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## Abortion Exceptionalism and Undue Burden Preemption

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# Abortion Exceptionalism and Undue Burden Preemption

Caitlin E. Borgmann\*

## *Abstract*

*This Article discusses the tendency of some lower federal courts to interpret the undue burden standard of Planned Parenthood of Southeastern Pennsylvania v. Casey as essentially occupying the field of potential constitutional claims whenever abortion is involved. Thus, where litigants have alleged constitutional claims other than, or in addition to, undue burden violations, courts have either changed how they normally analyze these constitutional claims or they have even completely foreclosed the application of other doctrines on the grounds that the undue burden standard subsumes or displaces these claims. This Article illustrates this phenomenon in the context of three types of non-undue-burden claims that have been asserted against some abortion restrictions: bodily integrity, equal protection, and the right against compelled speech. Undue burden preemption, I argue, flies in the face of the Court's recognition that "[c]ertain wrongs . . . can implicate more than one of the Constitution's commands."<sup>1</sup> Where multiple constitutional violations are alleged, the Court's normal approach is to examine each constitutional provision in turn. There is one well-established exception to this general rule, the "Graham doctrine." This doctrine provides that, when a litigant asserts a substantive due process claim, and where the Court finds that another more specific constitutional provision applies, the Court analyzes the claim under the more specific provision to the exclusion of substantive due process. This Article*

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1. Soldal v. Cook Cnty., 506 U.S. 56, 70 (1992).

*argues that undue burden preemption, far from being justified by the Graham doctrine, turns that doctrine on its head.*

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### *I. Introduction*

“Abortion exceptionalism” is a term that has been used to describe the tendency of legislatures and courts to subject abortion to unique, and uniquely burdensome, rules.<sup>2</sup> This Article addresses a particular kind of abortion exceptionalism, which I call “undue burden preemption.” Undue burden preemption is a trend in which some lower federal courts interpret the undue burden standard as essentially occupying the field of potential constitutional claims that may be brought against a given abortion restriction.<sup>3</sup> Under undue burden preemption, courts

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2. See, e.g., Caroline Mala Corbin, *Abortion Distortion*, 71 WASH. & LEE L. REV. 1175, 1177 (2014) (describing abortion exceptionalism as courts’ failure to apply “normal doctrine” when abortion is at issue); Ian Vandelwalker, *Abortion and Informed Consent*, 19 MICH. J. GENDER & L. 1, 3 (2012) (describing abortion exceptionalism as singling “abortion . . . out for more restrictive government regulation as compared to other, similar procedures”). Abortion rights opponents have used the term in the opposite sense, to suggest that courts have unfairly privileged abortion over competing constitutional rights. See “*Abortion Exceptionalism*” to be Reviewed by U.S. Supreme Court, LIFE LEGAL DEF. FOUND. (Sept. 12, 2013), <http://lldf.org/abortion-exceptionalism-to-be-reviewed-by-u-s-supreme-court/> (last visited Jan. 25, 2014) (describing abortion exceptionalism as “the idea that abortion clinics somehow deserve special treatment in the free speech context”) (on file with the Washington and Lee Law Review).

3. See *infra* Part III (discussing examples of undue burden preemption).

addressing the constitutionality of abortion restrictions either refuse to analyze claims other than undue burden claims on the grounds that the undue burden standard displaces the other claims, or they interpret the undue burden standard as supplanting or altering the normal doctrine applied to the separate claims.<sup>4</sup> Undue burden preemption is an aberration in constitutional adjudication. Normally, when a litigant alleges that a particular governmental action violates multiple constitutional rights, the courts analyze each alleged violation separately under the relevant doctrine.<sup>5</sup>

The only area in which the United States Supreme Court has allowed a particular constitutional claim to “preempt” another separate claim is that of substantive due process. Under the “*Graham* doctrine,” as it is known, when a litigant asserts a substantive due process claim, and where the Court finds that another more specific constitutional provision applies (for instance, the Fourth Amendment right against unreasonable searches and seizures), the Court analyzes the claim under the more specific provision to the exclusion of substantive due process.<sup>6</sup> Undue burden preemption is the opposite of the *Graham* doctrine. Whereas the *Graham* doctrine prefers a more specific constitutional claim to a more general one, undue burden preemption rejects, or waters down, more specific constitutional claims (or, in the case of bodily integrity, an equally nonspecific constitutional claim) in favor of the notoriously nonspecific undue burden standard.<sup>7</sup> Thus, under *Graham*, undue burden preemption is still jurisprudentially indefensible.

This Article is organized into three parts. Part II describes the prevailing approach to adjudicating constitutional claims, along with the single established exception to this approach, the *Graham* doctrine. Part III explains the concept of undue burden preemption, illustrating its use in three doctrinal contexts: bodily integrity, equal protection, and free speech. Part IV critiques undue burden preemption as a misguided and dangerous

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4. See *infra* Part III.

5. See *infra* Part III (discussing the prevailing approach).

6. See *infra* notes 25–31 and accompanying text (discussing the doctrine established in *Graham v. Connor*, 490 U.S. 386 (1989)).

7. See *infra* Part III (discussing undue burden preemption).

expansion of *Planned Parenthood of Southeastern Pennsylvania v. Casey*'s<sup>8</sup> undue burden standard, one that turns the *Graham* doctrine on its head.

## II. The Prevailing Approach

The Supreme Court has long recognized that a particular governmental act can implicate more than one constitutional right.<sup>9</sup> When this is the case, claimants can assert multiple constitutional claims, and courts will consider each in turn, applying the relevant constitutional doctrine to each claim separately.<sup>10</sup> The Court has expressly acknowledged this prevailing approach on more than one occasion. In *United States v. James Daniel Good Real Property*,<sup>11</sup> the Court addressed whether the government's seizure of the claimant's property without prior notice and a hearing violated procedural due process.<sup>12</sup> The Government argued that it need only comply with the requirements of the Fourth Amendment.<sup>13</sup> The Court agreed that the Fourth Amendment applied to the seizure but declared that this was not the "sole constitutional provision in question."<sup>14</sup> The Court explained: "We have rejected the view that the applicability of one constitutional amendment pre-empts the guarantees of another."<sup>15</sup> The Court in *Good Real Property* relied upon *Soldal v. Cook County*,<sup>16</sup> a property seizure case in which the Court had made the identical point.<sup>17</sup> In *Soldal*, the Court

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

9. See *Soldal v. Cook Cnty.*, 506 U.S. 56, 70 (1992) ("Certain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands.").

10. See *id.* ("Where . . . multiple violations are alleged, we are not in the habit of identifying as a preliminary matter the claim's 'dominant' character. Rather, we examine each constitutional provision in turn.").

11. 510 U.S. 43 (1993).

12. *Id.* at 46.

13. *Id.* at 49.

14. *Id.*

15. *Id.*

16. 506 U.S. 56 (1992).

stated: “Certain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution’s commands. Where such multiple violations are alleged, we are not in the habit of identifying as a preliminary matter the claim’s ‘dominant’ character. Rather, we examine each constitutional provision in turn.”<sup>18</sup>

The Court’s recognition of the prevailing approach in *Good Real Property* and *Soldal* merely makes explicit what courts have always done. Courts routinely address, *seriatim*, different constitutional claims addressing the same governmental action. They do not construe one applicable constitutional provision to preempt another, nor do they force claimants to litigate solely under the doctrine of the Court’s choice. In *Doe v. Bolton*,<sup>19</sup> for example, the Supreme Court considered claims that various Georgia abortion restrictions violated not only the right to privacy but also procedural due process, the Privileges and Immunities Clause, and equal protection.<sup>20</sup> The Ninth Circuit in a recent case addressing a sex offender registration law separately considered, and analyzed under the respective doctrines, claims that the law violated the Double Jeopardy or Ex Post Facto Clauses; procedural due process; and the Contract Clause.<sup>21</sup>

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17. See *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 49–50 (1993) (relying on *Soldal* to support the fact that the Court “ha[s] rejected the view that the applicability of one constitutional amendment pre-empts the guarantees of another”); see also *Soldal*, 506 U.S. at 60 (noting that the Court “granted certiorari to consider whether the seizure and removal of the Soldals’ trailer home implicated their Fourth Amendment rights”).

18. *Soldal*, 506 U.S. at 60; see also *Albright v. Oliver*, 510 U.S. 266, 287 (1994) (Souter, J., concurring in the judgment) (“The Court has previously rejected the proposition that the Constitution’s application to a general subject . . . is necessarily exhausted by protection under particular textual guarantees addressing specific events within that subject . . . , on a theory that one specific constitutional provision can pre-empt a broad field as against another more general one.”).

19. 410 U.S. 179 (1973).

20. See *id.* at 195–96, 200–01 (discussing whether appellant was deprived of procedural due process as a result of lack of access to hospital despite being pregnant and whether Georgia’s residency requirements violated the Privileges and Immunities Clause or equal protection provisions of the U.S. Constitution).

21. *Am. Civil Liberties Union of Nev. v. Masto*, 670 F.3d 1046, 1052–61 (9th Cir. 2012).

There is one well-established—if not exactly well-known<sup>22</sup>—exception to this general rule. This exception applies when a substantive due process claim is asserted. Under the exception, the Court applies other constitutional provisions to the exclusion of substantive due process where it finds that the other provisions supply an “explicit textual source of constitutional protection.”<sup>23</sup> This exception is known as the “*Graham* doctrine,” from one of the early cases to announce the doctrine, *Graham v. Connor*.<sup>24</sup> In *Graham*, the Court held that claims of excessive force in the course of an arrest or investigatory stop must be analyzed under the Fourth Amendment, rather than the “more generalized notion of ‘substantive due process.’”<sup>25</sup> While *Graham* could be interpreted as applying only to excessive force cases, or perhaps to the Fourth Amendment context more generally,<sup>26</sup> the Court has more recently applied the doctrine to the Takings Clause<sup>27</sup> and to the Eighth Amendment.<sup>28</sup> It has suggested in dicta that it applies to the Fifth Amendment Self-

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22. Toni M. Massaro, *Reviving Hugo Black? The Court’s “Jot for Jot” Account of Substantive Due Process*, 73 N.Y.U. L. REV. 1086, 1088 (1998) (describing the *Graham* doctrine as a “little known corner of due process law”).

23. *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (plurality opinion) (internal quotation marks omitted) (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)).

24. 490 U.S. 386 (1989); see also *id.* at 395 (“[We] hold that all claims that law enforcement officers have used excessive force . . . should be analyzed under the Fourth Amendment and its ‘reasonableness’ standard, rather than under a ‘substantive due process’ approach.”); *Gerstein v. Pugh*, 420 U.S. 103, 125 n.27 (1975) (holding that “The Fourth Amendment was tailored explicitly for the criminal justice system,” and therefore the Fourth Amendment, rather than the Due Process Clause, is more appropriate for determining proceedings required after criminal arrests).

25. *Graham*, 490 U.S. at 395.

26. See *Albright*, 510 U.S. at 273–75 (applying *Graham* doctrine to Fourth Amendment malicious prosecution claim).

27. See *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 560 U.S. 702, 721 (2010) (“The first problem with using Substantive Due Process to do the work of the Takings Clause is that we have held it cannot be done.”). But see Steven J. Eagle, *Substantive Due Process and Regulatory Takings: A Reappraisal*, 51 ALA. L. REV. 977, 1002–05 (2000) (discussing and criticizing the application of the *Graham* doctrine in the context of property takings).

