised claims that this does not comply with "the spirit of the law." *Pennsylvania Abortion Foes Say Law Is Being Undermined*, N.Y. TIMES, Sept. 26, 1994, at A14.

156. See *supra* note 93 for a discussion of the procedural hurdles confronting a woman seeking an abortion.

157. *Casey*, 112 S. Ct. at 2825.

158. *Id.* at 2825-26.

159. 857 S.W.2d 203 (Mo. 1993).

160. *Id.* at 208-09.

161. *Id.* at 210.

162. *See* Judith L. Shandling, Note, *The Constitutional Constraints on Grandparents' Visitation Statutes*, 86 COLUM. L. REV. 118, 119-22 (1986). For more discussion of grandparent visitation statutes, see Kathleen S. Bean, *Grandparent Visitation: Can the Parent Refuse?*, 24 J. FAM. L. 393 (1985);

provide a mechanism for grandparents to compel visitation with their grandchildren against parents' wishes.[163] Thus, the statutes give rise to a conflict between the childrearing interests of a parent and the police power of the state.

The United States Supreme Court recognizes that parents have a fundamental right to raise their children as they deem appropriate.[164] However, the Court also acknowledges a state's countervailing *parens patriae* power to intervene in the parent-child relationship when necessary to protect the welfare of the child.[165] Traditionally, before a state may invoke the *parens patriae* power, the state must make a showing of neglect or harm to a child.[166] A state may not intervene merely because it disagrees with a parent's particular childrearing decision.[167]

In compliance with the *parens patriae* requirement of harm, many grandparent visitation statutes allow compelled visitation only in a narrow set of circumstances, such as the death or divorce of a child's parents.[168]

Edward M. Burns, *Grandparent Visitation Rights: Is It Time for the Pendulum to Fall?* 25 FAM. L.Q. 59 (1991); Samuel V. Schoonmaker et al., *Constitutional Issues Raised by Third-Party Access to Children*, 25 FAM. L.Q. 95 (1991).

163. *See* Shandling, *supra* note 162, at 118.

164. *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (holding unconstitutional a statute forbidding children to learn German because it violated a parent's right to "establish a home and bring up children"); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925) (holding unconstitutional a statute requiring public education for all children because it unreasonably interfered with the right of parents and guardians to direct the development of their children); Moore v. East Cleveland, 431 U.S. 494, 499 (1977) (plurality opinion) (striking down a zoning statute because it limited a family's right of self-definition).

The Court applies strict scrutiny when examining statutes that infringe upon the fundamental right to raise children. *See Moore*, 431 U.S. at 499 (citing Poe v. Ullman, 367 U.S. 497, 554 (1961) (Harlan, J., dissenting)) ("[W]hen the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation.").

165. *See Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156, 1198-1202 (1979-1980) (discussing the origin and uses of the *parens patriae* power).

166. Stanley v. Illinois, 405 U.S. 645, 649-51 (1972); *see also Meyer*, 262 U.S. at 400 (stating that "[m]ere knowledge of the German language cannot reasonably be regarded as harmful"); Prince v. Massachusetts, 321 U.S. 158, 168-69 (1944) (stating that legislation falls within the state's police power if "appropriately designed to reach [the state's concerns]"; Wisconsin v. Yoder, 406 U.S. 205, 230 (1972) ("This case, of course, is not one in which any harm to the physical or mental health of the child . . . has been demonstrated . . . .").

167. *See Yoder*, 406 U.S. at 229-34 (discussing and rejecting the state's argument that it could use its *parens patrie* power to force Amish children to attend public school against their parents' wishes, where no showing of harm to children was shown); *Meyer*, 262 U.S. at 401 ("That the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally, and morally, is clear; but the individual has certain fundamental rights which must be respected.").

168. *See* Shandling, *supra* note 162, at 119-20.

