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Borrowing from Dormant Commerce Clause Doctrine in Analyzing Abortion Clinic Regulations

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BORROWING FROM DORMANT COMMERCE CLAUSE DOCTRINE IN ANALYZING ABORTION CLINIC REGULATIONS

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CONTENTS

INTRODUCTION

A new favorite weapon of the anti-abortion rights movement is legislation that singles out abortion facilities and providers for unnecessary and burdensome regulations (targeted regulation of abortion providers or "TRAP" laws). TRAP laws have infamously led to the closure of dozens of clinics in Texas and would have shuttered Mississippi's sole remaining clinic until that law was enjoined. TRAP laws purport to promote women's health, but they

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are part of a broader strategy to dismantle the right to abortion incrementally. States are constitutionally prohibited from enacting laws with the intent to hinder access to abortion. The question remains how to prove to courts that TRAP laws have this purpose or are otherwise unconstitutional.

Dormant commerce clause analysis may provide a useful framework for evaluating the constitutionality of TRAP laws that discriminate against abortion clinics without a valid medical reason. Generally speaking, dormant commerce clause case law is an appropriate source of comparison because it addresses a similar phenomenon to TRAP laws, namely a state's desire to pursue a politically motivated - and often politically popular - but impermissible goal. In the dormant commerce clause context, this goal is to protect local economic interests against interstate competition. Because the goal is constitutionally prohibited, however, states attempt to justify these laws on other grounds, such as environmental protection.

Specifically, dormant commerce clause jurisprudence provides two potential answers to the question of how to prove TRAP laws' unconstitutionality. Dormant commerce clause case law first analyzes whether the law discriminates against interstate commerce.[1] One aspect of this analysis is an independent purpose inquiry that provides a model for courts seeking to identify whether a TRAP law was motivated by the impermissible purpose of impeding access to abortion. When laws do discriminate against interstate commerce, dormant commerce clause case law requires states to justify the law on grounds other than economic protectionism. Assuming the state declares a valid alternative purpose, the court then examines whether the state could have pursued that purpose through less discriminatory means. This requirement that the state justify its law with a valid reason and the least-discriminatory-means analysis are also well-suited for analyzing the credibility of the woman-centered, medical safety rationale states offer for TRAP laws.

Dormant commerce clause case law thus offers support for revitalizing *Planned Parenthood v. Casey*'s near-dormant "purpose prong," by demonstrating that identification of illegitimate legislative purpose is a judicially manageable task. Alternatively, it allows judges to examine the supposed factual foundations for TRAP laws without a direct examination of their purpose.

1. *See infra* Part II.

I. TRAP LAWS AND THE UNDUE BURDEN STANDARD

A. TRAP Laws

TRAP laws are a tool that anti-abortion advocates have employed as part of an overarching strategy to attack the abortion right indirectly, by burdening it with excessive regulations. This strategy was devised as a way to undermine the right to abortion in the absence of a Supreme Court decision to overturn *Roe v. Wade*.[2] TRAP laws single out abortion facilities and providers for special, onerous regulations that are often extremely costly if not impossible to meet. States began to enact TRAP laws in the years after *Roe v. Wade*.[3] Because *Roe v. Wade* limited the kinds of restrictions that could be imposed on pre-viability abortions, however, lower federal courts in the early 1980s invalidated many of these regulations.[4]

In the 1990s, after *Casey* changed the standard for abortion restrictions to allow more regulation in the pre-viability period, TRAP laws were revived. States began taking more steps to regulate abortion facilities, such as setting minimum size requirements for examination, procedure, and recovery rooms.[5] Challenges to these

2. Roe v. Wade, 410 U.S. 113 (1973). The strategy of chipping away at the right to abortion is intended to burden access while also "chang[ing] hearts and minds" on the issue, in the hope that the Supreme Court will eventually be persuaded to reverse *Roe*. *See* Memorandum from James Bopp, Jr. & Richard E. Coleson, Attorneys at Law, Bopp, Coleson & Bostrom, To Whom It May Concern, at 5 (Aug. 7, 2007) (on file with the author).

3. GUTTMACHER INST., STATE POLICIES IN BRIEF: TARGETED REGULATIONS OF ABORTION PROVIDERS (June 1, 2015), http://www.guttmacher.org/statecenter/spibs/spib_TRAP.pdf.

4. *See, e.g.,* City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 426-433 (1983) (holding an Akron, Ohio, ordinance unconstitutional that, among other things, required all abortions after the first trimester to be performed in a hospital), *overruled on other grounds by* Planned Parenthood of Se. Penn. v. Casey, 505 U.S. 833 (1992); Ragsdale v. Turnock, 841 F.2d 1358, 1374 (7th Cir. 1988) (finding room size requirements not justified by important state health interests); Mahoning Women's Center v. Hunter, 610 F.2d 456, 456 (6th Cir. 1979) (holding unconstitutional a Youngstown, Ohio, abortion ordinance which imposed costly medical and building code regulations on clinics performing first trimester abortions), *vacated on other grounds*, 447 U.S. 918 (1980); Friendship Med. Ctr., Ltd. v. Chicago Bd. of Health, 505 F.2d 1141, 1154 (7th Cir. 1974) (holding unconstitutional regulations promulgated by the Chicago Board of Health setting forth who could perform an abortion, where it could be performed, and establishing physical plant requirements).

5. *See, e.g.,* Greenville Women's Clinic v. Bryant, 66 F. Supp. 2d 691, 703, 716-18 (D.S.C. 1999) (enjoining regulations, including minimum size requirements of recovery and procedure rooms and specific requirements

laws were often unsuccessful in the *Casey*'s wake. For example, the Fourth Circuit upheld strict TRAP requirements including regulations governing the minimum width of procedure and recovery rooms.[6] The court was unconcerned about the discriminatory nature of these regulations, declaring that "abortion clinics may rationally be regulated as a class while other clinics or medical practices are not."[7]

TRAP laws have gained momentum since 2010.[8] As these laws have proliferated and many clinics have closed, courts have been divided on whether particularly onerous TRAP laws impose an undue burden.[9] The Supreme Court has not yet ruled on these laws, but it has heard oral arguments on a Texas TRAP law, [10] and the Court temporarily blocked a Louisiana TRAP law.[11]

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for janitors' closets), *reversed*, 222 F.3d 157 (4th Cir. 2000); Pro-Choice Mississippi v. Thompson, No. 3:96-cv-00596-WHB, at *26-28 (S.D. Miss. Sept. 28, 1996) (preliminarily enjoining detailed and onerous physical plant requirements).

6. *See Greenville Women's Clinic*, 222 F.3d at 159; *see also* Women's Med. Prof'l Corp. v. Baird, 438 F.3d 595, 604-06 (6th Cir. 2006) (holding that hospital transfer agreement requirement leading to a clinic's closure did not constitute an undue burden). *But see* Tucson Woman's Clinic v. Eden, 379 F.3d 531, 555 (9th Cir. 2004) (striking down admitting privileges requirement).