28. See *United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997) (“*Graham* simply requires that if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process.”).

Incrimination Clause as well.<sup>29</sup> Some lower federal courts have interpreted *Graham* as establishing the general principle that whenever another amendment provides “an explicit textual source of constitutional protection,”<sup>30</sup> that provision must be applied to the exclusion of substantive due process.<sup>31</sup>

It is important to recognize that *Graham*—whatever its scope—displaces substantive due process claims only, and then only when an express textual provision is applicable. The apparent underlying premise of the *Graham* doctrine is that substantive due process is murky, lacks clear guideposts, and addresses unenumerated rights.<sup>32</sup> Therefore, if the Court has explicit constitutional text to apply, it prefers to do so.<sup>33</sup> The

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29. See *Chavez v. Martinez*, 538 U.S. 760, 773 n.5 (2003) (“If . . . the Fifth Amendment’s Self-Incrimination Clause governs coercive police interrogation even absent use of compelled statements in a criminal case, then *Graham* suggests that the Due Process Clause would not.”).

30. *Graham v. Connor*, 490 U.S. 386, 395 (1989).

31. See, e.g., *Holman v. Page*, 95 F.3d 481, 485–86 (7th Cir. 1996) (refusing to apply a due process or equal protection standard to cases challenging the proportionality of sentences because “[t]he Eighth Amendment explicitly addresses the constitutionality of punishments”), *overruled on other grounds by Owens v. United States*, 387 F.3d 607 (7th Cir. 2004); *Armendariz v. Penman*, 75 F.3d 1311, 1325–26 (9th Cir. 1996) (noting that, “[s]ince *Sinaloa*, the Supreme Court has made clear what was implicit in *Graham*,” that “[s]ubstantive due process analysis has no place in contexts already addressed by explicit textual provisions of constitutional protection, regardless of whether the plaintiff’s potential claims under those amendments have merit”), *overruled in part by Crown Point Dev., Inc. v. City of Sun Valley*, 506 F.3d 851, 855–56 (9th Cir. 2007) (finding that “the Fifth Amendment would preclude a due process challenge only if the alleged conduct is actually covered by [the Amendment]” and “it is no longer possible . . . to read *Armendariz* as imposing a blanket obstacle to all substantive due process challenges to land use regulation”). The Supreme Court itself has not consistently applied *Graham* this broadly, however. See *Massaro*, *supra* note 22, at 1108–09, 1113 n.132 (pointing out that the Supreme Court has not extended the *Graham* doctrine to Takings Clause cases or in some criminal procedure contexts).

32. See *Graham*, 490 U.S. at 395 (“Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of ‘substantive due process,’ must be the guide for analyzing these claims.”); *Massaro*, *supra* note 22, at 1115 (“The Court has since cited only judicial authority concerns of vagueness, open-ended provisions, and the absence of meaningful judicial standards in explaining *Graham*.”).

33. The *Graham* doctrine has been criticized on various grounds. See, e.g., Caitlin E. Borgmann, *The Constitutionality of Government-Imposed Bodily Intrusions*, 2014 U. ILL. L. REV. (forthcoming 2014) (manuscript at 51–56)



*Graham* doctrine does not foreclose the possibility that a wrong could implicate multiple constitutional claims.<sup>34</sup> Moreover, nothing about the *Graham* doctrine suggests that courts should interpret an unenumerated, substantive due process right—like the right to privacy—as preempting either a textually grounded constitutional claim<sup>35</sup> or another unenumerated right.<sup>36</sup>

### III. Undue Burden Preemption

Before the Supreme Court established a new standard for evaluating abortion restrictions in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, such restrictions were analyzed under strict scrutiny, pursuant to the framework set out in *Roe v. Wade*.<sup>37</sup> *Casey* changed the *Roe* framework in several

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[hereinafter Borgmann, *The Constitutionality*] (arguing that the *Graham* doctrine wrongly assumes that the Fourth Amendment offers doctrinally clearer guideposts than substantive due process in the context of state-imposed bodily intrusions) (on file with the Washington and Lee Law Review); Seth F. Kreimer, *Rejecting “Uncontrolled Authority Over the Body”: The Decencies of Civilized Conduct, The Past and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 423, 436–37 (2007) (criticizing the *Graham* doctrine’s “confining [of] rights to bodily integrity” to the Fourth Amendment as “somewhat mysterious and largely ineffective”); Massaro, *supra* note 22, at 1115–16 (arguing that the *Graham* doctrine, as broadly interpreted, amounts to an inadvisable adoption of Hugo Black’s rejected “jot-for-jot” interpretation of the Due Process Clause).

34. See, e.g., *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 49 (1993).

35. Cf. *Gehl Group v. Koby*, 63 F.3d 1528, 1535 n.8 (10th Cir. 1995) (noting that, although under *Graham* and *Albright* the Fourth Amendment displaces substantive due process claims concerning whether police acted with probable cause, it does not displace separate claims brought under “the equally explicit constitutional guarantees of the First Amendment and Equal Protection Clause”), *implicitly overruled on other grounds by* *Currier v. Doran*, 242 F.3d 905, 916 (10th Cir. 2001).

36. See, Massaro, *supra* note 22, at 1087 (“[The] trumping move [of the *Graham* doctrine] displaces only one general provision: substantive due process.”)

37. See *Roe v. Wade*, 410 U.S. 113, 163–65 (1973) (providing that a state must have a compelling interest in regulating abortion prior to the first trimester, and that it may reasonably regulate abortion procedure after the first trimester); see also *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 61 (1976) (applying *Roe*’s strict scrutiny framework); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 759 (1986) (same), *overruled by* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

significant ways, which some lower courts have interpreted as impelling the concept of undue burden preemption. First, the Court recognized the state's interest in the embryo or fetus as a valid basis for abortion regulation throughout pregnancy,<sup>38</sup> not just after viability as *Roe* had held.<sup>39</sup> Second, the Court lowered the standard from strict scrutiny to the more nebulous undue burden standard, which asks whether a law has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion.<sup>40</sup>

Since *Casey*, some lower courts seem to view the undue burden standard as preempting nearly all other substantive claims that might otherwise be brought against an abortion restriction.<sup>41</sup> The Fifth Circuit suggests that this is because *Casey* struck a delicate balance between the woman's rights and the interest of the state in the embryo or fetus in the pre-viability period of pregnancy, and it regards other substantive claims attacking abortion restrictions as disturbing this equilibrium.<sup>42</sup> The Fifth Circuit adheres to this view even when the separate claims are asserting the rights of entirely different parties (doctors, rather than patients, for example).<sup>43</sup> Three particular doctrines that different courts have found to be preempted by the

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38. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992) (“[T]he State has legitimate interests from the outset of the pregnancy in protecting . . . the life of the fetus that may become a child.”); see also Caitlin E. Borgmann, *Winter Count: Taking Stock of Abortion Rights After Casey and Carhart*, 31 *FORD. URB. L.J.* 675, 678–701 (2004) (discussing *Casey*'s changes to the *Roe* framework).

39. See *Roe*, 410 U.S. at 463 (“With respect to the State's important and legitimate interest in potential life, the ‘compelling’ point is at viability.”).

40. See *Casey*, 505 U.S. at 876 (“In our view, the undue burden standard is the appropriate means of reconciling the state's interest with the woman's constitutionally protected liberty.”).

41. One exception to this is vagueness, which even courts that apply undue burden preemption seem to agree is a doctrinally independent claim. See, e.g., *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 580–84 (5th Cir. 2013) (applying the void for vagueness doctrine as a standalone inquiry); *Planned Parenthood Sw. Ohio Region v. DeWine*, 696 F.3d 490, 503–06 (6th Cir. 2012) (same).

42. See *infra* note 191 and accompanying text (discussing *Tex. Med. Providers Performing Abortion Servs.*, 667 F.3d at 576–77).

43. See *infra* notes 178–93 and accompanying text (discussing the Fifth Circuit's application of the undue burden analysis in *Lakey* as occupying the field of constitutional claims).

undue burden standard are bodily integrity,<sup>44</sup> equal protection,<sup>45</sup> and compelled speech.<sup>46</sup> Because the *Casey* joint opinion did not analyze the abortion restrictions at issue there under bodily integrity or the equal protection doctrine,<sup>47</sup> it is difficult to argue that undue burden preemption in these contexts is compelled by *Casey*. Nevertheless some lower courts have, *sua sponte*, concluded that the undue burden standard displaces or limits these claims.<sup>48</sup> Compelled speech, on the other hand, was addressed in *Casey*, albeit briefly.<sup>49</sup> Analyzing undue burden preemption in the compelled speech context requires examining *Casey*'s own confusing treatment of the compelled speech claim there, as well as lower courts' interpretations of *Casey* as supporting undue burden preemption of compelled speech claims.

#### A. Bodily Integrity

The Sixth Circuit Court of Appeals' treatment of a bodily integrity claim against an abortion restriction offers perhaps the most straightforward example of undue burden preemption. In *Planned Parenthood Southwestern Ohio Region v. DeWine*,<sup>50</sup> the Sixth Circuit in effect applied undue burden preemption when it upheld a state restriction on medication abortion.<sup>51</sup> The Sixth Circuit reasoned, in part, that bodily integrity claims, which

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44. *Infra* Part III.A.

45. *Infra* Part III.B.

46. *Infra* Part III.C.

47. *See* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 844–47 (1992) (discussing the statutory provisions at issue and finding that the abortion right is constitutionally protected under the framework of substantive due process); *cf. id.* at 896 (noting that effect of Pennsylvania's husband notification provision "on a woman's protected liberty is doubly deserving of scrutiny in such a case, as the State has touched not only upon the private sphere of the family but upon the very bodily integrity of the pregnant woman").

48. *See, e.g., Planned Parenthood Sw. Ohio Region v. DeWine*, 696 F.3d 490, 506 (6th Cir. 2012) (applying the undue burden standard to a bodily integrity claim).

49. *See Casey*, 505 U.S. at 851.

50. 696 F.3d 490 (6th Cir. 2012).

51. *See id.* at 514, 518 (concluding that a statutory restriction on medication abortion was not unconstitutionally vague and did not impose an undue burden on the ability to get an abortion).

would normally be subject to strict scrutiny, should be analyzed under *Casey*'s undue burden standard when asserted against abortion requirements.<sup>52</sup>

In 2000, the Food and Drug Administration (FDA) had approved the drug mifepristone—also known as RU-486 or the early abortion pill—for use in the United States.<sup>53</sup> The FDA approved a specific regimen for administering mifepristone, but soon thereafter abortion providers began to change the protocol.<sup>54</sup> These adaptations were based on evidence from clinical trials that suggested, among other things, that lower dosages of the drug were equally effective and that the drug could safely and effectively be administered later in pregnancy.<sup>55</sup> This type of “off-label” use of a drug is routine and completely legal.<sup>56</sup>

In 2004, however, Ohio enacted a law requiring abortion providers to adhere to the original FDA-approved protocol.<sup>57</sup> Planned Parenthood<sup>58</sup> argued that this law unnecessarily required higher dosages of medication with no medical justification, and that the protocol increased the costs of abortion.<sup>59</sup> The plaintiffs challenged the requirement as unconstitutionally vague, a violation of women's bodily integrity, and an undue burden.<sup>60</sup>

Addressing the bodily intrusion claim, the Sixth Circuit recognized that “individuals possess a constitutional right to be free from forcible physical intrusions of their bodies against their will, absent a compelling state interest.”<sup>61</sup> However, the court found that the strict scrutiny that courts normally apply to violations of bodily integrity does not apply to a bodily intrusion

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52. *Id.* at 506.

