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Growing Burdens on Abortion Rights: An Individual Freedom During Covid-19 and Changing Judicial Interpretation

John Simpson

GROWING BURDENS ON ABORTION RIGHTS: AN INDIVIDUAL FREEDOM DURING COVID-19 AND CHANGING JUDICIAL INTERPRETATION

*John Simpson**

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I. INTRODUCTION

On April 13, 2020, Mary turned to her obstetrician (OB/GYN) questioning whether to go through with her pregnancy in the time of COVID-19.[1] "I would do it . . . I mean, in different circumstances I might continue the pregnancy. But now?"[2] The OB/GYN is empathetic, though its effect hidden behind a surgical mask.[3] Mary continues, "[h]ow could I be pregnant during this pandemic . . . [h]ow could I even get to appointments . . . what if I got sick?"[4] With three children

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[1] Maryl G. Sackeim, *Protecting Access to Abortion During the COVID-19 Pandemic*, 39(8) HEALTH AFFS. 1456, 1456 (2020).

[2] *Id.*

[3] *Id.*

[4] *Id.*

at home, Mary's presence at an abortion clinic during the pandemic not only affects the health and safety of herself and her pregnancy but also the health and wellbeing of her family.

Women in Mary's position face unique complications during the recent pandemic. Though the American College of Obstetricians and Gynecologists considered abortion an essential "time-sensitive service," some state governors issued executive orders suspending the practice in the early weeks of the pandemic.[5] Because of safety concerns, people may increasingly favor self-managed abortion procedures without in-person consultation.[6] According to Aid Access, the only online abortion telemedicine service in the United States, requests for self-managed medication abortions in the United States increased 27% between March 20 and April 11 of 2020.[7] This phenomenon may stem from fears of infection by the COVID-19 virus as well as an inability to access abortion clinics due to childcare or transit disruptions.[8] The World Health Organization (WHO) recommends telemedicine and self-managed abortion care during the pandemic, but this requires changing medical abortion policies for in-person dispensing of mifepristone, a drug used in medical abortions.[9]

On May 27, 2020, counsel for the American College of Obstetricians & Gynecologists filed a complaint for preliminary injunctive relief against the Food & Drug Administration (FDA) to forego the in-person dispensing requirement during a global pandemic.[10] Plaintiffs argue that this mandatory in-person dispensing policy unduly burdens patients' constitutional right to seek

[5] *Id.* at 1457; *see* B. Jessie Hill, *Essentially Elective: The Law and Ideology of Restricting Abortion During the COVID-19 Pandemic*, 106 VA. L. REV. ONLINE 99 (2020) (outlining litigation in the wake of state attempts to limit abortion access under executive orders limiting "non-essential" or "non-urgent" medical procedures).

[6] Abigail R.A. Aiken et al., *Demand for Self-Managed Online Telemedicine Abortion in the United States During the Coronavirus Disease 2019 (COVID-19) Pandemic*, 136(4) OBSTETRICS & GYNECOLOGY 835, 835–36 (2020).

[7] *Id.*

[8] *Id.* at 837.

[9] *Id.*

[10] Am. Coll. of Obstetricians & Gynecologists v. U.S. FDA, 472 F. Supp. 3d 183, 197 (D. Md. 2020).

an abortion.[11] While the pandemic brings uncertainty to many in Mary's situation, there is also a growing uncertainty regarding the judiciary's interpretation of the constitutional right to safe and legal abortion.

In the wake of *Roe v. Wade*, the United States Supreme Court greatly expanded constitutional protection for women by establishing a fundamental right to obtain a safe and legal abortion in the first trimester of gestation without governmental interference.[12] Nineteen years later, in *Planned Parenthood v. Casey*, the Court reaffirmed a woman's fundamental right to a safe and legal abortion but allowed government regulation in the first trimester, effectively limiting the constitutional protection afforded to abortion.[13] "Only where state regulation[s] *impose[] an undue burden on a woman's ability to make this decision* does the power of the State reach into the heart" of this fundamental right.[14]

In *Whole Woman's Health v. Hellerstedt*, the Supreme Court again expanded the constitutional protection for a woman's right to a safe and legal abortion by requiring a deeper judicial look into the medical effects of a law regulating abortion under *Casey*'s undue burden standard.[15] Last year, the Court's plurality opinion in *June Medical Services L.L.C. v. Russo* indicated that the justices could no longer agree on the proper interpretation of *Casey*.[16]

The realization of women's fundamental right to abortion not only faces uncertainties brought by a global pandemic, but also uncertainties in judicial interpretation and application of that right. In this article, I will examine the Supreme Court's jurisprudence on abortion rights.

[11] *Id.* at 211–17.
[12] Roe v. Wade, 410 U.S. 113 (1973).
[13] Planned Parenthood v. Casey, 505 U.S. 833 (1992).
[14] *Id.* at 874 (emphasis added).
[15] Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2309 (2016).
[16] June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103 (2020).

Then, I will review whether growing disagreements in applying *Casey*'s undue burden standard would again limit constitutional protections to the fundamental right to abortion in the time of COVID-19 and in future cases.

II. ORIGIN OF THE FUNDAMENTAL RIGHT TO REPRODUCTIVE AUTONOMY

Before addressing substantive law on abortion rights in the United States, it is important to understand a court's approach to fundamental rights in the Constitution.

First, courts must determine whether a right is fundamental. Generally, courts determine a fundamental right in historical terms. A fundamental right is a liberty "deeply rooted in this Nation's history and tradition."[17] Other scholars advocate that fundamental rights are those supported by a moral consensus within society.[18] No matter the perspective, a fundamental right must be one that a court sees as requiring special protection from governmental intrusion. If a fundamental right is at stake, a challenged law must survive strict scrutiny by a court; if not, then the challenged law need only survive an intermediate or rational basis level of scrutiny.[19]

Courts will uphold a law unless it "prejudice[s] against discrete and insular minorities[.]"[20] If a law affects minorities, then a court "may call for a correspondingly more searching [thorough] judicial inquiry."[21] Simply, if a law unjustly applies a suspect classification based on an immutable characteristic (race, gender, national origin) then a court will apply its most thorough review

[17] Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977).

[18] Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 284 (1973); *see* Trop v. Dulles, 356 U.S. 86, 100–01 (1958) (noting that denationalization for military desertion was unconstitutionally cruel and unusual punishment under the Eighth Amendment because this protection for individuals against excessive governmental treatment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.").

[19] WILLIAM J. RICH, MODERN CONSTITUTIONAL LAW § 11:3 (3d ed. 2019).

[20] United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) (holding that a Congressional Act prohibiting the shipment in interstate commerce of skimmed milk compounds was constitutional and did not require heightened judicial scrutiny because ample evidence of health concerns reinforces its purpose).

[21] *Id.*

(known as strict scrutiny) to that law.[22]

Second, if a law infringes on a fundamental right then the government must show a compelling state interest that justifies its infringement of that right.[23] If the infringed right is not fundamental, then a court only requires an important or legitimate interest justifying the government's infringement.[24] For instance, in abortion cases, the fundamental right at play is the individual woman's right to choose while the governmental interest is the health and preservation of life for both the mother and child. Courts must decide whether government's justification for laws regulating a woman's right to abortion sufficiently justify the law's continuation.

