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If the Purpose Fits: The Two Functions of *Casey*'s Purpose Inquiry

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I. Introduction

Most litigation over the constitutionality of abortion regulation has argued through the lens of "effect," asking whether the regulation imposes, in the words of *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[1] an "undue burden on a woman's ability to make th[e] decision to procure an abortion."[2] This emphasis on the effect of abortion regulations overlooks the other prong of the undue burden test, a test which prohibits regulations on abortion that have *either* the "purpose *or* effect" of imposing an undue burden.[3] A proper understanding of the purpose inquiry applicable to abortion regulations is integral to the unique form of intermediate scrutiny the *Casey* plurality substituted for strict scrutiny review and the trimester framework set out in *Roe v. Wade*.[4] Unfortunately, though, the Court was far from clear about the role the purpose inquiry in *Casey* was designed to serve, perhaps due to the evolving nature of liberty jurisprudence generally and instability in the tiers of review in particular.[5]

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1. 505 U.S. 833 (1992).

2. *Id.* at 877 (plurality opinion) ("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.").

3. *See id.* at 877–87 (emphasis added) (discussing the "purpose or effect" prong of the undue burden test).

4. 410 U.S. 113 (1973).

5. For commentary about the disarray in tiers jurisprudence, see generally Lawrence G. Sager, *Of Tiers of Scrutiny and Time Travel: A Reply to Dean Sullivan*, 90 CALIF. L. REV. 819 (2002) (discussing disconnect between the Court's insistence that it is applying "intermediate scrutiny" to gender-based classifications and the Court's actions); William D. Araiza, *After the Tiers:* Windsor*, Congressional Power to Enforce Equal Protection, and the Challenge of Pointillist Constitutionalism* (Brooklyn Law Sch. Research Papers, Research Paper No. 354, 2013)*, available at* http://ssrn.com/abstract=2310586. For a discussion of this as a continuing trend, see Josh Blackman, *Preview of New Article—Kennedy's Constitutional Chimera*, JOSH BLACKMAN'S BLOG (Aug. 22, 2013), http://joshblackman.com/blog/2013/08/22/preivew-of-new-article-kennedys-constitutional-chimera/ (last visited Mar. 10, 2013) (arguing that the Court's most recent jurisprudence "disregards long-standing norms of 'suspect classes,' 'fundamental rights[,]'" and "[i]nstead of speaking in terms of rights and classifications, the Court speaks more broadly in terms of liberty" and "puts aside" the "traditional scrutiny land approach") (on file with the Washington and Lee Law Review).

A close reading of the Court's use of purpose in *Casey* and subsequent abortion jurisprudence reveals that the purpose prong is serving two distinct functions. The first function of the purpose inquiry is to serve as a proxy for a determination of whether legislation in fact serves a legitimate state interest, one of sufficient importance to warrant the burden on rights it creates.[6] Courts examine the evidence to determine whether the legislation serves the group of interests that the Supreme Court identified in *Roe* and *Casey* are valid reasons for the regulation of abortion. This part of the purpose test, which ensures that abortion legislation is not designed to "strike at the right itself,"[7] is emphasized explicitly in numerous places in the decision. The second function of the purpose prong is to serve the "smoking out" function ascribed by many scholars to any "heightened" scrutiny analysis,[8] which determines whether the legislation is serving a hidden illegitimate purpose. As discussed below, this second function of the purpose prong was also in play in *Casey*.[9]

Because of the lack of clarity in *Casey* about these two distinct functions, both served in the name of "purpose," and also because the role of the second function of purpose in equality jurisprudence has been the subject of much scholarly debate, the courts have conflated the two functions in their purpose analyses after *Casey*. The resulting doctrine is a mess, creating rampant confusion and decisions at odds on theoretical and practical levels. In particular, there is disagreement between the Circuits

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6. *See* Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 401–07 (2006) (discussing purpose in the sense of serving a state interest, a "legitimate purpose," under different levels of review). Siegel notes that even rationality review includes such an analysis though a very permissive one because the legitimate ends of government are considered to be "so boundless." *Id.* at 358 n.24. Siegel also notes that even rationality review may result in overturning sufficiently egregious government action that runs afoul of the Constitution's "valid purpose" requirement. *Id.* (discussing Gomillion v. Lightfoot, 364 U.S. 339 (1960)).

7. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 874 (1992).

8. *See, e.g.*, Caitlin E. Borgmann, *In Abortion Litigation, It's the Facts that Matter*, 127 HARV. L. REV. F. 149, 150–51 (2014), *available at* http://www.harvardlawreview.org/issues/127/february14/forum_1026.php (focusing on the "smoking out" function of the purpose prong and arguing that it is possible to smoke out illegitimate purposes indirectly).

9. *Infra* text accompanying notes 41–51.

over the appropriate level of scrutiny of claimed state interests and whether this scrutiny is part of the purpose analysis.[10] The Fifth Circuit's own analysis of purpose has shifted along with the Circuit's ideological makeup.[11] As I show in what follows, some courts have merged their first function and second function purpose inquiries, further muddying the works.

After some early rigorous purpose analyses in the Fifth Circuit and Tenth Circuits in particular,[12] and after a confused decision by the Supreme Court,[13] purpose inquiry took a back seat. Now, however, states are pressing harder to find ways to restrict abortions in ways that will limit access, and lower courts struggle to articulate a line between regulations that have the effect of imposing "undue" burdens on the right to abortion, and are therefore unconstitutional, and regulations that place "tolerable" burdens on the right to abortion, and are therefore constitutional.[14] Courts have returned to *Casey*'s purpose prong

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10. For a discussion of different analyses courts have applied in the name of "purpose," see generally Lucy E. Hill, *Seeking Liberty's Refuge: Analyzing Legislative Purpose Under Casey's Undue Burden Standard*, 81 FORDHAM L. REV. 365 (2012) (describing different purpose tests used by different circuits prior to 2012). *See also* Borgmann, *supra* note 8, at 150–51 (arguing that purpose review has been "toothless").

11. *Compare* Okpalobi v. Foster, 190 F.3d 337, 356–57 (5th Cir. 1999) (determining the state's claimed purpose—"to inform a woman of all the risks associated with having an abortion"—was "not credible" by closely examining a previous statute mandating informed consent and finding that the new statute "ensure[d] that a physician cannot insulate himself from liability by" giving appropriate informed consent), *vacated and rev'd on other grounds en banc*, 244 F.3d 405 (5th Cir. 2001), *with* Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 734 F.3d 406, 411 (5th Cir. 2013) (determining that the admitting privilege requirement served claimed purpose of promoting women's health and that "'a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data'" (citation omitted)). *See also infra* text accompanying notes 79, 93–100.

12. *See* Hill, *supra* note 10, at 392–96 (analyzing the Tenth and Fifth Circuits views on "purpose").

13. *See* Mazurek v. Armstrong, 520 U.S. 968, 972–74 (1997) (finding no evidence of legislature's hidden illegitimate "purpose" in banning abortions by trained Physician Assistant; and also accepting that the legislation served legitimate purpose, citing approval of physician-only requirements in Supreme Court dicta, but failing to clarify that these were separate inquiries); *see also infra* text accompanying notes 50–61.

14. *See infra* Part II (discussing constitutional and unconstitutional restrictions on abortions). The evolution of the effects test itself will make for an interesting study that is beyond the scope of this paper.

as a means to impose limits on regulations that are true to the balance that the plurality decision in *Casey* professed to create between the rights of women and the authority of the state to regulate abortions.[15]

Two competing conceptions of purpose are locking horns in cases reviewing requirements that doctors obtain admitting privileges from a hospital within a certain distance of the facility at which they provide abortions. Decisions from the Seventh Circuit and the Fifth Circuit, one issued on a motion for preliminary injunction, and so at an early stage in the litigation, and the other rushed through to conclusion and issued as this paper goes to press, are on a collision course that will end only in the Supreme Court.[16] The Seventh Circuit decision requires a hands-on review of the evidence to determine whether the state proved that the legislation in fact served the claimed state interest, while the Fifth Circuit applies a form of review below rational basis review, what we might call oxymoronically "rational speculation" review.[17] This Article (1) identifies the two functions served by *Casey*'s purpose prong and the role both functions serve in preserving *Casey'*s unique form of intermediate scrutiny, (2) argues that these two functions are analytically distinct and demand two separate inquiries, and (3) shows that

15. *See infra* Part III (discussing the use of *Casey*'s purpose prong).

16. *Compare Abbott*, 734 F.3d at 411 (advocating a hands-off approach to argue that the claimed purpose of a statute is "a legislative choice . . . not subject to courtroom factfinding" but may be based on "rational speculation unsupported by evidence or empirical data" (citation omitted)), *with* Planned Parenthood of Wis. v. Van Hollen, 738 F.3d 786, 795 (7th Cir. 2013) (finding an invalid purpose where a state "neither presented evidence of a health benefit (beyond an inconclusive affidavit by one doctor concerning one abortion patient in another state[. . .]), [n]or rebutted the plaintiffs' evidence that the statute if upheld will harm abortion providers and their clients and potential clients"). *See infra* Part IV (discussing cases). As this Article went to press, the Fifth Circuit issued its decision in *Planned Parenthood of Greater Texas Surgical Health Services. v. Abbott*, No. 13-51008 (5th Cir. May 27, 2014), restating the position it took in the opinion on preliminary injunction that the lowest level of rational basis review applies to abortion legislation, according to which courts must only determine whether any conceivable rationale exists for an enactment. *Abbott*, slip op. at 14–15. The court seemed to go even further, arguably characterizing the undue burden test as a lower standard of review than rational basis review by stating that abortion legislation must not impose an undue burden and "must also pass rational basis review." *Id.* at 7.