7. *Greenville Women's Clinic*, 222 F.3d at 159.

8. GUTTMACHER INST., *supra* note 3, at 1; *Targeted Regulation of Abortion Providers: Avoiding the "TRAP,"* CENTER FOR REPRODUCTIVE RIGHTS (Aug. 2003), http://www.reproductiverights.org/sites/default/files/documents/pub_bp_avoidingthetrap.pdf.

9. *Compare* Planned Parenthood of Wisc. v. Van Hollen, 738 F.3d 786, 798 (7th Cir. 2013) (affirming preliminary injunction of Wisconsin admitting privileges law), *cert. denied*, 134 S. Ct. 2841 (2014); Jackson Women's Health Org. v. Currier, 760 F.3d 448, 450 (5th Cir. 2014) (affirming preliminary injunction of Mississippi admitting privileges requirement); and Planned Parenthood Se., Inc. v. Strange, 33 F. Supp. 3d 1330, 1381 (M.D. Ala. 2014) (permanently enjoining Alabama admitting privileges law) *with* Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 748 F.3d 583 (5th Cir. 2014) (upholding Texas admitting privileges requirement and medication abortion restrictions); Whole Women's Health v. Cole, 790 F.3d 563 (5th Cir. 2015) (upholding Texas ambulatory surgical center requirement), *cert. granted*, 136 S. Ct. 499 (2015).

10. *See* Whole Women's Health v. Cole, 790 F.3d 563 (5th Cir. 2015) (rejecting facial challenge to Texas ambulatory surgical center requirements), *cert. granted*, 135 S. Ct. 499 (2015).

11. June Med. Serv. v. Gee No. 15A880, 2016 WL853548 (U.S. Mar. 4, 2016), http://www.scotusblog.com/wp-content/uploads/2016/03/15A880-June-Medical-Serv.-v.-Gee-Order.pdf

TRAP laws attack *Roe* indirectly but with potentially devastating effects. Many TRAP laws impose unnecessary and expensive physical plant requirements on abortion facilities, for example requiring they meet the building standards of ambulatory surgical centers (ASCs). A Mississippi ASC law enjoined in part in 1996, for example, required that facilities providing more than ten abortions per month have six-foot wide corridors; doors measuring forty-four inches; five separate bathrooms; and separate locker rooms for male and female nurses, including a bathroom in each locker room, among other requirements.[12] A similar and more recent TRAP law in Texas requires that all facilities offering abortions meet ASC requirements, even if they provide abortions only through medication rather than surgery.[13] Other variations of TRAP laws target the medical professionals who perform abortions, for example requiring that they obtain admitting privileges at nearby hospitals.[14]

ASC and admitting privileges requirements have been extremely effective at shutting down clinics. Dozens of clinics across Texas closed after that state implemented both restrictions.[15] Texas's ASC standards, which are typical, "prescribe electrical, heating, ventilation, air conditioning, plumbing, and other physical plant requirements as well as staffing mandates, space utilization, minimum square footage, and parking design."[16] ASC requirements, which are not designed for procedures as safe as abortion, are prohibitively costly for many clinics to implement.[17] These requirements apply to clinics that do not even perform surgeries but rather only offer

12. Pro-Choice Mississippi v. Thompson, No. 3:96-cv-00596-WHB, slip op. at 18-19 (S.D. Miss. Sept. 28, 1996) (preliminarily enjoining multiple TRAP provisions including ASC requirements).

13. *See Whole Women's Health*, 790 F.3d 563 (5th Cir. 2015) (ruling Texas ASC law constitutional except as applied to one clinic) *cert. granted*, 136 S. Ct. 499 (2015).

14. *See* Planned Parenthood v. Abbott, 748 F.3d at 595 (upholding Texas admitting privileges law).

15. Manny Fernandez & Erik Eckholm, *Court Upholds Texas Limits on Abortions,* N.Y. TIMES, (June 9, 2015), http://www.nytimes.com/2015/06/10/us/court-upholds-texas-law-criticized-as-blocking-access-to-abortions.html?_r=0.

16. *See* Whole Women's Health v. Lakey, 46 F. Supp. 3d 673, 681(W.D. Tex. 2014*), aff'd in part, vacated in part, rev'd in part sub nom.* Whole Woman's Health v. Cole, 790 F.3d 563 (5th Cir. 2015), *cert. granted* 136 S. Ct. 499 (2015).

17. *See, e.g.*, *id.* at 682 ("If a clinic is able to make renovations to comply, those costs will undisputedly approach 1 million dollars and will most likely exceed 1.5 million dollars.").

abortions induced through medication.[18] Some clinics cannot implement the changes at all because the physical sites on which their buildings are located cannot accommodate the requirements.[19]

Admitting privileges requirements can be equally effective in closing clinics. These laws require that abortion providers obtain admitting privileges at a nearby hospital, generally within a prescribed distance from the clinic. These requirements may be unrealistic or impossible for abortion providers to meet for reasons unrelated to provider competence. For example, providers often fail to meet the requirements for hospital privileges because their patients so rarely end up in the emergency room.[20] Some hospitals impose a proximity condition for admitting privileges (requiring that the provider live or work within a specific radius surrounding the hospital) that providers may not meet.[21] Hospitals may refuse to extend privileges to abortion providers for political reasons.[22]

Admitting privileges requirements are medically unnecessary because, as the Seventh Circuit has pointed out, "Of course any doctor (in fact any person) can bring a patient to an emergency room to be treated by the doctors employed there (these days called 'hospitalists'), and . . . [a] hospital that has an emergency room is obliged to admit and to treat a patient requiring emergency care even if the patient is uninsured."[23] Indeed, in most states admitting privileges are not required for any other procedures performed outside of a hospital, including surgeries riskier or more complex than abortions.[24]

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18. *Id.*

19. *See id.* (noting that the cost of buying land and constructing a new compliant clinic would likely cost more than $3 million).

20. *See* Planned Parenthood of Wisc. v. Van Hollen, 738 F.3d 786, 797 (7th Cir. 2013), *cert. denied,* 134 S. Ct. 2841 (2014); *see also* Planned Parenthood Se., Inc. v. Strange, 33 F. Supp. 3d 1330, 1343 (M.D. Ala. 2014) (noting that "many hospitals require that a doctor with active-staff or courtesy-staff privileges admit a certain number of patients or perform a certain number of procedures on a regular basis").

21. Planned Parenthood Se., Inc. v. Strange, 33 F. Supp. 3d at 1381 (striking down Alabama's law).

22. *See Pro-Choice Mississippi* at *21 (invoking this rationale in enjoining requirement of written transfer agreement with hospital).