Finally, even if the government shows a sufficiently compelling or legitimate interest, it must also show that the law is necessary to achieve that interest.[25] To do this, government must prove it could not achieve its claimed interest through less restrictive means than by infringing the fundamental right. For a law impeding a fundamental right backed by compelling governmental interest, it must be narrowly tailored to achieve that interest; for a law impeding other rights not guaranteed by the Constitution and backed by a legitimate governmental interest, it must be only substantially related to achieving that interest.[26] Thus, if the government attempts to regulate a fundamental right, then the law infringing that right must do so as little as possible. If there is no fundamental right at issue, then courts will give broader deference to the legislature. Generally, to

[22] *See* Loving v. Virginia, 388 U.S. 1 (1967) (holding that a law prohibiting interracial marriage discriminated one's immutable characteristic of race and ruled unconstitutional under strict scrutiny); *see* Korematsu v. United States, 323 U.S. 214 (1944) (holding that a law discriminated one's immutable characteristic of national origin but national security interests justified its enactment); *see* Frontiero v. Richardson, 411 U.S. 677 (1973) (holding that a law discriminating based on gender dealt with an immutable characteristic and calls for strict scrutiny analysis); *see* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) (holding that laws impacting citizens with a mental disability is not discrimination based on an immutable characteristic requiring strict scrutiny).

[23] *Carolene Products Co.*, 304 U.S. at 152 n.4.

[24] RICH, *supra* note 19, at § 11:8.

[25] *Id.* § 11:4.

[26] *Id.* § 11:3.

summarize:

Level of Court Scrutiny	Required Level of Government Interest	Required Scope of the Contested Law
Strict Scrutiny	Compelling	Narrowly Tailored Means
Intermediate Scrutiny/Rational Basis	Important/Legitimate	Substantially/Reasonably Related Means

Table 1: Standards of Review[27]

Courts use this framework to determine the extent of a fundamental right's constitutional protection from government intrusion.

A. Early Interpretation of Reproductive Autonomy: A Broader Right to Privacy

The first expansion of women's right to privacy over reproductive autonomy occurred eight years before *Roe v. Wade*, paving the way for privacy rights extending to marriage, sexual orientation, and abortion.[28]

In *Griswold v. Connecticut*, the Supreme Court determined the constitutionality of a Connecticut law criminalizing both the use of contraceptives and the aiding of patients in preventing conception through contraceptives.[29] Appellants advised married couples on appropriate ways to prevent conception through contraceptives.[30] They argued that the law banning use and advisement of contraceptives violated the patient's personal liberty under the Due Process Clause of the Fourteenth Amendment.[31] In a 7-2 plurality decision, the Supreme Court

[27] Michael K. Steenson, Professor of Law, Mitchell Hamline School of Law, "Constitutional Law: Liberties" (Feb. 2019).

[28] *Lesson Plan: Landmark Supreme Court Case: Griswold v. Connecticut (1965)*, CSPAN CLASSROOM (Apr. 4, 2018).

[29] Griswold v. Connecticut, 381 U.S. 479, 480 (1965).

[30] *Id.*

[31] *Id.* at 480–82; *see* U.S. CONST. amend. XIV, §1 (noting that no "State [shall] deprive any person of life, liberty, or property, without due process of law").

held Connecticut's law unconstitutional because of its invasion into a person's personal sphere of privacy as protected by the Constitution even though the words "right to privacy" are not in its text.[32]

Conscious of this, Justice Douglas addressed where to find this "right to privacy" within the Constitution. He began by stating what the Court was not doing. "We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions."[33] To determine the extent of the Fourteenth Amendment's protection, the Court notes that other amendments in the Constitution also extend to rights not found in its text.[34]

> The [right to] association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents' choice—whether public or private or parochial—is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include [a guarantee] of those rights.[35]

The First Amendment protects not only speech and the press, but also a right to distribute and receive information.[36] These examples "suggest that specific guarantees in the Bill of Rights have penumbras [fringe rights], formed by emanations from those guarantees that help give them life and substance."[37] Simply, protections of individual action fulfilling the principles put forth in the

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[32] *Griswold*, 381 U.S. at 485 (holding that Defendants had standing to bring the case because this law criminally convicts them in serving married couples but third party standing in abortion cases is another area of dispute); *see* Brandon L. Winchel, Note, *The Double Standard for Third-Party Standing:* June Medical *and the Continuation of Disparate Standing Doctrine*, 96(1) Notre Dame L. Rev. 421 (2020); Stephen J. Wallace, Note, *Why Third-Party Standing in Abortion Suits Deserves a Closer Look*, 84 Notre Dame L. Rev. 1369 (2009).

[33] *Griswold*, 381 U.S. at 482.

[34] *Id.*

[35] *Id.*; *see* Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (holding that the right to educate one's children as one chooses applies to the states through the Fourteenth Amendment); *see* Meyer v. Nebraska, 262 U.S. 390 (1923) (holding that the right to study the German language applied to the states through the Fourteenth Amendment).

[36] *Griswold*, 381 U.S. at 482; *see* Martin v. City of Struthers, 319 U.S. 141, 143 (1943) (holding that a city ordinance prohibiting distribution of pamphlets and advertisements at individual's homes violated a Jehovah's Witness' implicit First Amendment right to distribute and receive information).

[37] *Griswold*, 381 U.S. at 484.

First Amendment give weight and substance to this fundamental right. To fully protect a street corner advocate's right to free speech, the Constitution must also protect their right to distribute ideas through their chosen means.

Similarly, various amendments, including the First Amendment's right to association, guarantee an individual's "zone of privacy" and so shows its importance to the liberty of American citizens.[38] The Ninth Amendment's declaration that all rights listed in the Constitution "shall not be construed to deny or disparage others retained by the people" lends weight to a general right to privacy from government intrusion.[39]

In *Griswold*, Justice Douglas concluded that the Connecticut law forbidding women's use of contraceptives regulates "a relationship lying within th[is] zone of privacy created by several fundamental constitutional guarantees."[40] The intimate marriage relationship is an area of privacy in which laws having a "governmental *purpose* to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."[41] Though not stated, Justice Douglas alludes to the idea that a law infringing a right so fundamental to citizens, such as private actions within a marital relationship, must be narrowly tailored.

Justice Goldberg, in his concurring opinion, agreed that the concept of one's personal liberty "is not confined to the specific terms of the Bill of Rights" when read with the Ninth

[38] *Id.* (noting the Third Amendment's prohibition to quartering soldiers without the homeowner's consent expresses a privacy right, the Fourth Amendment's right of the people to be secure from unreasonable government intrusion expresses a privacy right, while the Fifth Amendment guarantees a defendant may protect themselves in certain privacy rights from which government may not cross); *see* U.S. CONST. amends. III, IV & V; Katz v. United States, 389 U.S. 347 (1967) (holding that this right to privacy extends to not only private property but also to a person's reasonable expectation of privacy in semi-public areas).

[39] *Griswold*, 381 U.S. at 484; *see* U.S. CONST. amend. IX.

[40] *Griswold*, 381 U.S. at 485.

[41] *Id.* (emphasis added) (quoting NAACP v. Alabama, 377 U.S. 288, 307 (1964)).