A statute which does not require a showing of harm may violate a parent's fundamental right to raise a child as that parent sees fit. For instance, the Supreme Court of Tennessee recently held that the application of a grandparent visitation statute was unconstitutional where both parents maintained continuous custody of their child and were generally capable as parents.[169]

In *Herndon v. Tuhey*,[170] the Supreme Court of Missouri used the undue burden standard to uphold a grandparent visitation statute. *Herndon* resulted from an ongoing dispute between Ann and Randy Tuhey and Robert and Sara Herndon—the parents and grandparents, respectively, of a child named Cody.[171] Prior to the dispute, Randy Tuhey worked for the Herndons and Cody spent a substantial amount of time with his grandparents.[172] These relations eventually deteriorated and a family feud ensued.[173] After a series of family conflicts and lawsuits, the Herndons sued to establish visitation rights with Cody.[174] The Herndons sued under Missouri's grandparent visitation statute,[175] which allows visitation when a child resides with intact and capable parents if the visitation serves the "best interests of the child."[176]

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169. Hawk v. Hawk, 855 S.W.2d 573 (Tenn. 1993). Tennessee's grandparent visitation statute allowed visitation based only on the court's determination of the "best interests of the child." *Id.* at 576; *see also id.* at 582. In striking down the statute, the *Hawk* court frequently cited federal constitutional law, *id.* at 578-81, but ultimately invoked the privacy right in Article I, § 8 of the Tennessee Constitution to invalidate application of the statute to the circumstances presented in *Hawk*. *Id.* at 582. Applying strict scrutiny, the court found that "without [some showing of] a substantial danger of harm to the child, a court may not constitutionally impose its own subjective notions of the 'best interests of the child.'" *Id.* at 579.

But see King v. King, 828 S.W.2d 630 (Ky. 1992), *cert. denied*, 113 S. Ct. 378 (1992), where the court recognized a fundamental right of grandparents to visit their grandchildren. The Kentucky Supreme Court weighed the constitutional rights of the grandparent, the parents, and the child in upholding a statute similar to those in *Hawk* and *Herndon*. *Id.* at 632. The dissent in *King* took issue with the notion that grandparents have a fundamental right to visit their grandchildren. Justice Lambert argued, "None would seriously argue . . . that the state possesses the power to redistribute the infant population in such a manner simply because of its perception that a child would be better off somewhere else." *Id.* at 634 (Lambert, J., dissenting).

170. 857 S.W.2d 203 (Mo. 1993).

171. *Id.* at 205.

172. *Id.*

173. *Id.*

174. *Id.* at 206.

175. MO. REV. STAT. § 452.402 (Supp. 1992).

176. Section 452.402 provides:

> 1. The court may grant reasonable visitation rights to the grandparents of the child and issue any necessary orders to enforce the decree. The court may grant grandparent visitation when . . . (3) a grandparent is unreasonably denied visitation with the child for a period exceeding

In deciding the case, the *Herndon* court recognized both the parents' fundamental right of childrearing and the state's right to interfere in the parent-child relationship.[177] Rather than applying strict scrutiny based on the presence of the fundamental right,[178] the court applied the undue burden standard.[179] The court found that, even in the absence of harm to a child, the statute did not impose a "substantial encroachment" on the fundamental right of parenting.[180] Thus, the court upheld the statute as constitutional.[181]

The *Herndon* decision allowed the state to intrude upon the fundamental right of childrearing where the state disagreed with the parental decision to deny grandparent visitation. Had the court used strict scrutiny rather than the undue burden standard, the state would have had to justify the intrusion with a showing of harm to the child.[182] Instead, the undue burden standard enabled the state to avoid this requirement.[183] The burden shifted to the Tuheys to show that the statute unduly burdened their parenting rights.[184]

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90 days.

2. The court shall determine if the visitation by the grandparent would be in the child's best interests or if it would endanger the child's physical health or impair his emotional development. Visitation may only be ordered when the court finds such visitation to be in the best interests of the child. The court may order reasonable conditions or restrictions on grandparent visitation.

MO. REV. STAT. § 452.402 (Supp. 1992).

177. 857 S.W.2d at 207.

178. Under strict scrutiny, Missouri could justify the statute only by showing that it prevents harm to a child. *See supra* notes 166-67 and accompanying text (discussing the requirement of harm).

179. 857 S.W.2d at 208. The court found authority for the standard in *Zablocki*, 434 U.S. 374 (1978), the reasoning in Justice O'Connor's dissent in *Akron I*, 462 U.S. 416, 452-66 (1983), and *Casey*, 112 S. Ct. 2791 (1992).