23. *Van Hollen*, 738 F.3d at 787-88; *see also* Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 951 F. Supp. 2d 891, 899-900 (W.D. Tex. 2013) ("A lack of admitting privileges on the part of an abortion provider is of no consequence when a patient presents at a hospital emergency room. By law, no hospital can refuse to provide emergency care."), *rev'd in part*, 748 F.3d 583 (5th Cir. 2014).

24. *See Van Hollen*, 738 F.3d at 789.

B. The Undue Burden Standard and TRAP Laws: An Awkward Fit

In *Planned Parenthood v. Casey*,[25] the Supreme Court upheld what it referred to as the "essential holding" of *Roe v. Wade*,[26] but it established a new standard for evaluating abortion restrictions applicable in the pre-viability period. The *Roe v. Wade* framework had not permitted any pre-viability restrictions that furthered the state's interest in potential life.[27] The *Casey* joint opinion concluded that this aspect of the *Roe* framework "undervalued" the state's interest in embryonic or fetal life.[28] The joint opinion held that the state could enact pre-viability restrictions to promote its interest in potential life, so long as these restrictions did not impose an undue burden. The Court defined an undue burden as a law that has the purpose or effect of placing a substantial obstacle in the path of women seeking abortions.[29]

Although states did enact some TRAP laws in the post-*Roe* period, as discussed above, these laws were routinely struck down under *Roe*.[30] The Justices did not have occasion to revisit these rulings in *Casey*, since the major provisions challenged in that case were not TRAP laws. Other than reporting requirements, which the Court found not burdensome, the restrictions addressed in *Casey* all supported either the state's or private parties' interest in potential life.[31] Pennsylvania's waiting period and state-mandated information provision allowed the state to express its preference for childbirth. The husband notice and parental consent provisions effectively allowed private parties to intervene in a woman's abortion decision if they disagreed with it.

It is therefore not surprising that, in *Casey*, the Court's discussion about the constitutionality of abortion restrictions was closely intertwined with its discussion about how *Roe v. Wade* had misapprehended the nature of the woman's interest in an abortion (construing it as too absolute), thus undermining the state's interest in the embryo or fetus. The Justices were primarily concerned with balancing the state's (or private parties') moral opposition to abortion

25. Planned Parenthood of Se. Penn. v. Casey, 505 U.S. 833, 833 (1992).

26. *Id.* at 846.

27. Roe v. Wade, 410 U.S. 113, 163-134 (1973).

28. *See Casey*, 505 U.S. at 873.

29. *Id.* at 877.

30. See *supra* note 4 and accompanying text.

31. *See Casey*, 505 U.S. at 833 (noting that reporting requirements served women's interest in health because "information with respect to actual patients is a vital element of medical research").

with the woman's right to decide to terminate her pregnancy. Although the Justices contemplated the possibility of state interests beyond the interest in potential life, specifically the state's interest in the woman's health, they were clearly focused on reasons why the state would want to regulate abortion, not simply as any medical procedure, but as a decision with moral implications the state might find objectionable.[32] As the Ninth Circuit pointed out in *Planned Parenthood v. Humble*, because of this, "[*Casey*'s] application of the 'undue burden' standard is often not extendable in obvious ways to the context of a law purporting to promote maternal health."[33]

The *Casey* joint opinion articulated the undue burden standard as follows:

> 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 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. . . . whether a law *designed to further the State's interest in fetal life* which imposes an undue burden on the woman's decision before fetal viability could be constitutional. The answer is no.[34]

The Court then added, almost as an afterthought, "Regulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden."[35] When it restated the new undue burden framework, the Justices noted: "*As with any medical procedure*, the State may enact regulations to further the health or safety of a woman seeking an abortion. *Unnecessary health regulations* that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right."[36] The Court seemed generally to assume states' good faith in regulating abortion as it would other medical procedures and appeared confident in courts' ability to identify regulations not so intended.

32. Planned Parenthood of Ariz., Inc. v. Humble, 753 F.3d 905, 912 (9th Cir. 2014) ("The analysis in both *Casey* and *Gonzales* focused on state laws purporting to advance the state's interest in fetal life").

33. *Id.* (citation omitted).

34. *Casey*, 505 U.S. at 875-77 (emphasis added; citations omitted).

35. *Id.* at 878.

36. *Casey* at 879 (emphases added).

Thus, the *Casey* compromise was mainly about letting the state express its objection to abortion without interfering with the woman's decision. TRAP laws, on the other hand, are defended as health regulations, not as laws intended to advance the state's interest in potential life. Indeed, although government officials have not always been disciplined about sticking to the women's-health script,[37] the laws' constitutionality depends on the state eschewing any purposes related to embryonic or fetal welfare. TRAP laws do not address the moral aspects of the abortion decision in any way.[38] The only way they could advance the state's interest in the embryo or fetus would be by shutting down clinics. To admit to this goal, however, would be to acknowledge an impermissible purpose to impose a substantial obstacle to abortion access.

C. Probing TRAP Laws' Justifications

TRAP laws purport to regulate for women's health, not potential life, but this reason is clearly pretextual. The laws single out abortion for different and more stringent treatment than comparable or even more dangerous procedures. For example, ASC standards are not imposed on facilities performing outpatient surgeries that carry risks far higher than abortion.[39] This singling out of abortion is incongruous in light of the fact that abortion is an exceptionally safe medical procedure, with only 0.3% of patients in the United States experiencing a major complication.[40]

The national advocacy groups promoting TRAP laws admit to the pretext. American United for Life (AUL), for example, is an organization whose mission is to end legal abortion.[41] AUL publishes

37. *See infra* text accompanying notes 50-52.

38. The Supreme Court strained to find such a connection when it upheld the federal Partial Birth Abortion Ban Act, by claiming that the targeted procedure was especially morally repugnant. Gonzales v. Carhart, 550 U.S. 124, 155-62 (2007). Even that attenuated moral tie cannot be asserted of TRAP laws.

39. *See* Planned Parenthood of Wisc. v. Van Hollen, 738 F.3d 786, 790 (7th Cir. 2013) (citing higher risks of colonoscopy), *cert. denied,* 134 S. Ct. 2841 (2014).

40. Susan A. Cohen, *New Data on Abortion Incidence, Safety Illuminate Key Aspects of Worldwide Abortion Debate*, GUTTMACHER POL'Y REV. 2, 4 (2007); Planned Parenthood of Wisc. v. Van Hollen, 738 F.3d at 797 ("Complications of abortion are estimated to occur in only one out of 111 physician-performed aspiration abortions (the most common type of surgical abortion); and 96 percent of complications are "minor." (citations omitted)).

