NOTES

The *Casey* Undue Burden Standard: Problems Predicted and Encountered, and the Split Over the *Salerno* Test

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* Member, Third Year Class. B.A., Mills College, 1993. I dedicate this Note to the talented editorial board members, each of whom has added a unique connotation to my understanding of the word "colleague."

Introduction

In June 1992, the United States Supreme Court in *Planned Parenthood v. Casey*[1] struck down the trimester framework of *Roe v. Wade*[2] and replaced it with an undue burden standard to test the constitutionality of state abortion regulations.[3] Under this new standard, a state restriction on abortion is invalid if it has "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[4] Although one of the explicit purposes of the *Casey* joint opinion in promulgating the undue burden standard was to provide clarification to the lower courts,[5] these courts today remain largely confused about the standard's requirements and application.

After the *Casey* decision, several commentators predicted that the lower court application of the undue burden standard would be troublesome, and criticism of the standard became widespread.[6] These scholars argued primarily that *Casey* failed to provide sufficient guidance and methodology for using the new standard and judges would be allowed too much discretion in its application. Commentators predicted these problems would make the undue burden standard unworkable in practice, engender confusion in the lower courts, increase abortion litigation, result in judicial bias and speculation, and create arbitrary and inconsistent outcomes. In fact, the greatest application problem that arose was unpredicted: the threshold question of whether *Casey* overruled the traditional *Salerno* test for determining the facial constitutionality of state abortion regulations.

This Note analyzes the *Casey* undue burden standard as implemented by the lower courts in abortion law cases,[7] reviews the accuracy of the commentators' predictions, and examines the circuit court split over the application of the undue burden standard and the *Salerno* test. Part I places the *Casey* undue burden standard in the framework of developing constitutional law regarding a woman's right

1. 505 U.S. 833 (1992).
2. 410 U.S. 113 (1973).
3. *Casey*, 505 U.S. at 869-79.
4. *Id.* at 877.
5. *See infra* notes 99-100 and accompanying text.
6. *See infra* notes 99-122 and accompanying text.
7. The undue burden standard has been used in contexts other than abortion regulation. *See generally* Sandra L. Tholen & Lisa Baird, Note, *Con Law Is as Con Law Does: A Survey of* Planned Parenthood v. Casey *in the State and Federal Courts*, 28 LOY. L.A. L. REV. 971, 1029-36 (1995).

to choose. Part II reviews scholarly predictions of problems anticipated during application. Part III surveys the lower court decisions applying *Casey*'s undue burden standard to state abortion laws, and evaluates the analyses used by these courts. Part IV evaluates which of the scholarly predictions have been realized, and then summarizes and discusses the circuit court split over whether to disregard *Casey* and instead apply the *Salerno* test to facial challenges of state abortion regulation. Part V concludes that the use of *Salerno* in abortion cases is misplaced, and that the trend against its use will continue.

I. A Summary of the *Casey* Undue Burden Standard in the Context of Supreme Court Abortion Jurisprudence

A. Background

In 1973, *Roe v. Wade* established that a woman has a fundamental right to choose to terminate a pregnancy, a right which springs from the right to privacy and a liberty interest arising under the Due Process Clause of the Fourteenth Amendment.[8] To protect this right, *Roe* delineated a trimester system as a brightline test of the constitutionality of state abortion regulations.[9] Although *Roe* found a woman's right to abortion fundamental, it also held that the right is neither absolute nor unqualified, and must be considered against important state interests in abortion regulation.[10] Using strict scrutiny, the *Roe* Court held that any legislative enactment regulating the abortion right must be narrowly drawn to express only the legitimate government interest at stake.[11]

Following the *Roe* decision, several states enacted legislation imposing restrictions on a woman's right to an abortion, many of which

8. 410 U.S. 113, 152-56 (1973).

9. *Id.* at 162-66. Justice Blackmun summarized the trimester framework as follows:

> (a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.
> (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.
> (c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

Id. at 164-65.

10. *Id.* at 154. The Court further explained that "most . . . courts have agreed that the right of privacy . . . is broad enough to cover the abortion decision; that the right . . . is not absolute and is subject to some limitations; and that at some point the state interests as to protection of health, medical standards, and prenatal life, become dominant." *Id.* at 155.

11. *Id.* at 155 (citing Griswold v. Connecticut, 381 U.S. 479, 485 (1965)).

were subsequently found to be unconstitutional under *Roe*. Among these unconstitutional restrictions were mandatory pre-abortion counseling,[12] spousal[13] and parental notification and consent requirements,[14] and abortion clinic licensing limitations.[15]

In the 1989 decision of *Webster v. Reproductive Health Services*, however, a new majority of the Court signaled their willingness to uphold abortion restrictions.[16] Three Justices expressed a desire to significantly modify and narrow *Roe*.[17] One Justice called for an outright overruling of *Roe*.[18] During the aftermath of the *Webster* decision, several states passed new legislation to protect the life of the unborn fetus and limit the right to an abortion.[19]

B. The *Planned Parenthood v. Casey* Opinion

During the wave of new state abortion legislation following *Webster*, Pennsylvania amended its abortion statute[20] to add the following restrictions: first, a woman seeking an abortion must give her informed consent prior to the abortion procedure; second, she must receive certain information at least twenty-four hours before the

12. *See, e.g.*, Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986) (striking down requirement that a woman must receive from the state printed materials discouraging abortion).

13. *See, e.g.*, Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (holding a state cannot delegate veto power to a spouse).

14. *See, e.g., id.* (striking down a parent's absolute veto on a minor's abortion right).

15. *See, e.g.*, City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416 (1983) [hereinafter *Akron I*] (striking down requirement that all second trimester abortions must be performed in hospitals).

16. 492 U.S. 490, 520-21 (1989) (upholding viability testing and restrictions on the use of public employees and facilities to perform or assist nontherapeutic abortions) ("There is no doubt that our holding today will allow some governmental regulation of abortion that would have been prohibited under the language of [prior cases]."); *see* Utah Women's Clinic v. Leavitt, 844 F. Supp. 1482, 1484 (D. Utah 1994) ("*Webster* appeared to open up new opportunities for states to exert an interest in protecting unborn life by imposing additional restrictions on abortion.").

17. *Webster*, 492 U.S. at 521 ("To the extent indicated in our opinion, we would modify and narrow Roe and succeeding cases.") (Rehnquist, C.J., joined by White & Kennedy, JJ.).

18. *Id.* at 537 ("It thus appears that the mansion of constitutionalized abortion law, constructed overnight in Roe v. Wade, must be disassembled doorjamb by doorjamb, and never entirely brought down, no matter how wrong it may be.") (Scalia, J., concurring).

19. *See, e.g.*, 18 PA. CONS. STAT. §§ 3203-3220 (1990); 1991 La. Acts 26; 1991 N.D. Laws 141; UTAH CODE ANN. § 76-7-301 (1991); 9 GUAM CODE ANN. § 31.20-.23 (1990) (ruled unconstitutional by Ada v. Guam Soc'y of Obstetricians & Gynecologists, 962 F.2d 1366 (9th Cir.), *cert. denied*, 506 U.S. 1011 (1992)).

20. The Pennsylvania Abortion Control Act of 1982, 18 PA. CONS. STAT. §§ 3203-3220 (1995); Planned Parenthood v. Casey, 505 U.S. 833 app. at 902-11 (1992) ("Selected Provisions of the 1988 and 1989 Amendments to the Pennsylvania Abortion Control Act of 1982").

abortion is performed; third, one parent of a minor who seeks an abortion must give consent, and if the minor does not wish or cannot obtain a parent's consent, she can seek a judicial bypass; fourth, a married woman seeking an abortion must sign a statement indicating that she has notified her husband of her intended abortion, unless a statutorily defined exception applies; and fifth, providers of abortion services must comply with specified reporting requirements.[21] Immediately after enactment, the constitutionality of these five abortion restrictions was challenged in federal court,[22] and rose through the Third Circuit to the United States Supreme Court.[23]

In *Casey*, the Supreme Court issued an elaborately splintered decision in which the joint opinion, written by Justice O'Connor and joined by Justices Kennedy and Souter, announced the judgment and opinion of the Court.[24] The *Casey* joint opinion effected three principal changes to Supreme Court abortion jurisprudence: it reaffirmed "the essential holding of *Roe v. Wade*,"[25] struck down the *Roe* trimester framework,[26] and replaced it with a new undue burden standard.[27]

1. The "Essential Holding" of Roe

In reaffirming the essential holding of *Roe*, the joint opinion specifically upheld what Justice O'Connor described as its "three parts": one, the right of a woman to choose and obtain an abortion before viability without undue interference from the state; two, the state power to restrict abortions after fetal viability, as long as exceptions to protect a woman's life or health are provided; and three, the state interests in protecting the health of the woman and the life of the fetus.[28] By discussing the essential holding of *Roe* as a combination of rights and interests, the joint opinion effectively laid the groundwork

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

22. This suit was brought by five abortion clinics, a physician, and a class of doctors who provided abortion services. They sought injunctive relief and a declaratory judgment that each of the five provisions was unconstitutional on its face. *Casey*, 505 U.S. at 845.

23. Planned Parenthood v. Casey, 744 F. Supp. 1323 (E.D. Pa. 1990) (striking down all five provisions, except certain portions of the reporting requirements), *aff'd in part and rev'd in part*, 947 F.2d 682 (3d Cir. 1991) (holding only the spousal notification provision unconstitutional), *aff'd in part and rev'd in part*, 505 U.S. 833 (1992).

24. *Casey*, 505 U.S. at 843-911. The joint opinion is controlling because it is the statement of the members of the Court who concurred in the judgment on the narrowest grounds. *See* Marks v. United States, 430 U.S. 188 (1977) (explaining when a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five justices, the holding is the position taken by those justices who concurred in the judgment on the narrowest grounds); Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (same rationale).

25. 505 U.S. at 845-46.

26. *Id.* at 875-76.

27. *Id.* at 876-79.

28. *Id.* at 846.

for moving abortion jurisprudence away from a discussion of fundamental rights and strict scrutiny, and instead toward a balancing of interests typical of rational basis review.

2. Roe's Trimester System

Although the *Casey* joint opinion retains what it considered to be the essential principles of *Roe*, it explicitly rejects the trimester framework as a means of testing the constitutionality of state abortion regulations.[29] In doing so, Justice O'Connor first explained that "the Court's experience applying the trimester framework has led to the striking down of some abortion regulations which in no real sense deprived women of the ultimate decision" of whether to terminate a pregnancy.[30] Justice O'Connor made this conclusion, however, without citing any specific cases or abortion regulations.[31] Second, Justice O'Connor stated that in practice the trimester framework undervalued the substantial state interest in potential life throughout pregnancy by treating all government interference before viability as unwarranted.[32] Once again, these arguments demonstrate the joint opinion's preparation for a move toward a standard more in line with a rational basis review by highlighting the substantial nature of the state interest and the notion that a woman's ultimate decision can be restricted as long as it is not deprived in some "real sense."[33]

3. The Undue Burden Standard

After laying this foundation, the *Casey* joint opinion establishes the undue burden standard as the new test for determining the constitutionality of state abortion regulations, finding it to be "the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty."[34] The joint opinion describes the undue burden standard in the following way:

> A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. A statute with this purpose is invalid because

29. *Id.* at 873 ("We reject the trimester framework, which we do not consider to be part of the essential holding of Roe.") (citing Webster v. Reproductive Health Servs., 492 U.S. 490, 518 (Rehnquist, C.J.), 529 (O'Connor, J., concurring) (1989)).

30. *Id.* at 875.

31. Justice O'Connor did explain however that these decisions "went too far because the right recognized by Roe is a right 'to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.'" *Id.* (quoting Eisenstadt v. Baird, 405 U.S. 438, 453 (1972)).

32. *Id.* at 875-76 (citing *Webster*, 492 U.S. at 519 (Rehnquist, C.J.) and *Akron I*, 462 U.S. 416, 461 (1983) (O'Connor, J., dissenting)).

33. *Id.* at 875.

34. *Id.* at 876.

> the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it. And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends.[35]

In short, under this new standard, a state abortion regulation will be invalid if, "in a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion."[36]

With the promulgation of this new standard, the *Casey* decision effectively abolishes the fundamental right status of a woman's right to choose, and replaces *Roe*'s strict scrutiny with a "more permissive" standard[37] calling for consideration of state interests, thereby reducing the level of review to something more akin to heightened scrutiny[38] or rational basis review.[39]

Additionally, the *Casey* undue burden standard shifts the burden of proof from the state to the individuals challenging the regulation.[40] Previously, under *Roe*'s strict scrutiny standard, once facial challengers had proven a restriction impacted the abortion right to any degree, the burden shifted to the state to show that the restriction was nar-

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35. *Id.* at 877.

36. *Id.* at 895.

37. Kathryn Kolbert & David H. Gans, *Responding to* Planned Parenthood v. Casey: *Establishing Neutrality Principles in State Constitutional Law*, 66 TEMP. L. REV. 1151, 1154 (1993).

38. *See* David L. Faigman, *Madisonian Balancing: A Theory of Constitutional Adjudication*, 88 NW. U. L. REV. 641, 686-91 (1994).

39. *See* Elizabeth A. Schneider, Comment, *Workability of the Undue Burden Test*, 66 TEMP. L. REV. 1003, 1028-31 (1993).

One scholar has offered the following comment on desirability of the *Casey* standard over strict scrutiny:

> The alternative to an undue burden approach . . . may even be more limited and restrictive. If the only choice is between protecting the exercise of a right against all burdens under strict scrutiny review or interpreting the interest at stake as something other than a right and providing it no constitutional protection at all, the latter option may be selected in far too many circumstances.

Alan Brownstein, *How Rights Are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine*, 45 HASTINGS L.J. 867, 959 (1994); *see also infra* notes 339-342 and accompanying text (discussing *Casey*'s interruption of the Court's trend in a trilogy of cases applying the stricter *Salerno* test to abortion law).

40. Kolbert & Gans, *supra* note 37, at 1155; C. Elaine Howard, Note, *The* Roe*'d to Confusion*: Planned Parenthood v. Casey, 30 HOUS. L. REV. 1457, 1486 (1993). *But see* Faigman, *supra* note 38, at 689 ("The distinct impression the joint opinion gives is that the government had the burden of proof to show that spousal notification would not constitute a substantial obstacle.").

rowly drawn to serve a compelling state purpose.[41] Because the abortion right is no longer fundamental under *Casey*, challengers of abortion laws face a weightier facial showing of unconstitutionality than was required under *Roe*:[42] they must prove in the first instance that either "the legislature's purpose was to interfere substantially with a woman's abortion choice, or that a challenged regulation would impose a 'substantial obstacle' to the exercise of that choice."[43]

a. The Upheld Provisions

Under the auspices of this new undue burden analysis, the *Casey* joint opinion upheld all of the challenged Pennsylvania abortion restrictions except the spousal notification requirement.[44] In upholding the medical emergency definition,[45] the joint opinion stated that if the definition foreclosed abortions in the face of significant health risks, "we would be required to invalidate the restrictive operation of the provision, for the essential holding of *Roe* forbids a State from interfering with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health."[46] The Third Circuit found that the Pennsylvania legislature had intended to assure that compliance with its abortion laws would not pose a significant threat to a woman's life or health.[47] The *Casey* joint opinion then upheld the Third Circuit's interpretation of the definition, stating that, as construed, it imposed "no undue burden on a woman's abortion

41. *See* Roe v. Wade, 410 U.S. 113, 155-56 (1973).

42. *See* Kolbert & Gans, *supra* note 37, at 1154-55.

43. *Id.* at 1155.

44. Planned Parenthood v. Casey, 505 U.S. 833, 879-80 (upholding medical emergency definition), 881-87 (upholding informed consent provision), 887-98 (striking down spousal notification provision), 899-900 (upholding parental consent provision), 900-01 (upholding recordkeeping and reporting requirements) (1992).

45. The challenged statute provided the following definition of a medical emergency:

> [T]hat condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of major bodily function.