17. *Supra* note 16 and accompanying text.

Casey's version of intermediate scrutiny requires courts to undertake a first function review of purpose by determining whether abortion legislation in fact serves a legitimate state interest.

II. Casey*'s Balance: Intermediate Scrutiny*

At the time *Planned Parenthood of Southeastern Pennsylvania v. Casey* was argued in the spring of 1992, abortion rights supporters feared *Roe* would be overturned outright. Only the votes of Justices Stevens and Blackmun were firmly in hand, while Chief Justice Rehnquist and Justices White, Scalia, and Thomas were firmly opposed to *Roe*.[18] All the anti-choice camp had to do to reverse *Roe* was obtain the vote of only one of the new Republican appointees, Justices Kennedy, O'Connor, or Souter. Justice Kennedy and even Justice Souter had voted with the majority in *Rust v. Sullivan*[19] to uphold a regulation that prohibited employees of family planning clinics receiving federal money from counseling their patients on abortion.[20] Justice O'Connor, while voting in *Rust* to strike down the restrictive regulations on nonconstitutional grounds, had proven hostile to

18. Justices Rehnquist, White, and Scalia were all on record as opposed to *Roe*. *See, e.g.*, Webster v. Reprod. Health Servs., 492 U.S. 490, 532 (1989) (Scalia, J., concurring) (stating that *Roe* should be overturned more explicitly); Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 795 (1986) (White, J., dissenting) ("[T]he State's interest, if compelling after viability, is equally compelling before viability."); Roe v. Wade, 410 U.S. 113, 173 (1973) (Rehnquist, J., dissenting) (arguing that courts should apply rational basis review to abortion regulations and that the Court's "invalidation of any restrictions on abortion during the first trimester is impossible to justify under that standard"); *id.* at 221 (White, J., dissenting) (stating that the issue of abortion regulation should not be decided by the Court and instead should be left to the legislature). While Justice Thomas had no written record on *Roe*, his claim at his confirmation hearing in 1991 that he had never expressed a view on *Roe v. Wade*, even in private, was viewed as not credible, and he was considered a no vote. *See* Michael J. Gerhardt, *Divided Justice: A Commentary on the Nomination and Confirmation of Justice Thomas*, 60 GEO. WASH. L. REV. 969, 981 (1992) ("It stretched credulity for Justice Thomas to claim that he never *seriously* discussed *Roe v. Wade* . . . even though *Roe* was one of the most important constitutional law cases . . . *and* he had criticized it more than once in his public statements and writings." (citations omitted)).

19. 500 U.S. 173 (1991).

20. *Id.* at 203.

the *Roe* standard in *Thornburgh v. ACOG*,[21] *City of Akron v. Akron Center for Reproductive Health*,[22] and *Webster v. Reproductive Health Services*.[23]

In a surprise twist and after much internal debate among Justices O'Connor, Souter, and Stevens,[24] the three Justices joined together to forge a middle ground in between the four firmly anti-*Roe* Justices and the two firmly pro-*Roe* Justices. In a plurality decision that they hoped would placate both sides of the abortion debate, Justices O'Connor, Souter, and Kennedy acknowledged the divisiveness of the issue that was very much on their minds:

> Whether or not a new social consensus is developing on that issue, its divisiveness is no less today than in 1973, and pressure to overrule the decision, like pressure to retain it, has grown only more intense. A decision to overrule *Roe*'s essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law. It is therefore imperative to adhere to the essence of *Roe*'s original decision, and we do so today.[25]

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21. *See Thornburgh*, 476 U.S. at 828 (O'Connor, J., dissenting) ("The State has compelling interests in ensuring maternal health and in protecting potential human life, and these interests exist 'throughout pregnancy.'" (citation omitted)).

22. *See* City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 452–61 (1983) (O'Connor, J., dissenting) (disagreeing with *Roe*'s trimester approach). In referring to the *Roe* framework in her dissent in *Akron*, in which Rehnquist and White joined, Justice O'Connor wrote that

> it is apparently for the Court's opinion that neither sound constitutional theory nor our need to decide cases based on the application of neutral principles can accommodate an analytical framework that varies according to the 'stages' of pregnancy, where those stages, and their concomitant standards of review, differ according to the level of medical technology available when a particular challenge to state regulation occurs.

Id. at 452–53.

23. *See Webster*, 492 U.S. at 527 (O'Connor, J., concurring) (discussing potentially reexamining the *Roe* decision).

24. *See* LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY 200–06 (1st ed. 2005) (describing the Court's decision making processes in *Planned Parenthood of Southeastern Pennsylvania v. Casey*).

25. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 869 (1992).

With mixed emotions, the Justices announced they were reaffirming *Roe*'s protection of a woman's right to obtain previability abortions, as well as *Roe*'s rule that states could go so far as to ban abortions postviability as long as a woman's life and health were protected.[26] Pro-choice activists, relieved that *Roe* had not been overturned, were initially pleased with the result and especially took to heart the Court's discussion of the importance of the equality interests at stake in the case, as well as its acknowledgement that people of conscience stood on both sides of the issue.[27] Anti-choice advocates who had thought victory was close at hand and had reason to expect the Court to overrule *Roe* were sorely disappointed, experiencing *Casey* as a significant loss.[28]

However, the Justices gave a great deal to the anti-choice side. Emphasizing that *Roe* "speaks with clarity in establishing not only the woman's liberty but also the State's 'important and legitimate interest in potential life,'"[29] the Court firmly declared that "[t]hat portion of the decision in *Roe* has been given too little acknowledgment and implementation by the Court in its subsequent cases."[30] To expand opportunities for state regulation,[31] the Court abandoned strict scrutiny review and the

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26. *See id.* at 869–74 (discussing the holding and stating that "[a] decision to overrule *Roe*'s essential holding [would lead to] profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law," and that it was therefore "imperative to adhere to the essence of *Roe*'s original decision").

27. *See id.* at 856 ("The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." (citing ROSALIND POLLACK PETCHESKY, ABORTION AND WOMAN'S CHOICE: THE STATE, SEXUALITY, AND REPRODUCTIVE FREEDOM 109, 133 n.7 (1990))); *id.* at 852 (recognizing that the abortion decision "originate[s] within the zone of conscience and belief"); *id.* at 850 (recognizing that "men and women of good conscience can disagree").

28. *See* Neal Devins, *How* Planned Parenthood v. Casey *(Pretty Much) Settled the Abortion Wars*, 118 YALE L.J. 1318, 1329 (2009) ("National Right to Life Committee state legislative director Burke Balch lamented, 'We've been fighting to overturn *Roe v. Wade* for 20 years and if necessary we'll fight for 20 more, but for now, we've lost.'" (quoting Tamar Lewin, *Long Battles Over Abortion Are Seen*, N.Y. TIMES, June 30, 1992, at A18)).

29. *Casey*, 505 U.S. at 871 (quoting Roe v. Wade, 410 U.S. 113, 163 (1973)).

30. *Id.*

31. The Court directly overruled those portions of *Akron* and *Thornburgh* that struck down laws imposing a mandatory delay and requiring provision of

"rigid trimester framework" resulting from implementation of strict scrutiny in *Roe*, reasoning that "[a] framework of this rigidity was unnecessary and in its later interpretation sometimes contradicted the State's permissible exercise of its powers."[32] From now on, the undue burden standard would govern review of previability abortion regulation:

> To protect the central right recognized by *Roe v. Wade* while at the same time accommodating the State's profound interest in potential life, we will employ the undue burden analysis as explained in this opinion. An undue burden exists, and therefore a provision of law is invalid, if its *purpose or effect* is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.[33]

Importantly, though, in adopting what has become known as *Casey*'s "undue burden test," the plurality adopted a middle position, a type of intermediate scrutiny. While turning its back on strict scrutiny and the trimester framework it had required, the Court also refused to adopt the rational relationship test advocated by Chief Justice Rehnquist in dissent.[34] Instead, the Court maintained the requirement that legislation concerning abortion serve the previously approved state interests in potential life and maternal health, and now allowed such regulations to apply throughout pregnancy, with the important limitations discussed next.

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state-mandated information before a woman could have an abortion, declaring:

> [W]e depart from the holdings of *Akron I* and *Thornburgh* to the extent that we permit a State to further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion.

*Id.*at 883.

32. *Id.* at 872.

33. *Id.* at 878 (plurality opinion) (emphasis added).

34. *See id.* at 845 (distinguishing this analysis from that in the dissent of Chief Justice Rehnquist who "admits that he would overrule the central holding of *Roe* and adopt the rational relationship test as the sole criterion of constitutionality"); *cf. id.* at 966 (Rehnquist, J., concurring in part and dissenting in part) (arguing that "[a] woman's interest in having an abortion is a form of liberty protected by the Due Process Clause, but States may regulate abortion procedures in ways rationally related to a legitimate state interest").