53. *Id.* at 494.

54. *Id.* at 495.

55. *Id.*

56. *Id.* at 495–96.

57. *See id.* at 496 (describing Ohio House Bill 126, codified at OHIO REV. CODE § 2919.123 (2006)).

58. *Id.* at 493–94. The plaintiffs included two Ohio Planned Parenthood regional clinics and two Planned Parenthood directors. *Id.*

59. *Id.* at 496–97.

60. *Id.* at 498.

61. *Id.* at 506.

that occurs in the context of abortion.<sup>62</sup> The Sixth Circuit seemed to view the plaintiffs as attempting to cheat by invoking a claim that would merit higher scrutiny than the undue burden standard:

Although we understand why Planned Parenthood took this approach—requiring the government to show a compelling state interest for the Act would *relieve Planned Parenthood of its obligation* to show an undue burden on the right to choose an abortion—this argument is unconvincing. “Strict scrutiny, of course, no longer applies to abortion legislation.”<sup>63</sup>

The Sixth Circuit in *DeWine* regarded “[g]overnment restrictions on abortions [as] a form of interference with the right to bodily integrity and control over an individual’s person,”<sup>64</sup> but it interpreted the undue burden standard as swallowing the bodily integrity analysis.<sup>65</sup> Thus, the court said, the plaintiffs retained a viable right to bodily integrity claim, but “the analysis will map the undue-burden framework.”<sup>66</sup>

By lumping together all “restrictions on abortion” as triggering (only) the undue burden standard, the Sixth Circuit failed to recognize that the bodily integrity claim alleged in *DeWine* was of a different quality than one focused on whether a restriction places a “substantial obstacle” in the path of a woman seeking an abortion, as the undue burden inquiry examines.<sup>67</sup> The right to bodily integrity is a broad umbrella that encompasses the right to affirmative decision-making about one’s body as well as the right to repel unwanted bodily intrusions.<sup>68</sup> Abortion restrictions may encompass the former if they excessively burden a woman’s ability to choose abortion.<sup>69</sup> In

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62. *See id.*

63. *Id.* (emphasis added) (quoting *Women’s Med. Prof’l Corp. v. Taft*, 353 F.3d 436, 444 (6th Cir. 2003)).

64. *Id.* at 507.

65. *See id.* at 506–07.

66. *Id.* at 507.

67. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992).

68. Borgmann, *The Constitutionality*, *supra* note 33, at 5.

69. *See Casey*, 505 U.S. at 896 (“The effect of state regulation on a woman’s protected liberty is doubly deserving of scrutiny in such a case, as the State has touched not only upon the private sphere of the family but upon the very bodily integrity of the pregnant woman.”).

*DeWine*, the specific bodily intrusion claim made about medication abortion was of the latter category; the plaintiffs argued that the restriction unnecessarily forced certain women, who would otherwise be eligible for medication abortions under the new protocol, to undergo surgery as the only means to obtaining an abortion.<sup>70</sup> As the court recognized, “forcible physical intrusions of the body by their government” are normally subject to strict scrutiny.<sup>71</sup> These claims are not the same as a claim of denied or burdened access to abortion.

The difference between the two claims should be clear from the court’s separate discussion of the plaintiffs’ undue burden claim. Both the majority and the dissenting judge discussed the undue burden claim in terms of how the law burdened a woman’s access to abortion, asking such questions as whether otherwise-eligible women who could not obtain a medication abortion because of the law would forgo abortion altogether, and how much the FDA protocol increased abortion costs as compared with the new protocols.<sup>72</sup> Nevertheless, the court viewed this very distinct type of claim as preempting the claim that the state should not be allowed to effectively force a woman to undergo surgery, when another safe medical option is available, absent a compelling reason.<sup>73</sup>

### B. Equal Protection

There are a number of different types of equal protection claims that might be brought against abortion restrictions. First, claims may be divided based on whose rights are being asserted: abortion providers or women seeking abortions.<sup>74</sup> Next, equal

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70. *DeWine*, 696 F.3d at 506

71. *Id.*

72. *See id.* at 514–18 (“[O]ur case law indicates a statute that ‘restrict[s] the most commonly used procedure’ is likely to be problematic.” (quoting *Women’s Med. Profl Corp. v. Taft*, 353 F.3d 436, 453 (6th Cir. 2003))); *id.* at 507–13 (Moore, J., dissenting) (“[A]t the least, statutes banning the most common method of an abortion impose an unconstitutional burden on a woman’s rights.”).

73. *See id.* at 507.

74. *See, e.g., Greenville Women’s Clinic v. Bryant*, 222 F.3d 157, 162 (4th Cir. 2000) (“[T]he Greenville Women’s Clinic, the Charleston Women’s Medical

protection claims asserting women's rights can be of two varieties: equal protection claims premised on abortion as a fundamental right ("fundamental rights equal protection claims"), and equal protection claims based on sex discrimination (sex discrimination claims). Both of the latter types of equal protection claims have fallen prey to undue burden preemption. The Eighth Circuit Court of Appeals has interpreted fundamental rights equal protection claims in the abortion context as being subsumed within the undue burden standard. In *Planned Parenthood of Mid-Missouri and Eastern Kansas, Inc. v. Dempsey*,<sup>75</sup> the plaintiff challenged on equal protection grounds, among others, a Missouri law preventing abortion providers from receiving state family planning funds.<sup>76</sup> The court disagreed that the law should be subject to strict scrutiny, noting that "[a]ny constitutional right of clinics to provide abortion services . . . is derived directly from women's constitutional right to choose abortion."<sup>77</sup> It noted that *Casey* established a new standard of review for abortion regulations.<sup>78</sup> The court then shifted to an analysis indistinguishable from the undue burden standard, including an assessment of whether the law would "have the effect of placing an undue burden on women seeking abortion services" and concluding that it would not.<sup>79</sup>

Similarly, in addressing targeted regulations of abortion providers (TRAP laws), both the Fourth and Ninth Circuit Courts of Appeals have held that equal protection claims premised on abortion as a constitutionally protected right "collapse[] with the undue burden claim."<sup>80</sup> This, the courts maintain, is because

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Clinic, Inc., and Dr. William Lynn . . . brought this action seeking a declaratory judgment that Regulation 61-12 is unconstitutional on its face because, among other things, it would violate their . . . equal protection rights, as well as those of their patients.").

75. 167 F.3d 458 (8th Cir. 1999).

76. *Id.* at 460–61.

77. *Id.* at 464.

78. *See id.* at 464 ("Since *Casey*, we have applied the undue burden test in cases involving legislation that affects the right to abortion.").

79. *Id.*

80. *Tucson Women's Clinic v. Eden*, 379 F.3d 531, 544–45 (9th Cir. 2004); *see also Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 173 (4th Cir. 2000) ("[B]ecause we have concluded . . . that South Carolina's Regulation . . . does not place an undue burden on a woman's ability to make an abortion decision, there

“*Casey* defined a new standard of judicial review for determining when courts can recognize burdens on [the abortion] right as unconstitutional, . . . replacing the traditional scrutiny analysis with the undue burden test.”<sup>81</sup>

It is true that equal protection claims that challenge classifications implicating the exercise of a constitutional right often receive the same level of scrutiny traditionally applied to a direct violation of that right.<sup>82</sup> But this does not mean that courts evaluating such equal protection claims should simply act as though the claimant has alleged a violation of the substantive right. An equal protection claim makes a distinct assertion, namely that the *differential* treatment of the plaintiff is unconstitutional.<sup>83</sup> The level of protection afforded to the underlying right helps to determine the level of scrutiny the court should apply in determining whether the plaintiff is correct,<sup>84</sup> but it is not always appropriate to apply precisely the same test to a claim of equal protection as would be applied to a claim directly attacking a violation of the underlying right. This is particularly so where the test applicable to the underlying substantive right is one that focuses specifically on the *extent of interference* with the

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is no need to resolve whether it remains a fundamental right for an equal protection analysis and thus requires application of the strict-scrutiny standard.” (citation omitted)).

81. *Tucson Women’s Clinic*, 378 F.3d at 544; see also *Greenville Women’s Clinic*, 222 F.3d at 172–73 (“The *Casey* decision does not . . . apply the traditional strict-scrutiny standard which protects fundamental rights. Rather, the Court adopted an ‘undue burden’ standard.” (citation omitted)).

82. See, e.g., *Wirzburger v. Galvin*, 412 F.3d 271, 282–83 (1st Cir. 2005) (analyzing an equal protection fundamental right to religious free exercise claim by reference to the standard applicable to the free exercise claim).

83. See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886) (indicating that the Fourteenth Amendment is meant in part to ensure that “equal protection and security should be given to all under like circumstances” and that “[c]lass legislation, discriminating against some and favoring others, is prohibited” (citations and quotations omitted)).

84. See, e.g., *Kim Shayo Buchanan, Lawrence v. Geduldig: Regulating Women’s Sexuality*, 56 EMORY L.J. 1236, 1293 n.416 (2007) (noting that “[c]lassifications made in legislation that burdens a fundamental right are subject to strict scrutiny” (citing *Tennessee v. Lane*, 541 U.S. 509, 522–23 (2004))); *Wirzburger*, 412 F.3d at 282–83 (“Because we held, above, that the Religious Exclusion does not violate the Free Exercise Clause, we apply rational basis scrutiny to the fundamental rights based claim that this exclusion violates equal protection.”).



plaintiff's exercise of that right. The undue burden standard, as discussed above, is premised on *access* to abortion; it is ill-suited to assessing claims that center instead on the unjustified *dissimilarity* of the law's treatment of the plaintiffs.<sup>85</sup>

Thus, for example, a law that deliberately singles out certain religious adherents for differential treatment may be unconstitutional even if the restriction only negligibly or indirectly affects their ability to exercise their religion freely. In *Niemotko v. State of Maryland*<sup>86</sup> and *Fowler v. Rhode Island*,<sup>87</sup> the Supreme Court held that policies were unconstitutionally discriminatory where they denied Jehovah's Witnesses, but not other religious groups, the right to use public parks for religious gatherings.<sup>88</sup> In each case, the Court's focus was on the disparate treatment accorded the Witnesses. The Court did not appear interested in the extent to which this burden impeded the Witnesses' ability to practice their religion freely. Rather, the Court found objectionable the differential treatment of Witnesses as compared with other religious groups. In *Niemotko*, for example, the Court suggested that the Witnesses were being discriminated against because of the particular religious views and practices to which they adhered:

The conclusion is inescapable that the use of the park was denied because of the City Council's dislike for or disagreement with the Witnesses or their views. The right to equal protection of the laws, in the exercise of those freedoms of speech and religion protected by the First and Fourteenth

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85. Strict scrutiny, in contrast, is equally well adapted to assessing claims of discrimination as it is to assessing substantive rights violations, and indeed it has historically been used to assess both kinds of claims. *See, e.g.*, *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (applying strict scrutiny to a classification that burdened a certain class of individuals' exercise of the fundamental right to procreation).