18 PA. CONS. STAT. § 3203 (1990).

46. *Casey*, 505 U.S. at 879-80 (citing *Roe*, 410 U.S. at 164). The challengers argued that the definition was too narrow and would not allow women to obtain abortions when faced with certain significant health risks. *Id.* at 880. The district court found that three health-endangering conditions fell outside the statutory exception: pre-eclampsia, inevitable abortion, and prematurely ruptured membrane. Planned Parenthood v. Casey, 744 F. Supp. 1323, 1378 (E.D. Pa. 1990).

47. *Casey*, 505 U.S. at 879-80. The Third Circuit construed the phrase "serious risk" to include those health risks raised by the challengers. *See id.*

right."[48] In essence, the joint opinion's analysis consisted of using the Third Circuit's determination of legislative intent. Further, it acknowledged that a legislative purpose contrary to an essential holding of *Roe* constitutes an undue burden.

In upholding Pennsylvania's twenty-four hour informed consent requirement,[49] the *Casey* joint opinion broke down its inquiry into two portions: the specific requirements aimed at informing the woman's choice,[50] and the twenty-four hour waiting period.[51] With regard to the informed consent aspect, the joint opinion concluded that "[s]ince there is no evidence on this record that requiring a doctor to give the information as provided by the statute would amount in practical terms to a substantial obstacle to a woman seeking an abortion, we conclude that it is not an undue burden."[52] The joint opinion was in effect unable to perform an undue burden analysis on the informed consent provision since that analysis would have required a review of district court findings of fact which had not been developed below.[53]

With regard to the twenty-four hour waiting period, the joint opinion assessed the district court findings of fact as, although "troubling in some respects,"[54] not demonstrating that increased costs and potential delay were unduly burdensome.[55] This conclusion was reached despite the fact that these burdens were placed on "those women who have the fewest financial resources, those who must travel long distances, and those who have difficulty explaining their whereabouts to husbands, employers, or others."[56] Once again, the joint opinion's review of the district court record demonstrated how central

48. *Id.* This ruling was based on the traditional rule of deferring to the lower court's interpretation of state law in the absence of plain error. *Id.* (citing Palmer v. Hoffman, 318 U.S. 109, 118 (1943)).

49. 18 PA. CONS. STAT. ANN. § 3205 (1990). This provision requires that at least 24 hours prior to an abortion procedure a physician must inform the woman of the nature of the procedure, the health risks involved in both abortion and childbirth, and an estimate of the gestational age of the fetus. *Id.* Additionally, an abortion provider must inform the woman that Pennsylvania has available to her printed materials which describe the fetus, outline medical assistance available for childbirth, provide information about the father's child support obligations, and list adoption agencies. *Id.* Before receiving an abortion, the woman must sign a written consent form certifying that she has been informed of these printed materials, and if she requests to review them, that she has received them. *Id.* The provision does provide an exception if, in the medical judgment of the abortion provider, it appears that furnishing this information would result in a severely adverse effect on the physical or mental health of the woman. *Id.*

50. *Casey*, 505 U.S. at 881-85.

51. *Id.* at 885-87.

52. *Id.* at 884-85; *see also id.* at 881.

53. *See infra* notes 64-69 and accompanying text.

54. *Id.* at 886.

55. *Id.* at 887.

56. *Id.* at 886.

this examination is to an undue burden analysis when determining the effect of a provision.

In upholding the Pennsylvania parental consent provision,[57] the *Casey* joint opinion found the provision constitutional under well-established precedents: "We have been over most of this ground before. Our cases establish, and we reaffirm today, that a State may require a minor seeking an abortion to obtain the consent of a parent or guardian, provided that there is an adequate judicial bypass procedure."[58] Similarly, in upholding the recordkeeping and reporting requirements,[59] the joint opinion relied on precedent.[60] Justice O'Connor concluded that these recordkeeping and reporting provisions did not impose a substantial obstacle to a woman's choice: "At most they might increase the cost of some abortions by a slight amount. While at some point increased cost could become a substantial obstacle, there is no such showing on the record before us."[61] Again, in its analysis of the informed consent provision,[62] the joint opinion demonstrated that the district court findings of fact are needed to establish a substantial obstacle under the undue burden standard unless, as in the case of the parental consent provision, a well-established line of cases exists.[63]

57. 18 PA. CONS. STAT. ANN. § 3206 (1990) (proscribing an unemancipated woman under 18 from obtaining an abortion unless she and one of her parents or guardians provide informed consent).

58. *Casey*, 505 U.S. at 899 (citing Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 510-19 (1990) [hereinafter *Akron II*], Hodgson v. Minnesota, 497 U.S. 417, 461 (1990), *Akron I*, 462 U.S. 416, 440 (1983), and Bellotti v. Baird, 443 U.S. 622, 643-44 (1979)).

59. 18 PA. CONS. STAT. ANN. § 3207 (1990) (requiring every facility performing abortions to file a report stating its name and address, and that of any related, controlling, or subsidiary organization); *id.* § 3214 (requiring every facility to file a report for each abortion identifying the doctor, the facility, the referring doctor, the woman's age, her marital status, the number of her prior pregnancies and prior abortions, gestational age, type of procedure, date, preexisting conditions, medical complications, weight of the aborted fetus, and to file quarterly reports showing the number of abortions performed by trimester).

60. *Casey*, 505 U.S. at 900 (citing Planned Parenthood v. Danforth, 428 U.S. 52, 80 (1976)).

61. *Id.* at 901. The joint opinion did find that the provision requiring an abortion provider to document and report that a married woman seeking an abortion had notified her husband was an undue burden for the same reasons that the spousal notification provision was struck down. *Id.*; *see infra* notes 64-73 and accompanying text.

62. *See supra* notes 49-53 and accompanying text.

63. The *Casey* joint opinion apparently clarifies only those areas of abortion law that are in a state of confusion following *Webster*. This can be seen in its explanation and partial overruling of the informed consent cases, and its simple citation to well-settled law with regard to parental consent. *See Casey*, 505 U.S. at 884-85 (informed consent), 899 (parental consent).

b. The Spousal Notification Provision

In striking down the Pennsylvania spousal notification provision, the *Casey* joint opinion found it to be an undue burden because "in a *large fraction of the cases* in which [the provision] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion."[64] In making this determination, the joint opinion relied upon the district court's findings of fact developed from the testimony of numerous expert witnesses on the potential for physical abuse, battering, sexual assault, psychological pressure, and economic coercion that may result from spousal notification.[65] The joint opinion supplemented these district court findings with other social science studies of domestic violence.[66] In particular, the Court cited one research study that found "[w]here the husband is the father, the primary reason women do not notify their husbands is that [they] are experiencing marital difficulties, often accompanied by incidents of violence."[67] Taking together the district court findings of fact, the independent social science research cited, and "common sense,"[68] the joint opinion concluded that "the spousal notification requirement is thus likely to prevent a *significant number* of women from obtaining an abortion."[69]

The joint opinion specifically rejected Pennsylvania's argument that the spousal notification provision was valid since it imposed almost no burden on the *vast majority* of women seeking abortions and would adversely affect fewer than one percent of women that obtain abortions.[70] In response, Justice O'Connor explained:

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64. *Id.* at 895 (emphasis added).

65. *Id.* at 888-91. The district court findings of fact were developed from the testimony of medical directors of facilities that provide abortion services, doctors who have performed abortions, abortion counselors, professors of medicine, and one social psychologist. Planned Parenthood v. Casey, 744 F. Supp. 1323, 1329-34 (E.D. Pa. 1990).

66. *Casey*, 505 U.S. at 891-92 (citing COUNCIL ON SCIENTIFIC AFFAIRS, AMERICAN MED. ASS'N, VIOLENCE AGAINST WOMEN 7 (1991), Nancy M. Shields & Christine R. Hanneke, *Battered Wives' Reactions to Marital Rape*, *in* THE DARK SIDE OF FAMILIES: CURRENT FAMILY VIOLENCE RESEARCH 131, 144 (David Finkelhor et al. eds., 1983), LENORE E. WALKER, THE BATTERED WOMAN SYNDROME 27-28 (1984), Tracey B. Herbert et al., *Coping with an Abusive Relationship: How and Why Do Women Stay?*, 53 J. MARRIAGE & FAM. 311 (1991), B.E. Aguirre, *Why Do They Return? Abused Wives in Shelters*, 30 SOC. WORK 350, 352 (1985), and James A. Mercy & Linda E. Saltzman, *Fatal Violence Among Spouses in the United States, 1976-85*, 79 AM. J. PUB. HEALTH 595 (1989)).

67. *Id.* at 892 (citing Barbara Ryan & Eric Plutzer, *When Married Women Have Abortions: Spousal Notification and Marital Interaction*, 51 J. MARRIAGE & FAM. 41, 44 (1989)). The joint opinion did note, however, that only limited research has been conducted with respect to spousal notification, and that this research involves samples too small to be representative. *Id.*

68. *Id.*

69. *Id.* at 893 (emphasis added).

70. *Id.* at 894.

> The analysis does not end with the one percent of women upon whom the statute operates; it begins there. Legislation is measured for consistency with the Constitution by its impact on those whose conduct it affects. . . . The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.[71]

In flushing out this distinction, Justice O'Connor stated that an undue burden analysis of the Pennsylvania spousal notification provision required scrutiny of the narrow but relevant class of women that was the "real target" of regulation: married women seeking abortions who do not want to notify their husbands and are not covered by a statutory exception.[72] Through its analysis of the Pennsylvania spousal notification provision, the *Casey* joint opinion establishes *by example*[73] that an undue burden analysis should include reliance upon findings of fact developed from a record of extensive expert testimony, which may be supplemented by social science research and common sense, *and* an empirical inquiry focusing on the relevant class of women specifically targeted by the state regulation.

c. A Summary of *Casey*'s Use of the Undue Burden Standard

In evaluating the five Pennsylvania provisions, the joint opinion demonstrated the application of the *Casey* undue burden standard to a variety of state abortion laws. Most importantly, it illustrated why the analysis needed to address constitutionality under either the purpose or effect prong of the standard in finding whether "a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[74]

One commentator has summarized the undue burden standard as requiring "a threshold inquiry as to both means and ends into the state's purpose in adopting a challenged law, and then, depending on the nature of the state's purpose, an evaluation of the impact of the law to see if it constitutes an 'undue burden.'"[75] The specific requirements of the *Casey* purpose and effect prongs, however, were not explicitly stated and must be derived from the analysis used by the joint opinion in evaluating the five Pennsylvania provisions.

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71. *Id.*

72. *Id.* at 895. One statutory exception available under this invalidated spousal notification provision would have been for a medical emergency endangering the life or health of the pregnant woman. 18 PA. CONS. STAT. § 3203 (1990).

73. *See* Brownstein, *supra* note 39, at 883.

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

75. Brownstein, *supra* note 39, at 892.

The Purpose Prong

Under the joint opinion's analysis, an abortion restriction's purpose can be determined in one of three ways: it may be explicitly stated in the law, determined from legislative intent, or measured for validity against long-established precedent upheld in *Casey*. The joint opinion's analysis of the Pennsylvania medical emergency definition is a simple example of establishing purpose from legislative intent.

Specifically, it accepted the Third Circuit's finding that the legislature had intended to assure that a woman's life or health would not be threatened by compliance with its abortion laws and concluded that its purpose was therefore not unduly burdensome.[76] It noted, however, that if the legislature had intended to foreclose abortions in the face of significant health risks, that purpose would be invalid under an essential holding of *Roe* as upheld in *Casey*.[77] In evaluating both the parental consent and recordkeeping provisions, the joint opinion relied entirely upon well-established precedent to find valid purposes.[78]

The Effect Prong

As derived from the joint opinion's review of the Pennsylvania provisions, the primary requirement of a *Casey* effect-prong analysis is that it be based upon findings of fact. This is best illustrated by the extensive expert testimony relied upon by the joint opinion in its assessment of the spousal notification provision.[79] The joint opinion also used the district court's findings in its review of the twenty-four hour waiting period,[80] and noted the lack of factual evidence on the record when upholding the informed consent provision[81] and recordkeeping requirements.[82]

From the joint opinion's analysis of the spousal notification provision, it is evident that these findings of fact must center upon the relevant class of women: the group for which the law is a restriction on the exercise of the abortion right.[83] Facts developed to focus upon the vast majority of women seeking abortions are insufficient to determine the facial validity of abortion restrictions.[84] The joint opinion, therefore, relied upon findings specifically developed to address the

76. 505 U.S. at 879-80.
77. *Id.*
78. *Id.* at 899-900; *see supra* notes 57 and 63.
79. *See supra* notes 64-69 and accompanying text.
80. *Casey*, 505 U.S. at 886; *see supra* notes 54-55 and accompanying text.
81. 505 U.S. at 884-85.
82. *Id.* at 901.
83. *Id.* at 894.
84. *Id.*

battering and violence suffered by women in abusive spousal relationships, and related these findings to that class of married women seeking abortions which do not want to notify their husbands.[85] The joint opinion stated that this relevant class might be as small as one percent of all women.[86]

The next step under the *Casey* effect prong would be to determine whether the impact of the law places a substantial obstacle in the path of women seeking abortions of nonviable fetuses. The joint opinion's spousal notification analysis defined "substantial obstacle" two ways: a hinderance present in "a large fraction of cases,"[87] or a condition affecting "a significant number of women" within the relevant class.[88]

d. Later Guidance Offered by Joint Opinion Members

Since *Casey*, two members of the joint opinion have had occasion to clarify the meaning of the undue burden standard. First, in April 1993, Justice O'Connor, joined by Justice Souter, concurred in a Supreme Court denial of an injunction[89] requested by challengers of the North Dakota Abortion Control Act.[90] In this unusual concurrence, Justice O'Connor took the opportunity to comment on the district court's analysis of the facial constitutionality of the North Dakota abortion provisions:

> I write separately . . . to point out that our denial of relief should not be viewed as signaling agreement with the lower courts' reasoning. In my view, the approach taken by the lower courts is inconsistent with *Casey*. In striking down Pennsylvania's spousal-notice provision, we did not require petitioners to show that the provision would be invalid in *all* circumstances. . . . And the joint opinion specifically examined the record developed in the District Court in determining that Pennsylvania's informed-consent provision did not create an undue burden. . . . I believe the lower courts should have undertaken the same analysis.[91]

This concurrence, written by two of the *Casey* joint opinion Justices, again emphasizes the importance of engaging in an empirical inquiry that relies upon a record of district court findings of fact.

The second opportunity for a *Casey* joint opinion member to clarify the meaning of the undue burden standard came in February 1994

85. *Id.* at 895.
86. *Id.* at 894.
87. *Id.* at 895.
88. *Id.* at 893.
89. Fargo Women's Health Org. v. Schafer, 507 U.S. 1013 (1993); *see infra* notes 204-209 and accompanying text.
90. N.D. CENT. CODE § 14-02.1 (1991).
91. *Schafer*, 507 U.S. at 1014.

during a later proceeding in *Planned Parenthood v. Casey*.[92] Once again at the circuit court level, the *Casey* plaintiffs requested the Supreme Court to stay a mandate requiring the enforcement of the upheld Pennsylvania provisions pending their filing of a second petition for certiorari.[93] Justice Souter, writing in his capacity as Circuit Justice of the Third Circuit, issued an in-chambers opinion denying the request for stay.[94] In this opinion, Justice Souter elaborated on the joint opinion's requirement that an undue burden analysis be based on a factual record: "More than once, we phrased our conclusion that particular provisions withstood facial challenge under the Due Process Clause in terms of 'the record' before us in the case."[95] He further explained:

> [T]he references to "this record," combined with our readiness to decide the validity of the challenged provisions under the "undue burden" standard are plausibly understood as reflecting two conclusions: (1) that litigants are free to challenge similar restrictions in other jurisdictions, as well as these very provisions as applied, . . . and (2) that applicants had been given a fair opportunity to develop the record in the District Court.[96]

Justice Souter's discussion in this rare in-chambers opinion again substantiates the argument that an undue burden inquiry requires an examination of a factual record developed by the district court. Additionally, he echoed Justice O'Connor's *Fargo* concurrence that the facial validity of substantially similar abortion restrictions may be challenged on a state-by-state basis by presenting factual evidence.[97] Essentially, this means that two very similar abortion regulations enacted in different states each require an independent factual assessment by each district court, and that the analysis of the

92. In *Casey*, the joint opinion remands the case "for proceedings consistent with this opinion, including consideration of the question of severability." 505 U.S. 833, 901 (1992). On remand, the Third Circuit determined that the unconstitutional spousal notification and corresponding recordkeeping provisions were severable from the remainder of the Pennsylvania abortion provisions, and then remanded the case to the district court "for such further proceedings as may be appropriate." *Casey*, 978 F.2d 74, 78 (3d Cir. 1992). The district court granted the challengers' motion to reopen the record and continue the stay. *Casey*, 822 F. Supp. 227, 238 (E.D. Pa. 1993). This decision was appealed by Pennsylvania, and the Third Circuit reversed the district court's order and remanded with instructions to enter the final judgment. *Casey*, 14 F.3d 848, 863 (3d Cir. 1994). The plaintiffs then appealed to the Supreme Court to stay the Third Circuit mandate, and Justice Souter in his in-chambers opinion denied the plaintiffs' request. *Casey*, 114 S. Ct. 909, 912 (1994).