A. Purpose's First Function: Does the Legislation in Fact Serve a State Interest?

In *Casey*, the Court emphasized its inquiry into the purpose of abortion regulations in its discussion of the provisions it upheld—the mandatory delay, information, recordkeeping, and reporting requirements. First, the purpose must not be "designed to strike at the right itself."[35] Instead, the Court wrote:

> To promote the State's profound interest in potential life, throughout pregnancy the State may take measures to ensure that the woman's choice is informed, and measures designed to advance this interest will not be invalidated as long as their *purpose* is to persuade the woman to choose childbirth over abortion.[36]

Not all regulations that could promote this interest in, or "purpose of," dissuading women from choosing abortion, however, are valid. The Court emphasized that these measures must inform the woman's choice, not hinder it.[37]

Second, the Court confirmed the state's ability to legislate to serve its valid interest in the pregnant woman's health, noting that "[a]s with any medical procedure, the State may enact regulations *to further the* health or safety of a woman seeking an abortion."[38] Regulations that do not further the health or safety of the woman seeking an abortion were suspect: "[*u*]*nnecessary 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."[39] With respect to the recordkeeping and reporting requirements, the Court found that not only do these requirements "relate to health," but also examined the legislation's fit, finding that:

> [t]he collection of information with respect to actual patients is a vital element of medical research, and so it cannot be said

35. *Id.* at 874.
36. *Id.* at 878 (emphasis added).
37. *Id.* at 877.
38. *Id.* (emphasis added).
39. *Id.* (emphasis added).

> that the requirements *serve no purpose* other than to make abortions more difficult.[40]

With respect to both the mandatory information requirements and the recordkeeping requirements, then, the Court examined the factual record to determine whether in fact the requirements served the claimed state interest.

B. Purpose's Second Function: Smoking Out Hidden Purposes for Abortion Regulation

The Court's purpose analysis also came into play in review of the spousal notification provision, but this time the Court enacted the second function of the purpose prong, that of rooting out hidden purposes. Although the Court could have stopped its analysis of the spousal notice provision after determining that it had the *effect* of imposing a substantial obstacle, it went on to discuss the law's invalid purpose as well. The Court found it particularly objectionable that the spousal notice provision

> empower[s] [the husband] with this troubling degree of authority over his wife. . . . reminiscent of the common law. . . . A State may not give to a man the kind of dominion over his wife that parents exercise over their children.
>
> [The spousal notice requirement] embodies a view of marriage consonant with the common-law status of married women but repugnant to our present understanding of marriage and of the nature of the rights secured by the Constitution.[41]

Thus, even though the state has a valid interest in dissuading a woman from choosing abortion,[42] and the regulation arguably would have served that interest under a "rational speculation" test, like that applied by the Fifth Circuit in *Abbott*,[43] the Court went out of its way to lodge its objection to the state's reliance on, and promotion of, outmoded stereotypes in attempting to dissuade the woman. In revealing this hidden

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40. *Id.* at 900–01 (emphasis added).
41. *Id.* at 898.
42. *See id.*at 873–74 (discussing the state's valid interest).
43. *Supra* note 16 and accompanying text.

illegitimate purpose of the regulation, the Court made plain it would not countenance legislation serving such purposes. The Court thus referenced the role heightened scrutiny has played in jurisprudence involving equality guarantees.[44] It protects the regulated group, in this case women, not only from the impact of a law in restricting rights but also from the "disadvantage, . . . separate status, and . . . stigma"[45] that results from discriminatory treatment that reinforces status hierarchies.[46]

The right to abortion has become properly understood not just as a species of liberty but also as having an equality component, as Justice Ginsburg recognized in dissent in *Gonzales v. Carhart*[47] and as scholars have argued for years.[48] This

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44. Many scholars have made extensive study of the role of heightened scrutiny, and particularly the role of inquiry into purpose in protecting constitutional rights. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 145–48 (1980) (discussing the role of legislative intent in review of segregation and desegregation efforts); Paul Brest, Palmer v. Thompson, *An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 98–99 (introducing the conflict in *Palmer v. Thompson* about whether legislative intent should be considered in determining an equal protection violation); Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1700 (1984) (discussing the role of heightened review in the prohibition of naked preference). John Hart Ely argued that all different levels of constitutional scrutiny could be used to guard against illegitimate discriminatory purposes to "smoke them out." ELY, *supra*, at 145–48; *see also, e.g.*, Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 GEO. L.J. 2331, 2359–64 (2000) (discussing the functions of strict scrutiny review: "smoking out" illegitimate purposes and balancing costs and benefits).

45. United States v. Windsor, 133 S. Ct. 2675, 2693 (2013).

46. Indeed, inquiry into purpose has served a historic role in this country's evolving treatment of traditionally oppressed groups, *see* Sunstein, *supra* note 44, at 1700 (discussing review of statutes under heightened scrutiny review), a role required because equality mandates are often adopted as aspirations before what "equality" means for a previously oppressed group is truly understood. *See* J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2315 (1997) (noting that "[l]arge-scale changes in social structure require social transformation over long periods of time").

47. 550 U.S. 124, 172 (2007).

48. *See, e.g.*, Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815, 819–22 (2007) (discussing the connection between equality rights and the right to abortion; citing other scholars making similar equality arguments); Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991, 994–99 (discussing the interaction between equal protection and South Dakota's recent laws regulating

merging of equality and liberty rights protected by the Fourteenth Amendment has been identified by the Court as part of an equal right to liberty.[49] It is understandable, therefore, that the courts reviewing abortion restrictions have become more attentive to notions of illicit purpose.[50] The prohibition of illegitimate purposes in the abortion context, the reliance on outmoded stereotypes, and the view that women's only true fulfillment comes through motherhood, like the prohibition of "naked preferences,"[51] must be rooted out if we are to ensure equality to women.

This second function of the purpose inquiry, while important, has served to muddy the vital role of the first function of the purpose inquiry in maintaining *Casey*'s test. Courts must conduct their evaluations to reveal hidden purposes without obscuring the first function, that is, ensuring that the legislation in fact serves a legitimate interest.

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and limiting abortion); Priscilla Smith, *Give Justice Ginsburg What She Wants*: *Using Sex Equality Arguments to Demand Examination of the Legitimacy of State Interests in Abortion Regulation*, 34 HARV. J.L. & GENDER 377, 383–88 (2011) [hereinafter Smith, *Give Justice Ginsburg*] (explaining arguments in support and citing other scholars making equality arguments).

49. *See Gonzales*, 550 U.S. at 172 (Ginsburg, J., dissenting) ("[L]egal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship statute." (citing Reva B. Siegel, *Reasoning From the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1002–28 (1984))); United States v. Windsor, 133 S. Ct. 2675, 2695 (2013) ("The liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws."); *see also, e.g.*, Kim Shayo Buchanan, Lawrence v. Geduldig*: Regulating Women's Sexuality*, 56 EMORY L.J. 1235, 1294 (2007) (discussing rights to equal sexual liberty); Smith, *Give Justice Ginsburg*, *supra* note 48, at 407–12 (arguing that courts will be more receptive to equality arguments in an equal right to liberty frame rather than an equal protection frame).

50. Judicial inquiry into motivation of state action plays an especially important role in preservation of constitutional rights—especially those involving equality concerns, as Paul Brest articulated more than forty years ago in his article discussing *Palmer v. Thompson*, 403 U.S. 217 (1971). *See* Brest, *supra* note 44, at 139–46 (arguing in favor of judicial review of legislative motivation).

51. *See* Sunstein, *supra* note 44, at 1700 (explaining that a "naked preference" triggers a heightened scrutiny review).

*III. Post-*Casey *Purpose Inquiries in the Abortion Cases*

The Supreme Court has weighed in on purpose analysis two times after *Casey*, confirming *Casey*'s adoption of an intermediate scrutiny analysis requiring scrutiny of the state interest claimed and a fit analysis in the name of "purpose."[52] In *Mazurek v. Armstrong*,[53] the Supreme Court reversed a Ninth Circuit ruling that relied on a purpose theory to strike down a law preventing physician assistants from performing abortions, even under a doctor's supervision.[54] In *Mazurek*, while rejecting a purpose claim based on what it saw as insufficient evidence of improper "purpose," the Court did not reject the purpose line of argument, nor the two separate functions that purpose was meant to serve.[55]

The problem with the Court's decision is that it conflated the two functions of purpose. The Court conducted the first function analysis, conducting an inquiry into proper tailoring to serve a valid purpose, finding that the requirement that only physicians perform abortions in fact served a valid interest in women's health by reference to a statement in *Casey*.[56] Given that the Court had indicated its approval of licensing restrictions as a means to protect women's health in the past,[57] it is hardly surprising that the Court approved of "purpose" in the first function sense—that it in fact served a valid state interest in the health of the woman seeking abortion.

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52. *Cf.* Borgmann, *supra* note 8, at 150 (arguing that "[i]n addition to making it virtually impossible for challengers to prove an *illegitimate* purpose to the Court's satisfaction, the Court has made it very easy for the state to demonstrate a *valid* purpose for the law," but noting that courts should evaluate factual record more closely under *Casey*).

53. 520 U.S. 968 (1997).

54. *See id.*at 969–71, 976 (describing the law at issue, reversing the Ninth Circuit's judgment and remanding for further proceedings).

55. *See id.* at 974 (premising its reversal of the Ninth Circuit on a lack of legislative intent and the "insufficient evidence that the law created a 'substantial obstacle' to abortion" rather than on any substantive disagreement with the purpose prong of *Casey*).

56. *See id.* (noting that "[o]ur cases reflect the fact that 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" (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 885 (1992))).