41. *About,* AMERICANS UNITED FOR LIFE, http://www.aul.org/about-aul/ (describing AUL's mission as "[a]chieving comprehensive legal protection for human life from conception to natural death").

a legislative playbook of detailed strategic advice and model legislation for state legislators. The playbook advocates laws like TRAP measures because "state abortion-related laws designed to protect women's health" are more likely to withstand court challenges.[42] At the same time, AUL acknowledges that these laws also serve the interest of protecting "unborn children's lives."[43] However, as discussed above,[44] a TRAP law cannot simultaneously serve both of these interests. The laws "protect life" not by making abortion safer for women but by making it harder and more expensive to obtain or, at their most successful, by making it unavailable to some women. TRAP laws thus exemplify the favored approach of mainstream anti-abortion advocacy groups like the National Right to Life Committee and AUL. These groups seek to dismantle the right to abortion incrementally by whittling away at abortion access, a strategy they see as more viable in the current political climate than seeking an outright ban.[45]

AUL, for example, calls the incremental approach an "all-or-something" approach and contrasts it with the "all-or-nothing" approach abortion rights opponents in Canada have pursued. "The Canadian all-or-nothing approach failed. The American all-or-something approach has established legislative fences against abortion that have actually limited and reduced abortion . . . ."[46] AUL's playbook explains how restrictions like TRAP laws were not permissible under *Roe*'s original framework,[47] but now offer a way to undermine *Roe* indirectly. "[T]hese [incremental] laws—such as . . . abortion clinic regulations—save lives now. When a direct assault is not feasible because of obstacles beyond our control, it is necessary to design and implement a larger and broader assault on the target and its foundation."[48] AUL openly touts its strategy of cumulatively imposing burdens, describing as a prime example how this strategy succeeded in reducing abortion access in Mississippi to a single clinic.[49]

42. DENISE M. BURKE, ET AL., AMERICANS UNITED FOR LIFE, DEFENDING LIFE 2013 17 (2013) ("[I]n light of *Casey* and *Gonzales*, laws that include a stated women's health justification are more likely to withstand judicial scrutiny.").

43. *Id.*

44. *See supra* text accompanying notes 37-38

45. *See* Caitlin E. Borgmann, *Roe v. Wade's 40th Anniversary: A Moment of Truth for the Anti-Abortion-Rights Movement?,* 24 STAN. L. & POL'Y REV. 245, 260-61 (2013).

46. BURKE, *supra* note 42, at 39.

47. *Id.* at 38.

48. *Id.* at 41.

49. *Id.* at 55- 56.

State officials exulting in the passage of TRAP laws have praised the measures both for protecting embryonic life and safeguarding women's health. Texas Attorney General Ken Paxton described the Fifth Circuit's decision upholding his state's ASC law a "victory for life and women's health."[50] After Texas passed its ASC requirement, Texas Lt. Gov. David Dewhurst gleefully tweeted a map predicting how many clinics would shut down and stating that the law would essentially ban abortion statewide.[51] After signing Mississippi's admitting privileges law, which would have closed the state's last remaining abortion clinic, Gov. Phil Bryant declared, "We are going to continue to try to work to end abortion in Mississippi and this is an historic day to begin that process."[52]

Obvious as it may be that TRAP laws are intended to burden access to abortion rather than promote women's health, the question remains how to prove this in court under the undue burden standard. There are two possible ways to expose the pretextual health and safety rationale behind TRAP laws. The first is by directly examining a TRAP law's purpose. The second is by making the state justify a TRAP law with attention to whether the state has employed the least discriminatory means of regulating abortion. If a state treats abortion differently (and more burdensomely) than comparable medical procedures but cannot justify the differential treatment on medical grounds, it is likely that the purpose is a pretext for the state's ideological opposition to abortion. Dormant commerce clause jurisprudence can help with each of these approaches.

1. Attacking Purpose Directly

The undue burden standard holds that an abortion restriction is unconstitutional if its purpose or effect is to impose a substantial obstacle in the path of women seeking abortions.[53] Thus, one way to attack the invalidity of TRAP law is to attack its purpose directly by proving that the women's health rationale is a pretext, and that the real purpose is to reduce access to abortion. The "purpose prong" of

50. Fernandez & Eckholm, *supra* note 15.

51. *See* Christy Hoppe, Lt. Gov. Dewhurst Says in Tweet That Abortion Bill All About Shutting Down Accessibility, THE DALLAS MORNING NEWS (June 13, 2013), http://trailblazersblog.dallasnews.com/2013/06/lt-gov-dewhurst-says-in-tweet-that-abortion-bill-all-about-shutting-down-accessibility.html/.

52. Jeffrey Hess, *Governor Bryant Signs New Regulations For Mississippi's Only Abortion Clinic*, MISSISSIPPI PUBLIC BROADCASTING (April 12, 2012), http://archive.mpbonline.org/News/article/governor_bryant_signs_new_regulations_for_mississippis_only_abortion_clinic#sthash.ri8xGoJd.dpuf.

53. Planned Parenthood of Se. Penn. v. Casey, 505 U.S. 833, 875-77 (1992).

the *Casey* standard, however, has generally not been an effective vehicle for challenging abortion restrictions.[54] In *Mazurek v. Armstrong*,[55] for example, the Supreme Court upheld a law prohibiting medical providers other than physicians from performing abortions. In this per curiam decision, the Court refused to find an improper purpose despite evidence that an anti-abortion-rights group had drafted the law, and even though there was no evidence to support the state's women's-safety rationale.

In contrast to its reluctance to find improper purposes, the Court has readily found valid state purposes for abortion restrictions based on flimsy factual foundations.[56] In *Gonzales v. Carhart*, the Court held that the federal Partial Birth Abortion Ban Act had a valid purpose, stating that Congress needed only a "rational basis to act." [57] The Court located this "rational basis" in part in the theory that women might come to regret their abortions, even as it admitted that the theory lacked scientific support.[58]

Some scholars have argued for a reinvigoration of the purpose prong.[59] Lower courts also seem increasingly interested in probing the rationales states put forward for TRAP laws and have scrutinized whether the stated reasons hold up factually. While the courts have generally not formally applied *Casey*'s purpose prong, or have even expressly disavowed doing so,[60] their examination of the states' justifications reflect a new focus on states' purposes in regulating abortion. For example, in *Planned Parenthood v. Strange*, United States District Judge Myron Thompson extensively examined Alabama's arguments that its admitting privileges requirement was

54. *See, e.g.*, Caitlin E. Borgmann, *In Abortion Litigation, It's the Facts that Matter*, 127 HARV. L. REV. F. 149, 150 (2013); Jenny Jarrard, Note, *The Failed Purpose Prong: Women's Right To Choose In Theory, Not In Fact, Under The Undue Burden Standard*, 18 LEWIS & CLARK L. REV. 469 (2014).