180. 857 S.W.2d at 209. The court distinguished the intrusion of grandparent visitation on parenting decisions from other, more serious intrusions. *Id.* According to the court, more serious intrusions occur where the state dictates what school a child must attend or what language a child must learn, or if the state prohibits certain family members from living together based on an unreasonable definition of a family. *Id.*

The trial court granted extensive visitation to the Herndons, including two Saturdays per month with one overnight stay, five hours on Thanksgiving (or an alternate day), five hours on December 23rd and two days over the winter holidays, and one week during the summer. *Id.* at 206. The court also ordered the Tuheys to notify the Herndons of all school, social, and athletic activities in which Cody participates and which grandparents might want to attend. *Id.* The Supreme Court of Missouri found this visitation order excessive, but maintained that the statute itself was constitutional. *Id.* at 210.

181. *Id.*

182. *See supra* notes 166-67 and accompanying text (discussing requirement of harm to a child); *see also Hawk*, 855 S.W.2d at 580-81 (discussing United States Constitution's requirement of harm to a child before allowing state intrusion).

183. The court would apply strict scrutiny only if it found that the statute constituted an undue burden. Because the court concluded that the statute did not constitute an undue burden, the court applied rational basis review and upheld the statute. 857 S.W.2d at 210.

184. *Id.* at 208-09.

The problem with this state intrusion lies in its interference with the parental right to shape a child's development.[185] Parents, grandparents, and judges will disagree about the best moral and educational influences for a child.[186] The fundamental right of childrearing ensures that a parent holds the ultimate decisionmaking authority.[187] By forgoing the minimum requirement of harm to a child prior to state intrusion, the state may effectively appropriate any childrearing decision.[188]

Application of the modified undue burden standard would probably change the result in *Herndon*. The modified test would ask two questions: First, does the state act create a substantial obstacle to the exercise of a parent's fundamental right? Second, would the reasonably well-informed, objective observer perceive the act as approving or disapproving of the exercise of the parent's fundamental right?[189] The *Herndon* court completed the first step in the inquiry and found that the amount of interference caused by the visitation statute did not create an undue burden on the Tuheys' childrearing rights.[190]

Under the second step in the modified standard, however, a court would probably find that the objective observer would perceive the statute as projecting state disapproval of the Tuheys' exercise of their fundamental childrearing rights. Because the statute allows state interference with the decision of two presumably capable parents, the statute effectively vetoed the Tuheys' parenting decision.[191] The statute reflects a moral, value-based position that grandparent visitation serves a child's best interests, even when the child's parents object.[192] Thus, the statute would constitute

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185. *See* cases cited *supra* note 164.

186. *See* Bean, *supra* note 162, at 446-47. Professor Bean argues:

> Some parents and judges will not care if children are physically disciplined by the grandparents; some parents and judges will not care if the grandparents teach children a religion inconsistent with the parents' religion; some judges and parents will not care if the children are exposed to or taught racist beliefs or sexist beliefs . . . [b]ut some parents and some judges will care. Between the two, the parents should be the ones to choose not to expose their children to certain people or ideas . . . .

Id.

187. *See* cases cited *supra* note 164 and accompanying text.

188. *See Hawk*, 855 S.W.2d at 580 (stating that the requirement of harm constitutes "the sole protection that parents have against pervasive state interference in the parenting process").

189. See *supra* Part IV for discussion of a modified undue burden test.

190. 857 S.W.2d at 209 (holding that the "magnitude of the infringement" did not rise to the level of a constitutional violation).

191. *See* Bean, *supra* note 162, at 441, 445-46. Bean argues that if the state delegates to parents the authority to raise a child as they see fit, except when the state disagrees with their parenting choices, the delegation creates no authority. *Id.* at 441.