Amendment.[42] Its language shows that "the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned" elsewhere in the Constitution.[43] Though the legislature may make laws as they see fit, Justice Goldberg "do[es] not believe that this includes the power to experiment with the fundamental liberties of citizens[.]"[44] This Connecticut law violating a marriage relationship's fundamental right to privacy can only stand if the government shows an "interest which is compelling."[45] Connecticut's legitimate (but not compelling) interest in protecting marital relationships "can be served by a more discriminately tailored statute, which does not . . . sweep unnecessarily broadly" in banning all use of contraceptives.[46] Justice White, concurring in *Griswold*, held that laws intruding on one's fundamental right to privacy must be subject to strict scrutiny, backed by a compelling governmental interest, and narrowly tailored to meet that interest.[47]

In dissent, Justice Black disagrees with this broad constitutional right to privacy. Though Justice Black thought this law was offensive, he would have held it as constitutional.[48] Defendants knowingly engaged in advising married couples to violate this law.[49] "Merely because some speech was used in [this conduct] . . . [the Court is] not . . . justified in holding that the First Amendment forbids the State to punish their conduct."[50] The plurality opinions discuss a constitutional right of privacy "as though there is some constitutional provision . . . forbidding any

[42] *Id.* at 486–87.
[43] *Id.* at 488.
[44] *Id.* at 496.
[45] *Id.* at 497–98.
[46] *Id.* at 498.
[47] *Id.* at 503.
[48] *Id.* at 507.
[49] *Id.* at 508.
[50] *Id.*

law ever to be passed which might abridge the 'privacy' of individuals. But there is not."[51] Justice Black warns that this type of constitutional interpretation distorts the textual meaning to give it the flexibility required to meet the Court's preferential outcome.[52]

The decision in *Griswold* greatly expanded what liberties the Supreme Court considers as a constitutionally protected fundamental right.

B. Abortion Rights in the Twentieth Century: An Established Fundamental Right and Its Unduly Burdened Demotion

In *Roe v. Wade*, the Supreme Court established a woman's fundamental right to an abortion free from governmental regulation during the first trimester.[53] In *Casey*, the Court reaffirmed this right but removed *Roe*'s absolute protection to a woman's fundamental right in the first trimester.[54] This development limits the Constitutional protection to one's privacy for abortion.

In *Roe*, the Court analyzed a Texas law, and similar Georgia law, making it a crime to procure, or attempt to procure, an abortion except to save the life of the mother.[55] Jane Roe was an unmarried woman seeking an abortion but could not do so because her life was not in danger if the pregnancy continued.[56] Like *Griswold*, Roe claimed this Texas law violated her right to personal privacy under the First, Fourth, Fifth, and Fourteenth Amendments.[57] But the Court resisted *Griswold*'s broad analysis and looked to history as a supplement.[58]

Justice Blackmun, in a plurality opinion, set out a brief history of some cultures embracing

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[51] *Id.*
[52] *Id.* at 509.
[53] Roe v. Wade, 410 U.S. 113 (1973) (holding that after the first trimester, the state's interest grows legitimate and even compelling as the pregnancy progresses).
[54] Planned Parenthood v. Casey, 505 U.S. 833, 871 (1992) (holding that the government's interest in protecting life need only be legitimate and not compelling).
[55] *Roe*, 410 U.S. at 117–18.
[56] *Id.* at 120.
[57] *Id.*
[58] *Id.* at 118–46.

the open practice of abortion.[59] Generally in common law, governments applied harsher criminal penalties on abortions after the moment of "quickening" (first recognizable movement of the fetus in utero).[60] Historically, United States laws penalized aborting both a quickened and un-quickened fetus, but the diminished penalties of aborting an un-quickened fetus suggested to the Court that an individual's right to abortion was stronger early in pregnancy.[61]

By 1973, danger to the mother's life during an abortion procedure decreased with the introduction of modern medical techniques.[62] With the aid of antibiotics, "data indicat[ed] that abortion in early pregnancy . . . prior to the end of the first trimester . . . [was] now relatively safe."[63] Given this information, the Court was ready to follow *Griswold*'s lead: "[t]his right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy[,]" and so is a fundamental right.[64]

To protect this right, the Court determined that the government may not regulate abortion within the first trimester of pregnancy.[65] But it also acknowledges that as the embryo grows during pregnancy, the government's increasing interest in protecting the life of the embryo overtakes the woman's fundamental right to an abortion.[66] The Court holds that after the first trimester, "the right of personal privacy includes the abortion decision, but that right is not unqualified and must be considered against *important* state interests in regulation [to preserve life]."[67]

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[59] *Id.*

[60] *Id.* at 132, 138 (noting that an 1821 Connecticut law charging a misdemeanor for abortion of an un-quickened fetus and second-degree manslaughter for abortion of a quickened fetus).

[61] *Id.* at 139.

[62] *Id.* at 149.

[63] *Id.*

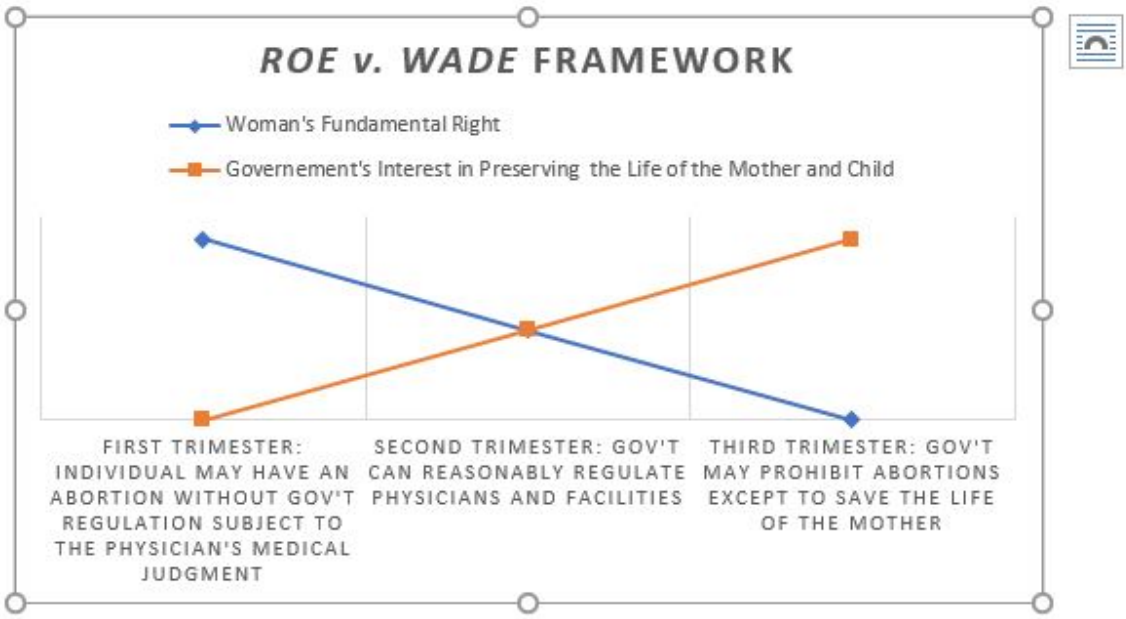
[64] *Id.* at 152–53 ("only personal rights that can be deemed 'fundamental' . . . are included in this guarantee of personal privacy.").

[65] *Id.* at 163.

[66] *Id.* at 153.

[67] *Id.* at 154 (emphasis added).

The right to abortion appears to require strict scrutiny in the first trimester, but then diminishes to a lower level of judicial scrutiny over time as the government's interest in the preservation of life increases. The Court ultimately establishes a three-trimester framework to determine where individual and government interests are at their highest.[68]



The three-trimester framework creates a zone of privacy around first trimester abortions in which there is no justifiable governmental regulation. This protection expands women's right to an abortion and privacy from government intrusion.