57. *Id.*

The negative language about failure to establish illicit "purpose" in *Mazurek* concerns the second function of the purpose inquiry, that is the inquiry into whether some hidden motive infected the legislative process. As a Fifth Circuit panel in *Okpalobi v. Foster*[58] pointed out, the Supreme Court simply found that evidence of improper purpose "discounted by the Court on other occasions—medical data indicating that non-physicians are capable of performing abortions safely and the involvement of certain lobbying groups in the legislative process"—was insufficient to establish illicit purpose.[59] Still, dicta in the Court's decision raised questions about the power of the purpose prong in cases where litigants could not also prove the legislation had the effect of imposing an undue burden.[60] These dicta may have discouraged litigants from pressing these claims, especially in the hostile context of "partial-birth abortion" regulation, challenges to which dominated the litigation landscape for the next ten years post-*Mazurek*.[61]

The next time the Court weighed in on Casey's purpose prong was in *Gonzales v. Carhart*,[62] where the Court conducted a detailed "purpose" inquiry in the first function sense, despite the fact that plaintiffs had not pressed the claim in that case.[63] While

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58. 190 F.3d 337 (5th Cir. 1999).

59. *Id.* at 355.

60. Mazurek v. Armstrong, 520 U.S. 968, 974–75 (1997) (noting that because the Montana law did not have the *effect* of creating a substantial obstacle to a woman's right to seek an abortion before the fetus attains viability, "there is simply no evidence that the legislature intended the law to do what it plainly did not do").

61. *See* Stuart Buck & Mark L. Rienzi, *Federal Courts, Overbreadth, and Vagueness: Guiding Principles for Constitutional Challenges to Uninterpreted State Statutes*, 2002 UTAH L. REV. 381, 406 ("In a way never before seen in our federal courts, legislative efforts to restrict partial-birth abortion gave rise to a flood of litigation challenging partial-birth abortion statutes . . . .").

62. *See* Gonzales v. Carhart, 550 U.S. 124, 156–60 (2007) (conducting an extensive inquiry into the governmental objectives that justify the statute and the legislative intent underpinning those objectives).

63. *See generally* Transcript of Oral Argument, Gonzales v. Carhart, 550 U.S. 124 (2007) (No. 05-380) (containing no extended discussion of the legislative intent or the governmental objectives behind the partial-birth abortion statute in question); *see also* Priscilla J. Smith, *Is the Glass Half-Full?:* Gonzales v. Carhart *and the Future of Abortion Jurisprudence*, 2 HARV. L. & POL'Y REV. ONLINE (Apr. 9, 2008) (manuscript at 11) [hereinafter Smith, *Is the Glass Half-Full?*], *available at* http://ssrn.com/abstract=1357506 ("The plaintiffs

upholding a ban on a method of second-trimester surgical abortions, narrowly defined by the Court to leave the vast majority of second-trimester procedures untouched,[64] the Court was careful to examine the validity of state interests as well as to conduct a fit analysis under the guise of the "purpose prong," asking whether those interests were in fact served by the legislation.[65]

Some have seen the purpose inquiry in *Gonzales* as undermining claims of purpose[66] because the Court upheld a ban on a method of performing abortions by reference to the state's dual interests in protecting potential life through dissuasion and in maintaining the "integrity and ethics of the medical profession."[67] However, there is no question that the Court conducted a fit analysis to determine whether the statute in fact served a valid state interest, finding that "a necessary effect of the regulation and the knowledge it conveys will be to encourage some women to carry the infant to full term, thus reducing the absolute number of late-term abortions."[68] According to the Court, the public debate about the type of abortions being banned would discourage at least some women from obtaining abortions *without* hindering them because other methods were always available.[69]

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did not make a claim that the law imposed an undue burden because it had the purpose of placing a substantial obstacle in the path of a woman obtaining an abortion." (emphasis added)).

64. *See Gonzales*, 550 U.S. at 150–52, 168 (finding that the act does not impose "an undue burden on a woman's right to abortion" because the Court limited its application to a prohibition on intact dilation and evacuation, a less common procedure).

65. *See id.* at 156–60 (finding that Congress intended for the act to respect the "dignity of human life" and protect the "integrity and ethics of the medical profession," not to "place a substantial obstacle in the path of a woman seeking an abortion" (citation and internal quotation marks omitted)).

66. Borgmann, *supra* note 8, at 150 (arguing that the Supreme Court "applied a weak version of *Casey*'s 'purpose prong' when it upheld the federal Partial Birth Abortion Ban Act, requiring only that Congress have had a 'rational basis to act'").

67. *See Gonzales*, 550 U.S. at 156, 159–60 (noting that "[t]he State has an interest in ensuring [that the partial-birth abortion] choice is well informed").

68. *Id.* at 160.

69. *See id.* (discussing another method of dilation and evacuation that escaped the partial-birth abortion ban and could be utilized). The Court expressed concern about "th[e] lack of information concerning the way in which the fetus will be killed" and its hope that "[t]he medical profession, furthermore,

While Justice Ginsburg argued in dissent that because the statute *banned* the abortions rather than requiring the doctors to *provide* information about them to patients and letting them decide, it did not serve the interest in dissuasion,[70] the Court was clear that it disagreed and saw the ban as a valid method of dissuasion.[71] *Gonzales*, therefore, supports the claim that an analysis of whether a regulation of abortion in fact serves a valid state interest is the first function of the purpose prong.

The main support for the idea that abortion regulations should be subjected only to a rational basis review comes from two references in *Gonzales* to a "rational" regulation or "rational basis" for regulations that are taken out of context. Both references are carefully limited to the facts of the case, which involved barring one procedure and substituting others and where only "marginal safety" considerations separated the two.[72] Even in that context, the Court is careful to note that the regulations must in fact serve a legitimate state interest. As the Court wrote: "*Considerations of marginal safety*, including the balance of risks, are within the legislative competence when the regulation is rational *and in pursuit of legitimate ends*."[73]

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may find different and less shocking methods to abort the fetus in the second trimester, thereby accommodating legislative demand." *Id.* at 159–60. Justice Kennedy, writing for the majority, noted that "[t]he State's interest in respect for life is advanced by the dialogue that better informs the political and legal systems, the medical profession, expectant mothers, and society as a whole of the consequences that follow from a decision to elect a late-term abortion." *Id.* at 129.

70. *See id.* at 183–84 (Ginsburg, J., dissenting) ("The solution the Court approves, then, is *not* to require doctors to inform women, accurately and adequately, of the different procedures and their attendant risks. Instead, the Court deprives women of the right to make an autonomous choice, even at the expense of their safety." (citations omitted)).

71. *See id.* at 160 (majority opinion) (arguing that the "lack of information concerning the way in which the fetus will be killed . . . is of legitimate concern to the State"); Smith, *Is the Glass Half-Full?*, *supra* note 63, at 13–14 (noting that there is "nothing in the opinion renouncing . . . the Court's approval of statutes mandating that women receive certain information before they obtain an abortion" and that such information can be used to dissuade women from getting an abortion).

72. *See* Gonzales v. Carhart, 550 U.S. 124, 158, 166 (2007) (using the terms of art in a very limited manner).

73. *Id.* at 166 (emphasis added); *see also id.* ("When standard medical options are available, mere convenience does not suffice to displace them; and if some procedures have different risks than others, it does not follow that the

Similarly, the Court mentions "rational basis" when it indicates that it will not allow the health requirement in abortion jurisprudence to allow doctors to choose any method he or she might prefer, even where the safety benefits were as small as the Court saw them to be in that case. Again, though, the Court is careful to make clear that the regulations must be "in furtherance of . . . legitimate interests."[74] Thus, nothing in *Gonzales* suffices to overturn *Casey*'s requirement that courts conduct an analysis of whether a regulation serves a legitimate state interest.

This means that if a regulation purports to regulate in the interest of potential life by informing a woman's decision in an attempt either to dissuade her from obtaining the abortion or just in an effort to ensure her decision is well-informed,[75] the courts must inquire whether the regulation actually serves that function or instead hinders the decision making process by requiring information that is irrelevant, false, misleading, or harmful.[76] Evidence that the regulation hinders and does not inform the process establishes a purpose of imposing an undue burden under *Casey*.[77] If the regulation purports to regulate in the interest of the health of the woman seeking an abortion, evidence that it would not serve the woman's health, including evidence that it would actually harm the woman's health, undermines the claim of valid purpose and is evidence that the regulation is designed simply to "strike at the right itself."[78]

State is altogether barred from imposing reasonable regulations.").

74. *Id.* at 158 (emphasis added).

75. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 878 (1992) ("[T]he State may take measures to ensure that the woman's choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion.").

76. *See id.* at 882, 968 (analyzing whether a statue requiring physicians to disclose information about child support and state funding for abortion alternatives requires practitioners to give "false or inaccurate" information and permitting an informed consent requirement where information provided is "truthful and not misleading").

77. *See supra* Part II.B (exploring the various portions of the *Casey* opinion that described the purpose requirement and recounting which portions of the regulations examined did not have a legitimate purpose).

78. *See* United States v. Windsor, 133 S. Ct. 2675, 2694 (2013) ("DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal. The principal purpose is to impose inequality, not for other

After *Gonzales*, courts now are beginning to turn back to some of the early post-*Casey* decisions that conducted a purpose analysis and to apply their methods. Some cases are simple. Where the result of the law is to ban previability abortions, either entirely or in a specific gestational range, even if the ban operates through incidental means, courts have had no problem holding that the purpose was improper.[79] As one district court judge recently wrote, the plaintiffs demonstrated a likelihood of success on the merits of their claim that the statute had an unconstitutional purpose because "the purpose of the bill appears to be the preservation of unborn human life through the creation of substantial, likely insurmountable, obstacles in the path of women seeking abortions in Nebraska."[80] Regulations short of a ban have proven more difficult. The Court's lack of clarity about the two functions of purpose is causing confusion and has given fodder to one Fifth Circuit panel that is intent on imposing a "rational speculation" analysis on abortion regulations, even lower than Justice Rehnquist's rejected rational basis review.