86. 340 U.S. 268 (1951).

87. 345 U.S. 67 (1953).

88. *See Niemotko*, 340 U.S. at 272–73 (concluding that the government's "completely arbitrary and discriminatory refusal to grant permits" for use of parks to Jehovah's Witnesses, but not to other religious groups, was a denial of equal protection); *Fowler*, 345 U.S. at 67–69 (finding that the government's refusal to allow the services of Jehovah's Witnesses, yet not other religious groups, violated the First Amendment); *id.* at 70 (Frankfurter, J., concurring) (concurring in the opinion of the Court but clarifying that the Equal Protection Clause, not the First Amendment, is the relevant constitutional provision).

Amendments, has a firmer foundation than the whims or personal opinions of a local governing body.<sup>89</sup>

The availability of equal protection as a claim distinct from undue burden is particularly important for laws—like TRAP laws—that do not purport to promote any interest in the embryo or fetus:

The deferential Casey standard [was] developed to balance women’s liberty and privacy against the state interest in protecting fetal life—an interest that [is] not related to the licensing and facility requirements imposed on abortion clinics by [TRAP] laws. By using the deferential Casey standard to replace the strict or heightened scrutiny that the women’s equal protection claims would normally warrant, these courts effectively took the view that the equality rights of pregnant women are attenuated when their unequal treatment relates to abortion.<sup>90</sup>

Abortion restrictions that purport to promote women’s safety are more likely to be pretextual than measures that openly aim to discourage abortion or to promote the state’s interest in embryonic or fetal life. TRAP laws that profess to make abortion safer are in fact an increasingly potent part of the arsenal anti-abortion-rights activists are employing in their fight to make abortion illegal.<sup>91</sup> Even where such laws do not succeed in shutting down all clinics, they aim to make abortion disfavored in the law, thereby “chang[ing] hearts and minds” on the issue and ultimately, activists hope, paving the way for a complete ban.<sup>92</sup>

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89. *Nimotko*, 340 U.S. at 272; *see also* *Fowler*, 345 U.S. at 69 (emphasizing as “fatal to [the State’s] case” that “a religious service of Jehovah’s Witnesses is treated differently than a religious service of other sects,” which “amounts to the state preferring some religious groups over this one”).

90. *Buchanan*, *supra* note 84, at 1293.

91. Caitlin E. Borgmann, *In Abortion Litigation, It’s the Facts That Matter*, 127 HARV. L. REV. F. 149, 151 (2014) [hereinafter *Borgmann*, *In Abortion Litigation*] (observing that, after signing a law that requires “abortion providers [to] secure admitting privileges at nearby hospitals” the Mississippi governor stated, “This is a historic day to begin the process of ending abortion in Mississippi” (quotations omitted)).

92. *See* Caitlin E. Borgmann, *Roe v. Wade’s 40th Anniversary: A Moment of Truth for the Anti-Abortion Rights Movement*, 24 STAN. L. & POL’Y REV. 245, 246–47 (2013) (describing the “incrementalist” strategy and citing anti-abortion strategy memos); Priscilla J. Smith, *Give Justice Ginsburg What She Wants: Using Sex Equality Arguments to Demand Examination of State Interest in Abortion Regulation*, 34 HARV. J.L. & GENDER 377, 389–91 (2011) (same).

It should not matter whether these laws immediately achieve their long-term goal of blocking abortion access. The fact that they uniquely burden abortion without proper justification should make the laws invalid.<sup>93</sup> A recent Seventh Circuit decision upholding a preliminary injunction of Wisconsin's admitting privileges law acknowledged the distinct lens that an equal protection inquiry brings to cases of this kind, noting: "An issue of equal protection of the laws is lurking in this case. For the state seems indifferent to complications from non-hospital procedures other than surgical abortion (especially other gynecological procedures, even when they are more likely to produce complications)."<sup>94</sup>

Because abortion remains a fundamental right after *Casey*,<sup>95</sup> courts should apply strict scrutiny to fundamental rights equal protection claims brought against abortion restrictions.<sup>96</sup> In *Greenville Women's Clinic v. Bryant*,<sup>97</sup> the court wrongly assumed the abortion right's fundamental status was in doubt after *Casey*.<sup>98</sup> As the Ninth Circuit pointed out in *Tucson Women's*

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93. If courts were not so single-mindedly focused on the effects part of the undue burden test and instead took the "purpose prong" more seriously as an independent basis on which to invalidate an abortion law, the same conclusion could be reached under the undue burden standard. See Borgmann, *In Abortion Litigation*, *supra* note 91, at 149–50 (distinguishing between the purpose and effects prongs of the undue burden test and noting that "it is possible to smoke out illegitimate purposes indirectly"); see also *id.* at 150 ("Factually unsupported laws that infringe constitutionally protected rights should not be allowed to stand. Such a shortcoming infects an entire law and warrants its wholesale invalidation.").

94. *Planned Parenthood of Wis., Inc. v. Van Hollen*, No. 13-2726, 2013 WL 6698596, at \*3 (7th Cir. Dec. 20, 2013).

95. *Infra* note 100.

96. See, e.g., *Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 172–74 (4th Cir. 2000) (plaintiffs argued—albeit unsuccessfully—that South Carolina clinic regulation must be analyzed under strict scrutiny because it treated abortion differently from comparable medical procedures and implicated the right to abortion); see also *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (observing that "classifications affecting fundamental rights . . . are given the most exacting scrutiny" (citing *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 672 (1966))); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 54 (1983) (noting that "strict scrutiny [is] applied when government action impinges upon a fundamental right").

97. 222 F.3d 157 (4th Cir. 2000).

98. *Id.* at 172 ("In *Roe*, the abortion-decision right was found to be fundamental. But following *Casey*, that conclusion may be in doubt." (citations

*Clinic v. Eden*,<sup>99</sup> this conclusion is contradicted by *Casey* itself.<sup>100</sup> Yet, despite recognizing this, the Ninth Circuit, like the Fourth Circuit, applied undue burden preemption rather than evaluating the equal protection claim independently under strict scrutiny.

At the very least, given that abortion is not only a fundamental but a controversial right, courts refusing to apply strict scrutiny to such claims should apply “second-order rational basis review” to fundamental rights equal protection claims in order to ensure that laws are not enacted out of animus to abortion providers.<sup>101</sup> Had the Eighth Circuit in *Dempsey* applied this review, for example, it would have inquired into whether the state’s discrimination against abortion providers in the distribution of state family planning funds reflected such animus.<sup>102</sup>

We need not speculate as to the outcome the Eighth Circuit would have reached to see that a traditional equal protection analysis is a very different one from the undue burden standard the court applied. The relevant questions should not be whether the law was intended to or in fact prevented or unduly *burdened women’s access to abortion*, but rather whether the state’s asserted interest in preserving embryonic and fetal life was sufficient to justify the disparate treatment of abortion providers, and—if so—how the denial of family planning funds related to

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omitted)).

99. 379 F.3d 531 (9th Cir. 2004).

100. See *id.* at 539 (“Women have a fundamental liberty interest, protected by the due process clause of the Fourteenth Amendment, in obtaining an abortion. . . . In *Casey*, the Supreme Court reaffirmed this central holding of *Roe v. Wade*.” (citations omitted)); see also *id.* at 544 (“The right to abortion is a fundamental constitutional right. *Casey* explicitly reaffirmed *Roe*’s holding in this regard . . .”).

101. Cf. *id.* at 545–46 (recognizing “that abortion providers can be a politically unpopular group” but finding that “no evidence has been presented that is sufficient to create an issue of material fact as to whether there is a stigmatizing or animus based purpose to the law”).

102. *Cleburne v. Cleburne Liv. Ctr.*, 473 U.S. 432, 458 (1985) (Marshall, J., dissenting in part and concurring in part) (referring to majority opinion’s apparent but unacknowledged application of heightened scrutiny under guise of rational basis review as “second order’ rational-basis review”); see also *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O’Connor, J., concurring in the judgment) (“When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.”).

that goal.<sup>103</sup> In fact, if the court was correct that the funding ban had a negligible impact on the availability of abortion because those abortions were paid for with private funds anyway,<sup>104</sup> this would seemingly undermine the state's justification for denying such funds. That denial would not save a single fetus, according to the court,<sup>105</sup> nor could the state plausibly claim that family planning funds were contributing to the destruction of fetuses.<sup>106</sup> Even if the court were to conclude that the law did not violate equal protection, it should have done so by focusing on the state's differential treatment of abortion and abortion providers, not on whether the restriction imposed an "undue burden" on women's access to abortion.

In addition to fundamental rights equal protection, sex discrimination provides another ground for challenging some abortion restrictions. Yet, here too, undue burden preemption has reared its head. In *Tucson*, plaintiffs separately claimed that the Arizona TRAP law constituted sex discrimination because it targeted for special burdens medical procedures sought only by women.<sup>107</sup> Although the Ninth Circuit did not rule out the possibility that the law discriminated based on sex, it invoked undue burden preemption, rendering plaintiff's claim irrelevant.<sup>108</sup>

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103. *Planned Parenthood of Mid-Mo. & E. Kan., Inc. v. Dempsey*, 167 F.3d 458, 460–61 (8th Cir. 1999) (discussing the plaintiffs' constitutional challenge to Tier I of § 10.715 of the Missouri code, which "prohibits family-planning funds from being used to perform, assist, encourage, or make direct referrals for abortions" and "provides that organizations or affiliates of organizations that 'provide or promote abortions' are not eligible for family-planning funds").

104. *See id.* at 465 (noting that Planned Parenthood's abortion services were "funded through independent private sources").

105. *See id.* at 464–65 (noting that, contrary to the district court's findings, "the record suggests that the legislature was aware that denying Planned Parenthood's family-planning funds would not affect Planned Parenthood's ability to provide abortion services").

106. *See id.* at 465 (noting that "Planned Parenthood has consistently maintained that State family-planning funds do not subsidize abortion services in any way" and "abortion services are funded through independent private sources").

107. *Tucson Women's Clinic v. Eden*, 379 F.3d 531, 547 (9th Cir. 2004).

108. *Infra* text accompanying note 114.

After the Supreme Court's decision in *Geduldig v. Aiello*<sup>109</sup> in 1974, it was generally believed that sex discrimination claims challenging classifications based on pregnancy (including laws targeting abortion) were no longer tenable.<sup>110</sup> In *Geduldig*, the Court appeared to shut the door on such claims when it found that discrimination based on pregnancy was not (necessarily) sex discrimination under the Equal Protection Clause.<sup>111</sup> In 2003, however, in *Nevada Dep't of Human Resources v. Hibbs*,<sup>112</sup> the Supreme Court "implied that laws which facially discriminate on the basis of pregnancy, even those that facially appear to benefit pregnant persons, can still be unconstitutional if the medical or biological facts that distinguish pregnancy do not reasonably explain the discrimination at hand."<sup>113</sup> The Ninth Circuit, seemingly breathing new life into sex discrimination claims in the abortion context, agreed that "*Hibbs* strongly supports plaintiffs' argument that singling out abortion in ways unrelated to the facts distinguishing abortion from other medical procedures is an unconstitutional form of discrimination on the basis of gender."<sup>114</sup>

But then, with the next breath, the court snuffed the flame. It concluded that, "even if laws singling out abortion can be judicially recognized as not gender neutral, where such laws facially promote maternal health or fetal life, *Casey* replaces the intermediate scrutiny such a law would normally receive under the equal protection clause with the undue burden standard"<sup>115</sup> Inexplicably, the court suggested that *Casey* had specifically supplanted equal protection claims with the undue burden

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109. 417 U.S. 484 (1974).