93. *Casey*, 114 S. Ct. 909 (1994) (denying plaintiffs' application for a stay of the Third Circuit mandate pending their filing a petition for certiorari to the Supreme Court).

94. *Id.*

95. *Id.* at 911 (quoting *Casey*, 505 U.S. at 887, 901).

96. *Id.* (citation omitted).

97. *See* Fargo Women's Health Org. v. Schafer, 507 U.S. 1013 (1993) (O'Connor, J., concurring in denial of stay).

constitutionality of the provisions of one state is not conclusive of the constitutionality of the provisions of another state. In other words, "Mississippi ain't Pennsylvania."[98]

II. Scholarly Predictions Concerning the Application of the Undue Burden Standard

A. Anticipated Problems Ensuing From Lack of Guidance

One of the explicit concerns of the *Casey* joint opinion was that "decisions after *Roe* [had] cast doubt upon the meaning and reach of its holding,"[99] and therefore, lower courts "must have guidance as they seek to address this subject."[100] As one of the first courts to review abortion regulations under the new *Casey* undue burden standard found, however, "[d]espite the recent efforts of a three-justice plurality of the Supreme Court, passing on the constitutionality of state statutes regulating abortion after *Casey* has become neither less difficult nor more closely anchored to the Constitution."[101] The explicit intention to provide clarity is particularly ironic given the amount of scholarly comment detailing inherent defects in the undue burden standard and predicting its troublesome application.

1. Prediction: Lack of Methodology Will Make the Standard Unworkable

A few commentators predicted that lower court implementation of the undue burden standard would reveal its inherent flaws since the *Casey* joint opinion failed to establish clearly a practical procedure for the test. For example, the joint opinion provided no methodology for identifying an invalid state purpose that would create an undue burden or for determining whether a regulation created an undue burden through its effect.[102] Critics also argued that the joint opinion failed to explain how the effects of a state regulation should be calculated, how much of an effect would be necessary for finding an undue burden, or what types of effects are even relevant to the inquiry.[103] Similarly,

98. Barnes v. Moore, 970 F.2d 12, 15 n.5 (5th Cir.) (per curiam), *cert. denied*, 506 U.S. 1021 (1992).

99. *Casey*, 505 U.S. at 845.

100. *Id.* Following this declaration, Justice O'Connor reviewed "the principles that define the rights of the woman and the legitimate authority of the State respecting the termination of pregnancies by abortion procedures," a discussion which led to the reaffirmation of the essential holding of *Roe*. *Id.* at 845-46.

101. Barnes v. Mississippi, 992 F.2d 1335, 1337 (5th Cir.), *cert. denied*, 114 S. Ct. 468 (1993).

102. Gillian E. Metzger, Note, *Unburdening the Undue Burden Standard: Orienting* Casey *in Constitutional Jurisprudence*, 94 COLUM. L. REV. 2025, 2035 (1994); *see* Brownstein, *supra* note 39, at 881-92 (discussing purpose and effect prongs of *Casey*).

103. Metzger, *supra* note 102, at 2035; Howard, *supra* note 40, at 1488.

another commentator stated that no guidance was given on how much weight to give each abortion restriction when balancing it against a woman's right to choose.[104] Moreover, these deficiencies in methodology cannot be rectified by reference to earlier enunciations of the undue burden standard since the *Casey* version is different from any previously articulated.[105]

2. *Prediction: The Inconsistent Methods Used in Casey Will Confuse the Lower Courts*

This lack of methodology, some have argued, will be worsened by inconsistencies in the *Casey* joint opinion itself.[106] For example, although it calls for a factual inquiry and engages in such an inquiry when determining the constitutionality of the Pennsylvania spousal notification provision, the joint opinion does not examine the factual record in sustaining the informed consent requirement.[107] It also was predicted that, due to these inconsistencies, lower courts might forego the requisite factual analysis of an abortion regulation and instead apply the specific holdings of *Casey*.[108] In other words, if a court was reviewing a regulation substantially similar to one which *Casey* had upheld, there might be a tendency to uphold the provision because of its similarity to the *Casey* provision instead of engaging in an independent factual analysis.

3. *Prediction: Abortion Litigation Will Increase*

Commentators predicted the ambiguity of the undue burden test would cause an increase in abortion law challenges seeking to clarify the boundaries of this new standard.[109] Further, it was argued that the

104. Janet Benshoof, Planned Parenthood v. Casey: *The Impact of the New Undue Burden Standard on Reproductive Health Care*, 269 L. & MED. 2249, 2252 (1993).

105. Metzger, *supra* note 102, at 2036. The first test by this name appeared in Justice O'Connor's dissent in *Akron I*, 462 U.S. 416, 468 (1983) (O'Connor, J., dissenting). Later, it surfaced again in a more delineated form in her dissent in *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 828 (1986) (O'Connor, J., dissenting), in which she contended that "[a]n undue burden will generally be found 'in situations involving absolute obstacles or severe limitations on the abortion decision,' not wherever a state regulation 'may "inhibit" abortions to some degree.'" *Id.* (quoting *Akron I*, 462 U.S. at 464). This *Thornburgh* version displays a midpoint in Justice O'Connor's development of the undue burden standard, incorporating language from the *Akron I* version, but not yet setting out the purpose and effect prongs that emerge in *Casey*.

106. *See* Howard, *supra* note 40, at 1483-88 (discussing internal flaws in the *Casey* decision that will likely lead to a confused and inconsistent standard).

107. *Id.* at 1484-85; *see supra* notes 49-53 and accompanying text.

108. Metzger, *supra* note 102, at 2037-38.

109. Alan I. Bigel, Planned Parenthood of Southeastern Pennsylvania v. Casey: *Constitutional Principles and Political Turbulence*, 18 U. DAYTON L. REV. 733, 762 (1993); Natalie Wright, Note, *State Abortion Law After* Casey: *Finding "Adequate and Independent" Grounds for Choice in Ohio*, 54 OHIO ST. L.J. 891, 899 (1993).

standard is unworkable because without giving the lower courts guidance, the Supreme Court "will be called upon to rule on every little variant the states will dream up to assert their regulatory privilege"[110] and become embroiled in "the minutiae of state legislation regarding the reasonableness of wisdom of statutory measures."[111] Ultimately, commentators have predicted that the post-*Casey* litigation would result in a reformulation of constitutional standards.[112] "[B]efore there is a final word on the contours of the 'undue burden' standard," a few years of litigation may be necessary.[113]

B. Anticipated Problems Resulting From Judicial Discretion

Several commentators have agreed that the *Casey* joint opinion, by not providing more specific guidance for the lower courts in applying the undue burden standard, in effect has handed lower court judges a significant amount of discretion. Commentators predicted this broad discretion, coupled with the lack of specified methodology, would lead to speculative, biased, arbitrary, and inconsistent outcomes.

1. Prediction: Judicial Bias and Speculation Will Result

Justice Scalia predicted that the imprecision of the undue burden standard would compel the lower courts to assess abortion regulations according to the subjective notions of each judge, and thus found the standard "inherently manipulable."[114] Some believed that the standard would allow district courts to arbitrarily choose which factors to consider in reviewing a state abortion regulation,[115] and that individual trial judges would receive "virtually unfettered discretion to uphold new anti-choice legislation."[116] Commentators argued that judges would rely on their limited life experience to decide whether a regulation unconstitutionally interferes with a woman's right to choose or obtain an abortion.[117] A judge who personally held anti-abortion sentiments, therefore, could become "a rubber stamp" for state abortion regulations.[118]

110. Charles S. Ross, *The Right of Privacy and Restraints on Abortion Under the "Undue Burden" Test: A Jurisprudential Comparison of* Planned Parenthood v. Casey *with European Practice and Italian Law*, 3 IND. INT'L & COMP. L. REV. 199, 201 (1993).

111. Bigel, *supra* note 109, at 759.

112. *Id.* at 762.

113. Kolbert & Gans, *supra* note 37, at 1156.

114. Planned Parenthood v. Casey, 505 U.S. 833, 985-86 (1992) (Scalia, J., concurring in part and dissenting in part).

115. Schneider, *supra* note 39, at 1033; Benshoof, *supra* note 104, at 2252.

116. Julie Schrager, *The Impact of* Casey, 1992 WIS. L. REV. 1331, 1331-32 (1992).

117. Schneider, *supra* note 39, at 1027.

118. *Id.*

2. Prediction: Inconsistent and Arbitrary Outcomes Will Occur

One scholar predicted that the failure to develop a methodical analysis, when combined with judicial discretion, would likely result in inconsistent rulings on abortion statutes.[119] Consequently, it was thought that different results would arise from cases with substantially similar facts.[120] In turn, some believed that these inconsistencies in outcome would lead to abortion laws that vary greatly from state to state since what is not burdensome to women in Pennsylvania may well be burdensome to women in other states.[121]

Taken together, this array of criticism of the undue burden standard seems to all but foreclose the standard's workability. Further, the inherently factual nature of the standard will engage the lower courts in a more complex analysis than previously required under *Roe*'s brightline trimester framework. As one commentator aptly described it, the undue burden standard is "'a principle' as much as a test," and will undergo refinement every time it is applied.[122]

III. A Survey and Analysis of the *Casey* Undue Burden Standard as Used by the Lower Courts in State Abortion Law Challenges

Since the *Casey* decision in June 1992, the lower courts have applied the undue burden standard in thirteen cases challenging the facial constitutionality of state abortion regulations.[123] These cases

119. Metzger, *supra* note 102, at 2037.

120. Schneider, *supra* note 39, at 1031-32.

121. Metzger, *supra* note 102, at 2038 (arguing an undue burden might be found in other states which have fewer abortion providers, or which have more rural or poor populations unable to pay transportation expenses).

122. Ross, *supra* note 110, at 213.

123. Planned Parenthood v. Miller, 63 F.3d 1452 (8th Cir. 1995), *cert. denied*, 64 U.S.L.W. 3724 (U.S. Apr. 29, 1996) (No. 95-856); Jane L. v. Bangerter, 61 F.3d 1493 (10th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3561 (U.S. Feb. 5, 1996) (No. 95-1242); Fargo Women's Health Org. v. Schafer, 507 U.S. 1013 (1993), *denying application for stay and injunction pending appeal from* 18 F.3d 526 (8th Cir. 1994); Barnes v. Mississippi, 992 F.2d 1335 (5th Cir.), *cert. denied*, 114 S. Ct. 468 (1993); Sojourner T. v. Edwards, 974 F.2d 27 (5th Cir. 1992), *cert. denied*, 507 U.S. 972 (1993); Barnes v. Moore, 970 F.2d 12 (5th Cir.) (per curiam), *cert. denied*, 506 U.S. 1021 (1992); Armstrong v. Mazurek, No. CV-95-083-GF, 1995 U.S. Dist. LEXIS 20136, at *8-*9 (D. Mont. Sept. 29, 1995); Women's Medical Professional Corp. v. Voinovich, 911 F. Supp. 1051 (S.D. Ohio 1995); A Woman's Choice-East Side Women's Clinic v. Newman, 904 F. Supp. 1434 (S.D. Ind. 1995); Causeway Medical Suite v. Ieyoub, 905 F. Supp. 360 (E.D. La. 1995); Utah Women's Clinic v. Leavitt, 844 F. Supp. 1482 (D. Utah 1994); Planned Parenthood v. Neely, 804 F. Supp. 1210 (D. Ariz. 1992); Preterm Cleveland v. Voinovich, 627 N.E.2d 570 (Ohio Ct. App. 1993).

So far, no challenge based on the *Casey* undue burden standard has arisen in an "as applied" context. However, such a challenge is available to test the constitutionality of abortion restrictions after implementation. Planned Parenthood v. Casey, 114 S. Ct. 909,

involved restrictive abortion regulations imposed by Mississippi,[124] Louisiana,[125] Arizona,[126] Utah,[127] North Dakota,[128] South Dakota,[129] Pennsylvania,[130] Ohio,[131] and Indiana.[132] In eight of these cases, the courts determined the disposition of state abortion statutes which were enacted prior to *Casey*.[133] In five more recent cases, the courts

911 (1994) ("litigants are free to challenge . . . these very provisions as applied"); *Casey*, 14 F.3d 848, 861-62 ("[W]e believe the Court meant that a future 'as applied' challenge to the Pennsylvania Act would be possible, and plaintiffs could demonstrate in practice that the Act imposed an undue burden."), 862 n.18 ("[A]n 'as applied' challenge is always possible after implementation.") (1994); *see generally* Gary Knapp, Annotation, *Supreme Court's Views as to Validity, Under Federal Constitution, of Abortion Laws*, 111 L. Ed. 2d 879 (1993) (discussing practical considerations in bringing an "as applied" challenge to an abortion law).

Only one state court action has so far challenged abortion restrictions under federal constitutional law. *See* Preterm Cleveland v. Voinovich, 627 N.E.2d 570 (Ohio Ct. App. 1993). In *Preterm*, an Ohio state appellate court reviewed the facial constitutionality of an Ohio abortion regulation under the *Casey* undue burden standard. *Id.* at 577. The informed consent provision reviewed by the court required that twenty-four hours before an abortion a physician must inform the woman of the medical risks involved in the abortion procedure, the probable gestational age of the fetus, and the medical risks associated with pregnancy. *Id.* at 577-78. Undertaking no analysis except a comparison of the Ohio provision to the Pennsylvania informed consent requirement in *Casey*, the court was unable to distinguish the two statutes, *id.* at 578, and found "no infirmity" in the legislation. *Id.* at 577. Therefore, the *Preterm* court did not engage in an undue burden analysis, but instead upheld the Ohio regulation merely by comparing it to its counterpart upheld in *Casey*.

For discussions of the implications of *Casey* for state abortion law, see generally Kolbert & Gans, *supra* note 37, and Wright, *supra* note 109.

Often state constitutions provide greater protection of a woman's privacy interests. *See, e.g.*, Planned Parenthood Shasta-Diablo v. Williams, 873 P.2d 1224 (Cal. 1994); Women's Health Ctr. v. Panepinto, 446 S.E.2d 658 (W. Va. 1994). *But see Preterm Cleveland*, 627 N.E.2d at 584 ("[W]e find no reason under the circumstances of this case to find that the Ohio Constitution confers upon a pregnant woman a greater right to choose whether to have an abortion or bear the child than is conferred by the United States Constitution.").

124. 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.) (per curiam), *cert. denied*, 506 U.S. 1021 (1992).

125. Sojourner T. v. Edwards, 974 F.2d 27 (5th Cir. 1992), *cert. denied*, 507 U.S. 972 (1993); Causeway Medical Suite v. Ieyoub, 905 F. Supp. 360 (E.D. La. 1995).

126. Planned Parenthood v. Neely, 804 F. Supp. 1210 (D. Ariz. 1992).

127. Jane L. v. Bangerter, 61 F.3d 1493 (10th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3561 (U.S. Feb. 5, 1996) (No. 95-1242); Utah Women's Clinic v. Leavitt, 844 F. Supp. 1482 (D. Utah 1994).

128. Fargo Women's Health Org. v. Schafer, 507 U.S. 1013 (1993), *denying application for stay and injunction pending appeal from* 18 F.3d 526 (8th Cir. 1994).

129. Planned Parenthood v. Miller, 63 F.3d 1452 (8th Cir. 1995), *cert. denied*, 64 U.S.L.W. 3724 (U.S. Apr. 29, 1996) (No. 95-856).