The starkest contrast is between the Seventh and Fifth Circuit cases mentioned at the beginning of this article. In *Planned Parenthood v. Van Hollen*,[81] the Seventh Circuit affirmed the trial court's grant of a preliminary injunction against enforcement of a provision requiring physicians providing abortions to obtain admitting privileges at a hospital within

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reasons like governmental efficiency.").

79. *See* Okpalobi v. Foster, 190 F.3d 337, 354–57 (5th Cir. 1999) (conducting a purpose analysis and accepting plaintiffs' argument that Louisiana's civil liability provision enabling civil actions to be brought against the abortion provider for damages caused by an abortion, including "damage to the unborn child," essentially created a ban on abortions), *vacated and rev'd on other grounds en banc*, 244 F.3d 405 (5th Cir. 2001); Jane L. v. Bangerter, 102 F.3d 1112, 1116–17 (10th Cir. 1996) (striking down a statute banning abortions after twenty weeks with few exceptions as having the purpose of imposing an undue burden on abortion and noting that a law's historical and social context showing a desire to ban abortion altogether is evidence of improper purpose to impose an undue burden); Planned Parenthood of the Heartland v. Heineman, 724 F. Supp. 2d 1025, 1043–46 (D. Neb. 2010) (finding that a law imposing disclosure requirements on physicians that were so vague that compliance would prove impossible had the impermissible purpose of banning abortions).

80. *Heineman*, 724 F. Supp. 2d at 1046.

81. 738 F.3d 786 (7th Cir. 2013).

thirty miles of the clinic where they operated.[82] Although "the purpose of the statute [was] not at issue in th[e] appeal,"[83] the court went to great lengths to examine whether the regulation actually would serve the state's claimed interest in promoting maternal health. As the court wrote:

> The state concedes that its only interest pertinent to this case is in the health of women who obtain abortions. But it has neither presented evidence of a health benefit (beyond an inconclusive affidavit by one doctor concerning one abortion patient in another state, . . .) or rebutted the plaintiffs' evidence that the statute if upheld will harm abortion providers and their clients and potential clients.[84]

In *Van Hollen*, the two functions of purpose inform each other. The court's suspicions about the state's claimed interest were raised because the statute's requirement was anomalous for reasons unrelated to any distinctions between abortion and other medical services. After noting that an "issue of equal protection of the laws is lurking in this case," Judge Posner, writing for the court, adopted the trial court's discussion of the purpose behind the statute:

> the complete absence of an admitting privileges requirement for . . . procedures including those with greater risk is certainly evidence that Wisconsin Legislature's only *purpose* in its enactment was to restrict the availability of safe, legal abortion in this State, particularly given the lack of any demonstrable medical benefit for its requirement either presented to the Legislature or [to] this court.[85]

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82. *See id.* at 787–88, 799 (reciting the details of the state law requirements and affirming the lower court's injunction).

83. *Id.* at 791. Plaintiffs reserved the issue for trial, mainly arguing at this stage that the statute had the effect of imposing an undue burden on abortion. *See id.* at 804–06 (Mannion, J., concurring in part and in the judgment) (summarizing and evaluating the plaintiffs' arguments regarding the effects prong).

84. *Id.* at 795 (majority opinion).

85. *Id.* at 790 (emphasis added). As further proof of improper purpose, the court pointed to the unreasonable "two-day deadline" imposed by the legislature that made compliance with the requirement impossible, as well as the "strange private civil remedy" provision entitling the father or grandparent to damages for a violation of the requirement upon proof of injury to the father or grandparent, but without proof of any harm to women's health. *Id.* at 790–91. These two factors further undermined any claim that the legislature was

As another court wrote with disapproval, "[n]o such legislative concern for the health of women, or of men, has given rise to any remotely similar informed-consent statutes" applicable to any health services other than abortion.[86]

Notably, this analysis is similar to the Supreme Court's analysis of purpose in *United States v. Windsor*,[87] where the Supreme Court struck down the Defense of Marriage Act as a violation of the plaintiff's equal right to liberty.[88] In *Windsor*, the Court noted that when attempting to determine "whether a law is motivated by an improper animus or purpose," courts should recognize that "discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision."[89] In *Windsor*, the Court emphasized that "unusual deviations" provided strong evidence that the law had an improper purpose.[90] As the Court noted, "DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal. The principal purpose is to impose inequality, not for other reasons like governmental efficiency."[91] In that case, the purpose was to impose a "disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States."[92]

In contrast, in *Planned Parenthood of Greater Texas Surgical Health Services v. Abbott*,[93] a panel of the Fifth Circuit reversed the trial court's grant of a preliminary injunction and accepted the State's evidence that an admitting privileges requirement "would assist in preventing patient abandonment by the physician who performed the abortion and then left the patient to

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concerned about maternal health. *See id.*at 791 (expressing doubt about whether the statute is "aimed *only* at protecting the mother's health").

86. *See* Planned Parenthood of Heartland v. Heineman, 724 F. Supp. 2d 1025, 1044 (D. Neb. 2010).

87. 133 S. Ct. 2675 (2013).

88. *Id.* at 2695–96.

89. *Id.* at 2692 (citations and internal quotation marks omitted).

90. *Id.* at 2693.

91. *Id.* at 2694.

92. *Id.* at 2693.

93. 734 F.3d 406 (5th Cir. 2013).

her own devices to obtain care if complications developed."[94] The court claimed that "[t]he district court's finding to the contrary is not supported by the evidence, and in any event, 'a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.'"[95] This bold adherence to legislative deference is supported by a quote from *FCC v. Beach Communications, Inc.*,[96] with no further explanation.[97] The court also made the even more outrageous and unsupported suggestion that the only way to find improper purpose in a facial challenge would be if a purpose to place a substantial obstacle in the path of a woman seeking an abortion was "facially indicated" in the statute's text.[98] This radical deference, "rational speculation" review, in which the court accepted the State's asserted state interest in women's health as the purpose of the statute without further inquiry,[99] is lower even than a traditional rational basis test and certainly fails to uphold the balance that *Casey* struck.[100]

IV. Review of Legislation's Service of Claimed State Interest as Purpose Inquiry Outside Abortion Jurisprudence

The difficulty currently facing courts reviewing the validity of the state's purpose in enacting an abortion regulation is that the state can always *claim* that it intends to promote women's health or fetal life to justify a given restriction.[101] Indeed, the

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94. *Id.* at 411.

95. *Id.*

96. 508 U.S. 307 (1993).

97. *Abbott*, 734 F.3d at 411.

98. *Id.* at 413–14.

99. *See id.* at 411–12 (discussing the court's reliance on maternal health and adequate medical care to determine that the statute had a rational basis).

100. *See, e.g.*, Buchanan, *supra* note 49, at 1291 (noting some courts have imported the "undue burden" standard to "adjudicate the equal protection rights of pregnant women in cases that have nothing to do with any countervailing state interest in protecting fetal life"); Janet Gallagher, *Prenatal Invasion & Interventions: What's Wrong with Fetal Rights*, 10 HARV. WOMEN'S L.J. 9, 15 (1987) (noting that use of women's health to limit a woman's right to choose certain medical care is a "serious distortion" of *Roe*).

101. *Infra* notes 102–04.

ease of hiding illicit motive is great in contentious fields like abortion where one can always find one expert willing to testify to scientifically refuted facts, like that abortion causes breast cancer,[102] that abortion causes severe depression,[103] or that a fetus at twenty weeks feels pain.[104] If the purpose prong—and indeed the *Casey* plurality's rejection of Chief Justice Rehnquist's proposal in dissent to apply rational basis scrutiny to abortion regulations[105]—is to mean anything, it must require more than

102. *See* Steven Ertelt, *Abortion has Caused 300K Breast Cancer Deaths Since Roe*, LIFENEWS (Jan. 17, 2011, 4:44 PM), http://www.lifenews.com/2011/01/17/abortion-has-caused-300k-breast-cancer-deaths-since-roe/ (last visited Feb. 4, 2014) (reporting that "[a] leading breast cancer researcher," Joel Brind, "says that abortion has caused at least 300,000 cases of breast cancer causing a woman's death since the Supreme Court allowed virtually unlimited abortion in its 1973 case") (on file with the Washington and Lee Law Review). *But see Fact Sheet: Abortion, Miscarriage, and Breast Cancer Risk*, NAT'L CANCER INST. (last updated Jan. 12, 2010), http://www.cancer.gov/cancertopics/factsheet/Risk/abortion-miscarriage (last visited Feb. 4, 2014) (reporting that "[i]n February 2003, the National Cancer Institute (NCI) convened a workshop of over 100 of the world's leading experts who study pregnancy and breast cancer risk. . . . [and] [t]hey concluded that having an abortion or miscarriage does not increase a woman's subsequent risk of developing breast cancer").

103. *See, e.g.*, Steven Ertelt, *Abortions Cause Severe Depression for Women, New Study Shows*, LIFENEWS (Jan. 2, 2006, 9:00 AM), http://www.lifenews.com/2006/01/02/nat-1941/ (last visited Feb. 4, 2014) (reporting that a New Zealand study found women who had abortions to be more likely to become severely depressed) (on file with the Washington and Lee Law Review). *But cf.* Gonzales v. Carhart, 550 U.S. 124, 183 n.7 (2007) (Ginsburg, J., dissenting) (listing studies in support of the proposition that the weight of scientific evidence does not comport "with the idea that having an abortion is any more dangerous to a woman's long-term mental health than delivering and parenting a child that she did not intend to have"); AM. PSYCHOLOGICAL ASS'N, REPORT OF THE APA TASK FORCE ON MENTAL HEALTH AND ABORTION 6 (2008), http://www.apa.org/pi/women/programs/abortion/mental-health.pdf (noting that evidence indicates that the relative risk of mental health problems due to an abortion is similar to the risk associated with an unplanned pregnancy but that risk increases in certain circumstances).