110. See Smith, *supra* note 92, at 383 (noting that the *Geduldig* case "was read as a broad rejection of the claim that pregnancy discrimination is sex discrimination").

111. See *Geduldig*, 417 U.S. at 496 n.20 ("While it is true that only women can become pregnant it does not follow that every legislative classification concerning pregnancy is a sex-based classification."). But see Smith, *supra* note 92, at 386 (noting that "*Geduldig* left open the possibility that some pregnancy classifications would constitute sex discrimination").

112. 538 U.S. 721 (2003).

113. *Tucson Women's Clinic v. Eden*, 379 F.3d 531, (9th Cir. 2004) (citing *Nev. Dep't of Human Res.*, 538 U.S. at 733 n.6).

114. *Id.* at 548.

115. *Id.* at 549.

standard,<sup>116</sup> although the joint opinion in *Casey* did not analyze the challenged provisions under Equal Protection Clause at all.<sup>117</sup> If the Ninth Circuit had applied intermediate scrutiny to the sex discrimination equal protection claim at issue in *Tucson*, it would have asked whether the Arizona TRAP law was supported by an “exceedingly persuasive” justification, and whether the “‘discriminatory means employed’ [were] ‘substantially related to the achievement of important governmental objectives.’”<sup>118</sup> Again, this analysis is a very different one from the undue burden standard that the court applied. The relevant questions should be not whether the law was intended to or in fact prevented or unduly *burdened women’s access to abortion*, but rather whether the state could justify the differential treatment of abortion providers by showing that the TRAP law was closely related to its stated goal of protecting women’s health. In addressing these questions, the burden of justification would have been on the State, not the plaintiffs.<sup>119</sup> Instead, the Ninth Circuit’s flawed analysis rendered wholly superfluous the plaintiffs’ distinct claim premised on sex discrimination.<sup>120</sup>

### C. Compelled Speech

Compelled speech is the one claim besides the plaintiffs’ substantive due process claim that the Court specifically

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116. See *id.* at 539 (“[A] plurality of the Court abandoned *both traditional equal protection scrutiny analysis* and the accompanying trimester framework of *Roe . . .*” (emphasis added)).

117. See *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 846–47 (1992) (explaining that the right to abortion is protected under the Due Process Clause of the Fourteenth Amendment); *id.* at 884–85 (briefly analyzing “informed consent” provision under First Amendment).

118. *United States v. Virginia*, 518 U.S. 515, 532–33 (1996).

119. See *id.* (noting that “[t]he burden of justification [of gender classifications] is demanding and it rests entirely on the State”).

120. Cf. Smith, *supra* note 92, (explaining how “analyzing abortion restrictions using a sex equality analysis” can create a more multi-dimensional understanding of how abortion restrictions violate women’s rights); Reva B. Siegel, *Abortion As a Sex Equality Right: Its Basis in Feminist Theory*, in *MOTHERS IN LAW: FEMINIST HISTORY AND THE LEGAL REGULATION OF MOTHERHOOD* 43, 67–68 (Martha Albertson Fineman & Isabel Karpin eds., 1995) (same).

addressed in *Casey*.<sup>121</sup> *Casey* by no means compels or even justifies undue burden preemption of free speech claims in the abortion context. But the joint opinion is sufficiently confusing in its treatment of physicians' First Amendment claims to have sowed confusion among lower courts as to whether or how the undue burden standard and compelled speech doctrine intersect. For example, the U.S. Court of Appeals for the Fifth Circuit has held that compelled speech claims against pre-abortion ultrasound requirements and other mandated pre-abortion disclosures are essentially coextensive with undue burden claims against these laws.<sup>122</sup> As with bodily integrity and equal protection claims, this results in a weakening of First Amendment compelled speech claims when they are raised in the context of abortion.

Generally, the Supreme Court closely reviews laws that target speech for regulation based on agreement or disagreement with the speaker's viewpoint.<sup>123</sup> The Court has explained:

As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based. . . . By contrast, laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral.<sup>124</sup>

When laws discriminate on the basis of viewpoint, the Supreme Court generally applies "the most exacting scrutiny."<sup>125</sup> This rigorous scrutiny applies equally to laws that limit speech and

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121. See *Casey*, 505 U.S. at 884 (addressing claim by petitioners of "an asserted First Amendment right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State" (citation omitted)).

122. See *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 576 (5th Cir. 2012) ("[I]nformed consent laws that do not impose an undue burden on the woman's right to have an abortion are permissible if they require truthful, non-misleading, and relevant disclosures. . . . [S]uch laws are . . . reasonable regulation[s] of medical practice and do not fall under the rubric of compelling 'ideological' speech . . .").

123. See, e.g., *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) ("Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content.").

124. *Id.* at 643.

125. *Id.* at 642.



those that “compel speakers to utter or distribute speech bearing a particular message.”<sup>126</sup>

The Supreme Court has recently held that *any* “content-based” or “speaker-based” restriction on speech warrants heightened scrutiny.<sup>127</sup> Thus, even in the context of commercial speech, which has traditionally received less constitutional protection,<sup>128</sup> the Court has skeptically viewed restrictions it sees as discriminating based on the content of the speech or identity of the speaker.<sup>129</sup> Following these precedents, in *R.J. Reynolds Tobacco Co. v. FDA*,<sup>130</sup> the U.S. Court of Appeals for the District of Columbia Circuit applied heightened scrutiny to strike down an FDA rule requiring new textual warnings and graphic images on cigarette packaging.<sup>131</sup> The court found that the warnings “represent[ed] an ongoing effort to discourage consumers from buying the [tobacco] Companies’ products, rather than . . . a measure designed to combat specific deceptive claims.”<sup>132</sup>

The Supreme Court’s precedents calling for stringent review of content-based speech restrictions have been applied to invalidate state interference with doctor–patient communications. For example, the Ninth Circuit invalidated a federal governmental policy that threatened to punish physicians for discussing with their patients the medical use of marijuana.<sup>133</sup>

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126. *Id.* (citations omitted); *see also* *Stuart v. Loomis*, No. 1:11-CV-804, 2014 WL 186310, at \*5 (M.D.N.C. Jan. 17, 2014) (stating, in the context of a challenge to pre-abortion ultrasound mandate, that content-based, government-compelled speech is generally subject to strict scrutiny).

127. *See Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664–65 (2011) (applying heightened scrutiny in the context of commercial speech).

128. *See Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978) (noting that the Court has “afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression”).

129. *See Sorrell*, 131 S. Ct. at 2664–65 (finding that the law at issue “is designed to impose a specific, content-based burden on protected expression” and rejecting the State’s argument “that heightened judicial scrutiny is unwarranted because its law is mere commercial regulation”).

130. 696 F.3d 1205 (D.C. Cir. 2012).

131. The court applied intermediate rather than strict scrutiny because the case involved “compelled commercial speech.” *Id.* at 1217–18.

132. *Id.* at 1216.

133. *Conant v. Walters*, 309 F.3d 629, 632 (9th Cir. 2002).

The court found that the law was content based, and therefore subject to heightened scrutiny, because it “condemn[ed] expression of a particular viewpoint, i.e., that medical marijuana would likely help a specific patient.”<sup>134</sup> Similarly, a federal district court recently enjoined a Florida law that forbade doctors to discuss gun ownership safety with their patients as part of the practice of preventive medicine.<sup>135</sup> Florida asserted that the law was intended to “prevent . . . harassment and discrimination by health care providers against patients based on their ownership of firearms.”<sup>136</sup> The court described the statute as “impos[ing] content-based restrictions on [physicians’] speech.”<sup>137</sup> The court found that “[t]he State, through this law, inserts itself in the doctor–patient relationship, prohibiting and burdening speech necessary to the proper practice of preventive medicine.”<sup>138</sup>

*Casey* did not appear to apply heightened scrutiny to the “informed consent” provision at issue there, even though some of the required information clearly conveyed the state’s ideological opposition to abortion.<sup>139</sup> The statute in *Casey* “require[d] that, at least [twenty-four] hours before performing an abortion, a physician inform the woman of the nature of the procedure, the health risks of the abortion and of childbirth, and ‘the probable gestational age of the unborn child.’”<sup>140</sup> It also required that “[t]he physician or a qualified nonphysician must inform the woman of the availability of printed materials published by the State describing the fetus and providing information about medical assistance for childbirth, . . . child support from the father, and a list of agencies which provide adoption and other services as alternatives to abortion.”<sup>141</sup> To the extent that some of the

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134. *Id.* at 637; *see also id.* at 639 (stating that “the government’s policy must have the requisite ‘narrow specificity’” (citing *Nat’l Ass’n for Advancement of Colored People v. Button*, 371 U.S. 415, 433 (1963))).

135. *Wollschlaeger v. Farmer*. 880 F. Supp. 2d 1251, 1255–56, 1270 (S.D. Fla. 2013).

136. *Id.* at 1256.

137. *Id.* at 1261.

138. *Id.* at 1266.

139. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 882 (1992).

140. *Id.* at 881.

141. *Id.*

information was clearly viewpoint-based,<sup>142</sup> *Casey*'s failure to clearly apply heightened scrutiny seems inconsistent with existing case law.<sup>143</sup>

States have wide latitude to regulate the medical profession in the interests of ensuring the public's safety.<sup>144</sup> This interest has prompted nearly every state to compel medical practitioners to convey information deemed necessary for a patient's informed consent.<sup>145</sup> The general purpose of informed consent laws is to

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142. Telling women about the nature of the procedure and the risks of abortion and childbirth is the kind of information that is typically conveyed in normal informed consent dialogues. *Infra* note 146. But information that conveys what the embryo or fetus looks like, or that makes the alternative of childbirth seem more attractive or financially tenable, has nothing to do with the medical aspects of the woman's decision and is only provided because the state prefers that women choose childbirth. *See id.* at 935–36 (Blackmun, J., concurring in part and dissenting in part) (“The requirements . . . that the woman be advised that medical assistance benefits may be available, and that the father is responsible for financial assistance in the support of the child similarly are poorly disguised elements of discouragement for the abortion decision.” (internal quotation marks omitted)). Pennsylvania does not require that women seeking prenatal care be told of the options of abortion or adoption. *But see* *Texas Med. Providers v. Lakey*, No. A-11-CA-486-SS, 2012 WL 373132, at \*5 (W.D. Texas Feb. 6, 2012) (describing the plaintiffs' compelled speech claims in *Casey* as bordering on frivolous, unlike the First Amendment issue before the court).