130. Planned Parenthood v. Casey, 14 F.3d 848, 863 (3d Cir. 1994).

131. Women's Medical Professional Corp. v. Voinovich, 911 F. Supp. 1051 (S.D. Ohio 1995); Preterm Cleveland v. Voinovich, 627 N.E.2d 570 (Ohio Ct. App. 1993).

132. A Woman's Choice-East Side Women's Clinic v. Newman, 904 F. Supp. 1434 (S.D. Ind. 1995).

133. 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.) (per curiam), *cert. denied*, 506 U.S. 1021 (1992);

have ruled on state abortion statutes that were enacted after the *Casey* decision.[134] Application of the undue burden standard has now been reviewed by the Third,[135] Fifth,[136] Eighth,[137] and Tenth[138] Circuits.

A. The Fifth Circuit Cases

The Fifth Circuit was the first Court of Appeals to review the constitutionality of a state abortion law under the *Casey* undue burden standard. In the Mississippi and Louisiana cases, the Fifth Circuit applied the undue burden standard while reviewing three pre-*Casey* district court decisions ruling on the facial constitutionality of various state abortion regulations.[139] Two of these cases involved abortion laws enacted during the post-*Webster* abortion climate,[140] while the third case concerned the constitutionality of a 1986 pre-*Webster* abortion statute that had been stayed for four years awaiting several Mississippi Supreme Court rulings on abortion.[141] In its review of these three facial challenges, the Fifth Circuit found only the Louisiana statute to be an undue burden.[142]

Planned Parenthood v. Neely, 804 F. Supp. 1210 (D. Ariz. 1992); Sojourner T. v. Edwards, 974 F.2d 27 (5th Cir. 1992), *cert. denied*, 507 U.S. 972 (1993); Jane L. v. Bangerter, 61 F.3d 1493 (10th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3561 (U.S. Feb. 5, 1996) (No. 95-1242); Fargo Women's Health Org. v. Schafer, 507 U.S. 1013 (1993), *denying application for stay and injunction pending appeal from* 18 F.3d 526 (8th Cir. 1994); Planned Parenthood v. Casey, 14 F.3d 848, 863 (3d Cir. 1994); Preterm Cleveland v. Voinovich, 627 N.E.2d 570 (Ohio Ct. App. 1993).

134. *See, e.g.*, Planned Parenthood v. Miller, 63 F.3d 1452 (8th Cir. 1995), *cert. denied*, 64 U.S.L.W. 3724 (U.S. Apr. 29, 1996) (No. 95-856); Women's Medical Professional Corp. v. Voinovich, 911 F. Supp. 1051 (S.D. Ohio 1995); Causeway Medical Suite v. Ieyoub, 905 F. Supp. 360 (E.D. La. 1995); A Woman's Choice-East Side Women's Clinic v. Newman, 904 F. Supp. 1434 (S.D. Ind. 1995); Utah Women's Clinic v. Leavitt, 844 F. Supp. 1482 (D. Utah 1994).

135. Planned Parenthood v. Casey, 14 F.3d 848, 863 (3d Cir. 1994).

136. 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.) (per curiam), *cert. denied*, 506 U.S. 1021 (1992); Sojourner T. v. Edwards, 974 F.2d 27 (5th Cir. 1992), *cert. denied*, 507 U.S. 972 (1993).

137. Planned Parenthood v. Miller, 63 F.3d 1452 (8th Cir. 1995), *cert. denied*, 64 U.S.L.W. 3724 (U.S. Apr. 29, 1996) (No. 95-856); Fargo Women's Health Org. v. Schafer, 507 U.S. 1013 (1993), *denying application for stay and injunction pending appeal from* 18 F.3d 526 (8th Cir. 1994).

138. Jane L. v. Bangerter, 61 F.3d 1493 (10th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3561 (U.S. Feb. 5, 1996) (No. 95-1242).

139. Barnes v. Mississippi, 992 F.2d 1335 (5th Cir.), *cert. denied*, 114 S. Ct. 468 (1993); Sojourner T. v. Edwards, 974 F.2d 27 (5th Cir. 1992), *cert. denied*, 507 U.S. 972 (1993); Barnes v. Moore, 970 F.2d 12 (5th Cir.) (per curiam), *cert. denied*, 506 U.S. 1021 (1992).

140. *Sojourner T.*, 974 F.2d at 29 (noting the Louisiana legislature enacted the Louisiana Abortion Statute in June of 1991); Barnes v. Moore, 970 F.2d at 13 (noting the Mississippi legislature enacted the Informed Consent to Abortion Act in March 1991).

141. Barnes v. Mississippi, 992 F.2d at 1337 (discussing MISS. CODE ANN. §§ 41-41-51 to -63 (1986)).

142. *Sojourner T.*, 974 F.2d at 31.

1. Barnes v. Moore

In August 1992, less than two months after the *Casey* decision, the Fifth Circuit decided the first case applying the new undue burden standard. In *Barnes v. Moore*,[143] the plaintiffs challenged the facial constitutionality of the Mississippi Informed Consent to Abortion Act,[144] which required a physician to inform a patient of the medical risks of abortion and provide her with information prepared by the state on abortion and its alternatives prior to performing an abortion procedure.[145] The Mississippi statute also required that a twenty-four hour waiting period lapse between the time the physician provided the patient with the information and the performance of the abortion.[146] While an appeal of the district court's injunction suspending enforcement of the statute was pending in *Moore*, the United States Supreme Court rendered its decision in *Casey*, upholding substantially identical Pennsylvania provisions.[147]

In their supplemental briefs, the plaintiffs raised a host of arguments in an attempt to distinguish the Mississippi abortion provisions from the Pennsylvania provisions of *Casey*.[148] Principally, they argued that, under *Casey*, the case should be remanded for evidentiary proceedings so that they might prove that the Mississippi statute posed an undue burden on women seeking abortions, regardless of the relative similarities to the Pennsylvania provisions upheld in *Casey*.[149] They reduced this argument to the aphorism "Mississippi ain't Pennsylvania."[150]

Although the Fifth Circuit acknowledged that *Casey* applied a different standard in striking down the Pennsylvania spousal notification provision,[151] it invoked the traditional formula for testing the facial validity of a statute as specified in *United States v. Salerno*.[152] This test requires a plaintiff to prove facial invalidity by establishing that "no set of circumstances exists under which the Act would be valid."[153] In choosing to apply the *Salerno* test rather than engage in the factual inquiry required under *Casey*, the Fifth Circuit cited Chief

143. 970 F.2d 12 (5th Cir.) (per curiam), *cert. denied*, 506 U.S. 1021 (1992).

144. MISS. CODE ANN. §§ 41-41-39, 41-41-59 to -63 (1993).

145. Barnes v. Moore, 970 F.2d at 14.

146. *Id.*

147. *Id.* at 13.

148. *See id.* at 14.

149. *See id.* at 15.

150. *See id.* at 15 n.5.

151. *Id.* at 14 n.2.

152. 481 U.S. 739 (1987); *see infra* notes 337-342 and accompanying text.

153. *United States v. Salerno*, 481 U.S. 739, 745 (1987).

Justice Rehnquist's dissent in *Casey*,[154] stating that it did not interpret *Casey* as having overruled the *Salerno* test in the abortion context.[155] The Fifth Circuit went on to find that "[i]n light of *Casey*'s holding substantially identical provisions of the Pennsylvania Act facially constitutional, the plaintiffs cannot satisfy this 'heavy burden.'"[156]

With regard to plaintiffs' argument that the matter should be remanded for evidentiary hearings and findings of fact, the Fifth Circuit acknowledged that the *Casey* joint opinion extensively referred to the district court findings of fact during its analysis of the Pennsylvania provisions.[157] Yet, the Fifth Circuit concluded that "the differences between the Mississippi and Pennsylvania Acts are not sufficient to render the former unconstitutional on its face," and that "[f]urther evidentiary proceedings would not affect that conclusion."[158]

The Fifth Circuit, in the first case to review the constitutionality of a state abortion law under the *Casey* standard, avoided applying the undue burden standard. Instead, it fell back upon the *Salerno* test for facial constitutionality, which makes almost any conceivable abortion regulation facially constitutional because of the extremely heavy burden of proof it places upon challengers. The Fifth Circuit also refused to remand for the factfinding required by *Casey*.

Barnes v. Moore exhibits many of the problems predicted by commentators. By not making explicit how the lower courts should handle the conflicting *Salerno* precedent, the *Casey* joint opinion did indeed leave room for confusion at the lower court level. Because of this lack of guidance, the Fifth Circuit, given its apparent uncertainty, improperly cited a *Casey* dissenting opinion as authority for its decision to apply *Salerno* instead of the undue burden standard. Further, *Barnes v. Moore* is an example of a lower court declining to conduct the factual analysis required by the *Casey* joint opinion, and instead applying the specific holdings of *Casey* to avoid the uncertainties of implementing a new constitutional standard with no clear model for application.

154. Barnes v. Moore, 970 F.2d at 14 n.2. In *Casey*, Chief Justice Rehnquist wrote "because this is a facial challenge to the Act, it is insufficient for petitioners to show that the notification provision 'might operate unconstitutionally under some conceivable set of circumstances.'" 505 U.S. 833, 972 (1992) (Rehnquist, C.J., concurring in part and dissenting in part) (quoting *Salerno*, 481 U.S. at 745). Instead, "they must 'show that no set of circumstances exists under which the [provision] would be valid.'" *Id.* (quoting *Akron II*, 497 U.S. 502, 514 (1990)). The Chief Justice further stated that "[t]he joint opinion . . . appears to ignore this point in concluding that the spousal notice provision imposes an undue burden on the abortion decision." *Id.* at 973 n.2.

155. Barnes v. Moore, 970 F.2d at 14 n.2.

156. *Id.* at 14.

157. *Id.* at 15.

158. *Id.*

2. Sojourner T. v. Edwards

In September 1992, one month after its opinion in *Barnes v. Moore*, the Fifth Circuit decided a second case involving the *Casey* undue burden standard. In *Sojourner T. v. Edwards*,[159] plaintiffs brought a pre-*Casey*[160] facial challenge to the 1991 Louisiana abortion statute[161] criminalizing the performance of all abortions except when the pregnancy was terminated under the following circumstances: to save the life or health of the unborn child, to remove a dead unborn child, to save the life of the mother, or because the pregnancy was the result of rape or incest.[162] The rape and incest exceptions to the Louisiana statute also required that the abortion be performed within the first thirteen weeks of pregnancy.[163] The district court found the statute unconstitutional under *Roe*.[164] While the suit was on appeal to the Fifth Circuit, the United States Supreme Court decided *Casey*.

Citing *Casey*'s reaffirmation of the essential holding of *Roe*, that before viability the state's interests are not strong enough to support a prohibition of abortion,[165] the Fifth Circuit struck down the Louisiana abortion regulation as plainly unconstitutional because it imposed an undue burden on women seeking an abortion before viability.[166] Since the statute amounted to a prohibition on almost all abortions during the previability stage, which violated an essential holding of *Roe*, the Fifth Circuit found the law's explicit purpose to be invalid under *Casey*. The *Sojourner T.* opinion, therefore, illustrates the simplest type of inquiry under the purpose prong of the undue burden standard since it involved an explicitly unconstitutional purpose. To find an undue burden under these circumstances, the court needed to determine only that the abortion regulation in its language was explicitly contrary to an essential holding of *Roe*.

3. Barnes v. Mississippi

In May 1993, eight months after its opinion in *Sojourner T. v. Edwards*, the Fifth Circuit decided a third case involving the *Casey*

159. 974 F.2d 27 (5th Cir. 1992), *cert. denied*, 507 U.S. 972 (1993).

160. Plaintiffs originally argued that the statute was unconstitutional under *Roe v. Wade*, 410 U.S. 113 (1973) and *Griswold v. Connecticut*, 381 U.S. 479 (1965) and also void for vagueness. *Sojourner T.*, 974 F.2d at 28. Louisiana contended that the law was constitutional because *Roe* had been overruled sub silentio by *Webster*. *Id.*

161. 1991 La. Acts 26 (amending and re-enacting LA. REV. STAT. ANN. § 14:87 (West 1990)).

162. *Sojourner T.*, 974 F.2d at 29. The rape and incest exceptions imposed certain additional reporting requirements. *Id.*

163. *Id.*

164. *Id.* at 28.

165. *Id.* at 30 (citing Planned Parenthood v. Casey, 505 U.S. 833, 846 (1992)).

166. *Id.* at 31.

undue burden standard. In *Barnes v. Mississippi*,[167] the plaintiffs launched a facial challenge to the 1986 Mississippi abortion statute[168] requiring a minor obtain the consent of both parents before having an abortion.[169] In a pre-*Casey* decision, the district court had previously held the statute unconstitutional, and the state appealed.[170] On appeal, the challengers argued that the two-parent requirement served no important state interest, unduly restricted a minor's access to an abortion, and intruded on a family's right to structure its relationships.[171]

In its review, the Fifth Circuit interpreted the inquiry under *Casey* as turning on "an examination of the importance of the state's interest in the regulation and the severity of the burden that regulation imposes on the woman's right to seek an abortion."[172] In the first prong of its inquiry, the Fifth Circuit determined that Mississippi did have an important interest in protecting children from their own immaturity and naivete, as well as from the possibly deficient advice of abortion providers.[173] It found these state interests equally present if not "heightened" with a two-parent consent provision because of the increased benefit of having both parents involved.[174]

In addressing the second prong of the inquiry, the Fifth Circuit stated that although a two-parent consent requirement would generally increase the number of children utilizing the judicial bypass mechanism, "the bulk of the burden is in requiring the consent of even one parent, as the state is unquestionably entitled to do."[175] The court therefore held that the additional burden placed upon the minor by requiring the approval of the second parent would be slight,[176] and did not place an undue burden upon a minor's right to seek an abortion.[177]

The Fifth Circuit's analysis in *Barnes v. Mississippi* is generally in line with the *Casey* joint opinion in that the joint opinion did not engage in an undue burden analysis with regard to Pennsylvania's one-parent consent with judicial bypass provision.[178] Instead, the joint

167. 992 F.2d 1335 (5th Cir.), *cert. denied*, 114 S. Ct. 468 (1993).

168. MISS. CODE ANN. §§ 41-41-51 to -63 (1993).

169. Barnes v. Mississippi, 992 F.2d at 1337. This parental consent provision contains a typical judicial bypass mechanism. *See* MISS. CODE ANN. § 41-41-53(3) (1993).

170. *Id.* at 1336-37.

171. *Id.* at 1337-38.

172. *Id.* at 1339.

173. *Id.*

174. *Id.*

175. *Id.* at 1340.

176. *Id.*

177. *Id.* at 1341.

178. Planned Parenthood v. Casey, 505 U.S. 833, 899-900 (1992).

opinion upheld the provision based on well-established precedent:[179] "Our cases establish, and we reaffirm today, that a State may require a minor seeking an abortion to obtain the consent of a parent or guardian, provided that there is an adequate judicial bypass procedure."[180] Following the example of *Casey*, the Fifth Circuit for the most part properly engaged in a relatively simple inquiry due to the close body of applicable constitutional law.[181] Its examination of Mississippi's two-parent consent provision, however, did not require a full undue burden analysis based on factual findings such as that illustrated by the *Casey* joint opinion's treatment of Pennsylvania's spousal notification provision.[182] Instead, under a purpose prong inquiry, the statute was found to have a clearly invalid purpose under well-established law upheld in *Casey*.

In its failure to engage in the factfinding required by the undue burden standard, however, the Fifth Circuit came close to fulfilling the prediction that the undue burden standard would allow judges to assess abortion regulations according to their own subjective notions. In its holding that only a slight burden will be placed upon the minor by requiring her to obtain approval of a second parent, the Fifth Circuit's conclusion rests in large part upon ungrounded assumptions. Within its discussion of this issue, the Fifth Circuit included the following unsupported notions:[183] "involvement of both parents in the decisionmaking process might increase the reflection and deliberation on the decisions";[184] "[w]here the state supplies an expeditious process for obtaining court approval, the additional burden on the minor is greatly relieved";[185] and "where one parent withholds consent, the minor will often have a willing supportive parent to accompany her to

179. *Id.* at 899.