In dissent, Justice Rehnquist commended the historical and legal analysis but does not believe that a right to privacy is involved.[69] He believed that the Court's "conscious weighing of competing factors . . . is far more appropriate to a legislative [body]."[70]

The social impacts of *Roe v. Wade* are apparent. Before *Roe*, illegal abortion estimates

[68] *Id.* at 163.
[69] *Id.* at 171 (Rehnquist, J., dissenting).
[70] *Id.* at 173.

ranged between 200,000 and 1,200,000 per year in the 1950's and 1960's.[71] In 1969, illegal abortions in New York City accounted for 23% of all pregnancy-related hospital admissions.[72] In 1973, 36% of abortions occurred at or before eight weeks of pregnancy; today, 91.4% of all legal abortions occur within the first thirteen weeks of pregnancy.[73] Abortion counseling has also changed. At the time of *Roe*, counselors saw themselves as advocates.[74] Physicians did not know their role in this now nationally legal operation. After legalization, counsellors became advisors, informing patients of their options moving forward as well as providing emotional counseling to women having moral hesitations with the procedure.[75] "The political debate over abortion has largely ignored the public health fact that the *Roe v. Wade* decision did not create or change the need for abortion; legalization simply made abortion safe."[76] As of 2013, 0.3% of 1.2 million abortion patients per year experience a complication requiring hospitalization.[77] Between 1973 and 2014, doctors performed more than fifty million abortions in the United States, equating to more than one million abortions per year.[78]

Nineteen years after *Roe v. Wade*, the Supreme Court approached the fundamental right to abortion again in *Planned Parenthood v. Casey*. Pennsylvania's Abortion Control Act of 1982

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[71] *Medical and Social Health Benefits Since Abortion was Made Legal in the U.S.*, PLANNED PARENTHOOD, https://www.plannedparenthood.org/uploads/filer_public/eb/38/eb38bdf9-7ebb-4067-8758-13d28afa1d51/pp_med_soc_benefits_abortion_final_1.pdf (last updated Jan. 2015).

[72] *Id.*

[73] *Id.*

[74] Carole Joffe, *The Politicization of Abortion and the Evolution of Abortion Counseling*, 103(1) AM. J. OF PUB. HEALTH, 57, 59–60 (2013).

[75] *Id.* at 60–62.

[76] Susan Yanow, *It Is Time to Integrate Abortion Into Primary Care*, 103(1) AM. J. OF PUB. HEALTH, 14, 14–15 (2013).

[77] *Id.*

[78] Stephen A. McCurdy, *Abortion and Public Health: Time for Another Look*, 83(1) THE LINACRE Q. 20, 24 (2016); *but see CDCs Abortion Surveillance System FAQs*, Ctrs. for Disease Control & Prevention, https://cdc.gov/reproductivehealth/data_stats/abortion.htm (last updated Nov. 25, 2020) (providing the number of reported abortions throughout the United States between 2009–2018 totaling 6,790,706 equating to 679,071 of reported abortions per year).

required a woman seeking an abortion to give her informed consent to the tending physician while receiving certain information within twenty-four hours of the procedure.[79] It also required married women to sign a statement proving that she notified her husband of her intended abortion.[80] In a 5-4 plurality opinion, the Court reaffirmed a woman's fundamental right to an abortion.[81] But it rejected *Roe v. Wade*'s three-trimester framework and its prohibition of government interference within the first trimester of pregnancy.[82] Instead, the Court held that a fetus' viability,

> . . . is the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman.[83]

In cases between *Roe* and *Casey*, courts "decided that any regulation . . . must survive strict scrutiny, to be sustained only if drawn in narrow terms to further a compelling state interest."[84] But the Court in *Casey* noted that this interpretation conflicts with *Roe v. Wade*; the government "has *legitimate* interests in the health of the woman and in protecting the potential life within her."[85]

Under *Casey*, laws regulating abortion are unconstitutional "[o]nly where [it] imposes an undue burden on a woman's ability" to get an abortion.[86] An undue burden means a law with "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[87] Government regulations "which do no more than create a structural mechanism

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[79] Planned Parenthood v. Casey, 505 U.S. 833, 844 (1992).
[80] *Id.*
[81] *Id.* at 845–46.
[82] *Id.* at 872–73.
[83] *Id.* at 870.
[84] *Id.* at 871.
[85] *Id.* (emphasis added) (noting that this fundamental right does not call for strict scrutiny, unlike other fundamental rights, but rather a lower level of scrutiny).
[86] *Id.* at 874.
[87] *Id.* at 877.

by which the State . . . may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose."[88]

In *Casey*, the Court held that the government's interest to inform a patient of relevant health risks about abortion justified its informed consent requirement.[89] This portion of the law is a structural mechanism that does not amount to a substantial obstacle in obtaining an abortion.[90] But the law's requirement for proof of spousal consent may pose a substantial obstacle to a patient seeking an abortion.[91] "Many may fear devastating forms of psychological abuse from their husbands, including verbal harassment, threats of future violence . . . withdrawal of financial support, or the disclosure of the abortion to family and friends."[92] This portion of Pennsylvania's law is unconstitutional because it places a substantial obstacle unduly burdening a woman's right to abortion.[93]

Justice Stevens, in a concurring opinion, said the Court did not go far enough. "A state-imposed burden on the exercise of a constitutional right is measured both by its effects and by its character: A burden may be 'undue' either because the burden is too severe or because it lacks a legitimate, rational justification."[94] Justice Stevens argued that the informed consent requirement is also unconstitutional because "such a delay serves [no] useful and legitimate purpose."[95] This interpretation calls for a higher level of judicial scrutiny throughout all three trimesters.

Though *Roe* expanded women's fundamental right to privacy and access to safe and legal

[88] *Id.*
[89] *Id.* at 882.
[90] *Id.* at 883.
[91] *Id.* at 893.
[92] *Id.*
[93] *Id.* at 893–94.
[94] *Id.* at 920.
[95] *Id.* at 921.

abortion free from governmental intrusion, *Casey* changed the character of this fundamental right and limited its protection. The government may now regulate abortion early in pregnancies as long as it does not unduly burden abortion access. The fundamental right to abortion does not call for a compelling governmental interest with laws narrowly tailored to meet that interest, but only a legitimate governmental interest with laws substantially tailored to meet that interest.[96]

C. Abortion Rights in the Twenty First Century: A Balancing Interpretation with Signs of Disfavor

Both *Whole Woman's Health v. Hellerstedt* and *June Medical Services L.L.C. v. Russo* again tested the Supreme Court's interpretation of laws regulating a woman's right to abortion.[97]

In *Whole Woman's Health*, a 5-4 plurality opinion, Texas abortion providers sued to invalidate two laws regulating their clinics.[98] An admitting-privileges requirement directed physicians who perform abortions to have active admitting privileges at a hospital no farther than thirty miles from the clinic, while a surgical-center requirement compelled abortion facilities to have minimum safety standards equivalent to ambulatory surgical centers.[99]

While the District Court invalidated these regulations as unduly burdening a woman's right to abortion, the Court of Appeals for the Fifth Circuit reversed that ruling as inconsistent with the undue burden standard established in *Casey*.[100] It expressed the standard as a state law "regulating previability abortion is constitutional if: (1) it does not have the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus; and (2) it is

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[96] *Id.* at 871.

[97] Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2300 (2016); June Med. Services L.L.C. v. Russo, 140 S. Ct. 2103, 2112 (2020).

[98] *Whole Woman' Health*, 136 S. Ct. at 2300.

[99] *Id.*

[100] *Id.* at 2301.

reasonably related to (or designed to further) a legitimate interest."[101]

Justice Breyer, writing for the Court, held that this was an incomplete interpretation of *Casey* because the first element "requires . . . the courts [to] consider the burdens a law imposes on abortion access *together with the benefits those laws confer*."[102] This definition, the dissent argued, is the Supreme Court's attempt to apply heightened judicial scrutiny when analyzing Texas' law because it may affect a woman's fundamental right to abortion.[103]

Texas first argued that the benefit of the admitting-privileges requirement is to "help ensure that women have easy access to a hospital should complications arise during an abortion procedure."[104] The Supreme Court pushed back with medical testimony noting that complications were rare in early pregnancy abortions.[105] The highest rate or major abortion complications, including those requiring hospital admission "was less than one-quarter of 1%."[106] "The [district] court found that '[t]he great weight of evidence demonstrates that, before the [admitting-privileges requirement's] passage, abortion in Texas was extremely safe with particularly low rates of serious complications and virtually no deaths occurring on account of the procedure.' Thus, there was no significant health-related problem that the new law helped to cure."[107] The law did not appear to accomplish its alleged benefit.