143. Although the Supreme Court had not earlier evaluated similar “informed consent” laws under free speech doctrine, it did recognize that mandating specific information that is not normally part of medical informed consent was an impermissible attempt by the state to convey its viewpoint through the doctor. *See Thornburgh v. Am. Coll. Obstetricians & Gynecologists*, 476 U.S. 747, 760–64 (1986) (invalidating disclosure requirements similar to those in *Casey* and describing them as “nothing less than an outright attempt to wedge the State's message discouraging abortion into the privacy of the informed-consent dialogue between the woman and her physician”), *overruled by Casey*, 505 U.S. 833. *But see* *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 445 n.37 (1983), *overruled by Casey*, 505 U.S. 833 (noting in dicta that mandating “the availability of information on birth control and adoption . . . and the availability of assistance during pregnancy and after childbirth” if accurate, “certainly is not objectionable”).

144. *See, e.g., Nat'l Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology*, 228 F.3d 1043, 1055–56 (9th Cir. 2000) (refusing to apply strict scrutiny where state psychologist licensing scheme “was not adopted because of any disagreement with psychoanalytical theories”).

145. *See* Jaime Staples King & Benjamin W. Moulton, *Rethinking Informed Consent: The Case for Shared Medical Decision-Making*, 32 AM. J.L. & MED. 429, 430 (2006) (noting that forty-eight states have adopted either a physician-based or patient-based standard for informed consent).

inform, not to persuade or to convey a particular moral point of view.<sup>146</sup> “Informed consent” requirements like those validated in *Casey*, however, perform a very different function. Abortion disclosure laws have nothing to do with the practice of medicine or with ensuring patients’ safety<sup>147</sup> and everything to do with conveying the state’s disapproval of abortion.<sup>148</sup> For this reason, one would expect that they would be treated as other viewpoint discriminatory laws and subjected to at least heightened, if not strict, scrutiny.<sup>149</sup> *Casey*, however, did not clearly subject the disclosure mandate there to strict or heightened scrutiny. *Casey*’s treatment of the disclosure mandate is confusing and in part seemingly conflates due process analysis with First Amendment analysis. This has led some lower courts to conclude that First Amendment claims raised against abortion restrictions receive less protection.

In addressing the mandated disclosure law at issue in *Casey*, the Supreme Court first determined whether the requirement

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146. See Robert D. Goldstein, *Reading Casey: Structuring the Woman’s Decisionmaking Process*, 4 WM. & MARY BILL RTS. J. 787, 816 (1996) (pointing out that “the moral appropriateness of a particular medical procedure is normally assumed to be outside the proper range of physician disclosures”).

147. This differentiates them, for example, from laws prohibiting the practice of sexual orientation change efforts (SOCE), as the latter are intended to protect patients from harm. See, e.g., *King v. Christie*, Civ. Action No. 13-5038, 2013 WL 5970343, at \*15 (D.N.J. Nov. 8, 2013) (“[D]octor-patient communications about medical treatment receive substantial First Amendment protection, but the government has more leeway to regulate the conduct necessary to administering treatment itself.” (quoting *Pickup v. Brown*, 728 F.3d 1042, 1052 (9th Cir. 2013))); *Pickup v. Brown*, No. 2:12-CV-02497-KJM-EFB, 2012 WL 6021465, at \*24 (E.D. Cal. Dec. 4, 2012) (“[T]he plaintiffs’ protected fundamental right is a patient’s decision whether to seek treatment or not; but a patient’s ‘selection of a particular treatment, or at least a medication, is within the area of governmental interest in protecting health.’”), *aff’d*, 728 F.3d 1042 (9th Cir. 2013).

148. See Erin Bernstein, *The Upside of Abortion Disclosure Laws*, 24 STAN. L. & POL’Y REV. 171, 179–80 (2013) (“Most of the states that have enacted pre-abortion disclosure laws have designed the disclosures to discourage abortion and/or promote fetal life.”).

149. See, e.g., *Riley v. Nat’l Federation of the Blind of N.C., Inc.*, 487 U.S. 781, 798–801 (1988) (applying strict scrutiny to a state’s content-based law compelling certain speech); see also *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (concluding that the state may not “prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion”).

violated the undue burden standard.<sup>150</sup> The Court's admonishment that any mandated information be "truthful and not misleading"<sup>151</sup> seemed to refer to normal medical informed consent requirements,<sup>152</sup> which mandate the provision of factual information to allow a patient autonomy in making her own decision about her care.<sup>153</sup> But the joint opinion also emphasized the state's prerogative to express its moral opposition to abortion and even to attempt to convince women not to choose abortion: the opinion stated, "Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage [a woman] to know that there are *philosophic and social arguments* of great weight that can be brought to bear in favor of continuing the pregnancy to full term."<sup>154</sup> The Court thus concluded that "informed choice need not be defined in such narrow terms that all considerations of the effect on the fetus are made irrelevant."<sup>155</sup>

The Court next, very briefly, addressed whether the mandated disclosure violated physicians' First Amendment right not to speak.<sup>156</sup> The Court implicitly acknowledged that the First Amendment ordinarily protects against government-compelled speech, citing *Wooley v. Maynard*,<sup>157</sup> which held that New Hampshire could not constitutionally require citizens to display

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150. *Infra* notes 172–202 and accompanying text.

151. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 882 (1992).

152. *See id.* at 882–84 (comparing information disclosure for abortion with other procedures, observing that "a requirement that a doctor give a woman certain information as part of obtaining her consent to an abortion is, for constitutional purposes, no different from a requirement that a doctor give certain specific information about any medical procedure").

153. *See id.* at 881 ("Our prior decisions establish that as with any medical procedure, the State may require a woman to give her written informed consent to an abortion.").

154. *Id.* at 872 (emphasis added).

155. *Id.* at 883; *see also id.* at 882 ("We also see no reason why the State may not require doctors to inform a woman seeking an abortion of the availability of materials relating to the consequences to the fetus, even when those consequences have no direct relation to her health.").

156. *Id.* at 884.

157. 430 U.S. 705 (1977); *see also Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992) ("To be sure, the physician's First Amendment rights not to speak are implicated . . ." (citing *Wooley v. Maynard*, 430 U.S. 705 (1977))).

the state's motto, "Live Free or Die," on their vehicle license plates.<sup>158</sup> Without further discussion of *Wooley*, the *Casey* Court next, in the same sentence, turned to the state's police power to subject the practice of medicine to "reasonable licensing and regulation."<sup>159</sup> For this proposition, the Court cited *Whalen v. Roe*,<sup>160</sup> a case in which physicians and patients challenged a law that required prescription information to be reported to the state.<sup>161</sup>

As commentators have observed, the juxtaposition of these two cases is odd and renders opaque the Court's meaning.<sup>162</sup> *Wooley* is a First Amendment case establishing that laws requiring speakers to utter the state's ideological viewpoint are constitutionally impermissible.<sup>163</sup> Yet in discussing the physicians' First Amendment claim, the *Casey* joint opinion referred not to the permissibility of mandating that physicians provide information conveying the state's ideological opposition to abortion but only to the permissibility of requiring "information

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158. See *Wooley*, 430 U.S. at 716–17.

159. See *Casey*, 505 U.S. at 884.

160. 429 U.S. 589 (1977); see also *Casey*, 505 U.S. at 884 (observing that physicians' First Amendment rights to speak must be analyzed "as part of the practice of medicine, subject to reasonable licensing and regulation by the State" (citing *Whalen v. Roe*, 429 U.S. 589, 603 (1977))).

161. See *Whalen*, 429 U.S. at 591 ("The constitutional question presented is whether the State of New York may record, in a centralized computer file, the names and addresses of all persons who have obtained, pursuant to a doctor's prescription, certain drugs for which there is both a lawful and an unlawful market.").

162. See Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771, 773–74 (1999) ("To fuse these two models in a shorthand formulation provides little indication of how to resolve any professional's First Amendment claim other than the precise one at issue in *Casey*."); Jennifer M. Keighley, *Physician Speech and Mandatory Ultrasound Laws: The First Amendment's Limit on Compelled Ideological Speech*, 34 CARDOZO L. REV. 2347, 2355 (2013) ("Neither *Wooley* nor *Whalen* discusses the First Amendment rights of physicians, so these citations provide little illumination of the balance between the general First Amendment protections against compelled speech and the state's power to regulate medical professionals."); Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939, 946 ("Exactly how the strict First Amendment standards of *Wooley* are meant to qualify the broad police power discretion of *Whalen* is left entirely obscure.").

163. See *Wooley v. Maynard*, 430 U.S. 705, 713 (1977).

about the risks of abortion, and childbirth.”<sup>164</sup> The stronger First Amendment claim, that the state should not compel ideological speech or regulate speech based on its disagreement with the speaker’s viewpoint, was left unaddressed.<sup>165</sup>

*Whalen*, on the other hand, is not about free speech at all. The *Whalen* plaintiffs had claimed that law violated the right to privacy, not the First Amendment.<sup>166</sup> The Court in *Whalen* disagreed that the statute violated the plaintiffs’ rights to privacy of personal information and independence in making important personal decisions.<sup>167</sup> *Casey*’s reliance on a privacy case to resolve physicians’ free speech claims sows confusion about the relationship, if any, between privacy claims and free speech claims against compelled disclosures in the abortion context. Nevertheless, as two federal district courts have observed, it seems unlikely that the authors of the *Casey* joint opinion intended to “analytically merge the First Amendment rights of doctors with the Fourteenth Amendment rights of women.”<sup>168</sup>

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164. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992) (emphasis added); see also Keighley, *supra* note 162, at 2355–56 (“The risk information pointed to by the Court assuredly is the type of information that a physician already has a duty to give a patient in order to get that patient’s informed consent to the abortion procedure.”).

165. As discussed above, the joint opinion in *Casey* addressed the ideological information mandated by the Pennsylvania law only in the context of assessing whether it imposed an undue burden. See *Casey*, 505 U.S. at 882–83.

166. See *Whalen v. Roe*, 429 U.S. 589, 591 (1977) (“The District Court enjoined enforcement of the portions of the New York State Controlled Substances Act of 1972 which require such recording on the ground that they violate appellees’ constitutionally protected rights of privacy.” (footnote omitted)).

167. See *id.* at 602 (“[I]t is, of course, true that private information must be disclosed to the . . . New York Department of Health. Such disclosures, however, are not . . . meaningfully distinguishable from a host of other unpleasant invasions of privacy that are associated with many facets of health care.”).