55. Mazurek v. Armstrong, 520 U.S. 968 (1997).

56. Borgmann, *supra* note 54, at 149.

57. Gonzales v. Carhart, 550 U.S. 124, 158 (2007).

58. *Id.* at 159.

59. *See, e.g*, Priscilla Smith, *If the Purpose Fits: The Two Functions of Casey's Purpose Inquiry*, 71 WASH. & LEE L. REV. 1135, 1169-71 (2014); Note, *After Ayotte: The Need To Defend Abortion Rights With Renewed "Purpose"*, 119 HARV. L. REV. 2552 (2006).

60. *See, e.g.*, Planned Parenthood Se., Inc. v. Strange, 33 F. Supp. 3d 1330, 1341 n.7 (M.D. Ala. 2014) ("Since the court finds that the statute would have the effect of imposing a substantial obstacle, it is unnecessary to reach the purpose claim . . .").

needed to protect women's health.[61] Thompson concluded that Alabama's justifications for the law were "weak, at best."[62]

In reviewing a preliminary injunction of Wisconsin's admitting privileges law, Judge Richard Posner, writing for a panel of the United States Court of Appeals for the Seventh Circuit, skeptically reviewed the state's women's safety rationale, noting that "[i]n this case the medical grounds thus far presented . . . are feeble."[63] Similarly, in a recent decision blocking Texas's ASC requirements and enjoining its admitting-privileges law as to two specific clinics, United States District Judge Lee Yeakel found the state's health rationales "largely unfounded," "without a reliable basis," "weak," "speculative," and "not credible."[64]

Dormant commerce clause analysis includes a purpose inquiry that evaluates whether facially neutral laws nevertheless have the "purpose or effect" of discriminating against interstate commerce.[65] This framework can help courts evaluate whether a TRAP law was passed in order to burden access to abortion rather than for the stated reason of protecting women's health.

2. Attacking Purpose Indirectly

A second way to expose an unconstitutional purpose behind an abortion restriction is to make the state justify the law. This approach smokes out illegitimate purposes indirectly.[66] As shown above, several recent federal court decisions that have examined the factual foundations supposedly necessitating TRAP laws have recognized how "feeble" those footings are.[67] In these cases, judges have typically applied a balancing test for examining legislative purpose. They first assess the extent of the burden an abortion restriction imposes. Where the burden is severe, they have required a commensurate burden of justification by the state.

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61. *See id.*

62. *Id.* at 1342.

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

64. Whole Woman's Health v. Lakey, 46 F. Supp. 3d 673, 684-85 (W.D. Tex. 2014), *aff'd in part, vacated in part, rev'd in part*, Whole Woman's Health v. Cole, 790 F.3d 563 (5th Cir. 2014), *cert. granted*, 136 S. Ct. 499 (2015). The Fifth Circuit, however, rejected Judge Yeakel's reasoning. 790 F.3d at 585 (stating that plaintiffs "failed to proffer competent evidence contradicting the legislature's statement of a legitimate purpose for H.B. 2").

65. *See infra* Part II.B.

66. Borgmann, *supra* note 54, at 150; Smith, *supra* note 59, at 1137.

67. Van Hollen, 738 F.3d at 798.

For example, when Judge Thompson struck down Alabama's admitting-privileges law in *Planned Parenthood v. Strange*,[68] he weighed the burdens the law imposed against the strength of Alabama's interest in the law. Judge Thompson concluded that Alabama's law imposed "significant harms" on women,[69] and, as noted above, he found the state's justifications for the law "weak, at best."[70] Judge Richard Posner likewise explained, in examining Wisconsin's admitting-privileges law: "The feebler the [state's] medical grounds, the likelier the burden, even if slight, to be 'undue' in the sense of disproportionate or gratuitous."[71] Judge Yeakel, in reviewing Texas's ASC law, balanced the predicted drastic reduction in abortion clinics against the state's safety rationales, which he found flimsy.[72] In reviewing Arizona restrictions on medication abortions, the Ninth Circuit explained that "we compare the extent of the burden a law imposes on a woman's right to abortion with the strength of the state's justification for the law."[73]

Dormant commerce clause case law can help courts willing to probe states' justifications for TRAP laws. Abortion facility and provider regulations are usually discriminatory on their face.[74] As such, the more appropriate analog in the dormant commerce clause analysis might in fact not be the purpose analysis but the strict test courts apply to discriminatory laws.[75] This test requires a heavy burden of justification on the part of the state.[76]

3. Why a New Approach Is Needed

The *Casey* undue burden standard is primarily focused on laws that openly advance the state's interest in potential life.[77] As such, it is not well-suited to analyzing TRAP laws that purport to promote maternal health, while serving an underlying goal of hindering access

68. Planned Parenthood Se., Inc. v. Strange, 33 F. Supp. 3d 1330, 1342 (M.D. Ala. 2014).

69. *Id.* at 1355.

70. *Id.* at 1342.

71. *Van Hollen*, 738 F.3d at 798.

72. *See supra* note 64 and accompanying text.

73. Planned Parenthood of Ariz. v. Humble, 753 F.3d 905, 914 (9th Cir. 2014).

74. *See infra* Part II.C.

75. *See infra* Part II.A.

76. *Id.*

77. *See supra* Part I.B.

to abortion.[78] Some federal courts have adapted the *Casey* framework to employ a balancing test in examining a women's health rationale for abortion restrictions.[79] However, this approach has some disadvantages. In particular, as discussed above, recent approaches have linked the state's burden of justification for its law to the extent of the burden the law places on women. This link requires that much of the litigation in a TRAP law challenge be focused on the extent to which a law has the *effect* of imposing an undue burden.

Focusing on effects is potentially problematic for two reasons. First, the approach fails to make purpose a truly distinct prong, despite *Casey*'s clear designation of the two prongs as separate. Second, many TRAP laws are challenged on a pre-enforcement basis. Pre-enforcement challenges are critical because TRAP laws have the potential to force clinics to close, results that could be irrevocable even if the litigation is ultimately successful. Following Texas's enactment of admitting privileges and ASC requirements, twenty-two of forty-one clinics across the state closed.[80] When a law is challenged before it is enforced, however, it can be very difficult to prove to a court's satisfaction that the law will have the predicted effects. When the Fifth Circuit initially granted a stay of the district court's preliminary injunction of Texas's admitting privileges law,[81] allowing the law to go into effect pending the litigation, the plaintiffs appealed to the Supreme Court for emergency relief. The Court refused to intervene, [82] and a rash of clinic closed.[83]

Dormant commerce clause case law can help avoid these problems by suggesting approaches either for directly examining a TRAP law's

78. *See id.*

79. *See, e.g.,* Planned Parenthood of Wisc., Inc. v. Van Hollen 738 F. 3d 786, 798 (7th Cir. 2013), *cert denied,* 134 S. Ct. 2841 (2014); Planned Parenthood v. Humble, 753 F.3d at 912; Planned Parenthood Se., Inc. v. Strange, 33 F. Supp. 3d 1330, 1336-37 (M.D. Ala. 2014); Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 951 F. Supp. 2d 891, 898 (W.D. Tex. 2013), *rev'd in part*, 748 F.3d 583 (5th Cir. 2014); *see also supra* Part I.C.2.