104. *See* Teresa Stanton Collett, *Previability Abortion and the Pain of the Unborn*, 71 WASH. & LEE L. REV. 1211, 1219–24 (2014) (exploring arguments supporting the existence of fetal pain). *But cf.* Susan J. Lee, *Fetal Pain: A Systematic Multidisciplinary Review of Evidence*, 294 J. AM. MED. ASS'N 947, 947–54 (2005) (reviewing studies and finding that "[e]vidence regarding the capacity for fetal pain is limited but indicates that fetal perception of pain is unlikely before the third trimester" and "probably does not exist before twenty-nine or thirty weeks").

105. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 874 (1992) (adopting the undue burden standard despite Chief Justice Rehnquist's argument in dissent); *id.* at 966 (Rehnquist, C.J., concurring in the judgment in

bald speculation by the state that a regulation serves an interest in potential life or an interest in maternal health. To ensure that *Casey*'s standard is met, that the law in fact serves a valid purpose of sufficient importance to warrant any burden it creates, courts must look behind these claims to examine the factual support for the state's claim and evidence undermining that claim, as the Seventh Circuit did.

Criticisms and skepticism about the promise of a purpose inquiry arise mostly because of the difficulties faced by courts in uncovering hidden purposes, especially where doing so requires the court to ascertain subjective legislative intent.[106] Paul Brest called the problem of determining legislative purpose one of the "most muddled areas of our constitutional jurisprudence,"[107] and the Court has warned that "[i]nquiries into congressional motives or purposes are a hazardous matter."[108]

However, the concerns about and criticisms of purpose inquiries are most applicable in cases where courts are asked to "void a statute that is . . . constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it."[109] For example, a law creating certain zoning restrictions that are otherwise permissible may be invalidated if the plaintiffs challenging that law can establish that it was enacted with racially discriminatory motives. The equal protection violation that the court must root out is the racially discriminatory motive itself, and the existence of a valid purpose does not necessarily negate an invalid one.[110]

The same is true in the bill of attainder cases where the purpose being examined is *itself* the unconstitutional act.[111] In

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part and dissenting in part) (arguing in dissent that "the Constitution does not subject state abortion regulations to heightened scrutiny").

106. *See* Brest, *supra* note 44, at 99–102 (discussing the difficulty of determining legislative motive).

107. *Id.* at 99.

108. United States v. O'Brien, 391 U.S. 367, 383 (1968).

109. *Id.* at 384.

110. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265–66 (1977) (noting that "[w]hen there is a proof that discriminatory purpose has been a motivating factor in the decision, . . . judicial deference [to a legislature's decision-making] is no longer justified").

111. *See O'Brien*, 391 U.S. at 383 n.30 (discussing the need to determine legislative purpose in evaluating a bill of attainder).

these cases, it is more difficult to determine whether a hidden motive exists based on statements of individual legislators that might provide some context for race discrimination or bill of attainder claims but may not reflect an entire legislative body's purpose.[112] As the Court has said of such a context, "[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it."[113] These are difficult determinations, and yet the courts still undertake them.

The inquiries discussed, especially first function purpose inquiries, are much simpler. There are numerous other contexts in which courts examine the evidence to determine whether a statute *actually* serves a valid interest. Those most analogous to the abortion cases are equal right to liberty cases, eminent domain cases, and preemption cases.

A. Equal Right to Liberty—United States v. Windsor

The Court's recent decision striking down the federal Defense of Marriage Act (DOMA) has followed *Casey*'s lead and further anchored purpose analysis to judicial review of government infringements on the right to liberty, especially when groups of people acting in constitutionally protected ways are targeted for infringement of their liberty.[114] This is because "[t]he liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws."[115] After a careful examination of

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112. *See id.* at 384 (explaining the need to "eschew guesswork" in such situations).

113. *Id.*

114. *See* United States v. Windsor, 133 S. Ct. 2675, 2689 (2013) ("Against this background of lawful same-sex marriage in some States, the design, purpose, and effect of DOMA should be considered as the beginning point in deciding whether it is valid under the Constitution.").

115. *Id.* at 2695. For a discussion of rights acting in concert, sometimes referred to as "hybrid rights," see Reva B. Siegel, *Abortion as a Sex Equality Right: Its Basis in Feminist Theory*, *in* MOTHERS IN LAW: FEMINIST THEORY AND THE LEGAL REGULATION OF MOTHERHOOD 43, 68 (Martha Albertson Fineman & Isabel Karpin eds., 1995) [hereinafter Siegel, *Abortion as a Sex Equality Right*] ("As *Casey* illustrates, the Court will oppose abortion restrictions when it believes they are gender biased in impetus or impact, even if the Court is not

the claimed state interests supporting DOMA, and with an interesting mirroring of *Casey*'s purpose and effect phraseology, the Court found that "no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity."[116] As a result, the Court held, DOMA was an unconstitutional deprivation of liberty of the person because the "principal purpose and the necessary effect of this law are to demean those persons" treated unequally by the law.[117] Like the men and women who marry their same-sex partners under state law and seek the same benefits of marriage available to those who marry members of the opposite sex, women who seek abortions similarly invoke an equal right to liberty. As the Court wrote in *Thornburgh*, this liberty right "extends to women as well as men."[118]

B. Eminent Domain Cases

Courts also examine "purpose" in the context of takings under eminent domain powers. In that context, "a State may transfer property from one private party to another if future 'use by the public' is the purpose of the taking; the condemnation of land for a railroad with common-carrier duties is a familiar example."[119] The government may not take property "under the

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ready to adopt the equal protection clause as the constitutional basis for protecting the abortion right."); Pamela S. Karlan, *Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment*, 33 MCGEORGE L. REV. 473, 473–92 (2002) [hereinafter Karlan, *Equal Protection*] (describing use of hybrid claims combing liberty and equity principles); Pamela S. Karlan, *Foreword: Loving* Lawrence, 102 MICH. L. REV. 1447, 1449–63 (2004) [hereinafter Karlan, *Foreword*] (arguing that the *Lawrence* decision, while based in liberty jurisprudence, incorporates equality principles).

116. *Windsor*, 133 S. Ct. at 2696.

117. *Id.* at 2695.

118. Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 772 (1986) (noting that failure to protect the woman's choice to have an abortion would "protect inadequately a central part of the sphere of liberty that our law guarantees equally to all"); *see also* Smith, *Give Justice Ginsburg*, *supra* note 48, at 383–87, 400–02 (providing a brief history of the recognition of equality concerns in reproductive rights doctrine and scholarship).

119. Kelo v. City of New London, 545 U.S. 469, 477 (2005).

mere pretext of a public purpose, when its actual purpose was to bestow a private benefit."[120] The disposition of these cases, therefore, "turns on the question whether the City's development plan serves a 'public purpose.'"[121] Even in applying "meaningful" rational basis review under the Public Use Clause, Justice Kennedy has emphasized that a detailed review of legislative motivation is required to ascertain whether an illegitimate purpose is animating state takings using eminent domain power.[122] In determining the line between public and private use, courts cannot rely blindly on a state's claimed purpose for the taking.[123] Justice Kennedy acknowledged that "[a]n external, judicial check on how the public use requirement is interpreted, however limited, is necessary if this constraint on government power is to retain any meaning."[124] Justice Kennedy admonished:

> A court applying rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits, just as a court applying rational-basis review under the Equal Protection Clause must strike down a government classification that is clearly intended to injure a particular class of private parties, with only incidental or pretextual public justifications.[125]

Courts must take "plausible accusation[s]" of improper purpose seriously and "review the record to see if it has merit."[126] Kennedy approved the trial court's "careful and extensive inquiry into 'whether, *in fact*, the development plan is of primary benefit to . . . the developer . . . , and in that regard, only of incidental

120. *Id.* at 478.

121. *Id.* at 480.

122. *See id.* at 491–92 (Kennedy, J., concurring) (noting that the trial court reviewed evidence from six different sources before concluding that benefitting a private company was not "the primary motivation or effect of this development plan" (internal quotation marks omitted)).

123. *See id.* at 497 (noting that while the Court gives "considerable deference to legislatures' determinations about what governmental activities will advantage the public," the political branches cannot be the "sole arbiters of the public-private distinction" or else the "Public Use Clause would amount to little more than hortatory fluff").

124. *Id.*

125. *Id.* at 491.

126. *Id.*

benefit to the city.'"[127] It was this extensive and close analysis, what Kennedy referred to as meaningful rational basis review, that Kennedy noted was, in his view, "required under the Public Use Clause."[128]

C. Preemption Cases

Similarly, in the preemption cases, courts frequently conduct detailed evaluations of legislative purpose by combining evaluation of whether legislation serves its intended purpose with inquiries into subjective legislative intent. The doctrinal question in preemption cases, whether certain state action is preempted by federal law is one of congressional intent: "'The purpose of Congress is the ultimate touchstone.'"[129] Moreover, "the Court define[s] the preempted field, in part, by reference to the motivation behind the state law."[130] In the absence of explicit statutory language establishing the intent to preempt a field, congressional purpose to preempt state law by occupying a field with its own regulations can be shown by an actual conflict between state and federal law, which requires careful analysis of the scope and impact of the areas of law.[131] The Court has noted that it does not "hesitate[] to draw an inference of field pre-emption where it is supported by the federal statutory and regulatory schemes."[132] In fact, purpose can be inferred "from a 'scheme of federal regulation . . . so pervasive as to make

127. *Id.* (emphasis added) (first omission in original).