180. *Id.* (citing *Akron II*, 497 U.S. 502, 510-19 (1990) (O'Connor, J., concurring), Hodgson v. Minnesota, 497 U.S. 417 (1990), *Akron I*, 462 U.S. 416, 440 (1983), and Bellotti v. Baird, 443 U.S. 622, 643-44 (1979)).

181. *Id.* at 1338-41 (citing Hodgson v. Minnesota, 497 U.S. 417 (1990), Planned Parenthood v. Ashcroft, 462 U.S. 476 (1983), Bellotti v. Baird, 443 U.S. 622 (1979), and Planned Parenthood v. Danforth, 428 U.S. 52 (1976)).

182. *See supra* notes 64-73 and accompanying text.

183. The court provided no legal authority or social science research for any of these ideas, as required by *Casey*. *See supra* notes 64-69 and accompanying text.

184. Barnes v. Mississippi, 992 F.2d at 1339. Obviously, the reverse of this statement may be the case. For example, an increase in negative parental involvement could bring a doubling of the potential danger of a parental veto over the minor's right to seek an abortion. In addition, one parent, perhaps the mother, may understand the child's concerns better than a second parent.

185. *Id.* at 1340. The court gave no explanation for how the judicial bypass mechanisms will corrolatively decrease the burden upon the minor as the analysis shifts from a one-parent to a two-parent consent requirement. Upon reflection, this statement may merely indicate that even under the press of an additional burden the minor may still avail herself of the bypass mechanisms.

court."[186]

In ruling on the constitutionality of Pennsylvania's spousal notification provisions, the *Casey* joint opinion relies upon the district court findings of fact developed from extensive expert testimony. Similarly, the Fifth Circuit should have remanded the case to allow parties to present expert testimony. Of course, such a procedure does not guarantee that the ultimate judicial opinion will be free of all subjective notions. It would be an improvement, however, over the method used in *Barnes v. Mississippi*, in which the Fifth Circuit grounded its analysis in untested assumptions.

4. *A Recent District Court Case Within the Fifth Circuit:* Causeway Medical Suite v. Ieyoub

In October 1995, a Louisiana district court in *Causeway Medical Suite v. Ieyoub*,[187] granted summary judgment to challengers and permanently enjoined two 1995 revisions[188] to the judicial bypass provisions of the Louisiana parental consent law.[189]

While acknowledging that under Fifth Circuit law a facial challenge to an abortion law must meet the strict *Salerno* test, the court applied neither the *Salerno* or *Casey* standard,[190] since the revisions clearly violated the rights of all minors seeking judicial bypass of a parental consent requirement as established in *Bellotti v. Baird*,[191] and upheld in subsequent Supreme Court cases including *Casey*.[192] The *Ieyoub* court, therefore, did not perform an undue burden analysis although it concluded that the 1995 revisions constituted an "undue burden."[193] The court's analysis, however, would have been identical

186. *Id.*

187. 905 F. Supp. 360 (E.D. La. 1995).

188. 1995 La. Acts 40:1299.35.5.

189. *Ieyoub*, 905 F. Supp. at 361.

190. *Id.* at 363 n.2.

191. *Id.* at 363 (citing Bellotti v. Baird, 443 U.S. 622 (1979)). The court found that these statutory revisions were directly in conflict with all four *Bellotti* requirements for judicial bypass. First, by substituting "may" for "shall," the amendment would give judges discretion to deny an abortion to a minor although she had sufficiently shown herself to be mature and informed. *Id.* at 364. Second, the amendment did not specify within what period of time a juvenile court must rule on the minor's request, and therefore it failed to guarantee an expeditious determination sufficient to allow an effective opportunity for the minor to obtain an abortion as required under *Bellotti*. *Id.* at 365. Third, the amendment also failed to ensure an expeditious determination by allowing a judge to order mental health counseling for the minor prior to making a ruling with no timeframe for its completion. *Id.* at 365. Fourth, the amendment improperly required that the juvenile court could notify the parents of immature minors who applied by judicial bypass if the court determined parental involvement would be in their best interests. *Id.* at 365-66.

192. *Id.* at 365 (citing *Akron II*, 497 U.S. 502 (1990) and Planned Parenthood v. Casey, 505 U.S. 833 (1992)).

193. *Id.* at 366.

under a purpose prong inquiry of the *Casey* undue burden standard since the district court found that the 1995 amendment demonstrated on its face four invalid purposes as defined previously in *Bellotti*.

B. The Eighth Circuit Cases

1. The Fargo *Cases*

a. The District Court Decision

In February 1993, a North Dakota district court decided *Fargo Women's Health Organization v. Sinner* and upheld the entire North Dakota Abortion Control Act[194] as facially constitutional.[195] In *Fargo*, the plaintiffs challenged a twenty-four hour waiting period, an informed consent requirement, a physician penalty provision, and the statute's definitions of abortion and medical emergency.[196] The challengers urged the court to make a factual assessment of the burden imposed on the right to choose an abortion.[197] They argued that the fact-intensive inquiry used by the *Casey* joint opinion signified a new standard of review for facial challenges.[198] The district court however refused to engage in the requested burden assessment[199] and concluded, after citing *Barnes v. Moore*[200] and Justice Scalia's dissent in *Ada v. Guam Society of Obstetricians & Gynecologists*,[201] that *Casey* did not create a new standard of review for facial challenges.[202]

Instead, using the *Salerno* test for reviewing facial challenges, and noting the striking similarities between the North Dakota and Pennsylvania provisions upheld in *Casey* as well as their similarity to the Mississippi provisions upheld in *Barnes v. Moore*, the district court held that the challengers could not satisfy "the heavy burden required for a successful facial challenge."[203] Here again, a lower court failed to apply the undue burden standard because the *Casey* joint opinion was not explicit in its overruling of *Salerno* in the context of facial challenges to abortion restrictions. This lack of guidance allowed the lower court to sidestep a factual inquiry. Because of its confusion over the methodology required under an undue burden analysis, the district court also improperly depended upon the relative similarities between North Dakota and Pennsylvania provisions in its ruling.

194. N.D. CENT. CODE § 14-02.1 (1991).
195. 819 F. Supp. 862, 865 (D.N.D. 1993).
196. *Id.* at 863.
197. *Id.*
198. *Id.* at 864 n.2.
199. *Id.*
200. 970 F.2d 12 (5th Cir.) (per curiam), *cert. denied*, 506 U.S. 1021 (1992).
201. 506 U.S. 1011 (1992) (Scalia, J., joined by Rehnquist, C.J., and White, J., dissenting from denial of certiorari); *see infra* notes 346-347 and accompanying text.
202. *Sinner*, 819 F. Supp. at 864 n.2.
203. *Id.* at 864 (citing United States v. Salerno, 481 U.S. 739, 745 (1987)).

b. Justice O'Connor's Concurrence in the Denial of Stay

The challengers then appealed to the Eighth Circuit and requested an injunction staying enforcement of the North Dakota abortion statute.[204] The Eighth Circuit denied their request for injunctive relief, agreeing with the district court that *Salerno* applied and *Casey* did not require a different approach.[205] The plaintiffs then appealed to the Supreme Court for a stay of the district court's judgment and an injunction staying enforcement pending appeal.[206] Although the application was denied, in an unusual concurrence joined by Justice Souter, Justice O'Connor explained:

> I write separately . . . to point out that our denial of relief should not be viewed as signaling agreement with the lower courts' reasoning. In my view, the approach taken by the lower courts is inconsistent with *Casey*. In striking down Pennsylvania's spousal-notice provision, we did not require petitioners to show that the provision would be invalid in *all* circumstances. Rather, we made clear that a law restricting abortions constitutes an undue burden . . . if, "in a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion." . . . And the joint opinion specifically examined the record developed in the District Court in determining that Pennsylvania's informed-consent provision did not create an undue burden. . . . While I express no view as to whether the particular provisions at issue in this case constitute an undue burden, I believe the lower courts should have undertaken the same analysis.[207]

Even though Justice Kennedy, the third Justice of the *Casey* joint opinion, did not join in the concurrence,[208] it is safe to say that Justice O'Connor legitimately represents the voice of the *Casey* joint opinion were it to speak today. As such, the concurrence clarified a few of the issues that the lower courts stumbled over in their first attempts to apply the *Casey* undue burden standard. Specifically, the *Fargo* concurrence explained: the use of the *Salerno* standard for reviewing facial challenges is inconsistent with *Casey*, the test for a facial challenge to a law restricting abortions under *Casey* is whether it operates as a substantial obstacle to a woman's choice in a large fraction of cases in which the law is relevant, and this inquiry requires an examination of the district court record.[209]

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204. Fargo Women's Health Org. v. Schafer, 18 F.3d 526 (8th Cir. 1994).

205. *Id.*

206. Fargo Women's Health Org. v. Schafer, 507 U.S. 1013, 1013 (1993) (O'Connor, J., concurring).

207. *Id.* at 1014 (citations omitted).

208. Without knowing the circumstances of why Justice Kennedy did not join in this concurrence, it would be presumptuous to draw any legal meaning from his absence.

209. 507 U.S. at 1014.

c. The Circuit Court Opinion

In February 1994, the Eighth Circuit decided *Fargo Women's Health Organization v. Schafer*.[210] The challengers argued that the undue burden standard requires a trial court to make factual findings, and that a facial challenge may succeed even if the statute could be applied constitutionally to some women.[211] North Dakota argued that the district court properly dismissed the suit because its legislation was similar to the Pennsylvania statute upheld in *Casey*.[212] Given Justice O'Connor's *Fargo* concurrence, the Eighth Circuit decided that it should analyze the issues first under the *Salerno* test, and then alternatively as if the undue burden standard had replaced *Salerno*.[213]

Under its *Salerno* analysis, the Eighth Circuit summarily accepted the district court's finding that the challengers had failed to overcome the difficult burden of proving that no set of circumstances existed under which the law could be constitutionally valid.[214] For its undue burden analysis, the Eighth Circuit incorporated the guidance provided by Justice O'Connor's *Fargo* concurrence and embarked on a factual inquiry of whether the North Dakota law operated as a substantial obstacle to a woman's choice to obtain an abortion in a large fraction of cases in which the law was relevant.[215] As the basis for this factual assessment, the court accepted as true the affidavits and deposition testimony submitted by plaintiffs in their opposition papers.[216]

The plaintiffs' principal arguments against each of the North Dakota provisions were that they unduly burdened a woman's right to an abortion because they would require two trips to an abortion provider instead of one, "exposing the woman to dual harassment, stalking, and contact at home."[217] For example, the North Dakota statute contains

210. 18 F.3d 526 (8th Cir. 1994).

211. *Id.* at 528.

212. *Id.*

213. *Id.* at 529. The Eighth Circuit apparently did not find Justice O'Connor's *Fargo* concurrence conclusive, and decided that the proper inquiry required examination under both approaches because "[i]f the three justices [had] wanted to depart from the *Salerno* standard, we believe they would have specifically stated that the standard did not apply." *Id.*

Judge McMillian dissented, stating that he believed the district court erred in applying the *Salerno* test, and the proper formulation to be used was stated by Justice O'Connor in her concurrence. *Id.* at 536 (McMillian, J., dissenting). "I would remand this case to the district court with instructions that [it] hold an evidentiary hearing and make factual findings as to whether the North Dakota provisions in question create such an undue burden." *Id.*

214. *Id.* at 530 (citing United States v. Salerno, 481 U.S. 739, 745 (1987)).

215. *Id.*

216. *Id.*

217. *Id.* at 533. The challengers also argued that the additional visit would increase travel and extended-stay expenses. *Id.*

several sections requiring an abortion provider to give certain information to a woman seeking an abortion at least twenty-four hours prior to an abortion procedure; the challengers argued that these requirements would mandate at least one additional visit.[218] The Eighth Circuit found instead that the statute's provisions requiring a woman be "told" or "informed" of this information did not require the face-to-face verbal exchanges:[219] "We do not believe a telephone call and a single trip, whatever the distance to the medical facility, create an undue burden."[220]

With the assurance that "[w]e have applied the undue burden standard to the factual record made in the district court as the Supreme Court did in *Casey*,"[221] the Eighth Circuit found that the North Dakota statute's twenty-four hour waiting period and informed consent requirements, physician penalty provisions, and abortion and medical emergency definitions posed no substantial obstacle to a woman's choice to undergo an abortion and did not constitute an undue burden.[222] The court also noted the "close similarity" of the North Dakota informed consent, twenty-four hour waiting period, and medical emergency definition provisions, to their Pennsylvania counterparts upheld in *Casey*,[223] stating that this similarity "reaffirms our conclusion that these particular provisions of the statute are not an undue burden for women in North Dakota."[224]

In *Fargo Women's Health Organization v. Schafer*, the Eighth Circuit was the first court after *Casey* to engage in a factual inquiry in undertaking an undue burden analysis.[225] This inquiry was in large part due to the guidance delivered by Justice O'Connor in her *Fargo* concurrence which made clear that a factual inquiry must be undertaken. The Eighth Circuit, however, was less convinced by the *Fargo* concurrence on the issue of whether to apply *Salerno*. Even though the concurrence specified that in *Casey* the Court had not required challengers "to show that the provision would be invalid in *all* circum-

218. *Id.* at 530-31.

219. *Id.* The Eighth Circuit accepted the North Dakota Attorney General's arguments that the information could be given by telephone, the woman's written certification that she received the information could be obtained when she came for the procedure, and gestational age of the fetus could be obtained by an agent of the physician. *Id.* at 530.

220. *Id.* at 533.

221. *Id.* at 536 n.8.

222. *Id.* at 530-34.

223. *Id.* at 532-33.

224. *Id.* at 533.

225. The court did not, however, examine district court findings because this was an appeal from summary judgment. *Id.* at 530. It therefore substituted the evidence provided by the challengers in their opposition papers. *Id.*

stances,"[226] the Eighth Circuit still found the applicability of *Salerno* to abortion regulations to be an "open question."[227]

2. Planned Parenthood v. Miller

a. The District Court Case

In August 1994, a South Dakota district court decided *Planned Parenthood v. Miller*, finding the civil and criminal penalty provisions of the South Dakota abortion statute[228] to be unduly burdensome on women seeking abortions.[229] The court, however, upheld an informed consent requirement, a twenty-four hour waiting period, and a forty-eight hour waiting period for unemancipated minors.[230] Additionally, it struck down a one-parent notice requirement based on prior precedent because it did not contain a judicial bypass mechanism.[231]

In reviewing the constitutionality of the civil and criminal penalty provisions of the South Dakota abortion statute, the district court relied upon the undisputed facts from the parties' summary judgment papers.[232] With regard to the civil penalty provision providing for strict liability of $10,000 in damages per violation, the court found the provision to be an unconstitutional obstacle that "chill[ed] the abortion decision."[233] The court stated that "South Dakota has [only] one physician providing abortion services. If this statutory provision is allowed to stand, there may not be any provider willing to subject himself or herself to the vagaries of the statute."[234] Similarly, with regard to the criminal penalty provision which included penalties of a $100 fine and one year of imprisonment,[235] the court found the provision "acts as a chilling effect upon a physician's desire to continue performing abortions."[236] It further explained that "where a basic constitu-

226. Fargo Women's Health Org. v. Schafer, 507 U.S. 1013, 1014 (1993) (O'Connor, J., concurring).

227. *Schafer*, 18 F.3d at 529.

228. 1993 S.D. Laws 249 ("An Act to Regulate the Performance of Abortion").

229. 860 F. Supp. 1409, 1417-18 (civil penalty provision), 1419-20 (criminal penalty provision) (D.S.D. 1994). Although the court also struck down the South Dakota one-parent notification without bypass provision, calling it an "undue burden on the minor's privacy right to make the abortion decision," it found the provision unconstitutional under long-standing precedent. *Id.* at 1415-16; *see* Hodgson v. Minnesota, 853 F.2d 1452 (8th Cir. 1988) (en banc), *aff'd*, 497 U.S. 417 (1990).

230. *Miller*, 860 F. Supp. at 1416-17 (48 hour waiting period for unemancipated minors), 1418-19 (informed consent provision), 1420-21 (24 hour waiting period).

231. *Id.* at 1415-16 (citing Hodgson v. Minnesota, 497 U.S. 417 (1990); Planned Parenthood v. Ashcroft, 462 U.S. 476 (1983); Bellotti v. Baird, 443 U.S. 622 (1979); Planned Parenthood v. Danforth, 428 U.S. 52 (1976)).