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[101] *Id.* at 2303.

[102] *Id.* at 2309 (emphasis added); *see* Planned Parenthood v. Casey, 505 U.S. 833, 887–98 (1992) (performing this balancing on a spousal notification provision); *see also id.* at 889–901 (performing a balancing on a parental notification provision); *id.* at 878 ("[u]nnecessary health regulations that have the purpose or effect of placing a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.").

[103] *Whole Woman's Health*, 136 S. Ct. at 2324 (Thomas, J., dissenting) (noting that this definition of "the undue-burden test [is] something much more akin to strict scrutiny.").

[104] *Id.* at 2311.

[105] *Id.*

[106] *Id.* (noting that a study of 54,911 abortions recorded complications in 2.1% of patients, and 0.23% of those complications required hospital admission).

[107] *Id.* (citation omitted).

Texas' law also posed a substantial obstacle in the way of a woman's ability to have an abortion because of its impact on local abortion clinics. Since many clinics were not within thirty miles of a hospital, eight clinics closed before the law's effective date and eleven more closed soon after.[108] "These closures meant "fewer doctors, longer waiting times, and increased crowding" effectively limiting the locations in which a woman could access a safe and legal abortion.[109] The admitting-privileges requirement placed a substantial obstacle to abortion access and provided minimal medical benefits to patients.[110] The Supreme Court held that the admitting-privileges requirement unconstitutionally placed an undue burden on the fundamental right to abortion.[111]

Texas next argued that the surgical-center requirement establishes high safety standards in local clinics to protect women during their procedure should complications arise.[112] The Supreme Court, however, noted that safety "risks are not appreciably lowered for patients who undergo abortions at ambulatory surgical centers as compared to nonsurgical-center facilities."[113] Moreover, medically-induced abortions rarely have complications and those that do arise usually occur after a patient has left the facility.[114] Renovating clinics to bring the facility up to ambulatory surgical standards also posed an economic burden.[115] Unaffordable renovations may force closures leaving the few open clinics with strained capacity.[116] The surgical-center requirement also placed a substantial obstacle in the path of women attending an open clinic, provided minimal benefits,

[108] *Id.* at 2312.
[109] *Id.* at 2313.
[110] *Id.*
[111] *Id.* at 2300–01.
[112] *Id.* at 2314.
[113] *Id.* at 2315.
[114] *Id.*
[115] *Id.* at 2296–97 (noting that upgrade renovations of existing clinics would cost between $1.5–$3 million dollars to comply with ambulatory surgical requirements).
[116] *Id.*; *see id.* at 2299 (noting that if clinics continued to close due to the surgical-center requirement, then the remaining clinics may need to accommodate an increased capacity by a factor of about five).

and did not further Texas' legitimate interest in protecting women who may have complications during a procedure.[117] The Court held that the surgical-center requirement unconstitutionally placed an undue burden on the fundamental right to abortion.[118]

In his dissent, Justice Thomas opposed the Supreme Court's interpretation of *Casey* and its intent to weigh a law's burden on abortion access together with the benefit it confers.[119] "*Casey* did not balance the benefits and burdens of Pennsylvania's spousal and parental notification provisions, . . . [it] imposed an undue burden because findings established that the requirement would 'likely . . . prevent a significant number of women from obtaining an abortion'—not because these burdens outweighed its benefits."[120] This interpretation is "nowhere to be found in *Casey* or its successors, and transform[s] the undue-burden test to something *much more akin to strict scrutiny*."[121]

Whole Woman's Health raised the level of scrutiny established in *Casey*.[122] Justice Breyer's interpretation appears to also embrace Justice Stevens' interpretation in his partial concurrence and dissent opinion in *Casey*.[123]

The Supreme Court again applied this higher level of scrutiny to laws regulating abortion in *June Medical Services L.L.C. v. Russo*. In *Russo*, it addressed a nearly identical admitting-

[117] *Id.* at 2300.
[118] *Id.* at 2318.
[119] *Id.* at 2324 (Thomas, J., dissenting).
[120] *Id.*; *see id.* at 2325 (noting that it is not the job of the judiciary to assess medical uncertainties to justify legislation).
[121] *Id.* at 2324 (emphasis added).
[122] *See* Linda Greenhouse & Reva B. Siegel, *The Difference a Whole Woman Makes: Protection for the Abortion Right After* Whole Woman's Health, 126 YALE L.J. F. 149 (Oct. 11, 2016) (noting that *Whole Woman's Health* might reshape abortion rulings with the Court's application of the undue burden framework).
[123] Planned Parenthood v. Casey, 505 U.S 833, at 920 ("A state-imposed burden on the exercise of a constitutional right is measured both by its effects and by its character: a burden may be 'undue' either because the burden is too severe or because it lacks a legitimate, rational justification.").

privileges requirement in Louisiana.[124] Three abortion clinics and two abortion providers sued arguing it unconstitutionally "imposed an undue burden on the right of their patients to obtain an abortion."[125] In a 5-4 plurality opinion, Justice Breyer applied the same undue burden standard as in *Whole Woman's Health*; laws furthering a legitimate state interest regulating abortion are unconstitutional if it has the purpose or effect of placing a substantial obstacle in the path of a woman's right to choose.[126] To assess a substantial obstacle, the Court should consider the burdens that a law imposes on abortion access together with the benefits that a law confers.[127]

First, the Court analyzed the law's burdens on abortion clinics and providers.[128] Evidence showed four of these providers tried—in good faith—to obtain admitting privileges but failed "for reasons that had nothing to do with their ability to perform abortions safely."[129] Even if providers in Louisiana obtained admitting privileges to a nearby hospital, they may lose privileges for failing to meet minimum hospital admission requirements due to the low number of complications during abortion procedures.[130] As a result, many clinics would close leaving only a few to serve large areas of Louisiana.[131] The Court held that Louisiana's admitting-privileges requirement placed a heavy burden on a woman's right to an abortion.[132]

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[124] June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103 at 2112 (2020).

[125] *Id.* at 2113; *see id.* at 2118–19 (noting the clinics and providers had proper third-party standing to bring a constitutionality claim on behalf of their patients); *but see id.* at 2142–44 (noting, in dissent, that it is improper for courts to hear cases claiming third-party standing under U.S. Constitution Article III's case-or-controversy requirement).

[126] *Id.* at 2120.

[127] *Id.*

[128] *Id.* at 2122.

[129] *Id.*; *see id.* at 2123 ("evidence also shows that opposition to abortion played a significant role in some hospitals' decisions to deny admitting privileges.").

[130] *Id.* at 2123; *see* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2312 ("hospitals often condition admitting privileges on reaching a certain number of admissions per year.").

[131] *June Med. Services L.L.C.*, 140 S. Ct. at 2128–30 (noting that this would lead to longer wait times, increased crowding, and increased travel distances); *see id.* at 2130 (noting increased travel burdens fall disproportionately on poor women who are least able to absorb them).

[132] *Id.* at 2130.