128. *Id.*; *cf.* Andrew Tutt, *Blightened Scrutiny*, 47 U.C. DAVIS L. REV. (forthcoming 2014) (manuscript at 1), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2323267 (arguing that heightened scrutiny should be required for eminent domain takings under the Constitution) (on file with the Washington and Lee Law Review).

129. Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 137–38 (1990) (internal quotation marks omitted).

130. English v. Gen. Elec. Co., 496 U.S. 72, 84 (1990).

131. *See* Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992) ("Absent explicit pre-emptive language, we have recognized at least two types of implied pre-emption: field pre-emption, where the scheme of federal regulation is 'so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,' and conflict pre-emption . . . ."(citations omitted)).

132. *English*, 496 U.S. at 79.

reasonable the inference that Congress left no room for the States to supplement it,' or where an Act of Congress 'touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'"[133] For example, in *Pacific Gas and Electric Co. v. State Energy Resources Conservation and Development Commission*,[134] "the Court carefully analyzed the congressional enactments relating to the nuclear industry in order to decide whether a California law that conditioned the construction of a nuclear power plant on a state agency's approval of the plant's nuclear-waste storage and disposal facilities fell within a pre-empted field."[135]

Courts in these cases often look to legislative history in their evaluations of purpose. As the Second Circuit noted recently, while the Supreme Court's opinion in *Pacific Gas* did not "explain with precision the role legislative history plays in the analysis of an Atomic Energy Act preemption claims,"[136] "legislative history is an important source for determining whether a particular statute was motivated by an impermissible motive in the preemption context."[137] Even after finding that the Supreme Court had not explicitly delineated the level of scrutiny a court must perform to determine whether a statute is preempted, the Second Circuit held that the "Court's admonition against a 'state judgment that nuclear power is not safe enough to be further developed,' requires us to conduct a more searching review to determine whether a statute was enacted based upon radiological safety concerns."[138] The court, therefore, "decline[d] Vermont's invitation to apply an analytic framework akin to 'rational basis review,' which would preclude us from identifying the true purpose of a statute as required by *Pacific Gas* and would allow states to implement a 'moratorium on nuclear construction

133. *Id.*

134. 461 U.S. 190 (1983).

135. *English*, 496 U.S. at 80 (discussing *Pacific Gas*).

136. Entergy Nuclear Vt. Yankee, LLC v. Shumlin, 733 F.3d 393, 419 n.27 (2d Cir. 2013).

137. *Id.* at 419.

138. *Id.* (citation omitted).

grounded in safety concerns [that] falls squarely within the prohibited field.'"[139]

Similarly, in *Entergy Nuclear Vermont Yankee, LLC v. Shumlin*,[140] the Second Circuit examined the purpose of the state statute at issue, starting with the text of the statute itself.[141] The court refused to simply adopt the state interests advanced blindly,[142] but instead questioned whether the state's claimed goal of diversifying energy sources was really a purpose of the statute given the many other ways available to the state to achieve this same goal.[143]

The court explicitly rejected rational basis review of a state's interest because that would "preclude [it] from identifying the true purpose of a statute as required by" Supreme Court precedent[144]:

> We do not blindly accept the articulated purpose of [a state statute] for preemption purposes. If that were the rule, legislatures could "nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy—other than

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139. *Id.* at 416 (citing Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 213 (1983)); *see also id.* at 419 ("We can no longer adhere to the aberrational doctrine . . . that state law may frustrate the operation of federal law as long as the state legislature in passing its law *had some purpose in mind* other than one of frustration [of the federal regulatory scheme]." (quoting Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 105–06 (1992))).

140. 733 F.3d 393 (2d Cir. 2013).

141. *Id.* at 414. ("The proper place to begin the analysis of a statute is its text." (citing United States v. Am. Trucking Ass'ns, 310 U.S. 534, 543 (1940) ("There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes.")).

142. *See id.* at 416 ("Although Vermont's asserted policy interests would not necessarily interfere with the preempted concern of radiological safety, our inquiry does not end at the text of the statute."). Specifically, the court noted that "[t]he legislative policy and purpose section of Act 160 sets forth several rationales for the statute." *Id.* at 415. Drawing on the language of the Act, the State argued "that Act 160 advances two policy interests: (1) increased use of a diverse array of renewable power sources; and (2) promotion of energy sources that are more cost-effective." *Id.* at 416.

143. *See id.* at 417 ("Closing Vermont Yankee would thus have little effect on the actual array of energy sources from which Vermont utilities can purchase power.").

144. *Id.* at 416.

> frustration of the federal objective—that would be tangentially furthered by the proposed state law."[145]

The court then looked to the statute's legislative history "to determine if it was passed with an impermissible motive," rejecting that state's argument that precedent foreclosed the use of legislative history to analyze a state statute's purpose in determining preemption.[146] In conducting its close evaluation of legislative purpose, the Second Circuit noted that "several other courts applying *Pacific Gas* have endorsed the use of legislative history" to examine preemption issues, determining that legislative history of both federal as well as state statutes "is an important source for determining whether a particular statute was motivated by an impermissible motive in the preemption context."[147]

> Although the lack of systemized record-keeping may make [their] task more challenging, the informality of the proceedings of the Vermont Legislature and the State's decision to not document its legislative history do not immunize Act 160 from judicial inquiry into legislative motivation.[148]

The Second Circuit approved the district court's careful analysis of legislative purpose, which delved extensively into the legislative record, concluding that the record contained "references, almost too numerous to count, [that] reveal legislators' radiological safety motivations and reflect their wish to empower the legislature to address their constituents' fear of radiological risk, and [the legislators'] beliefs that the plant was too unsafe to operate, in deciding a petition for continued operation."[149] In affirming the lower court, the Second Circuit declared:

> We need not repeat the entirety of the district court's examination, which included considering many hours of

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145. *Id.* (citing Greater N.Y. Metro. Food Council v. Giuliani, 195 F.3d 100, 108 (2d Cir. 1999)).

146. *Id.* at 418.

147. *Id.* at 419.

148. *Id.* at 420.

149. *Id.* (alteration in original) (quoting Entergy Nuclear Vt. Yankee, LLC v. Shumlin, 838 F. Supp. 2d 183, 229 (D. Vt. 2012)).

> audiotapes of floor debates and committee meetings for which written transcriptions are not typically maintained, except to note the remarkable consistency with which both state legislators and regulators expressed concern about radiological safety and expressed a desire to evade federal preemption.[150]

V. The Future of First Function and Second Function Inquiries Under the Purpose Prong

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.[151] This may not always be true. There may come a time when abortion is not regulated differently from other medical procedures. But even if a generally applicable regulation has some sort of differential impact on abortion and creates a substantial obstacle to obtaining one, it would need to be challenged.[152] This is simply not the case now. All contemporary regulations of abortion being challenged regulate abortion differently than other similar medical procedures, claiming to serve a valid purpose nonetheless.[153]

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150. *Id.*

151. *See* Buchanan, *supra* note 49, at 1239 (explaining that "[s]exual regulation has always been gendered. . . . [I]t visits the legal, financial, health, and reproductive burdens of unmarried sex exclusively on women").

152. The author has failed in her attempt to come up with an example of such a regulation. But perhaps her imagination has simply failed her.

153. *See, e.g.*, Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 734 F.3d 406, 409 (5th Cir. 2013) (describing the two provisions at issue: one "requires that a physician performing or inducing an abortion have admitting privileges, on the date of the procedure, at a hospital no more than thirty miles from the location" of the procedure; the other limits the use of abortion-inducing drugs, but no other drugs, to the label approved for advertising with certain narrow exceptions); Planned Parenthood of Wis., Inc. v. Van Hollen, 738 F.3d 786, 787 (7th Cir. 2013)

> describing the statute at issue as one that "prohibits a doctor, under threat of heavy penalties if he defies the prohibition, from performing an abortion (and in Wisconsin only doctors are allowed to perform abortions) unless he has admitting privileges at a

In abortion cases, the first function purpose inquiry to determine whether the state's interest in potential life or in women's health is in fact served by the legislation at issue requires close examination of medical and scientific evidence. If the statute *does* in fact serve a valid state interest, the court must *also* conduct a second inquiry to determine that there was not also some hidden motive, such as the purpose of promoting an outmoded view of the dominion of husband over wife at issue in *Casey*.[154]

In making the case for judicial invalidation of illicitly motivated laws even where those laws also served a valid purpose, Paul Brest made an argument I find particularly persuasive that stems from concerns about the legitimacy and integrity of government policy-making processes, legislative or administrative. Brest argued that consideration of illicit objectives can influence the outcome of the decision making process, encouraging more restrictive regulation than the lawfully motivated decision maker would enact.[155] In other words, illicit motives could prejudice the decision maker, undermining his or her objectivity and ability to appropriately weigh evidence in favor of the regulation. He argued that this lack of objectivity should undercut the deference we commonly give to legislative decision making as well as our faith in the democratic legitimacy of the legislative process.[156]

If we were conducting an equal protection review of an abortion regulation, an illicit purpose, such as a purpose to promote an outmoded stereotype of women, definitely would be enough to invalidate the regulation for the reasons Brest

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> hospital no more than 30 miles from the clinic in which the abortion is performed," but fails to impose similar requirements on physicians performing any other procedures

(citation omitted); Cline v. Okla. Coal. for Reprod. Justice, 313 P.3d 253, 262 (Okla. 2013) (answering the Court's certified questions by explaining that statute requiring doctors to use outdated medical protocol "effectively bans all medication abortions").