232. *Id.* at 1413-14 ("Findings of Fact").

233. *Id.* at 1418.

234. *Id.*

235. *Id.* at 1419-20.

236. *Id.* at 1420.

tional right of the female is involved, . . . the chilling effect becomes much more significant as it impacts . . . the ability to find competent physicians to perform the procedure."[237]

Here, in its analysis of the civil and criminal penalty provisions, the district court relied on specific findings of fact concerning the circumstances present in South Dakota, and in particular, the significant effects of having only one in-state abortion provider. This factual assessment generally fits the requirements of the *Casey* joint opinion. In upholding the twenty-four hour waiting period and parental consent provisions, however, the district court engaged in the improper comparison of these provisions to the Pennsylvania provisions upheld in *Casey* to determine constitutionality.[238]

b. The Circuit Court Case

In August 1995, the Eighth Circuit decided the appeal in *Planned Parenthood v. Miller* and affirmed the district court's decision in all respects.[239] The critical issue on appeal was whether the *Casey* undue burden standard had replaced the *Salerno* test for challenges to the facial constitutionality of abortion laws.[240] Earlier in February 1994, the Eighth Circuit in *Schafer* had left this issue an "open question."[241] Later, in *Miller*, the court explained that it avoided the issue in *Schafer* because the result would have been the same no matter which test it followed.[242] In resolving this issue, the Eighth Circuit decided "to follow what the Supreme Court actually did—rather than what it failed to say."[243] In other words, the court found that *Casey* effectively overruled *Salerno* for facial challenges to abortion statutes.[244]

With regard to each reviewed provision, the Eighth Circuit followed the basic reasoning laid out by the district court. First, it struck down the South Dakota one-parent notice provision based on the well-established precedents that require a judicial bypass mecha-

237. *Id.*

238. *See id.* at 1418-19 (citing similarities to informed consent provisions in Planned Parenthood v. Casey, 505 U.S. 833 (1992), Barnes v. Moore, 970 F.2d 12 (5th Cir. 1992), and Fargo Women's Health Org. v. Schafer, 18 F.3d 526 (5th Cir. 1992)), 1420-21 (citing similarity to *Casey* provision).

239. 63 F.3d 1452, 1454 (8th Cir. 1995), *cert. denied*, 64 U.S.L.W. 3724 (U.S. Apr. 29, 1996) (No. 95-856).

240. *Miller*, 63 F.3d at 1456-57. This district court applied the *Casey* undue burden standard without regard to *Salerno*.

241. *Schafer*, 18 F.3d at 529.

242. *Miller*, 63 F.3d at 1457. The court further explained that although the *Miller* challengers could meet the undue burden standard, they would fail under the *Salerno* test. *Id.*

243. *Id.* at 1458.

244. *Id.*

nism.[245] Second, it struck down both the civil and criminal penalty provisions for physicians, finding that they "chill the willingness of physicians to perform abortions in South Dakota."[246] Third, it summarily upheld the informed consent provision reasoning that it was virtually identical to provisions upheld in *Schafer* and *Casey*.[247] Therefore, in *Miller*, the Eighth Circuit mirrored almost exactly the successes and failures of the district court in its undue burden analysis: it properly depended upon findings of fact with regard to the civil and criminal penalty provisions, but improperly decided constitutionality by comparing the South Dakota informed consent provision to similar provisions in other states.

C. The Tenth Circuit Cases

1. Jane L. v. Bangerter

a. The District Court Case

In December 1992, a Utah district court decided *Jane L. v. Bangerter*,[248] in which challengers sought to invalidate the entire Utah abortion law[249] by challenging its central provisions.[250] The statute placed limitations on abortions both before and after viability, with an exception for instances of grave danger to a woman's health, and required parental and spousal notification "if possible."[251] The district court quickly dispensed with the statute's ban on abortions before viability, based upon *Casey*'s reaffirmation of the essential holding of *Roe*: before viability the state interest in protecting potential life is not strong enough to support a prohibition of abortion.[252]

In setting out the standard for a facial challenge to the statute's postviability abortion prohibition, the court encountered the dilemma of whether to apply the *Salerno* test or abandon it as the *Casey* joint opinion did in its analysis of spousal notification.[253] Grappling with this issue, the court noted the joint opinion's own inconsistent han-

245. *Id.* at 1459-60 (citing Hodgson v. Minnesota, 497 U.S. 417 (1990), Planned Parenthood v. Ashcroft, 462 U.S. 476 (1983), Bellotti v. Baird, 443 U.S. 622 (1979), and Planned Parenthood v. Danforth, 428 U.S. 52 (1976)).

246. *Id.* at 1465, 1467.

247. *Id.* at 1467.

248. 809 F. Supp. 865 (D. Utah 1992). This memorandum decision came after earlier decisions rendered prior to *Casey*. *See* 794 F. Supp. 1528 (D. Utah 1992); 794 F. Supp. 1537 (D. Utah 1992). After *Casey*, the parties were permitted to file briefs on the impact of *Casey*. 809 F. Supp. at 867.

249. UTAH CODE ANN. §§ 76-7-301 to -325 (1991).

250. 809 F. Supp. at 868.

251. *Id.* at 868-69 (citing UTAH CODE ANN. §§ 76-7-302, -304, -307, -308, and -315 (1991)).

252. *Id.* at 870.

253. *Id.* at 871-72.

dling of facial challenge analysis: "In the context of Pennsylvania's twenty-four hour waiting period statute, the Court appears to have combined facial challenge analysis with the undue burden test. However, with regard to the spousal notification statute, the Court did not determine whether the law had *any* constitutional applications as *Salerno* requires."[254]

Citing this inconsistency in *Casey*, and Justice Scalia's dissent from the denial of the petition for certiorari in *Ada v. Guam Society of Obstetricians & Gynecologists*[255] in which he claimed that *Casey* did not alter facial challenge analysis, the court decided to implement the *Salerno* test.[256] Under this standard, the court held that the statute withstood the facial challenge because "[i]t is clear that the Utah statute can be applied constitutionally in the vast majority of cases."[257]

Again applying *Salerno*, the Utah district court found the provision restricting late, nontherapeutic abortions did not constitute an undue burden.[258] In its discussion, the court noted that such abortions have never been performed in Utah and doctors generally avoid the trauma of late abortions.[259] Since the plaintiffs submitted no evidence that any woman wanted or had attempted to obtain a late abortion, the court found no undue burden.[260] Here, the Utah district court properly depended upon the record and made findings of fact as required under the *Casey*.

The court also upheld the statute's choice-of-method provisions requiring physicians to employ the abortion method that gives the unborn child the best chance of survival.[261] The court based this holding on the notion that *Casey*'s striking down of *Roe*'s trimester system overruled prior Supreme Court jurisprudence and increased the importance of the state's interest in potential life.[262] Finding the Utah method provisions rationally related to this heightened state interest, the court found no undue burden.[263]

In reviewing Utah's spousal notification provision that required a physician to notify the husband of a woman seeking an abortion, the court noted its similarity to the Pennsylvania spousal notification pro-

254. *Id.* at 871 n.10.
255. 506 U.S. 1011, 1013 (1992) (Scalia, J., dissenting from denial of certiorari).
256. *Jane L.*, 809 F. Supp. at 872.
257. *Id.* at 871-72 (citing United States v. Salerno, 481 U.S. 739, 745 (1987)). The court stated that this is "because the Utah statutory prohibition of abortions at 21 weeks gestational age corresponds with the time when the unborn child is capable of independent existence, being fully developed and simply maturing in the womb." *Id.* at 872.
258. *Id.* at 873-74.
259. *Id.* at 873.
260. *Id.*
261. *Id.* at 875-76.
262. *Id.* at 875.
263. *Id.* at 875-76.

vision struck down in *Casey*, and found this notice provision requiring physicians to give notice directly to the husband, rather than allow women to tell their husbands, to be "a distinction without a difference."[264] The court reasoned that "[t]he same abuse from violent and dangerous husbands could be expected whether the notice comes from the woman or the woman's physician."[265] Based on this comparison, the court found the provision to be an unconstitutional burden on the abortion right.[266]

In *Jane L.*, the district court properly found the previability prohibitions to be an undue burden without engaging in a factual inquiry because the prohibitory purpose of these provisions violated an essential holding of *Roe* reaffirmed by *Casey*. In other words, the court employed a purpose prong inquiry under the undue burden standard and found the purpose illegal on its face. In upholding Utah's restrictions on late, nontherapeutic abortions, the court also properly relied on factual findings as required by the effect prong of the undue burden standard. It improperly assessed the constitutionality of the Utah spousal notification requirement, however, by essentially borrowing the evidence presented in *Casey* and comparing the provisions of different states.

b. The Circuit Court Case

In August 1995, the Tenth Circuit issued *Jane L. v. Bangerter*,[267] its first opinion reviewing abortion restrictions since *Casey*. For the most part, the Tenth Circuit upheld the undue burden analysis of the district court and reversed only the lower court's ruling on Utah's choice-of-method provisions.[268] The Tenth Circuit rejected the district court's contention that *Casey*'s striking down of the trimester framework had dislodged well-established precedents based on *Roe*'s trimester system.[269]

Instead, the Tenth Circuit found the "importance of maternal health is a unifying thread that runs from *Roe* to *Thornburgh* and then to *Casey*," and "[t]he Utah choice of method provisions violate this consistent strain of abortion jurisprudence."[270] The court further held that *Casey* did not disturb *Roe*'s approach to postviability regulation,

264. *Id.* at 876.

265. *Id.* The court cited no findings of fact or social science research to support this notion. *See id.* at 876-77.

266. *Id.* at 877.

267. 61 F.3d 1493 (10th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3561 (U.S. Feb. 5, 1996) (No. 95-1242).

268. *Jane L.*, 61 F.3d at 1502-05. Other issues involved severability, *see id.* at 1496-99, and the statute's ban on fetal experimentation, *see id.* at 1499-1502.

269. *Id.* at 1503-04.

270. *Id.* at 1504.

but instead reaffirmed the state's interest in potential life and its ability to regulate abortion after viability, as long as exceptions exist for the life and health of the mother.[271]

With the choice-of-methods issue, the Tenth Circuit properly assessed these provisions under the purpose prong of the undue burden standard, which recognizes the constitutionality of provisions aligned with the essential holdings of *Roe* as reaffirmed by *Casey*. The Tenth Circuit also let stand without mention the Utah district court's use of the *Salerno* test rather than the undue burden standard.

2. Utah Women's Clinic v. Leavitt

In February 1994, prior to *Jane L.*, a Utah district court decided *Utah Women's Clinic v. Leavitt*,[272] upholding the twenty-four hour waiting period and informed consent requirements of the Utah Abortion Act Revision of 1993.[273] In drafting the law, the state legislature purposefully tailored its provisions after the Pennsylvania restrictions upheld in *Casey* to ensure that the Act would pass constitutional muster.[274] In reviewing the constitutionality of these provisions, the district court relied heavily upon comparisons between the Utah and Pennsylvania provisions upheld in *Casey*. For example, in evaluating the effect of the twenty-four hour waiting period, which would force women seeking abortions to make two visits to an abortion clinic instead of one, the court stated that "[b]ecause the two visit requirement is constitutional in Pennsylvania, it must also be constitutional in Utah."[275]

The court also stumbled over the question of how to reconcile the traditional *Salerno* test with the new *Casey* undue burden standard.[276] It noted that *Casey* seemed to have altered the traditional standard for facial challenges in the abortion context, but that its new standard changed only "the focus as to whom the law will affect. It does not, however, change the standard for statutory interpretation under a facial challenge."[277] Following this discussion, the court chose to apply a type of *Salerno-Casey* hybrid, holding that to bring a good faith facial action, the challengers "must reasonably believe that the statute is incapable of being applied constitutionally" (the gist of *Salerno*) "in a large fraction of the cases in which it is relevant" (the language of *Casey*).[278] The court then summarily found that plaintiffs did not have

271. *Id.*
272. 844 F. Supp. 1482 (D. Utah 1994).
273. UTAH CODE ANN. § 76-7-305 (1993).
274. *Leavitt*, 844 F. Supp. at 1485-86.
275. *Id.* at 1487.
276. *Id.* at 1488-90.
277. *Id.* at 1489.
278. *Id.*

this reasonable belief since they conceded that, if the law was interpreted to allow the information to be given to women by telephone rather than requiring a second visit to the abortion facility, it would not impose an undue burden.[279] Using its hybrid *Salerno-Casey* test, the court upheld the twenty-four hour waiting period and informed consent requirement, stating that "it would be extremely difficult, if not impossible, to bring a good faith facial challenge."[280]

The challengers also argued that the *Casey* joint opinion relied on the district court record in making its determinations, and that each subsequent abortion law must be scrutinized on the individual factual record before the court.[281] The court held that such inquiries were not required and that such a review would amount to "a futile exercise unless there is a reasonable expectation that circumstances in the forum state are materially different from circumstances in Pennsylvania."[282] The court then reviewed the factual record previously developed by the magistrate judge, found it in all material respects identical to the record examined in *Casey*, and thus constitutional.[283]

Here, the *Leavitt* court did review the factual record as required by *Casey*, but improperly assessed that record by comparing it to the record used in *Casey* to uphold the Pennsylvania informed consent provision. Without the guidance the *Casey* joint opinion should have provided by explicitly overruling *Salerno* in abortion regulation challenges, the court crafted a hybrid of *Salerno* and *Casey*, instead of properly following the undue burden standard.

D. District Court Cases in Other Circuits

1. Arizona: Planned Parenthood v. Neely

In September 1992, an Arizona district court decided *Planned Parenthood v. Neely*, which ruled on the facial constitutionality of an Arizona statute[284] that required parental consent before an abortion procedure could be performed on an unmarried or unemancipated minor.[285] Although the action was originally brought in August 1989, a preliminary injunction remained in force and the matter was left

279. *Id.*

280. *Id.* at 1491.

281. *Id.* at 1490.

282. *Id.* The court noted that "[i]t could be argued that because Utah is geographically larger than Pennsylvania, with only one major metropolitan area, the waiting period's burden is greater on rural women in Utah because they have farther to travel to get to the abortion clinic." *Id.* at 1491 n.11. The court found this travel burden, however, not to be a factor in its constitutional inquiry. *Id.*

283. *Id.* at 1495.

284. ARIZ. REV. STAT. ANN. §§ 36-2152, -2153 (1989).

285. 804 F. Supp. 1210, 1213 (D. Ariz. 1992).

pending until *Casey*.[286]

The district court found the statute's medical emergency exception[287] to be an undue burden absent broader language addressing a "serious risk" to the "health" of the minor woman.[288] In deciding the issue, the court cited the *Casey* joint opinion's determination that the essential holding of *Roe* forbids a state from interfering with a woman's choice if continuing her pregnancy would constitute a threat to her health.[289] The court used the Pennsylvania definition of a medical emergency, which was upheld in *Casey*, as a measuring stick for the constitutionality of the Arizona definition.[290]

Although the district court found the statute unconstitutional, and therefore did not reach the issue of the constitutional adequacy of the statute's judicial bypass procedure, it nevertheless reviewed the procedure to offer guidance to the state legislature for future drafting of a revision that would be constitutional.[291] The court stated that the provision's requirement that a minor file a notice of appeal within twenty-four hours of receiving an adverse court order was unconstitutional and would place an undue burden on the minor.[292] Moreover, the court found that without provisions for court-appointed counsel at all levels of the proceeding, or for the appointment of guardians or proceedings through a friend, the procedure was inadequate to ensure an effective opportunity for the minor to obtain judicial permission to make the abortion decision without parental consent.[293]

In its analysis of both the Arizona medical emergency definition and the judicial bypass procedure, the district court engaged mostly in a comparison of these Arizona provisions to their Pennsylvania counterparts.[294] By using this comparative method, the court avoided the fact-based analysis that *Casey* mandated and instead merely applied *Casey*'s specific holdings. This methodology moves abortion law towards consistency among jurisdictions, instead of fostering inconsistency as some predicted. An unexpected advantage resulting from

286. *Id.* at 1211.