192. Had the statute provided for grandparent visitation in the event of the death or divorce of a parent, or some other showing of harm to the child, the social meaning of the statute might change. An

an undue burden under the second prong of the modified test, and the court would apply strict scrutiny to the statute.[193]

C. *The Right to Die*

In *Cruzan v. Director, Missouri Department of Health,*[194] the United States Supreme Court held that Missouri's "clear and convincing" evidentiary requirement[195] did not violate an incompetent patient's[196] right to die.[197] The Court avoided the issue of whether an incompetent patient possesses a fundamental right to die,[198] and merely assumed that the patient had a liberty interest in controlling the decision to withdraw life-support mechanisms.[199] The Supreme Court of Missouri found that statements Nancy Cruzan made while competent that she would not want to live as a "vegetable," coupled with similar testimony from her family, did not constitute clear and convincing evidence that Nancy wanted to die.[200] Nancy would have had to appoint a surrogate decisionmaker in order to create clear and convincing evidence of her desire to withdraw life-sustaining treatment.[201] Although Missouri's clear and convincing

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observer might find that the statute merely prevents harm to the child by ensuring that each child has a minimum level of necessary adult support. The statute would no longer appear to replace a parent's fundamental right to raise a child as that parent deems best.

193. *See* discussion of strict scrutiny *supra* note 11.

194. 497 U.S. 261 (1990).

195. The Court defined clear and convincing evidence as:

> proof sufficient to persuade the trier of fact that the patient held a firm and settled commitment to the termination of life supports under the circumstances like those presented, [or] . . . evidence which produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.

Id. at 285 n.11 (citations omitted).

196. The use of "incompetent" here indicates a person in a "persistent vegetative state." A person in a persistent vegetative state "exhibits motor reflexes but evinces no indications of significant cognitive function." *Id.* at 266.

197. *Id.* at 280-82. Many variations of the right to die exist. Patients involved in right-to-die disputes vary significantly in their level and history of competency. Thomas A. Eaton & Edward J. Larson, *Experimenting with the "Right to Die" in the Laboratory of the States*, 25 GA. L. REV. 1253, 1255 (1991). Medical prognoses also evince wide variances from one right-to-die case to the next. *Id.* Possible life-sustaining treatments include blood transfusions, nutrition and hydration, chemotherapy, surgery, and a variety of other measures. *Id.* ("There is no 'typical' case."). The *Cruzan* case and this example address only the right of an incompetent patient in a persistent vegetative state to refuse artificial nutrition and hydration.

198. *Cruzan*, 497 U.S. at 277-81.

199. *Id.* at 279. A court will subject state action that affects mere liberty interests to the least level of scrutiny, rational basis review. See *supra* note 11 for a discussion of rational basis review.

200. 497 U.S. at 285-87.

201. *Id.* at 287 n.12, 289-92 (O'Connor, J., concurring).

evidentiary requirement created a barrier against the withdrawal of treatment,[202] the United States Supreme Court nonetheless upheld the requirement.[203] The Court stated that Missouri's unqualified interest in the preservation of human life outweighed any hardship imposed by the requirement upon Nancy's right to die.[204]

The *Cruzan* decision did not settle whether an incompetent person's right to die constitutes a fundamental right;[205] the Court also did not apply the undue burden standard to such a right. Nonetheless, the *Cruzan* case presents an excellent factual situation with which to demonstrate the utility of the modified undue burden standard in the right-to-die context. In fact, such a hypothetical case may well arise. Many states currently recognize the right to die as fundamental.[206] Such states usually ground the fundamental right to die in the right to privacy guaranteed by the federal Constitution[207] or the state's own constitution.[208] Furthermore, the United States District Court for the Western District of Washington, a Michigan circuit court, and several Michigan Supreme and Appeals Court justices have already applied the *Casey* undue burden standard in right-to-die cases addressing the issue of assisted suicide.[209]

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202. See *supra* note 195 for the definition of clear and convincing evidence.

203. 497 U.S. at 286-87.

204. *Id.* at 280-82.

205. *See supra* notes 198-99 and accompanying text.

206. *See, e.g., In re* Quinlan, 355 A.2d 647, *cert. denied sub nom.* Garger v. New Jersey, 429 U.S. 922 (1976) (recognizing a right to die in the United States Constitution's right to privacy).

207. *See* Gray v. Romeo, 697 F. Supp. 580, 584-86 (D.R.I. 1988); Leach v. Akron Gen. Med. Ctr., 426 N.E.2d 809, 814 (Ohio C.P. 1980); *In re* Severns, 425 A.2d 156, 158 (Del. Ch. 1980); Satz v. Perlmutter, 379 So. 2d 359, 360 (Fla. 1980); Superintendent of Belchertown State School v. Saikewicz, 370 N.E.2d 417, 424 (Mass. 1977); *Quinlan*, 355 A.2d at 663-64. *But cf.* Thomas W. Mayo, *Constitutionalizing the "Right to Die,"* 49 MD. L. REV. 103 (1990) (arguing against creating a fundamental right to die).