Second, the Supreme Court assessed the medical benefits of Louisiana's admitting-privileges requirement and found none.[133] It concluded that "'[c]omplications from surgical abortion are relatively rare,' and '[t]hey very rarely require transfer to a hospital or emergency room and are generally not serious.'"[134] Furthermore, complications from medically-induced abortions usually arise after the patient has left the facility.[135] The Court therefore determined that the admitting-privileges requirement provided no medical benefit.[136]

After weighing the burdens and benefits of Louisiana's law, four of the five Justices in the majority held that it effectively posed a substantial obstacle in the path of a woman's right to an abortion.[137] The law also did not further Louisiana's legitimate interest to protect the health and safety of women.[138] Thus, Louisiana's admitting-privileges requirement was unconstitutional.[139]

Chief Justice Roberts, in a concurring opinion, signaled his discontent in the Court's application of *Casey*'s undue burden standard.[140] He notes that measuring a law's potential burden together with its benefits is impossible and not a job for this Court: "[C]ourts applying [this] balancing test would be asked in essence to weigh the [government's] interests 'in protecting the potentiality of human life' and the health of the woman, on one hand, against the woman's liberty interest in defining her 'own concept of existence, of meaning, of the universe, and of the mystery of human life' on the other. There is no plausible sense in which anyone, let alone this Court, could

[133] *Id.* at 2131–32.
[134] *Id.* at 2131 (citation omitted).
[135] *Id.* (noting standard protocol "when a patient experiences a complication after returning home from the clinic is to send her 'to the hospital that is nearest and able to provide the service that the patient needs.' which is not necessarily a hospital within 30 miles of the clinic." (citation omitted)).
[136] *Id.* at 2132.
[137] *Id.* at 2133.
[138] *Id.*
[139] *Id.*
[140] *Id.* at 2135 (Roberts, C.J, concurring); *see id.* at 2134 (noting that the principle of stare decisis (similar cases should be decided similarly) called for consistency in the Court's ruling).

objectively assign weight to such imponderable values and no meaningful way to compare them if there were. Attempting to do so would be like 'judging whether a particular line is longer than a particular rock is heavy[.]'"[141]

Simply put, interpreting the undue burden standard as requiring analysis of the burdens a law imposes together with the benefits those laws confer, conflicts with the precedent established in *Casey* and is an improper application of the undue burden standard.[142] Chief Justice Roberts' concurrence in *Russo* is a sign that five members of the Court would disregard any potential benefits a law may have when regulating abortion and only focus on whether it poses a substantial obstacle to abortion access.

III. Abortion Rights in the Time of COVID-19

The COVID-19 pandemic is a new unforeseeable burden on existing abortion regulations compounding the growing disagreement of judicial interpretation. As of March 18, 2021, there have been 29,431,658 confirmed cases of COVID-19 in the United States resulting in 535,217 deaths.[143] Early in the pandemic, governors throughout the United States considered abortions "non-essential" and closed clinics to preserve personal protective equipment for healthcare workers.[144] These closures barred women's access to safe and legal abortions during a critical time of their pregnancy. According to the Centers for Disease Control and Prevention's latest abortion surveillance data from 2016, 91% of the 623,471 recorded abortions occurred within the first 13

[141] *Id.* at 2136 (citation omitted).
[142] *Id.*
[143] *United States COVID-19 Cases and Deaths by State*, Ctrs. for Disease Control & Prevention, https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days (last updated Mar. 13, 2020, 8:22 PM).
[144] Sackeim, *supra* note 1; *but see* Lindsay F. Wiley & Stephen I. Vladeck, *Coronavirus, Civil Liberties, and the Courts: The Case Against "Suspending" Judicial Review*, 133 Harv. L. Rev. F. 179 (2020) (arguing that judicial review concluding suspension of civil liberties because of a pandemic, and in general, is improper).

weeks of pregnancy.[145] The decision to close abortion clinics during the pandemic could have delayed about 32,732 abortions between March 22 and April 12, 2020.[146]

Though many governors now define abortion access as essential healthcare, telemedicine may be an important way to access medication abortions while meeting safety guidelines during the pandemic. Four policies in the United States impede telemedicine use:

(1) State laws requiring separate, in-person counseling followed by a waiting period before medical or surgical abortion;

(2) State laws requiring an ultrasound at the time of the abortion;

(3) State laws mandating the prescribing clinician to be physically present during mifepristone administration; and

(4) The FDA Risk Evaluation and Mitigation Strategies (REMS) for mifepristone, a medical inducing abortion pill, mandating in-person drug dispensing to patients within a clinic or hospital setting under supervision of the prescriber.[147]

A. The FDA Regulation of Mifepristone

In 2000, the FDA approved the use of mifepristone with another pill called misoprostol (both used for nonsurgical abortions).[148] Recognizing mifepristone can cause incomplete abortions or serious bleeding, the FDA administered REMS for mifepristone because of its adverse effects requiring that the "drug be dispensed to patients only in certain health care settings," such as

[145] Elizabeth Chloe Romanis et al., *COVID-19 and Reproductive Justice in Great Britain and the United States: Ensuring Access to Abortion Care During a Global Pandemic*, 7 J. L. BIOSCIENCES 1, 4 (2020).
[146] *Id.* at 4.
[147] Isabel R. Fulcher et al., *State and Federal Abortion Restrictions Increase Risk of COVID-19 Exposure by Mandating Unnecessary Clinic Visits*, 102(6) CONTRACEPTION 385, 385–86 (2020).
[148] Am. Coll. of Obstetricians & Gynecologists v. U.S. FDA, 472 F. Supp. 3d 183, 189–90 (D. Md. 2020).

hospitals, clinics, or offices under the supervision of a certified provider.[149] Upon review in 2016, the FDA concluded that no new safety concerns arose since 2007, the known serious risks occur rarely, and that future serious adverse events will remain low.[150] As a result, the FDA allowed patients to self-administer "based on the finding that there is 'no significant difference in either efficacy or safety' for women who take both mifepristone and misoprostol at home as compared to women who take mifepristone at a medical office and misoprostol at home."[151] However, the FDA still required patients to pick up mifepristone, in person, at a designated health care setting while under the supervision of a healthcare provider.[152]

To receive mifepristone, healthcare providers must first determine a patient's eligibility through an interview.[153] The FDA does not regulate in what manner this assessment occurs.[154] The initial interview may occur either in person or through telemedicine.[155] Next, the healthcare provider counsels the patients on mifepristone's risks, use of the drug, and follow-up care.[156] Finally, the patient must obtain mifepristone in person at a hospital, clinic, or medical office in accordance with FDA regulations.[157]

On March 13, 2020, the president of the United States declared a national emergency in response to the COVID-19 pandemic, giving the secretary of Health and Human Services (HHS) emergency authority "to temporarily waive or modify certain requirements of the Medicare,

[149] *Id.* at 191; *see* 21 U.S.C. § 355-1(f)(3)(C) (2020).
[150] *Am. Coll. of Obstetricians & Gynecologists*, 472 F. Supp. 3d at 190–91.
[151] *Id.* at 191 (citation omitted).
[152] *Id.*
[153] *Id.* at 192 (noting that the healthcare provider determines whether the patient is less than ten weeks pregnant and does not have an ectopic pregnancy).
[154] *Id.*
[155] *Id.* (noting that whether the interview occurs in-person or through video depends on the healthcare professional's best medical judgment).
[156] *Id.*
[157] *Id.*

Medicaid, and State Children's Health Insurance programs . . ." throughout the COVID-19 outbreak.[158] In response, the Secretary of HHS waived in-person dispensing requirements for certain drugs but not for mifepristone.[159]

Medical professionals and reproductive activists quickly sued the FDA to forgo its required in-person distribution of mifepristone during the pandemic in *American College of Obstetricians & Gynecologists v. United States FDA.*[160]

B. Resulting Medication Abortion Care

Diminished access to abortion care is one unintended effect of the recent pandemic. Many medical offices have closed or reduced their capacity to comply with government safety regulations.[161] Procuring transportation to attend the in-person requirement amid the pandemic can be particularly difficult for patients with lower incomes as well as minority communities.[162]

Arranging childcare during in-person medical visits is another complication for some patients. "[T]his challenge is more acute during the pandemic because many schools and daycare centers have closed . . . " and medical offices may not allow patients' children to come with them to appointments.[163] Issues with transportation and childcare during the pandemic have also disproportionately affected minority communities.[164]

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[158] Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, 3 C.F.R. § 1 (2020).