287. Parental consent is not required where "[t]here is an emergency need for an abortion to be performed or induced such that continuation of the pregnancy is an immediate threat and grave risk to the life of the pregnant woman and the attending physician so certifies in writing." ARIZ. REV. STAT. ANN. § 36-2152(B)(2).

288. 804 F. Supp. at 1215.

289. *Id.* (citing Planned Parenthood v. Casey, 505 U.S. 833, 879 (1992)).

290. *Id.* at 1215.

291. *Id.* at 1216.

292. *Id.* at 1217.

293. *Id.* at 1218.

294. *Id.* at 1214-15 (comparing ARIZ. REV. STAT. ANN. § 36-2152(B)(2) with 18 PA. CONS. STAT. ANN. § 3203 (1990)), 1217-18 (comparing ARIZ. REV. STAT. ANN. § 36-2153(A) with 18 PA. CONS. STAT. ANN. § 3206(e)).

this erroneous method is to limit the imposition of the judge's subjective notions into the abortion law analysis.

2. Recent District Court Rulings on Preliminary Injunctions

a. *Montana:* Armstrong v. Mazurek

In September 1995, a Montana district court in *Armstrong v. Mazurek* denied a motion for injunctive relief brought against a physicians-only provision by three doctors and a physician assistant who perform abortions in Montana.[295] The motion contended that a 1995 amendment to Montana abortion law[296] was facially invalid under the *Casey* undue burden standard.[297] At issue was a provision which added the language: "A physician assistant-certified may not perform an abortion."[298]

To obtain a preliminary injunction, the challengers were required to demonstrate a strong likelihood of success on the merits, irreparable injury, and a balance of hardships in their favor.[299] In assessing whether the purpose of the amendment was invalid under *Casey*, the court stated that its inquiry was narrow because "'the Constitution gives the States broad latitude to decide that particular functions may be performed only by licensed professionals, even if an objective assessment might suggest that those same tasks could be performed by others.'"[300] The court summarily held that there was insufficient evidence in the record to support finding an undue burden,[301] and declined to engage in an analysis of the physician-only provision under the effect prong of the undue burden standard.

b. *Ohio:* Women's Medical Professional Corporation v. Voinovich

In December 1995, an Ohio district court issued a preliminary injunction in *Women's Medical Professional Corporation v. Voinovich*,

295. No CV-95-083-GF, 1995 U.S. Dist. LEXIS 20136, at *8-*9 (D. Mont. Sept. 29, 1995). The court, however, enjoined the enforcement of two licensing and advertising provisions previously found unconstitutional in earlier actions on other grounds. *Id.* at *3.

296. *See* MONT. CODE ANN. §§ 37-20-103, 50-20-109 (1995).

297. *Armstrong*, 1995 U.S. Dist. LEXIS 20136, at *7. The challengers also argued that the amendment is unconstitutional because it violates equal protection law on the basis of sex, and that it violates the Bill of Attainder Clause since it amounted to legislative punishment directed specifically against the physician assistant challenger because she was the only physician assistant performing abortions in Montana. *Id.* at *7-*8.

298. MONT. CODE ANN. § 37-20-103 (1995).

299. *Armstrong*, 1995 U.S. Dist. LEXIS 20136, at *9 (citing Los Angeles Memorial Coliseum Comm'n v. NFL, 634 F.2d 1197, 1200 (9th Cir. 1980)). Alternatively, challengers could obtain the injunction by demonstrating either a combination of probable success and irreparable harm, or "that serious questions are raised and the balance of hardships tip sharply in [their] favor." *Id.* (citing *Coliseum Comm'n*, 634 F.2d at 1201).

300. *Id.* at *18 (quoting Planned Parenthood v. Casey, 505 U.S. 833, 884 (1992)).

301. *Id.* at *18-*19.

which enjoined a 1995 abortion act[302] that contained a viability-testing requirement and banned performing postviability abortions or the dilation and extraction procedure.[303] In determining which standard to apply in assessing the facial constitutionality of state abortion laws, the court noted that the undue burden standard used in *Casey* "appeared to signal a new approach."[304] The court decided to follow the *Casey* approach, rather than use the *Salerno* test, for two reasons: in the *Casey* analysis of the spousal notification provision, the challengers were not required to show that no set of circumstances existed under which the law would be invalid; and secondly, as a practical matter it would be impossible to find an undue burden without examining specific facts in the record.[305]

The court found the challengers had shown a substantial likelihood that they would succeed on the merits in their challenges to all three provisions.[306] In its assessment of the ban on the dilation and extraction procedure, the court engaged in an extensive review of expert testimony and found the procedure to be potentially the safest abortion procedure, and banning it would have the unconstitutional effect of forcing a significant number of women having abortions to undergo riskier procedures that might endanger their health.[307] Regarding the ban on postviability abortions, the court found the provision unconstitutional because, based on the record, it would prevent postviability abortions that might be necessary to preserve the health of pregnant women and thus violated an essential holding of *Roe* as reaffirmed in *Casey*.[308] Lastly, the court found the viability testing re-

302. OHIO REV. CODE ANN § 2919.11-.19 (Anderson 1995).

303. 911 F. Supp. 1051, 1057 (S.D. Ohio 1995). The standard used by the court in issuing the injunction required consideration of four factors: the substantial likelihood of success on the merits, whether irreparable harm would be caused by not issuing it, whether others would be harmed by the injunction, and whether the injunction would serve the public interest. *Id.* at 1059 (citing International Longshoremen's Ass'n v. Norfolk Southern Corp., 927 F.2d 900, 903 (6th Cir. 1991)).

304. *Id.* at 1061.

305. *Id.* at 1061-62. The court noted that the traditional *Salerno* test, besides being inapplicable to previability restrictions, should also not be applied in the postviability context because the standard is too strict in cases which involve laws that threaten severe and irreparable harm, and because it would be unconscionable to hold that a pregnant woman may not challenge a postviability restriction until after she is unconstitutionally deprived of her life or health. *Id.* at 1062.

306. *Id.* at 1093. The challengers also proved that the injunction would save abortion patients from irreparable harm, not harm others, and serve the public interest. *Id.* at 1091-92.

307. *Id.* at 1070.

308. *Id.* at 1087. This ban contained a definition of "serious risk of the substantial and irreversible impairment of a major bodily function," which the court found too narrow to meet constitutional standards because of its potential negative effects on the mental and emotional health of women and fathers. *Id.* at 1080.

quirement unconstitutionally void for vagueness.[309]

Here, the *Voinovich* court properly engaged in an undue burden analysis under the effect prong in its evaluation of the statute's ban on the abortion procedure. First, the court undertook extensive factfinding, which demonstrated the ban's effect would be to force a significant number of the relevant class of women having abortions to undergo riskier procedures that could potentially endanger their health. Second, in its assessment of the statute's ban on postviability abortions, the court also engaged in an analysis under the effect prong of *Casey*. The court examined factual evidence at length, and then concluded that the effect of the ban would be to prevent postviability abortions which might be necessary to preserve the health of pregnant women, an unconstitutional effect under *Roe* as reaffirmed by *Casey*.

c. *Indiana:* A Woman's Choice-East Side Women's Clinic v. Newman

In November 1995, an Indiana district court issued a preliminary injunction enjoining enforcement of the 1995 amendment to the informed consent provision of Indiana's abortion statute[310] in *A Woman's Choice-East Side Women's Clinic v. Newman*.[311] Specifically, the amendment added mandatory disclosure and waiting period requirements to the informed consent provision, provided that a woman seeking an abortion must be given certain medical information and information concerning alternatives to abortion at least eighteen hours before an abortion, and added a definition of medical emergency.[312]

To obtain a preliminary injunction, the challengers were required to demonstrate some likelihood that they would succeed on the merits, that they would suffer irreparable harm without the injunctive relief, and that no adequate remedy at law existed.[313] The court found the *Casey* undue burden standard controlling for this analysis,[314] and stated that the joint opinion's handling of the Pennsylvania spousal notification provision illustrated the type of showing required to meet an undue burden analysis in a facial challenge.[315] In accepting the *Casey* standard, the court noted that the statement of the undue burden standard and its application by the joint opinion seemed inconsis-

309. *Id.* at 1090-91. Specifically, the provision's definitions of nonviability and medical emergency were found to be unconstitutionally vague. *Id.*

310. IND. CODE § 16-34-2-1.1 (1995).

311. 904 F. Supp. 1434 (S.D. Ind. 1995).

312. *Id.* at 1440-41.

313. *Id.* at 1442 (citing Abbott Lab. v. Mead Johnson & Co., 971 F.2d 6, 11 (7th Cir. 1992)).

314. *Id.* at 1445-46.

315. *Id.* at 1447.

tent with the traditional *Salerno* test:[316]

> It is true that *Casey* did not expressly overrule or limit *Salerno*. However, the *Casey* Court's actions and statements conflict with the standard stated in *Salerno*. *Casey* is very closely on point here, and more recent. In addition, Justices O'Connor and Souter have indicated clearly in the *Fargo* case and in *Casey* on remand that a law "constitutes an undue burden, and hence is invalid, if, 'in a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion.'" Therefore, like the Third and Eighth Circuits, this court believes that *Casey* effectively displaced *Salerno*'s application to abortion laws.[317]

By following the model set out by the *Casey* joint opinion in its analysis of spousal notification, the Indiana district court embarked on an effect prong analysis of the undue burden standard, relying extensively on the expert testimony submitted by the parties at hearing.[318]

Based on the evidence presented at the hearing, the court found the amendment's mandatory requirement that women be informed in person and not by telephone constituted an imposition of a two-trip requirement.[319] The court also found that the information requirement would have prevented an estimated eleven to fourteen percent of women from obtaining abortions, which it considered the measure of the law's burden upon the abortion right.[320] The court derived that percentage from data collected by an expert witness in Mississippi, the only state where a law with a two-trip requirement had been in effect long enough such that data could be developed to evaluate the law's effect.[321] Additionally, the court found that the magnitude of this effect was sufficient to satisfy the undue burden standard because eleven to fourteen percent was "a significant fraction of women who would otherwise choose to have abortions."[322] The court also determined that the Mississippi statute had this unconstitutional effect because of its burdens on the right to an abortion, rather than the persuasive effects of the delay and that information was disseminated to the women in person.[323]

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316. *Id.*

317. *Id.* (citations omitted).

318. *Id.* at 1449-62.

319. *Id.* at 1459.

320. *Id.* at 1457.

321. *Id.* at 1454. The Mississippi law contained disclosure and delay requirements similar to those required under the Indiana amendment, and the court accepted the challengers' argument that this Mississippi data provided the best evidence available for measuring potential effects of the amendment in Indiana. *Id.*

322. *Id.* at 1457.

323. *Id.* at 1458.

In its ruling on a motion for preliminary injunction, the *Newman* court went further than any previous court in undertaking a full analysis under the effect prong of the *Casey* undue burden test. First, it dispensed with the *Salerno* test. Second, it scrutinized the Indiana law at hand independent of any comparison to the Pennsylvania provisions in *Casey*. Third, it developed an extensive record of evidence from expert testimony and relied on it for establishing the law's effect. Fourth, it made findings of fact with regard to the relevant class of those women who would otherwise obtain abortions. Lastly, it found that where the law would affect a significant number of women within the relevant class in such a way that it would likely prevent those women from obtaining abortions, a substantial obstacle exists.

E. Third Circuit Law on the Application of the Undue Burden Standard

In *Casey*, the United States Supreme Court remanded the case with the instruction to engage in "proceedings consistent with this opinion, including consideration of the question of severability."[324] Following this course, the Third Circuit then determined that the unconstitutional spousal notification and corresponding recordkeeping provisions were severable from the remainder of the Pennsylvania abortion provisions, and remanded to the district court "for such further proceedings as may be appropriate."[325] The district court then granted the challengers' motion to reopen the record and continue the stay.[326] This ruling was appealed by Pennsylvania; the Third Circuit reversed the district court's order and remanded with instructions to enter the final judgment.[327]

In this last opinion, the Third Circuit provided its view on three crucial features of an undue burden analysis. First, it found that "[a]t a minimum, we believe the Court meant that other state abortion laws require individualized application of the undue burden standard."[328] The court found this view bolstered by Justice O'Connor's *Fargo* concurrence, which stated "the joint opinion specifically examined the record developed in the district court in determining that Pennsylvania's informed consent provision did not create an undue burden. . . . I believe the lower courts should have undertaken the same analysis."[329] The Third Circuit, therefore, believed an independent factual assessment of each state's provisions would be required even

324. 505 U.S. 833, 901 (1992).

325. *Casey*, 978 F.2d 74, 78 (3d Cir. 1992). The severability of these provisions allowed the remainder of the statute to stand. *Id.*

326. *Casey*, 822 F. Supp. 227, 236 (E.D. Pa. 1993).

327. *Casey*, 14 F.3d 848, 863 (3d Cir. 1994).

328. *Id.* at 861.

329. Fargo Women's Health Org. v. Schafer, 507 U.S. 1013, 1013 (1993).

though these provisions in language might be substantially similar to the Pennsylvania provisions upheld in *Casey*.

Second, the Third Circuit believed by limiting its holdings to the record developed by the district court, the *Casey* joint opinion meant that a future "as applied" challenge to the Pennsylvania abortion statute would be possible to allow the challengers to prove that the law in practice imposed an undue burden on the abortion right.[330] Third, the court believed *Casey* established a new standard for facial challenges to previability abortion laws that made the old *Salerno* rule inapplicable.[331]

IV. An Evaluation of the Predicted Problems and an Analysis of the Circuit Court Split Over the Use of *Salerno*

A. The Predicted Problems

1. The Lack of Guidance Predictions

Several of the major predictions made by the commentators have in fact been realized in these thirteen lower court cases involving the constitutionality of state abortion regulations under the *Casey* undue burden standard. It is not a surprise that the broadest criticism—that *Casey*'s joint opinion offered too little guidance on how to implement the standard[332]—has been a theme throughout these cases.

The most unresolved issue created by this lack of guidance is the threshold question of whether *Casey* did away with the *Salerno* test in abortion law challenges. This threshold issue has stopped several courts from ever reaching an undue burden analysis.

For the most part, the courts have been grappling with the larger components of an undue burden analysis, such as whether to develop a factual record under an effect prong inquiry. The prediction that *Casey*'s own internal inconsistencies would cause courts to forego a factual analysis and instead merely apply the specific holdings of *Casey* has frequently appeared.[333] In fact, it seems that where challenged provisions were substantially similar to *Casey*'s, there has been a strong tendency for the courts to note the similarity and sometimes directly decide constitutionality on that basis.

The prediction that the ambiguity of the undue burden standard would lead to an increase in litigation seems to have been incorrect. As a practical matter, it appears that the driving force behind the amount of litigation is not anything inherent to the standard that, as

330. *Casey*, 14 F.3d at 861-62.
331. *Id.* at 863 n.21.
332. Metzger, *supra* note 102, at 2035.
333. *Id.* at 2037-38.

predicted, would require abortion legislation to be relitigated in an effort to gain clarity. Instead, the number of challenges is in direct proportion to the number of abortion restrictions passed by the state legislatures, since with each newly enacted abortion restriction comes a challenge. If an increase in litigation can be construed to mean longer and more complex cases, however, this prediction is probably accurate given the extensive findings of fact required under the standard's effect prong.

2. The Judicial Discretion Predictions

With the exception of *Barnes v. Mississippi*,[334] there has so far been no significant example of judicial bias and speculation infecting an undue burden analysis. Of course, the nature of bias is that it operates below the conscious level of statements which enter the actual text of an opinion. Therefore, other than the obvious examples of presumptions concerning families and family life that were demonstrated in *Barnes v. Mississippi*, this prediction is better left to the empirical research of the social scientists.

Overall, the prediction that broad judicial discretion would lead to disparate outcomes in different states on similar facts has not occurred. This is because several courts have relied upon a comparison of each provision to its Pennsylvania counterpart to determine its constitutionality. Such a method, albeit improper, has reduced the variety of outcomes among the law of different states. As courts apply more extensive factual analyses, as is the trend, inconsistencies may increase in the future.