154. *Supra* Part II.B.

155. *See* Brest, *supra* note 44, at 116 (describing how illicit motivation can influence the decision maker's ability to make objective decisions).

156. *See id.* at 116–18 ("In this case, proof that the decision maker took account of an illicit objective rebuts whatever presumption of regularity otherwise attaches.").

outlines, and the sex discrimination case law upholds. Under the undue burden standard, however, the question is arguably more difficult to answer. One could argue that the right to abortion may be regulated so long as it does not have the effect of imposing an undue burden and so long as it serves a valid purpose, even if it also was enacted with an invalid one.[157]

On the other hand, based on what the Court actually did in *Casey*, it seems eminently reasonable to argue that when illicit objectives are part of the decision making process in enacting an abortion regulation, even one that is found to in fact serve a valid state interest, the court should also inquire into the existence of an invalid purpose and strike the statute if an invalid purpose exists.[158] This would mean that even if the court found a regulation actually served an interest in maternal health, the regulation would still fall if it was enacted with the purpose of reinforcing traditional sex-role stereotypes. In fact, this seems to be exactly what the Court did in striking the spousal notification provision.[159] Surely, informing one's husband, even a husband vehemently opposed to a woman's abortion, would result in a more "informed" decision, or at least allow the state to express its preference for childbirth over abortion through a husband who shared this view. Nonetheless, the Court struck the provision at least in part because it expressed an outmoded view of women's proper role in society.[160]

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157. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 878 (1992) ("[M]easures to ensure that the woman's choice is informed, and measures designed to advance this interest will not be invalidated *as long as their purpose is to persuade the woman to choose childbirth over abortion*." (emphasis added)).

158. *See* Brest, *supra* note 44, at 118 (arguing that when a decision is partially based on illicit objectives "the court should place on the decision-maker a heavy burden of proving that his illicit objective was not determinative of the outcome").

159. *See Casey*, 505 U.S. at 887–98 (invalidating Pennsylvania's spousal notification requirement because it was an undue burden on a woman's choice to undergo an abortion).

160. *See id.* at 898 ("Section 3209 embodies a view of marriage consonant with the common-law status of married women but repugnant to our present understanding of marriage and of the nature of the rights secured by the Constitution. Women do not lose their constitutionally protected liberty when they marry."). Paul Brest rebutted arguments that invalidating laws with improper purposes when they also served valid purposes, laws with mixed motivations, was both futile and inefficient because they could be reenacted without the improper purposes. Brest, *supra* note 44, at 119–28. Indeed, if we

Given the current state of abortion jurisprudence, it would be a significant step towards implementation of the *Casey* purpose prong if courts would always undertake an exacting first function inquiry to ensure that the legislation in fact serves a valid state interest.[161] This more limited application of the *Casey* purpose prong, requiring an exacting inquiry into whether the regulation serves the state's valid interests in potential life or maternal health to determine whether it had a valid purpose, has one practical advantage over purpose inquiries in the equal protection context. It requires only a fairly common, if not mundane, judicial function of closely examining the fit between the claimed state interest and the regulation itself to confirm that the regulation actually serves the valid interest.[162]

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take seriously the idea that the bad motive has tainted the decision making process, then invalidating the law will improve the quality of decision making in our democracy by ridding the process of any improper weighing of the pros and cons of regulation. *Id.* at 127–28. If the same regulation is reenacted based on proper motive and supports valid state interests, so be it. *Id.* at 125 ("Judicial review of motivation is no more 'futile' merely because reenactment is possible than appellate review is futile because an appellee may prevail again on remand after a trial court is reversed for giving weight to inadmissible evidence or misapplying the law."). Second, Brest notes that intolerance for illicit purpose is proper because the bad purpose is harmful in and of itself, and doing away with bad purpose is thus a good. *Id.* at 127. This characterization rebuts both a claim of futility and inefficiency or "disutility," the idea that judicial review of illicit motivation may result in invalidation of law that is otherwise perfectly good, even where the law can be reenacted based either on an actual good purpose or on a sham good purpose. *Id.* at 125–28. If the law can simply be reenacted based on a claimed good purpose, then the only "harm" in striking down a so-called "good law" because it was enacted for a bad purpose, is that it can be reenacted again and the legislature has had to stand on valid principle the second time in enacting the good law. *Id.* at 125. This is no harm at all but another assurance that the democratic process is working as it should. *Id.* at 127.

161. *Compare* Planned Parenthood of Wis., Inc. v. Van Hollen, 738 F.3d 786, 795–99 (7th Cir. 2013) (affirming a preliminary injunction against the enforcement of a statute requiring admitting privileges, in part, because there was no evidence that the statute served an interest in women's health), *with* Planned Parenthood of Greater Tex. Surgical Health Servs., v. Abbott, 734 F.3d 406, 419 (5th Cir. 2013) (ordering a stay on a permanent injunction against the enforcement of Texas's admitting privileges requirement statute based on the state's bald allegation that it served maternal health), *motion to vacate denied by* 134 S. Ct. 506 (2013).

162. *Cf.* Brest, *supra* note 44, at 119–28 (discussing critiques of judicial inquiry into motive because of the difficulty in ascertaining motivation).

VI. Conclusion

We are at a critical juncture in the abortion debate. The courts, and the Supreme Court of the United States in particular, may respond to these regulations with the full force of *Casey*'s original power and arrest the erosion of access and reduction in services that has taken a real toll on women's lives.[163] If they do not, renewed pro-choice activism and mobilization of women and men on the abortion issue threaten (or promise, depending on one's point of view) over time to unravel the increasingly uneasy alliance the Republican Party has made with anti-choice activists,[164] or at least make the party increasingly irrelevant to half the nation.[165] In the meantime, even if the Court does not

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163. *See* Laura Bassett, *Anti-Abortion Laws Take Dramatic Toll on Clinics Nationwide*, HUFFINGTON POST (Nov. 11, 2013, 4:12 PM), http://www.huffingtonpost.com/2013/08/26/abortion-clinic-closures_n_3804529.html (last visited Jan. 29, 2014) (conducting a nationwide survey concluding that fifty-four abortion providers across twenty-seven states have ended their abortion services since the legislative attacks on providers began in 2010) (on file with the Washington and Lee Law Review); Laura Tillman & John Schwartz, *Texas Clinics Stop Abortions After Court Ruling*, N.Y. TIMES (Nov. 1, 2013), http://www.nytimes.com/2013/11/02/us/texas-abortion-clinics-say-courts-ruling-is-forcing-them-to-stop-the-procedures.html (last visited Jan. 29, 2014) (noting that after an appeals court reversed a grant of preliminary injunction, many clinics across the state stopped providing abortions, leaving women seeking services struggling to find services out of state or in Mexico) (on file with the Washington and Lee Law Review).

164. *See* Linda Greenhouse & Reva B. Siegel, *Before (And After)* Roe v. Wade: *New Questions About Backlash*, 120 YALE L.J. 2028, 2052–67 (2011) (discussing Republican Party efforts to attract Catholic anti-abortion voters to the party); *id.* at 2067–71 (discussing gradual realignment of Republican and Democratic Parties on the issue of abortion).

165. *See* Jeremy W. Peters, *Parties Seize on Abortion Issues in Midterm Race*, N.Y. TIMES (Jan. 20, 2014), http://www.nytimes.com/2014/01/21/us/politics/parties-seize-on-abortion-issues-in-midterm-race.html (last visited Jan. 29, 2014) (noting that both parties seek to use the abortion issue to their advantage and discussing Republican concern about improper "framing" of the issue that could repel women voters) (on file with the Washington and Lee Law Review). While some Republicans "summit" to discuss how to avoid alienating women voters, former Republican Governor of Arkansas and presidential candidate Mike Huckabee bizarrely lambasted Democratic support of insurance coverage for contraceptives as a sign that Democrats think women need government help to control their libidos:

> [I]f the Democrats want to insult the women of America by making them believe that they are helpless without Uncle Sugar coming in and providing [] them a prescription each month for birth control

directly overrule *Roe v. Wade*, without a renewed commitment to *Casey*, access to abortion care will continue to diminish at this pace, and we find ourselves once again facing an intolerable situation like that Justice Blackmun warned of in his 1991 dissent in *Rust v. Sullivan*:

> While technically leaving intact the fundamental right protected by *Roe v. Wade*, the Court "through a relentlessly formalistic catechism," once again has rendered the right's substance nugatory. This is a course nearly as noxious as overruling *Roe* directly, for if a right is found to be unenforceable, even against flagrant attempts by government to circumvent it, then it ceases to be a right at all.[166]

> because they cannot control their libido or their reproductive system without the help of government, then so be it, let's take that discussion all across America.

Alexandra Petri, *Mike Huckabee and Women's Uncontrolled Libido, or, Uncle Sugar*, WASH. POST (Jan. 23, 2014, 4:15 PM), http://www.washingtonpost.com/blogs/compost/wp/2014/01/23/mike-huckabee-and-womens-uncontrolled-libido-or-uncle-sugar/ (last visited Jan. 29, 2014) (on file with the Washington and Lee Law Review).

166. Rust v. Sullivan, 500 U.S. 173, 220 (1991) (Blackmun, J., dissenting) (citations omitted) (quoting Harris v. McRae, 448 U.S. 297, 341 (1980) (Marshall, J., dissenting)).