[159] *Am. Coll. of Obstetricians & Gynecologists*, 472 F. Supp. 3d at 194 (noting that drugs Spravato and Tysabri no longer require in-person dispensing during the COVID-19 pandemic).

[160] *Id.* at 189.

[161] *Id.* at 196 (noting that one doctor who testified estimated that her medical office would operate at 25% capacity through the spring of 2021).

[162] *Id.* at 196–97 (noting that 75% of women obtaining abortions are people with low-income and 60% are women of color who, according to SisterSong Women of Color Reproductive Justice Collective, rely more heavily on public transportation and other modes of transportation that may expose them to risk of infection by COVID-19).

[163] *Id.* at 197.

[164] *Id.* at 197–98. (noting that according to an April 2020 study, 61% of Hispanic American and 44% of African American families experienced a job or wage loss).

In *American College of Obstetricians & Gynecologists v. United States FDA*, medical experts testified that, "[T]elemedicine can be used to meet the REMS requirements of an assessment of an abortion patient, required counseling and discussion of the Patient Agreement Form, and securing of a signature on that form without having to meet in person with the patient . . . [M]ifepristone can be safely and promptly delivered by mail or delivery services to a patient at or near the time of the signing of the Patient Agreement Form. Accordingly, [the medical experts] conclude that in light of telemedicine, the In-Person Requirements are medically unnecessary."[165]

Though the pandemic placed unintended effects on abortion access, telemedicine appears to be a workable alternative to avoid possible burdens on abortion access while continuing to respect the benefits of safety furthered by the FDA's regulation on mifepristone.

C. Weighing the Burdens and Benefits During COVID-19

In determining whether the FDA's in-person dispensing requirement of mifepristone unduly burdens a woman's fundamental right to abortion access in a pandemic, the Federal District Court of Maryland followed the Supreme Court's process in *Whole Woman's Health*.[166] The district court considered the burdens the law imposed on abortion access together with the benefits the law confers, to find whether it posed a substantial obstacle to women seeking a medication abortion.[167]

First, the district court assessed the burdens the in-person dispensing requirement places on patients seeking medication abortions.[168] Many patients eligible for mifepristone are

[165] *Id.*
[166] *Id.* at 208.
[167] *Id.*
[168] *Id.* at 211–12.

susceptible to increased travel costs, difficulties in securing transportation, a potential need to arrange childcare, and overwhelming healthcare providers struggling with increased demand because of closures.[169] Also, "[b]ecause many individuals infected with [COVID-19] lack symptoms, . . . any time that abortion patients venture out of their residence, including to fulfill the In-Person Requirements, they risk contracting a highly dangerous disease."[170]

The FDA argued that risks to any abortion patient traveling to a medical office is low and the overall difficulty of travel does not amount to a substantial obstacle.[171] But this argument contradicts the FDA's decision to waive in-person requirements for other drugs to minimize health risks.[172] The in-person dispensing requirement did pose a substantial obstacle to women seeking medication abortions because it posed both safety and economic challenges to the patient.[173]

Second, the district court assessed the benefits that the in-person dispensing requirement provides patients seeking medication abortions.[174] According to Dr. Allison Bryant Mantha ("Dr. Bryant") an OB/GYN at Massachusetts General Hospital in Boston and an associate professor at Harvard Medical School, "there is no clinical reason to require patients to travel to a clinic, hospital, or medical office in person to obtain mifepristone."[175] The court concluded that healthcare providers can assess a patient's eligibility to use mifepristone through telemedicine; if a healthcare provider, in their best medical judgment, requires an in-person meeting, then this can occur.[176]

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[169] *Id.*
[170] *Id.* at 212.
[171] *Id.* at 212–13.
[172] *Id.*; *see also id.* at 194 (noting that the drugs Spravato and Tysabri no longer require in-person dispensing during the pandemic).
[173] *Id.* at 217.
[174] *Id.* at 217–18.
[175] *Id.* at 217.
[176] *Id.* at 221.

The FDA argued that the in-person dispensing requirement is necessary for healthcare counseling, mitigating serious risks associated with mifepristone use, and preventing delays in filling prescriptions, which may occur through mail or commercial carriers.[177] Yet, the court emphasized, telemedicine is available to counsel the patient on risks associated with mifepristone without meeting in person.[178] There is also little evidence that removing the in-person dispensing requirement will cause delays in taking the medication, as commercial carriers are capable of same-day delivery.[179] In fact, there appears to be little actual health benefit to the in-person dispensing requirement. According to Dr. Bryant, "[t]here is no safety or medical benefit in requiring patients to make a trip to the health care facility just to pick up the mifepristone."[180]

Finally, the district court measured the burdens of the in-person dispensing requirement against its benefits. "[T]he more substantial the burden, the stronger the [FDA]'s justification for the law must be to satisfy the undue burden test; conversely, the stronger the [FDA]'s justification, the greater the burden may be before it becomes 'undue.'"[181] It held that the in-person dispensing requirement most likely does pose a substantial obstacle in the path of a woman's fundamental right to an abortion without adequate justification and therefore is likely unconstitutional.[182]

On July 13, 2020, the District Court ruled for the plaintiff's preliminary injunctive relief claim noting "the In-Person Requirements, combined with the COVID-19 pandemic, place a substantial obstacle in the path of women seeking medication abortion and that may delay or

[177] *Id.* at 218–221.
[178] *Id.* at 220.
[179] *Id.* at 221.
[180] *Id.* at 218.
[181] *Id.* at 222.
[182] *Id.* at 223.

preclude a medication abortion and thus may necessitate a more invasive procedure."[183] As a result, the FDA must allow dispensing mifepristone absent in-person contact unless the prescribing physician, in their expert medical opinion, requires an in-person visit.[184] This ruling, however, is not indefinite. It is only enforceable until this case has finished, or the Secretary of Health and Human Services ends the public health emergency declared under 42 U.S.C. § 247d, whichever comes first.[185]

On August 26, 2020, the FDA appealed to the Supreme Court arguing that the in-person dispensing requirement is a long-established safety check, there are still surgical methods of abortion available, and the pandemic's incidental effects on abortion access does not make a law unconstitutional especially when government action is not the cause.[186] On October 8, 2020, the Supreme Court denied the FDA's appeal to review its request to stay the lower court's order on the merits.[187] A dissent by Justice Alito, joined by Justice Thomas, accompanied the Court's denial for review expressing the inconsistencies in the Court's recent rulings on "COVID-19-related public safety measures."[188]

In *South Bay United Pentecostal Church v. Newsom*, the Supreme Court upheld a Governor's Executive Order limiting attendance of public gatherings three months earlier.[189] Religious institutions argued this order violated their right to religious practice under the Free

[183] *Id.* at 227.
[184] *Id.*
[185] *Id.* at 233.
[186] Application for a Stay at 3, FDA v. Am. Coll. of Obstetricians & Gynecologists, 141 S. Ct. 10 (2020) (No. 20A34).
[187] FDA v. Am. Coll. of Obstetricians & Gynecologists, 141 S. Ct. 10 (2020); *see* Nina Totenberg, *Supreme Court Punts on Abortion Pills, Allowing Them To Be Mailed—For Now*, NPR News (Oct. 8, 2020), https://www.npr.org/2020/10/08/921921889/supreme-court-refuses-to-block-lower-court-order-on-abortion-pills.
[188] *Am. Coll. of Obstetricians & Gynecologists*, 141 S. Ct. at 11 (Alito, J., dissenting).
[189] S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020) (mem.).