208. *See In re* Browning, 568 So. 2d 4, 10 (Fla. 1990); Rasmussen v. Fleming, 741 P.2d 674, 682 (Ariz. 1987); Bouvia v. Superior Court, 179 Cal. App. 3d 1127, 1137 (1986); *In re* L.H.R., 321 S.E.2d 716, 722 (Ga. 1984); *In re* Colyer, 660 P.2d 738, 742 (Wash. 1983).

209. *See* Compassion in Dying v. State of Washington, 850 F. Supp. 1454, 1462-64 (W.D. Wash. 1994); People v. Kevorkian, 527 N.W.2d 714, 746 (Mich. 1994) (dissenting opinions of Justices Levin and Mallett); Hobbins v. Attorney General, 518 N.W.2d 487, 499 (Mich. App. 1994) (dissenting opinion of Judge Shelton); Hobbins v. Atty. General, No. 93-306-178CZ, 1993 WL 276833, at *9 (Mich. Cir. Ct. 1993).

In these cases, those judges and justices who applied the undue burden standard had an easy analysis because the statutes at issue completely prohibited assisted suicide. Therefore, they quickly found that the statutes constituted an undue burden. *See Compassion in Dying*, 850 F. Supp. at 1465; *Kevorkian*, 527 N.W.2d at 751 (Mallet, J., dissenting); *Hobbins*, 518 N.W.2d at 499 (Shelton, J., dissenting). However, courts may soon be faced with regulatory barriers that simply make the exercise of the right to die more difficult, such as the clear and convincing evidentiary standard at issue in *Cruzan*. In such cases, courts will apply the undue burden analysis to weigh the extent of the infringement created by

Applying the *Casey* undue burden standard to *Cruzan*, a court would most likely find that Missouri's clear and convincing evidentiary requirement does not create an undue burden on the fundamental right to die. Arguably, the clear and convincing evidence requirement creates a difficult hurdle for a person who wishes to exercise the right to die. Most Americans do not execute formal living wills or create sufficient oral evidence to overcome the requirement.[210] Despite this common lack of preparation, the actual burden of executing a formal living will does not present a substantial obstacle against exercising one's right to die. A living will typically entails a simple notarized statement requesting that no heroic measures be taken to extend an incapacitated patient's life.[211] On the other hand, a challenger might also argue that the very existence of a prejudicial evidentiary requirement necessarily imposes an undue burden upon the fundamental right to die. Nonetheless, a court would probably find that such an evidentiary hurdle does not create an undue burden because, within certain limits, a state may express its interest in the preservation of human life by imposing procedural requirements upon the exercise of a fundamental right.[212]

Applying the modified undue burden standard would yield the opposite result. A court would ask a second question: Would an objective observer view the clear and convincing evidentiary requirement as demonstrating a value-based approval or disapproval of an incompetent patient's exercise of the right to die? On its face, an observer might view the Missouri requirement as value-neutral because it seeks to discover the true wishes of the incompetent patient. However, Missouri's clear and convincing requirement does not follow normal evidentiary practice. The requirement shifts the risk of error to the incompetent patient and constitutes a heightened, "markedly asymmetrical"[213] standard of evidence. Courts normally impose the clear and convincing requirement upon states before they deprive their citizens of their liberty interests, rather than upon citizens

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a regulation. Thus, the following analysis of *Cruzan* under both the *Casey* and the modified undue burden standard is designed to highlight the neutrality problems that will likely arise in future right-to-die cases.

210. *See Cruzan*, 497 U.S. at 323-24 (Brennan, J., dissenting).

211. BLACK'S LAW DICTIONARY 1599 (6th ed. 1990); *see also* 497 U.S. at 291-92 (O'Connor, J., concurring).

212. *See* Casey, 112 S. Ct. 2791, 2825 (1992) (stating that "under the undue burden standard a State is permitted to enact persuasive measures which favor childbirth over abortion, even if those measures do not further a health interest").