80. Lawrence Hurley, *Impact of Texas Clinic Law at Issue in Abortion Case Before Supreme Court,* REUTERS (Mar. 1, 2016), http://www.reuters.com/article/us-usa-court-abortion-idUSKCN0W35H5.

81. Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 734 F.3d 406, 419 (5th Cir. 2013).

82. Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 134 S. Ct. 506, 507 (2013).

83. Irin Carmon, *What You Need to Know About the Texas Abortion Case*, MSNBC (Oct. 15, 2014), http://www.msnbc.com/msnbc/what-you-need-know-about-the-texas-abortion-case-scotus.

purpose, or for requiring the state to justify a law that discriminates against abortion, without linking that analysis to a demonstration of unduly burdensome effects.

II. DORMANT COMMERCE CLAUSE ANALYSIS AND ITS RELEVANCE TO ASSESSING THE CONSTITUTIONALITY OF TRAP LAWS

A. Overview of Dormant Commerce Clause Analysis

The commerce clause of the United States Constitution gives Congress the power to regulate interstate commerce.[84] The Supreme Court has interpreted this clause to have a "negative" or "dormant" aspect that protects Congress's power by prohibiting states or localities from discriminating against or unduly burdening interstate commerce, in the absence of congressional approval.[85] The evil the dormant commerce clause intends to prevent is economic protectionism by individual states.[86] For this reason, dormant commerce clause doctrine is especially wary of state and local laws that discriminate against interstate commerce. Such laws are presumptively invalid regardless of the burdens they impose.[87]

A law may discriminate against interstate commerce in one of three ways. It may discriminate on its face,[88] or it may be facially neutral but have either a discriminatory purpose[89] or a discriminatory effect.[90] If it discriminates in any of these ways, dormant commerce clause analysis applies a strict test for evaluating the law, known as "virtually per se invalidity."[91] Under this test, the burden is on the state to show that the law was motivated by a purpose other than economic protectionism.

While states are permitted to discriminate against interstate commerce if they act for reasons other than economic protectionism,

84. U.S. CONST. art. I, § 8 (granting Congress the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.").

85. South Dakota Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583, 592 (8th Cir. 2003).

86. Fulton Corp. v. Faulkner, 516 U.S. 325, 330-31 (1996); s*ee* HP Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 532-33, 537-38 (1949).

87. C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 392 (1994); City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978).

88. Chem. Waste Mgmt. v. Hunt, 504 U.S. 334, 342 (1992).

89. Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 270 (1984).

90. Maine v. Taylor, 477 U.S. 131, 148 n. 19 (1986).

91. *City of Philadelphia*, 437 U.S. at 624.

this framework–placing the burden on the state to justify a discriminatory law–makes sense because historically economic protectionism has been a primary motivation for such discriminatory laws.[92] Furthermore, courts need to insure against the particular, corrosive harms that laws motivated by economic protectionism can cause.[93]

Even assuming the state meets its burden of showing that the law was passed for a purpose other than economic protection, the court's inquiry is not finished. The court next asks whether there are less discriminatory means to accomplish the same purpose.[94] The tailoring analysis under this part of the dormant commerce clause framework is akin to strict scrutiny, so states may easily fail this "means" analysis.[95]

B. Applying the Dormant Commerce Clause Framework to Discern an Unconstitutional Purpose for TRAP Laws

Dormant commerce clause doctrine resembles the undue burden standard for abortion in that, if a state law is passed with the purpose of discriminating against interstate commerce, a court will invalidate it without proceeding to examine the burdens the law imposes on interstate commerce. Thus, like the undue burden standard, dormant commerce clause doctrine includes an independent "purpose" clause.

Recent federal court decisions have applied a purpose analysis under the dormant commerce clause to determine whether a law that is neutral on its face intentionally discriminates against interstate commerce.[96] This test resembles the test applied under the equal protection clause to determine whether a facially neutral law was motivated by discriminatory intent. Like in equal protection case law, courts apply a list of factors to help identify a purpose to discriminate. These factors include statements by lawmakers; the sequence of events leading up to statute's adoption, including

92. *See id.* at 623-34; *H.P. Hood & Sons, Inc.*, 336 U.S. at 534-38.

93. *H.P. Hood & Sons*, 336 U.S. at 538-39.

94. *See generally* Hughes v. Oklahoma, 441 U.S. 322 (1979) (when discrimination against commerce is demonstrated, the burden falls on the state to justify it both in terms of the local benefits flowing from the statute and the unavailability of non-discriminatory alternatives adequate to preserve local interests).

95. *See, e.g., id.* at 338 (invalidating law and noting that the state chose "the most discriminatory means even though nondiscriminatory alternatives would seem likely to fulfill the State's purported legitimate local purpose more effectively").

96. Smithfield Foods, Inc. v. Miller, 367 F.3d 1061, 1064 (8th Cir. 2004); Waste Mgt. Holdings, Inc. v. Gilmore, 252 F.3d 316 (4th Cir. 2001); Jones v. Gale, 405 F. Supp. 2d 1066, 1075 (D. Neb. 2005).

irregularities in procedures used to adopt the law; a state's consistent pattern of "disparately impacting members of a particular class of persons"; a statute's historical background, including any history of discrimination by the state; and a statute's use of highly ineffective means to promote the legitimate interests asserted by the state.[97]

Several courts have found a discriminatory purpose under the dormant commerce clause by applying this test. For example, in *South Dakota Farm Bureau, Inc. v. Hazeltine*, a provision of the South Dakota Constitution generally prohibited corporations from acquiring or obtaining an interest in land used for farming and from otherwise engaging in farming in South Dakota.[98] The Eight Circuit Court of Appeals found that the provision was motivated by a purpose to discriminate against interstate commerce, based on direct evidence including the "pro" statement on a "pro-con" statement compiled by Secretary of State Hazeltine and disseminated to South Dakota voters, and notes from drafting meetings.[99] The court also found indirect evidence of discriminatory purpose from "irregularities in the drafting process," including the legislators' failure to make an effort to find information that a ban on corporate farming would effectively preserve family farms or protect the environment (the purported non-protectionist reasons proffered for the amendment).[100] Significantly, the court in *Hazeltine* was willing to find an unconstitutional purpose to discriminate even though the provision was a constitutional amendment, approved by "thousands of citizens of South Dakota who voted for [the] Amendment."[101]

In *Waste Management Holdings, Inc. v. Gilmore*, the Fourth Circuit Court of Appeals found that a discriminatory purpose had prompted Virginia statutory provisions that placed a cap on the amount of municipal solid waste (MSW) that could be accepted by Virginia landfills and that restricted the use of barges and trucks to transport such waste in Virginia.[102] In considering plaintiffs' summary judgment motion, the court concluded, "[N]o reasonable juror could find that the statutory provisions at issue had a purpose other than to reduce the flow of MSW generated outside Virginia into Virginia for disposal."[103] The court based this conclusion upon the historical

97. *Waste Mgt. Holdings*, 252 F. 3d at 336.