Exercise Clause of the First Amendment.[190] Though the Executive Order limited the number of worshipers in a church, it also limited public gatherings in secular settings and so did not violate the Free Exercise Clause.[191] Furthermore, public officials have broad discretion when acting in areas of medical and scientific uncertainty in the interest of public safety.[192] The Court allowed government intrusion to an individual's First Amendment fundamental right to gather and freely practice religion by giving elected officials broad discretion in actions furthering the health and safety of the public during a pandemic. But it did not review the FDA's appeal to enforce its in-person dispensing requirement furthering protection of women who wish to obtain an abortion.

Justice Alito noted that decisions by an unelected federal judiciary, lacking medical expertise, should give latitude to the government's medical experts.[193] "While COVID-19 has provided the ground for restrictions on First Amendment rights, the District Court saw the pandemic as a ground for expanding the abortion right recognized in *Roe v. Wade*."[194]

D. Abortion Rights Without the Benefit of Assessing Medical Benefits

If the Supreme Court continues to defer to the legislature when assessing medical benefits of laws regulating abortion, then judicial protection of a woman's fundamental right to abortion will diminish. Following *Russo*, lower courts are already following Chief Justice Roberts'

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[190] *Id.* (Roberts, C.J., concurring).

[191] *Id.* (noting the Governor's Executive Order limiting attendance in public gatherings applied to places of worship, lectures, concerts, movie showings, sporting events, and theatrical performances).

[192] *See* Jacobson v. Massachusetts, 197 U.S. 11 (1905) (holding that a mandatory smallpox vaccination was constitutional because it substantially furthered government official's constitutional duty to promote the safety and health of the public); *see* Marshall v. United States, 414 U.S. 417 (1974) (giving broad discretion to Congress' actions allowing a drug rehabilitation option for those with two offenses or less under the Narcotic Addict Rehabilitation Act of 1966 because it is an action in an area of medical and scientific uncertainty).

[193] *Am. Coll. of Obstetricians & Gynecologists*, 141 S. Ct. at 12.

[194] *Id.* at 12; *but see* Ariane Frosh, *Reproducing Equality: How COVID-19 Can Strengthen Abortion Rights*, 68 UCLA L. REV. DISCOURSE 80 (2020) (noting that the pandemic laid bare the inadequacies of traditional constitutional interpretation to protect women's reproductive rights when it does not account for socioeconomic context of women seeking safe and legal abortions).

interpretation of *Casey* instead of Justice Breyer's interpretation.

In *EMWomen's Surgical Center P.S.C. v. Friedlander*, the United States Court of Appeals for the Sixth Circuit determined the constitutionality of a Kentucky regulation "requiring abortion facilities to obtain transfer agreements with a local hospital and transport agreements with local ambulance service[s]."[195] When a Supreme Court opinion garners a split majority, as in *Russo*, lower courts must "treat the 'position taken by [the Justice or Justices] who concurred in the judgment[] on the narrowest grounds' as 'the holding of the Court.'"[196] Justice Breyer's interpretation in *Russo*, judicially scrutinizing a law's medical benefits, would presumably invalidate more laws than Chief Justice Roberts' interpretation.[197] Chief Justice Roberts' concurrence therefore controls as precedent for lower courts in abortion-related cases.[198]

Following Chief Justice Roberts in *Russo*, the Sixth Circuit Court determined that a law regulating abortion is valid if it is reasonably related to a legitimate state interest and does not have the effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.[199]

Like the government's health-related justifications for its admitting-privileges requirement in *Whole Woman's Health* and *Russo*, Kentucky justified its transfer—and transport—requirement as a safety precaution if abortion-related complications arise in its facilities.[200] The Circuit Court reasoned that "state and federal legislatures [have] wide discretion to pass legislation in areas

[195] EMWomen's Surgical Ctr., P.S.C. v. Friedlander, 978 F.3d 418, 422–23 (6th Cir. 2020).
[196] *Id.* at 431 (quoting Marks v. United States, 430 U.S. 188, 193 (1977)).
[197] *Id* at 431–33.
[198] *Id.*
[199] *Id.* at 432–34.
[200] *Id.* at 439.

where there is medical and scientific uncertainty."[201] Courts, therefore, lack the authority to determine whether a state's reason for its regulation is medically sensible.[202] Kentucky's transfer—and transport—requirement is a reasonable protection for women who suffer complications during an abortion procedure and is reasonably related to Kentucky's legitimate interest in protecting the health of women seeking abortion.[203]

For Kentucky's transfer—and transport—requirement to pose a substantial obstacle in the path of women seeking an abortion, abortion clinics must show that their facilities would close if the requirement took effect despite making a good faith attempt to comply.[204] Kentucky's abortion clinics failed to do so.[205] Following Chief Justice Roberts' concurrence in *Russo*, the Circuit Court upheld Kentucky's transfer—and transport—requirement because it was reasonably related to a legitimate state interest and did not pose a substantial obstacle in the path of women seeking an abortion.[206]

The Supreme Court will continue to give greater deference to legislatures in abortion-related cases when medical benefits are at play.[207] This approach once again effectively lowers the Court's scrutiny in such cases.

CONCLUSION

The Supreme Court's protection of the constitutional right to abortion expands and

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[201] *Id.* at 438 (quoting Gonzales v. Carhart, 550 U.S. 124, 163 (2007)); *see* June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2136 (2020) (Roberts, C.J., concurring in judgment); *see Gonzales*, 550 U.S. 124 (holding that Congress' Partial-Birth Abortion Ban Act was constitutional by deferring to the Legislature's medical justifications).

[202] *EMWomen's Surgical Ctr., P.S.C.*, 978 F.3d at 438.

[203] *Id.* at 438–39.

[204] *Id.* at 440; *see June Med. Servs. L.L.C.*, 140 S. Ct. at 2141 (Roberts, C.J., concurring in the judgment).

[205] *EMWomen's Surgical Ctr.*, 978 F.3d at 442–45.

[206] *Id.* at 446.

[207] *See June Med. Servs. L.L.C.*, 140 S. Ct. at 2157 (Alito, J., dissenting); *see EMWomen's Surgical Ctr., P.S.C.*, 978 F.3d at 438 (noting that Chief Justice Roberts' interpretation of the undue burden test in *Russo* is the controlling standard and calls for deference to legislative bodies when determining a law's health benefits when regulating abortion).

contracts as the Court changes its members. In *Roe*, the Court greatly expanded women's access to safe abortion procedures by establishing a fundamental right and prohibiting governmental regulation in the first trimester. In *Casey*, the Court limited this right by allowing government to regulate abortion during pre-viability so long as it had a legitimate purpose to do so, and its law did not pose a substantial obstacle to women seeking a safe and legal abortion. In *Whole Woman's Health*, the Court interpreted *Casey*'s undue burden standard as requiring analysis of a law's burden on women's access to abortion as well as its medical benefits effectively raising the required judicial scrutiny in abortion-related cases. Last year in *Russo*, a majority of the Supreme Court no longer agrees with this interpretation.

Roe v. Wade's fundamental right to a safe and legal abortion is part of the Supreme Court's jurisprudence. But women's realization of this fundamental right may garner limited judicial protection for years to come due to unforeseen difficulties brought by the COVID-19 pandemic, as well as growing disagreement on the Supreme Court.

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