B. An Analysis of the Circuit Court Split Over the Use of *Salerno*

Ironically, the question with the greatest consequence for abortion regulation challenges is also one which was never predicted by the commentators: whether to apply the traditional *Salerno* facial test or recognize that *Casey* set a new standard for facial challenges in the abortion context. The root of this problem lies in the fact that the joint opinion did not explicitly overrule the *Salerno* test. In its effect-prong analysis of the Pennsylvania spousal notification provision, however, the joint opinion *demonstrated* for the lower courts that the standard had been radically altered.[335] Also, it was subsequently made clear by Justice O'Connor in her *Fargo* concurrence, and by Justice Souter in his in-chambers opinion, that the joint opinion had not required plaintiffs to meet the *Salerno* standard in challenges to state abortion regulations.[336] Because of the confusion created by the joint

334. 992 F.2d 1335 (5th Cir.), *cert. denied*, 114 S. Ct. 468 (1993).
335. *See supra* notes 64-73 and accompanying text.
336. *See supra* notes 89-98 and accompanying text.

opinion's failure to provide more explicit guidance, however, the circuit courts are split over the practical issue of whether to apply the *Salerno* test.

1. *The Traditional* Salerno *Test, as Opposed to the Undue Burden Standard*

In *United States v. Salerno*, Chief Justice Rehnquist reiterated the traditional standard by writing "[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that *no set of circumstances exists under which the Act would be valid.*"[337] If this heavy burden is met by challengers, a statute is rendered entirely invalid.[338] Following *Salerno*, the Court subsequently held this facial standard to apply to state abortion laws in a trilogy of cases.[339] First, in *Webster v. Reproductive Health Services*,[340] the Court applied *Salerno* to a law prohibiting the use of public facilities to perform abortions except when necessary to save the life of the mother. Second, in *Ohio v. Akron Center for Reproductive Health*,[341] the Court applied the test to a judicial bypass procedure for minors seeking abortions without parental consent. And finally, in *Rust v. Sullivan*,[342] the Court applied the test to regulations affecting abortion and family planning counseling.

With the 1992 *Casey* decision, the Court changed course with the joint opinion's pronouncement of the undue burden standard as the new measuring stick for the constitutionality of abortion regulations.[343] In contrast to *Salerno*, the undue burden standard would find a state regulation invalid if, "in a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion."[344] The undue burden standard, therefore, *lowered* the threshold burden challengers must meet from the almost unreachable heights of the *Salerno* test *and* the trend established in the *Webster-Akron-Rust* trilogy. If this trend had continued, today the constitutionality of abortion laws would most likely be scru-

337. 481 U.S. 739, 745 (1987) (emphasis added). An exception to this rule was carved out for statutes which are violative on First Amendment free speech grounds under the overbreadth doctrine. *See, e.g.*, Gooding v. Wilson, 405 U.S. 518, 520-23 (1972).

338. *Salerno*, 481 U.S. at 745. In *Salerno*, the Court upheld the federal Bail Reform Act after finding the plaintiffs' showing that the Act might operate unconstitutionally under *some conceivable set of circumstances* insufficient to render the statute facially invalid. *Id.*

339. *See* Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 271-76 (1994) (arguing *Salerno* is generally inconsistent with the Court's abortion cases).

340. 492 U.S. 490, 524 (1989).

341. 497 U.S. 502, 514 (1990).

342. 500 U.S. 173, 183 (1991).

343. 505 U.S. at 869-79.

344. *Id.* at 895.

tinized under a simple rational basis review. Instead, the *Casey* joint opinion has provided a unique form of heightened scrutiny for reviewing abortion laws.

Two members of the Court who did not join in Justice O'Connor's *Casey* concurrence have expressed a contrary view on *Salerno*'s continuing applicability. First, in his *Casey* dissent, Chief Justice Rehnquist argued that "because this is a facial challenge to the [Pennsylvania] Act, it is insufficient for petitioners to show that the [spousal] notification provision 'might operate unconstitutionally under some conceivable set of circumstances.'"[345] Second, Justice Scalia, in *Ada v. Guam Society of Obstetricians and Gynecologists*, dissented from the Court's denial of certiorari in a case striking down as facially unconstitutional a Guam law that banned all abortions except in cases of medical emergency.[346] In this dissent, Justice Scalia contended that in *Casey* the Court "did not purport to change this well-established rule."[347]

Immediately following *Casey*, these dissenting voices supporting the use of the traditional *Salerno* test in the abortion context were apparently not strong enough to build a quorum of members sufficient to overcome the *Casey* standard. This is the obvious implication of the Court's denial of certiorari in *Ada*: the Guam law was inconsistent with the principles of *Roe* and the application of *Casey*, and therefore unconstitutional.[348] Four years after *Casey*, this small number of dissenting voices supporting the use of *Salerno* in facial challenges to abortion regulations remains insufficient even to secure a granting of certiorari when the Court is "squarely presented" with the circuit split.[349]

2. *A Summary of the Circuit Court Split*

A circuit split has developed over whether to continue applying the traditional *Salerno* test in determining the facial constitutionality of state abortion laws after *Casey*. The lower courts have considered this threshold issue in eight of the thirteen cases implementing the

345. *Id.* at 972-73 (quoting *Salerno*, 481 U.S. at 745) (Rehnquist, C.J., dissenting, joined by Scalia & Thomas, JJ.).

346. 506 U.S. 1011, 1011 (Scalia, J., dissenting from denial of certiorari, joined by Rehnquist, C.J., and White, J.) ("That [denial] seems to me wrong, since there are apparently some applications of the statute that are perfectly constitutional.").

347. *Id.* at 1013.

348. Dorf, *supra* note 339, at 237.

349. Planned Parenthood v. Miller, *cert. denied*, 64 U.S.L.W. 3724, 3725 (U.S. Apr. 29, 1996) (No. 95-856) (Scalia, J., dissenting from denial of certiorari, joined by Rehnquist, C.J., and Thomas, J.).

undue burden standard in abortion law challenges.[350] The issue has risen to the appellate level in the Third,[351] Fifth,[352] and Eighth[353] Circuits. Also, three currently active court cases in the states of Ohio,[354] Indiana,[355] and Montana[356] may cause the issue to be reviewed by the Sixth, Seventh, and Ninth Circuits during the next few years.

The Third Circuit's view is that *Casey* established a new standard for facial challenges to previability abortion laws which made the old *Salerno* rule inapplicable.[357] The Eighth Circuit's arrival at this same conclusion was more circuitous. First, in *Fargo*,[358] despite Justice O'Connor's instructive concurrence, it left the issue of *Salerno*'s applicability to abortion laws an "open question."[359] The court avoided deciding the issue because under its alternative analyses of the provisions up for review, the result would have been the same under *Casey* or *Salerno*.[360] Later, in *Miller*, the applicability of the *Salerno* test be-

350. These cases are: Planned Parenthood v. Miller, 63 F.3d 1452 (8th Cir. 1995), *cert. denied*, 64 U.S.L.W. 3724 (U.S. Apr. 29, 1996) (No. 95-856); Fargo Women's Health Org. v. Schafer, 507 U.S. 1013 (1993), *denying application for stay and injunction pending appeal from* 18 F.3d 526 (8th Cir. 1994); Barnes v. Moore, 970 F.2d 12 (5th Cir.) (per curiam), *cert. denied*, 506 U.S. 1021 (1992); Women's Medical Professional Corp. v. Voinovich, 911 F. Supp. 1051 (S.D. Ohio 1995); A Woman's Choice-East Side Women's Clinic v. Newman, 904 F. Supp. 1434 (S.D. Ind. 1995); Causeway Medical Suite v. Ieyoub, 905 F. Supp. 360 (E.D. La. 1995); Utah Women's Clinic v. Leavitt, 844 F. Supp. 1482 (D. Utah 1994); Jane L. v. Bangerter, 809 F. Supp. 865 (D. Utah 1992).

The cases which did not discuss the applicability of the *Salerno* test are: Jane L. v. Bangerter, 61 F.3d 1493 (10th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3561 (U.S. Feb. 5, 1996) (No. 95-1242); Barnes v. Mississippi, 992 F.2d 1335 (5th Cir.), *cert. denied*, 114 S. Ct. 468 (1993); Sojourner T. v. Edwards, 974 F.2d 27 (5th Cir. 1992), *cert. denied*, 507 U.S. 972 (1993); Armstrong v. Mazurek, No. CV-95-083-GF, 1995 U.S. Dist. LEXIS 20136, at *8-*9 (D. Mont. Sept. 29, 1995); Planned Parenthood v. Neely, 804 F. Supp. 1210 (D. Ariz. 1992); Preterm Cleveland v. Voinovich, 627 N.E.2d 570 (Ohio Ct. App. 1993).

351. Casey v. Planned Parenthood, 14 F.3d 848 (3d Cir. 1994).

352. Barnes v. Mississippi, 992 F.2d 1335 (5th Cir.), *cert. denied*, 114 S. Ct. 468 (1993); Sojourner T. v. Edwards, 974 F.2d 27 (5th Cir. 1992), *cert. denied*, 507 U.S. 972 (1993); Barnes v. Moore, 970 F.2d 12 (5th Cir.) (per curiam), *cert. denied*, 506 U.S. 1021 (1992).

353. Planned Parenthood v. Miller, 63 F.3d 1452 (8th Cir. 1995), *cert. denied*, 64 U.S.L.W. 3724 (U.S. Apr. 29, 1996) (No. 95-856); Fargo Women's Health Org. v. Schafer, 507 U.S. 1013 (1993), *denying application for stay and injunction pending appeal from* 18 F.3d 526 (8th Cir. 1994).

354. Women's Medical Professional Corp. v. Voinovich, 911 F. Supp. 1051 (S.D. Ohio 1995).

355. A Woman's Choice-East Side Women's Clinic v. Newman, 904 F. Supp. 1434 (S.D. Ind. 1995).

356. Armstrong v. Mazurek, No. CV-95-083-GF, 1995 U.S. Dist. LEXIS 20136, at *8-*9 (D. Mont. Sept. 29, 1995).

357. *Casey*, 14 F.3d at 863 n.21; *see supra* notes 324-331 and accompanying text.

358. Fargo Women's Health Org. v. Schafer, 507 U.S. 1013 (1993), *denying application for stay and injunction pending appeal from* 18 F.3d 526 (8th Cir. 1994).

359. *Fargo*, 18 F.3d at 529.

360. *Miller*, 63 F.3d at 1457.

came the critical issue.[361] In resolving this issue, the Eighth Circuit decided "to follow what the Supreme Court actually did—rather than what it failed to say," and found *Salerno* effectively overruled in the abortion regulation context.[362]

The Tenth Circuit in *Jane L.* upheld the district court's findings which used the *Salerno* test in determining the facial constitutionality of the Utah abortion regulations,[363] and let stand without mention its use of the *Salerno* test rather than the undue burden standard. It is not clear, however, that the Tenth Circuit in fact agreed with the use of *Salerno* since the issue was not raised by the parties on appeal. In the Tenth Circuit, therefore, the applicability of *Salerno* is currently an open question. A Utah district court in *Leavitt* had previously avoided an all-or-nothing decision of which standard to use by creating a *Salerno-Casey* hybrid. Additionally, this issue will not likely come before the Tenth Circuit any time soon, since no current litigation is pending in any court within the circuit.[364]

The Fifth Circuit was the first United States Court of Appeals to decide the *Salerno* issue. In *Barnes v. Moore*, it acknowledged that *Casey* may have applied a somewhat different standard in striking down the spousal notification provision, but chose instead to apply the traditional *Salerno* test.[365] In making this determination, the Fifth Circuit cited Chief Justice Rehnquist's dissent in *Casey*,[366] and stated that it did not interpret *Casey* as having overruled the *Salerno* test in the abortion context.[367] Although the recent *Ieyoub* district court case[368] was decided within Fifth Circuit boundaries and might possibly arise on appeal, it is unlikely that this would provide the Fifth Circuit with an opportunity to revisit the *Salerno* issue. As the *Ieyoub* court noted, since the parental consent provision clearly violated the *Bellotti v. Baird* requirements for a judicial bypass mechanism, the outcome would have been the same under either the *Salerno* or *Casey* standard.

361. *Id.* at 1456-57.

362. *Id.* at 1458.

363. Jane L. v. Bangerter, 61 F.3d 1493 (10th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3561 (U.S. Feb. 5, 1996) (No. 95-1242).

364. Search of LEXIS, Genfed library, DIST file (Apr. 30, 1996).

365. 970 F.2d 12, 14 n.2 (5th Cir.) (per curiam), *cert. denied*, 506 U.S. 1021 (1992).

366. Barnes v. Moore, 970 F.2d at 14. In *Casey*, Chief Justice Rehnquist wrote "because this is a facial challenge to the Act, it is insufficient for petitioners to show that the notification provision 'might operate unconstitutionally under some conceivable set of circumstances.'" 505 U.S. 833, 972 (1992) (Rehnquist, C.J., concurring in part and dissenting in part) (quoting *Salerno*, 481 U.S. 739, 745 (1987)). Instead, he stated, "they must 'show that no set of circumstances exists under which the [provision] would be valid.'" *Id.* at 973 (quoting *Akron II*, 497 U.S. 502, 514 (1990)). The Chief Justice further stated that "[t]he joint opinion . . . appears to ignore this point in concluding that the spousal notice provision imposes an undue burden on the abortion decision." *Id.* at 973 n.2.

367. Barnes v. Moore, 970 F.2d at 14 n.2.

368. 905 F. Supp. 360 (E.D. La. 1995).

Outside those circuits already discussed, the *Salerno* issue recently arose in two other district court cases. In both cases, the courts easily dismissed the applicability of *Salerno* and chose to follow the model of the undue burden standard as set out in the *Casey* joint opinion. First, in *Voinovich*,[369] the Ohio district court noted that the undue burden standard used in *Casey* "appeared to signal a new approach."[370] The court decided to follow *Casey* rather than *Salerno* because in *Casey* the spousal notification analysis did not require the challengers to show that there was no set of circumstances under which the law would be invalid,[371] and as a practical matter it would be impossible to find an undue burden without examining the factual record.[372] If after the final decision in *Voinovich* the parties choose to appeal, the Sixth Circuit may receive its first opportunity to decide the *Salerno* issue.

Second, in *Newman*,[373] the Indiana district court found the *Casey* undue burden standard controlling for its analysis.[374] If *Newman* later arrives at the Seventh Circuit on appeal, it will be difficult for the court to avoid a discussion and ruling on *Salerno* given the breadth of treatment it received by the Indiana district court.

In recent district courts of first impression, therefore, there appears to be a trend to dispense with *Salerno* and apply *Casey*. It seems likely that this trend in district courts of first impression will continue as this body of pro-*Casey* case law is refined. As is apparent from *Voinovich* and *Newman*, the arguments in support of the position that *Casey* overruled *Salerno* in facial challenges of state abortion regulation are becoming more elaborate and persuasive. Against this background, the primary argument in support of applying *Salerno*—that *Casey* did not *expressly* overrule *Salerno*—rings flat and unconvincing.

V. Conclusion

In June 1992, the United States Supreme Court in *Planned Parenthood v. Casey* struck down the trimester framework of *Roe v. Wade* and replaced it with an undue burden standard to test the constitutionality of state abortion regulations. After *Casey*, commentators predicted the standard would be unworkable in practice, engender confusion in the lower courts, increase abortion litigation,

369. Women's Medical Professional Corp. v. Voinovich, 911 F. Supp. 1051 (S.D. Ohio 1995).

370. *Id.* at *17.

371. *Id.* at *17-*18.

372. *Id.* at *18.

373. A Woman's Choice-East Side Women's Clinic v. Newman, 904 F. Supp. 1434 (S.D. Ind. 1995).

374. *See supra* notes 314-318, and accompanying text.

allow judges broad discretion, and create inconsistent outcomes from state to state. After a survey of the thirteen cases which have so far implemented the undue burden standard, there is little evidence of the accuracy of these predictions, with the exception that the courts have been confused widely about the requirements of this new standard.

The greatest problem that has arisen was unpredicted: the threshold question of whether *Casey* implicitly overruled the traditional *Salerno* test for facial challenges to abortion restrictions. A split on this issue has developed among the Third, Fifth, and Eighth Circuits. The trend, however, in these circuit courts as well as district courts of first impression outside of these circuits, is clearly toward dispensing with *Salerno* and applying the undue burden standard. In practical terms, this trend means that challenges to newly enacted state abortion restrictions prior to implementation will meet with increased success in future cases.