98. South Dakota Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583, 597 (8th Cir. 2003).

99. *Id.* at 593-94.

100. *Id.* at 594-95.

101. *Id.* at 596.

102. *Waste Mgmt. Holdings*, 252 F.3d at 336.

103. *Id.* at 340.

background and sequence of events leading to the enactment and signing of the statutory provisions.[104] The sequence of events began with news reports that New York City planned to close its Fresh Kills landfill and begin exporting more of its MSW, followed by reports of a $20,000,000 investment by defendants in a Virginia landfill. These news reports launched a political movement by a state senator and the governor to curb the flow of out-of-state MSW from entering Virginia.[105] The movement was evidenced by press releases and statements from the senator and Gov. Jim Gilmore, a letter from the governor to New York City Mayor Rudolph Giuliani, and the legislative transcript, which established "the General Assembly's general antipathy toward MSW generated outside Virginia."[106]

In *Superior FCR Landfill, Inc. v. Wright County*, a federal district court found that a jury had sufficient evidence to find that a county in Minnesota intentionally discriminated against interstate commerce when it enacted zoning regulations preventing the plaintiff's expansion of its landfill.[107] The direct evidence supporting an improper purpose included a commissioner's campaign statements strongly opposing the importation of out-of-state waste and other commissioners' awareness of and concern about the landfill expansion's effect on interstate commerce.[108] Indirect evidence included a commissioner's statements discussing the small amount of waste being produced locally; a proposal for increased waste surcharges in part to slow the amount of out-of-county waste coming into the landfill; procedural irregularities in the consideration of plaintiff's expansion request; and a history of discrimination against interstate commerce; among other factors.[109]

Decisions like these should reassure courts that, although they have been reluctant to apply the independent purpose prong under *Casey*, identifying unconstitutional legislative purpose is not impossible. That is particularly true in both the dormant commerce clause and abortion contexts. Economic protectionist purposes can be popular among some constituents and therefore are often openly expressed by state legislators and officials. In *Waste Management*

104. *Id.* at 336.

105. *Id.* at 336-40.

106. *Id.* at 339.

107. Superior FCR Landfill, Inc. v. Wright County, 2002 WL 511460 (D. Minn. Mar. 31, 2002) (the court also found that jury had evidence to find that the county failed to show that it lacked other, less discriminatory alternatives).

108. *Id.* at *9-10.

109. *Id.* at *3.

Holdings, the Fourth Circuit cited public statements opposing out-of-state waste made by the governor, state legislators, and other state officials.[110] The governor, for example, had declared that "the home state of Washington, Jefferson, and Madison has no intention o[f] becoming New York's dumping grounds."[111]

Likewise, legislators and public officials are often likely to admit to a desire to end abortion in order to score political points. Even when they are purportedly passing, signing, or enforcing legislation in order to protect women's health, legislators and public officials have a hard time policing themselves and remaining silent about their true goal of impeding abortion access.[112] In this way, both the dormant commerce clause and abortion contexts are unlike contexts such as racial discrimination, where it has become rare to see legislators or officials frankly expressing discriminatory motivations. Thus, the unconstitutional purposes underlying TRAP laws may be easier to identify, and the dormant commerce clause framework provides a ready means for doing so.

C. Applying the Dormant Commerce Clause Framework to Require a Justification for Discriminatory TRAP Laws

Dormant commerce clause analysis can also be helpful to courts willing to require states to justify discriminatory regulation of abortion providers and facilities. The strict test that dormant commerce clause doctrine applies to laws that discriminate against interstate commerce is analogous to what courts should do when laws discriminate against abortion facilities or providers. When laws discriminate in this manner, there is actually no need to evaluate purpose. Courts use the purpose prong of the dormant clause analysis when attempting to discern whether a law that is *facially neutral* towards interstate commerce was nevertheless enacted with a discriminatory purpose.[113] When a law *expressly discriminates* against interstate commerce, the court does not need to examine purpose.[114] Rather, the court goes on to determine whether the state can offer any non-protectionist reason for the discriminatory treatment and, if so, whether there are any less discriminatory means of accomplishing such purposes.[115] Note that this is an indirect way of smoking out an illegitimate purpose. Courts do not require that plaintiffs prove that

110. *Waste Mgmt. Holdings*, 252 F.3d at 337.

111. *Id.* at 337.

112. *See* Fernandez & Eckholm, *supra* note 15.

113. *See supra* note 96.

114. *See* Chem. Waste Mgmt. v. Hunt, 504 U.S. 334, 342 (1992).

115. *See id.* at 342-46.

economic protectionism is the purpose. Rather, courts look to whether state's purported non-protectionist purpose holds up to scrutiny.[116]

The same should hold true for laws that treat abortion differently than comparable medical procedures, without claiming potential life as a justification. The reason that the courts apply a strict test to laws that facially discriminate against interstate commerce is that such laws are highly likely to be motivated by the very evil the dormant commerce clause aims to prevent: economic protectionism.[117] The long history of discrimination against interstate commerce for protectionist purpose warrants the strict evaluation of facially discriminatory laws. Similarly, the evil that the undue burden standard aims to prevent is states enacting pre-viability restrictions with the intent to burden women's access to abortion.[118] TRAP laws virtually always discriminate against abortion providers or facilities on their face. The entire purpose of these laws is to treat abortion in a uniquely burdensome manner. As Priscilla Smith points out:

> The danger that arises in the abortion context is different from the danger that arises in the context of a law neutral on its face but enacted with discriminatory motive. We are not confronted with neutral laws of general applicability that may impact a certain racial or religious group disproportionately. We are most often confronted with laws that squarely subject abortion services, and thus women who seek them, to unique burdens.[119]

It is not self-evident from the reasoning in *Casey* that laws purporting to promote women's *health and safety* should be permitted to treat abortion differently than similar procedures[120] or those of comparable medical risk,[121] absent a medical justification for the disparity. *Casey* clearly contemplated that laws aiming to promote the state's interest in potential life – that is, laws that regulate abortion as a moral decision – should be permitted to single out abortion for special treatment.[122] Thus, for example, *Casey* approved a law designed to let women know of the state's preference for

116. *See id.*

117. *See supra* notes 92-93.