168. *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, No. A-11-CA-486-SS, 2012 WL 373132, at \*2 (W.D. Tex. Feb. 6, 2012); see also *Stuart v. Loomis*, No. 1:11-CV-804, 2014 WL 1863, at \*17 (M.D.N.C. Jan. 17, 2014) (“Despite its brevity, [*Casey*’s] First Amendment analysis is clearly a traditional one . . . . *Casey* did not purport to carve out a new First Amendment exception or create a new standard of review for all abortion-related speech cases.”); cf. Keighley, *supra* note 162, at 2361–64 (arguing that *Casey* should not be read as endorsing the constitutionality under the First Amendment of requirements that abortion providers personally communicate to their patients—rather than merely make available in written form—the substance of a state’s ideological message). Indeed, given the minimal attention plaintiffs devoted to the First

Invoking *Casey*, some lower courts have applied a deferential standard to uphold abortion laws that—more obviously than in *Casey*—insert the state into a doctor’s relationship with her patient for ideological reasons.<sup>169</sup> Some have done so by deliberately blurring the lines between the undue burden standard and First Amendment doctrine.<sup>170</sup>

The Fifth Circuit has expressly interpreted *Casey* as tethering abortion providers’ free speech claims to the undue burden standard. In May 2011, Texas amended its abortion disclosure law to require that, before performing an abortion, physicians conduct and display a sonogram of the embryo or fetus, make audible the heartbeat for the woman to hear, and verbally explain to her the results of both procedures, including detailed descriptions of the fetus or embryo and a simultaneous verbal explanation of the heart auscultation.<sup>171</sup> A woman may decline to view the images or hear the heartbeat, but in most circumstances she may not decline to receive an explanation of the sonogram images.<sup>172</sup> No less than the anti-smoking messages in *R.J. Reynolds*, these requirements are an “unabashed attempt[] to evoke emotion (and perhaps embarrassment) and browbeat” abortion patients into choosing childbirth over abortion.<sup>173</sup>

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Amendment issue in their briefs and at oral argument in *Casey*, it seems unwise to read too much into the Court’s brief free speech discussion. See Keighley, *supra* note 162, at 2357–61 (describing the limited focus on the free speech question in the *Casey* litigation).

169. See *infra* text accompanying notes 178–179 (discussing Planned Parenthood Minn., N.D., S.D. v. Rounds, 530 F.3d 724, 733–35 (8th Cir. 2008) (en banc)).

170. See Corbin, *supra* note 2, at 1190–92 (“[Courts] dodge the doctors’ free speech claims by applying the *Casey* undue burden test . . . .”); Keighley, *supra* note 162, at 2349 (“[T]he Fifth Circuit recently set forth . . . that physicians retain virtually no First Amendment rights while they are practicing medicine. . . . This model . . . essentially collapses the First Amendment inquiry with *Casey*’s analysis of women’s substantive due process rights.”).

171. TEX. HEALTH & SAFETY CODE ANN. § 171.012(a)(4) (West 2014).

172. See *id.* § 171.012(b)–(d) (providing that the required information be provided orally, that the web address on which the printed materials may be found be disclosed, and that it include the likelihood of obtaining child support).

173. *R.J. Reynolds Tobacco Co. v. Food & Drug Admin.*, 696 F.3d 1205, 1217 (D.C. Cir. 2012).



In *Texas Medical Providers Performing Abortions v. Lakey*,<sup>174</sup> abortion providers challenged these restrictions on a variety of grounds, including that they unconstitutionally compel physicians to engage in government-mandated speech and that they violate abortion patients' right not to speak by compelling them to certify the physician's compliance with the procedures.<sup>175</sup> The plaintiffs did not challenge the requirements on undue burden grounds.<sup>176</sup> The district court understood that the plaintiffs' choice to challenge the requirements on compelled speech grounds meant the court could not simply evaluate the requirements based on *Casey's* undue burden analysis of Pennsylvania's mandated disclosure requirement:

This Court quotes substantial portions of *Casey*[']s [undue burden analysis of Pennsylvania's mandated disclosure law] because Defendants rely heavily on [that] language in arguing Plaintiffs' First Amendment challenge lacks merit. However, . . . the Supreme Court's discussion is in the context of a constitutional challenge based upon a woman's Fourteenth Amendment Due Process right to an abortion, not a First Amendment challenge. Accordingly, while the Court's statements may be instructive on the First Amendment issue, they are not dispositive.<sup>177</sup>

In addressing plaintiffs' compelled speech claim, the district court applied strict scrutiny.<sup>178</sup> Finding the physician-patient dialog to be either noncommercial speech or mixed commercial and noncommercial speech, the court noted that, "[o]utside the commercial context, 'content-based regulations of speech are presumptively invalid.'"<sup>179</sup> The court then found that the new

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174. 806 F. Supp. 2d 942 (W.D. Tex. 2011), *vacated in part*, 667 F.3d 570 (5th Cir. 2012).

175. *See id.* at 949 (summarizing the plaintiffs' claims).

176. *Id.*

177. *Id.* at 971-72.

178. *See id.* at 970.

179. *Id.* at 969 (quoting *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 188 (2007)); *see also* *Stuart v. Loomis*, No. 1:11-CV-804, 2014 WL 1863, at \*10 (M.D.N.C. Jan. 17, 2014) (stating, in context of pre-abortion ultrasound speech and display requirement, that "[r]equiring a physician or other health care provider to deliver the state's content-based, non-medical message in his or her own voice as if the message was his or her own constitutes compelled ideological speech and warrants the highest degree of First Amendment protection").

Texas requirements violated the First Amendment rights of both abortion patients and their doctors.<sup>180</sup> The court concluded:

The net result of these provisions is: (1) a physician is required to say things and take expressive actions with which the physician may not ideologically agree, and which the physician may feel are medically unnecessary; (2) the pregnant woman must not only passively receive this potentially unwanted speech and expression, but must also actively participate—in the best case by simply signing an election form, and in the worst case by disclosing in writing extremely personal, medically irrelevant facts; and (3) the entire experience must be memorialized in records that are, at best, semi-private.<sup>181</sup>

Unlike the district court, the Fifth Circuit in *Lakey* saw *Casey*'s undue burden analysis as inextricably linked to, and determinative of, compelled speech challenges to mandated disclosure laws in the abortion context.<sup>182</sup> The Fifth Circuit panel relied not just on *Casey* but also on *Gonzales v. Carhart*,<sup>183</sup> which stated that “the government may use its voice and its regulatory authority to show its profound respect for the life within the woman.”<sup>184</sup> *Gonzales* did not involve any free speech challenge to the federal “partial-birth abortion” ban at issue there.<sup>185</sup> But this did not matter to the Fifth Circuit, which made clear that it viewed the answer to the undue burden question as dispositive of the compelled speech claim:

The import of these cases is clear. First, informed consent laws that do not impose an undue burden on the woman's right to have an abortion are permissible if they require truthful, nonmisleading, and relevant disclosures. Second, such laws are part of the state's reasonable regulation of medical practice

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180. See *Tex. Med. Providers Performing Abortions v. Lakey*, 806 F. Supp. 2d 942 (W.D. Tex. 2011) (“[T]he Act compels physicians to advance an ideological agenda with which they may not agree . . . . Accordingly, the Court finds the Act's compelled speech requirements . . . are unconstitutional violations of the First Amendment right to be free from compelled speech.”), *vacated in part*, 667 F.3d 570 (5th Cir. 2012); see also *Stuart*, 2014 WL 186310, at \*20 (finding a similar law unconstitutional under the First Amendment).

181. *Lakey*, 806 F. Supp. 2d at 975.

182. See *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 576 (5th Cir. 2012).

183. 550 U.S. 124 (2007).

184. *Id.* at 128.

185. See *id.* at 132–33 (summarizing the plaintiff's claims).

and do not fall under the rubric of compelling “ideological” speech that triggers First Amendment strict scrutiny. Third, “relevant” informed consent may entail not only the physical and psychological risks to the expectant mother facing this “difficult moral decision,” but also the state’s legitimate interests in “protecting the potential life within her.”<sup>186</sup>

The Fifth Circuit saw *Casey*’s undue burden standard not simply as relevant to the compelled speech question, but as displacing it. In the Fifth Circuit’s view, it is not possible for an abortion restriction to violate a constitutional right independent of a woman’s right to access abortion.<sup>187</sup> Like the Sixth Circuit considering a bodily integrity claim in *DeWine*, the Fifth Circuit in *Lakey* viewed the doctors’ First Amendment claims with suspicion, as if the plaintiffs were somehow impermissibly seeking an end-run around the undue burden standard.<sup>188</sup> The court labeled as an “omission” the plaintiffs’ failure to argue that the ultrasound requirements amounted to an undue burden, describing it as “significant.”<sup>189</sup> The Fifth Circuit observed: “[I]f [the restrictions] would not violate the woman’s privacy right under the *Casey* plurality opinion, then Appellees would, by means of their First Amendment claim, essentially trump the balance *Casey* struck between women’s rights and the states’ prerogatives.”<sup>190</sup> Thus, like the court in *DeWine*, the Fifth Circuit

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186. *Lakey*, 667 F.3d at 576 (emphases added).

187. The one exception to this appears to be vagueness, which the Fifth Circuit appears to view as independent of the undue burden standard. *See supra* note 41 and accompanying text (discussing the Fifth Circuit’s treatment of the void for vagueness claim in *Lakey*).

188. *See* *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, No. A-11-CA-486-SS, 2012 WL 373132, at \*2 n.6 (W.D. Tex. Feb. 6, 2012) (“An early point of departure between this Court’s analysis and the [Fifth Circuit] panel’s is that this Court takes Plaintiffs’ claims at face value . . . whereas the panel apparently sees it as . . . about women’s right to an abortion—an issue specifically disclaimed by Plaintiffs in this suit.”).

189. *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 577 (5th Cir. 2012). The district court questioned how such an omission could be “significant” if the plaintiffs were not even making an undue burden claim. *See Lakey*, 2012 WL 373132, at \*3 (noting that “Plaintiffs may have failed to make such allegations precisely because they were bringing First Amendment challenges on behalf of doctors” and “[Plaintiffs]—like this Court— court were surprised by the panel’s apparent importation of a Fourteenth Amendment ‘undue burden’ standard into their First Amendment compelled speech claims.”).

190. *Lakey*, 667 F.3d at 577.

appears to view the undue burden standard as occupying the field of abortion regulation. Because these courts see the undue burden standard as striking a careful “balance” on the issue of abortion, they see any other claim that might invalidate an abortion restriction is seen as upsetting this balance.<sup>191</sup> As discussed in Part II, this kind of “field preemption” is unprecedented in constitutional law.<sup>192</sup> The federal district court in *Lakey*, on remand, accused the Fifth Circuit panel of “creat[ing] a special rule for informed consent for abortions” not supported by *Casey*.<sup>193</sup>

The Eighth Circuit has come close to applying undue burden preemption to a compelled speech claim, albeit less obviously. In *Planned Parenthood v. Rounds*,<sup>194</sup> the Eighth Circuit Court of Appeals, sitting en banc, refused to enjoin a requirement that abortion providers give a written statement to their patients asserting that abortion “will terminate the life of a whole, separate, unique, living human being.”<sup>195</sup> While the Eighth Circuit in *Rounds* did not as openly conflate the undue burden and First Amendment analyses as did the Fifth Circuit, its analysis still seems unlikely to be applied to any viewpoint-discriminatory speech regulation other than a post-*Casey* abortion law. The problem is that the Fifth and Eighth Circuits interpret “truthful, non-misleading information relevant to a patient’s decision” to encompass not just information typical to ordinary medical informed consent requirements—such as the comparative medical risks of abortion and childbirth—but also “information” clearly mandated purely for ideological reasons.<sup>196</sup>

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191. See *id.*; see also *Tucson Women’s Clinic v. Eden*, 379 F.3d 531, 549 (9th Cir. 2004) (“[I]t is not necessary to determine whether the classification should be deemed gender-neutral, because the interests at stake should be balanced by simply applying the *Casey* undue burden standard.”).