213. *Cruzan*, 497 U.S. at 316 (Brennan, J., dissenting).

before they can exercise their fundamental rights.[214] In order to reflect neutrality, an evidentiary requirement would have to distribute evenly the risk of error between the individual and the state.

In addition, the state of Missouri admitted that it sought to trump an individual's right to die when it asserted an *unqualified* interest in the preservation of human life.[215] A neutral state interest would more clearly project a desire for accuracy in determining a patient's wishes, rather than a desire to override a patient's wishes if those wishes contradict the state's interests. Thus, based on the atypical use of the clear and convincing evidentiary requirement and the explicit state intent to override an individual's right to die, an objective observer would probably find that the state's legislation did not assume a neutral stance with regard to one's exercise of the right to die. Therefore, under the modified undue burden standard, a court would find that the clear and convincing evidentiary requirement constitutes an undue burden on the fundamental right to die.

V. CONCLUSION

The *Casey v. Planned Parenthood* decision[216] created a new method by which courts can analyze state regulations affecting fundamental rights. Prior to *Casey*, the Supreme Court did not tolerate any amount of state interference when it decided the constitutionality of regulations that directly affected fundamental rights.[217] The *Casey* decision represents a shift towards allowing a certain degree of direct state interference with fundamental rights. The lack of precedent to support this change in approach shows that the *Casey* undue burden standard does not rest on solid footing.[218] Nonetheless, lower courts faced with determining the constitutionality of abortion regulations currently use the undue burden standard,[219] and several courts have applied the undue burden standard to

214. *Id.* at 319-20 (Brennan, J., dissenting); *see also* Mark E. Haddad, Cruzan *and the Demands of Due Process*, 8 ISSUES L. & MED. 205 (1992) (arguing that states should not follow the clear and convincing requirement).

215. Haddad, *supra* note 214, at 205, 208. This goal of protecting human life under any condition reflects Missouri's belief that the intrinsic value of human life outweighs the derivative value of an individual's life. *See* Dworkin, *supra* note 122, at 406. Professor Dworkin points out that the debate over the right to die turns on whether a state has a legitimate interest in the detached value of human life. If it does possess such an interest, then the state can enact laws prohibiting people from ending their lives. *Id.* at 396-97.

216. 112 S. Ct. 2791 (1992).

217. *See supra* notes 8-51 and accompanying text.

218. *See supra* Part II.C.

219. *See supra* notes 90-97 and accompanying text.

cases involving nonabortion fundamental rights.[220] This new use of the undue burden standard threatens the protection historically afforded fundamental rights. Under traditional fundamental rights analysis, a state may not seek to foster moral conformity through regulations affecting fundamental rights.[221] Under the *Casey* undue burden standard, however, states may foster moral conformity, so long as the state does not create an undue burden on the exercise of a fundamental right.[222]

Two solutions exist. The Supreme Court could abandon use of the undue burden standard in the abortion context and return to its use of strict scrutiny. However, given the current moderate trend in the Court,[223] a return to strict scrutiny does not appear likely. Alternatively, the Supreme Court and lower courts could modify the undue burden standard as it currently exists.

In its current form, the undue burden standard allows a state to coerce citizens into adopting the state's position on moral, value-based issues, even if those moral issues involve fundamental rights. This moral coercion contradicts the theory underlying the historical sanctity of fundamental rights—rights which are protected from the political process and left to the individual.[224] By contrast, the modified undue burden standard proposed herein allows state regulation of fundamental rights only if that regulation reflects moral neutrality.[225] By ensuring that a state will act neutrally when it regulates fundamental rights, the modified undue burden standard protects individual moral autonomy against changing political tides. The Supreme Court and lower courts should replace the *Casey* undue burden standard with the proposed modified undue burden standard in order to retain the protection traditionally afforded fundamental rights.

Valerie J. Pacer

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220. *See* cases cited *supra* notes 101, 103, 209.

221. *See supra* Part IV.A.

222. *See supra* notes 98-106 and accompanying text.

223. *See* Sullivan, *supra* note 4, at 109-12.

224. *See* West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

225. See *supra* Part IV for a detailed discussion of the modified undue burden standard, and Part V for examples applying the modified standard; *see also* note 140 (explaining that the modified standard allows a goal of moral responsibility but not moral conformity).