118. Planned Parenthood of Se. Penn. v. Casey, 505 U.S. 833, 877 (1992); *see supra* Part I.B.

119. Smith, *supra* note 61, at 1166.

120. See *infra* note 132 and accompanying text.

121. See *infra* notes 126-28 and accompanying text.

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

childbirth.[123] The interest in potential life does not exist with respect to most other medical procedures. Thus, recognizing the state's interest in potential life is to recognize its power to treat abortion differently than other medical procedures when acting to further that interest.

But courts, including the Supreme Court, have not adequately addressed whether or when discrimination against abortion is permissible when the state's justification is medical. Indeed, they generally have not incorporated the fact of such discrimination into the legal framework at all. It is true that differential treatment of other medical procedures does not normally trigger closer constitutional scrutiny. But, as in the dormant commerce clause context, courts have reason to be skeptical when states decide to treat abortion differently, because of the long history of advocates' and elected officials' resistance to *Roe* and their attempts to dismantle it incrementally.

As TRAP laws have threatened abortion access in increasingly obvious ways, judges have seemed to recognize the need to require some justification for special regulation of abortion on health grounds. For example, a federal district judge in Alabama reviewing that state's admitting privileges law noted,

> Of course, outside the context of an undue-burden challenge, a regulatory decision grounded only in . . . speculation would be an acceptable exercise of the State's police powers. However, whether, under *Casey*, the justification is strong enough to warrant the burdens and obstacles that the staff-privileges requirement would create for Alabama women seeking abortions is another question entirely.[124]

Even as early as 1996, a federal district court in Mississippi found that the state could not meet its burden of "showing that there is a reasonable medical necessity to preserve the woman's health" in requiring ob-gyn residency training for all physicians performing abortions; for imposing the building requirements of ambulatory surgical centers on abortion facilities that operated very differently than such centers; and for requiring a written hospital transfer agreement with a nearby hospital.[125]

More intriguingly, Judge Posner's recent opinion for the Seventh Circuit Court of Appeals in *Planned Parenthood v. Hollen* seemed to

123. *Id.* at 883.

124. Planned Parenthood Se., Inc. v. Strange, 33 F. Supp. 3d 1330, 1376 (M.D. Ala. 2014) (citation omitted).

125. Pro-Choice Mississippi v. Thompson, No. 3:96CV596BN, slip op. at *18-21 (S.D. Miss. Sept. 28, 1996).

recognize that differential treatment of abortion is suspect.[126] Without pursuing the line of inquiry, the court noted in passing that an "issue of equal protection of the laws is lurking in this case."[127] Judge Posner noted that the "complete absence" of admitting privileges requirements for riskier medical procedures suggested that the admitting-privileges law's likely purpose was to impose a substantial obstacle to abortion.[128]

It makes sense to require states to justify differential treatment of abortion when they do not purport to act in furtherance of the interest in potential life. The *Casey* framework was specifically altered to expand the state's power to promote its interest in embryonic or fetal life in the pre-viability period, unlike what was permitted under *Roe*.[129] This is the essence of the "*Casey* compromise." If the state wants to earn the increased deference of the *Casey* standard, then, it should be required to admit on the record that its law is for the protection of potential life. Otherwise, it should forfeit this deference. States should not be able to assert an interest in women's health, yet still gain the stronger deference accorded the interest in potential life.

Advocates and states enacting restrictions after *Roe* tended to be more focused on expressing their interest in fetal life and in making women hear arguments against abortion. But the anti-abortion movement has now shifted tactics in significant part to a medical rationale, which they believe is more likely to succeed in the courts.[130] The *Casey* framework was never really designed for this type of law and is ill-suited for evaluating it. Thus, as with evaluating discriminatory laws under the dormant commerce clause, laws that discriminate against abortion facilities or providers under a rationale of women's safety rather than potential life should be evaluated under a test similar to that applied in dormant commerce clause case law.

Courts should first ask whether the law discriminates against abortion providers on its face.[131] If it does, the court should examine whether the law is motivated by a purpose other than to impose a burden on women seeking abortions. The state will assert the

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

127. *Id.* at 790.

128. *Id.*

129. *See Casey,* 505 U.S. at 846.

130. *See* BURKE ET AL., *supra* note 42, at 17.

131. If the law is facially neutral, the dormant commerce clause test for identifying a discriminatory purpose could be applied. See *supra* Parts I(C)(1); II(B).

justification of women's health. But, as under the dormant commerce clause – where states often assert environmental protection or other non-economic-protectionist justifications for laws that discriminate against interstate commerce – the court's analysis should not end there. Rather, the court should evaluate whether states could pursue the same interest through less discriminatory means.

This last step is missing as an express step in virtually all TRAP decisions, yet it is vitally important. The inquiry will be a highly effective means of identifying whether a law was truly motivated by a medical purpose. For example, if the state were truly concerned that abortions performed by suction curettage required special safety regulations, it should be equally concerned that similar procedures on non-pregnant patients, such as dilation and curettage (D&Cs), were regulated similarly.[132] The state's credibility in asserting a women's health rationale is undermined if it is unwilling to treat non-abortion patients in a like manner.

History demonstrates that abortion-discriminatory laws are more likely to be motivated by anti-abortion sentiment than women's health.[133] This history is similar to the history of state laws that discriminate against interstate commerce for economic protectionist reasons. The dormant commerce clause framework is therefore eminently suited for analyzing TRAP laws.

CONCLUSION

Anti-abortion advocates and state legislators are increasingly turning to a women's health rationale to justify abortion restrictions. While the underlying goal to end abortion access remains the same, these laws do not overtly claim to advance the state's interest in potential life. TRAP laws have proven to be a remarkably effective implementation of the incrementalist strategy for eroding access to abortion. The *Casey* framework, however, is primarily aimed at laws that promote the state's interest in potential life. Courts have differed in how *Casey* applies to TRAP laws. Some courts have closely scrutinized the rationale underlying TRAP laws, but they have tended to tie such inquiries to examinations of the laws' effects.

Dormant commerce clause doctrine provides a useful and appropriate framework for analyzing TRAP Laws. The doctrine was designed to ferret out a common but illegitimate purpose (promoting economic protectionism) underlying laws that discriminate against interstate commerce. The framework provides a useful model both for

132. *See*, *e.g.*, Planned Parenthood v. Strange, 33 F. Supp. 3d at 1336 (making this comparison).

133. *See* Borgmann, *supra* note 45.

courts wishing to examine TRAP laws' purposes directly and for those who want to require states to justify discriminatory laws that purport to regulate abortion purely on medical grounds. Either way the framework is used, it provides a mechanism to examine the rationales for TRAP laws independently of their effects, providing a potentially helpful option for pre-enforcement challenges, where courts may be reluctant to accept predictions of specific effects.