192. See *supra* Part II (discussing the prevailing approach of analyzing each constitutional claim separately according to each applicable doctrine); see also *infra* Part IV (critiquing undue burden preemption).

193. *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, No. A-11-CA-486-SS, 2012 WL 373132, at \*2 (W.D. Tex. Feb. 6, 2012).

194. 530 F.3d 724 (8th Cir. 2008) (en banc).

195. *Id.* at 735.

196. See, e.g., *id.* at 734–35 (“[T]he State . . . can use its regulatory authority to require a physician to provide truthful, non-misleading information relevant to a patient’s decision to have an abortion, even if that information might also

Indeed, in *Rounds*, the Eighth Circuit strained mightily to read the language at issue as non-ideological, interpreting it to mean simply that the embryo or fetus is biologically human, a fact that no woman of sound mind needs a doctor to tell her.<sup>197</sup> Similarly, the Fifth Circuit in *Lakey* described ultrasound images as “surely . . . the purest conceivable expression of ‘factual information,’”<sup>198</sup> although one wonders whether it would have seen the graphic anti-smoking photos in *R.J. Reynolds* in the same light.<sup>199</sup>

Despite its confusing treatment of Pennsylvania’s mandated information law, *Casey* does not provide support for the idea that ideologically motivated disclosure requirements—such as those in *Lakey* and *Rounds*—do not violate the First Amendment. *Casey* did say that the state may express its preference for childbirth under the undue burden standard,<sup>200</sup> but it omitted any mention of such ideologically motivated speech in its First Amendment discussion.<sup>201</sup> The district court in *Lakey* saw through the game being played by the Fifth and Eighth Circuits, saying of the Fifth Circuit panel decision:

[T]he result is that doctors may permissibly be compelled to parrot anything the state deems necessary to further its “legitimate interests in protecting the potential life within” the pregnant woman, provided the message does not impose an undue burden on the woman’s right to have an abortion. That

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encourage the patient to choose childbirth over abortion.”).

197. See Caitlin E. Borgmann, *Eighth Circuit to Pregnant Women: You’re Not Carrying a Dolphin!*, REPROD. RIGHTS. PROF. BLOG (June 27, 2008), [http://lawprofessors.typepad.com/reproductive\\_rights/2008/06/eighth-circui-1.html](http://lawprofessors.typepad.com/reproductive_rights/2008/06/eighth-circui-1.html) (last visited Jan. 25, 2014) (“Just think of all those scores of women who have flocked to abortion clinics under the sad misimpression that they were carrying developing dolphins. The women of South Dakota can rest safely in the knowledge that . . . they will at last understand the mystery of their pregnancy . . .”) (on file with the Washington and Lee Law Review).

198. *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 577 n.4 (5th Cir. 2012).

199. See *supra* notes 131–32 and accompanying text (discussing how the court applied heightened scrutiny in *R.J. Reynolds* to strike down an FDA rule requiring graphic images on cigarette packaging because it “represent[ed] an ongoing effort to discourage consumers from buying the [tobacco] Companies’ products”).

200. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 883 (1992).

201. *Id.*; *supra* notes 164–65 and accompanying text.

is, within the abortion context, the doctor's right to speak, or not to speak, is wholly dependent on the contours of a woman's right to an abortion. . . . [T]his Court is concerned with the panel's implicit conflation of "reasonable regulation of medical practice," with "truthful, nonmisleading, and relevant disclosures"—particularly given the panel's broad definition of "relevant" in this context. As this Court reads the panel's opinion, an extended presentation, consisting of graphic images of aborted fetuses, and heartfelt testimonials about the horrors of abortion, would be "truthful, nonmisleading, and relevant." Accordingly, the government could apparently require doctors personally to make such presentations prior to performing abortions . . . .<sup>202</sup>

Courts should recognize that compelled speech claims address a very different interest than whether a woman's right to access abortion has been unduly burdened. There is no reason why ordinary First Amendment doctrine should not apply to these claims. Under that doctrine, viewpoint discriminatory, mandatory abortion disclosures should be assessed under strict scrutiny.

#### *IV. A Critique of Undue Burden Preemption*

The undue burden standard makes sense only as an inquiry that focuses on access to abortion. The Supreme Court in *Casey* specifically described *Roe*'s "essential holding" as establishing "the right of the woman to choose to have an abortion before viability *and to obtain it* without undue interference from the State."<sup>203</sup> The Court then went on to modify this standard to allow more restrictions on abortion access, so long as these were not unduly burdensome.<sup>204</sup> The undue burden standard expressly

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202. *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, No. A-11-CA-486-SS, 2012 WL 373132, at \*2–3 (W.D. Tex. Feb. 6, 2012) (referring to language used by the Fifth Circuit's panel decision in *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 574–80 (5th Cir. 2012)) (footnote omitted); *see also* *Stuart v. Loomis*, No. 1:11-CV-804, 2014 WL 1863, at \*17 (M.D.N.C. Jan. 17, 2014) ("With due respect, *Lakey* and *Rounds* are wrongly decided. . . . The application of a due process standard to a First Amendment issue improperly conflates two separate constitutional doctrines in a way that gives short shrift to the First Amendment.").

203. *Casey*, 505 U.S. at 846 (emphasis added).

204. *See id.* at 878.

looks at whether a law has the “purpose or effect of *placing a substantial obstacle* in the path of a woman seeking an abortion.”<sup>205</sup> It therefore makes sense to apply the undue burden standard only to assertions that a law burdens, limits, or bars women’s access to abortion.

Abortion restrictions, however, often go beyond limiting access to abortion, implicating other distinct rights. The fact that an ultrasound law compels a physician to communicate certain information to a patient implicates the physician’s First Amendment rights irrespective of whether the law affects women’s ability to obtain abortions. That same law also implicates a woman’s bodily integrity, by forcing her to undergo a procedure ranging from somewhat to intensely intrusive, depending on the type of sonogram performed.<sup>206</sup> Like the doctor’s compelled speech claim, the woman’s bodily intrusion claim exists independently of whether the requirement hampers or prevents her access to abortion. Even if abortion remains freely available and is no more expensive than before, her bodily integrity has been violated.

As discussed above, the Supreme Court’s prevailing approach to constitutional adjudication recognizes that a single claim may implicate more than one constitutional provision.<sup>207</sup> In *United States v. James Daniel Good Real Property*, the Court recognized that the Fourth Amendment did not preempt the Fifth Amendment due process claim raised there because the claims were not interchangeable.<sup>208</sup> The same principle holds true in the abortion context. Undue burden preemption allows the undue burden standard to gobble up, Pac-Man-like, wholly distinct constitutional claims that assert interests different from abortion access and sometimes even the interests of people other than

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205. *Id.*

206. See Borgmann, *The Constitutionality*, *supra* note 33, at 67–72 (arguing that state-compelled pre-abortion sonography should be evaluated under strict scrutiny because, when conducted for the state’s ideological purposes, it is a significant physical and dignitary intrusion on a woman’s body).

207. *Supra* Part II.

208. *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 52 (1993) (concluding that the government’s action, in purpose and effect, went “beyond the traditional meaning of search and seizure,” justifying the application of the Fifth Amendment Due Process Clause).

abortion patients. There is nothing in *Casey* that justifies such an alarming expansion of the undue burden standard. Indeed, by separately analyzing the (tentatively argued) free speech claims raised in *Casey*,<sup>209</sup> the Court clearly regarded these claims as distinct, confusing though its discussion may have been.

The *Graham* doctrine—which allows certain constitutional claims to displace substantive due process claims—likewise does not support undue burden preemption.<sup>210</sup> In fact, undue burden preemption turns the *Graham* doctrine on its head. Under *Graham*, courts *avoid* applying substantive due process, the very source of the right to abortion protected by the undue burden standard.<sup>211</sup> If *Graham* is justified—which itself is questionable<sup>212</sup>—it is on the grounds that substantive due process is not grounded in explicit constitutional text and therefore lacks sufficient guideposts for courts.<sup>213</sup> The Court at least plausibly claims to prefer to analyze governmental action under an express constitutional provision, where that provision clearly applies.<sup>214</sup> In such cases, the Court purports to apply an analysis that it views as more or less interchangeable with (albeit more specific than) the substantive due process claim.<sup>215</sup>

These justifications do not apply to undue burden preemption. First, *Graham*'s impulse to avoid wading into the uncharted waters of substantive due process cannot possibly

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209. See *supra* note 168 and accompanying text.

210. See *supra* Part II (describing the *Graham* doctrine).

211. See *supra* Part II (discussing the prevailing approach to analyzing constitutional issues, and the *Graham* doctrine's exception for substantive due process claims); see also *Graham v. Connor*, 490 U.S. 386, 395 (1989) ("Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims.").

212. See *supra* note 33 and accompanying text (describing criticisms of *Graham* doctrine).

213. *Supra* note 32 and accompanying text.

214. See *supra* note 32 and accompanying text (describing the justification for application of the *Graham* doctrine). *But see* Borgmann, *The Constitutionality*, *supra* note 33, at 51–52 (pointing out that the Court has often applied *Graham* only to reject the more "textually explicit" claim on the merits, raising the question of how a litigant is to know that this provision even "applies" to her case).

215. *Supra* notes 23–36 and accompanying text.



justify allowing a substantive due process claim to preempt any other constitutional claim. In an about-face from *Graham*, undue burden preemption has been applied to allow an unenumerated, substantive due process right—the right to abortion—to displace the textually explicit rights of equal protection and freedom of speech. As to bodily integrity, which is also unenumerated, there is still no reason one can draw from *Graham* for concluding that one substantive due process right preempts another. Second, in the cases in which courts have applied undue burden preemption, the preempted claims were not interchangeable with undue burden claims. As discussed above, each raised distinct concerns having nothing to do with whether a woman could access abortion.<sup>216</sup> Thus, under the sole exception to the prevailing approach, undue burden preemption is still indefensible.

### V. Conclusion

Abortion has been wrongly subjected to special, disfavored treatment in many areas of the law. Most obviously, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Supreme Court jettisoned strict scrutiny for a new constitutional test, custom made for abortion restrictions. This test opened the door for state legislatures' exceptional treatment of abortion, as they have piled on restrictions not applied to other medical procedures. Undue burden preemption, however, goes a step beyond this by interpreting the undue burden standard as preempting wholly unrelated constitutional claims. It thus effectively eliminates valid claims against abortion restrictions that are not about access—the issue for which the undue burden standard was clearly designed.

In other contexts, courts analyze separate constitutional rights claims individually, under the respective rules applicable to each claim. The only recognized exception to this rule—the *Graham* doctrine—further casts doubt on the legitimacy of undue burden exceptionalism. Under the *Graham* doctrine, courts displace substantive due process claims when a more specific constitutional provision also applies. In these cases, both claims

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216. *Supra* Part III.

are essentially duplicative, and the court eschews the doctrinal approach considered more amorphous and judicially precarious. Undue burden preemption turns this concept upside down. Courts abandon well-established tests—even under textually explicit provisions such as the First Amendment or the Equal Protection Clause—for the infamously nebulous undue burden standard. Undue burden preemption cannot be explained as anything other than a bald attempt to limit the constitutional avenues claimants may use to challenge abortion restrictions. It will be up to the Supreme Court to recognize and stop this trend.