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IN ABORTION LITIGATION, IT'S THE FACTS THAT MATTER

Caitlin E. Borgmann

The undue burden standard has become a double standard in the evaluation of abortion restrictions. Courts demand from plaintiffs fact-intensive proof that an abortion law causes harm. Usually, plaintiffs must prove that the law will completely deny some women access to abortion, a difficult if not impossible task in many cases. At the same time, courts are highly deferential to the states' own fact-based assertions about why these laws are needed. If states simply assert that laws are intended to protect women's health, keep women informed of their options, or protect the integrity of the medical profession, for example, courts tend to agree, with minimal further inquiry. As a result, the country is replete with onerous, factually unjustified abortion laws.

When legislatures target controversial rights or unpopular groups, courts should look beyond the nature of the asserted government interest and closely examine the factual bases supposedly undergirding these laws. This is because thorough, unbiased factfinding often takes a back seat in these cases. For years, bans on marriages between same-sex couples were defended in part on the assertion that children are harmed when raised by gay couples. But courts that looked closely at the evidence saw that the claim was spurious, and the Supreme Court implicitly agreed in its recent decision invalidating section 3 of the Defense of Marriage Act. Abortion regulation is subject to the same disregard for facts. Unless courts are willing to take a closer look at the factual premises states cite to justify these measures, factually unsupported abortion laws will continue to flourish. The Supreme Court this year will likely review a Texas abortion restriction that purports to promote abortion patients' safety but, far from doing so, has caused a dozen clinics to shut down. If the Court takes up the issue, it should review the state's alleged justifications for the law at least as closely as it does the plaintiffs' proof of the law's burdensome effects.

Unfortunately, courts applying the undue burden standard established in *Planned Parenthood v. Casey* in 1992 have tended to focus mainly or exclusively on the effects of abortion restrictions, promoting judicial disregard for the facts underlying these laws. The anti-abortion-rights movement has pushed the envelope of the undue burden standard, successfully pressing state legislatures to pass ever-more onerous measures, some of which threaten to, or already have, shut down abortion clinics. The courts' primary inquiry in reviewing these

laws is usually whether the restrictions have the *effect* of placing a substantial obstacle in the path of women seeking abortions. That question inevitably depends on variables including the number and distribution of providers in a given state, and individual judges' views of what constitutes a "substantial obstacle." The undue burden standard has thus opened the door to a broad array of laws that affect how and whether women can access abortion.

Meanwhile, another aspect of the undue burden standard has remained essentially toothless. The first prong of the test asks whether a law has the *purpose* of placing a substantial obstacle before women seeking abortions. It's hardly a secret that the anti-abortion-rights movement views restrictions such as parental involvement laws, waiting periods, and clinic facility regulations as steps on the path to dismantling the right to abortion entirely. But to prove that this movement goal amounts to an unconstitutional purpose behind a particular law has been virtually impossible. For instance, in *Mazurek v. Armstrong* the Supreme Court upheld a law that permits only physicians to perform abortions. The Court rejected as insufficient to prove improper purpose the fact that an anti-abortion-rights group drafted the law, and that no evidence supported its patient-safety rationale.

In addition to making it virtually impossible for challengers to prove an *illegitimate* purpose to the Court's satisfaction, the Court has made it very easy for the state to demonstrate a *valid* purpose for the law. In a 2007 decision, *Gonzales v. Carhart*, the Supreme Court applied a weak version of *Casey's* "purpose prong" when it upheld the federal Partial Birth Abortion Ban Act, requiring only that Congress have had a "rational basis to act." The Court's far-fetched conclusion that the ban was justified because women might come to regret their abortions was notoriously — and self-admittedly — unconcerned with scientific support.

But it is possible to smoke out illegitimate purposes indirectly. If courts looked more skeptically at the factual foundations supposedly necessitating abortion laws, they would often discover those foundations to be weak if not totally absent. Whether this is because of legislative insincerity, inattention, or bias is irrelevant. 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.

The outcome of a constitutional challenge to legislation or other governmental action often turns on whether a court defers to or skeptically probes the state's factual justifications. This is true whether the court purports to apply strict scrutiny or a less stringent form of review. For example, in *Sorrell v. IMS Health Inc.*, the Supreme Court recently applied "heightened scrutiny" in a First Amendment challenge to Vermont's Prescription Confidentiality Law, ruling in favor of a facial challenge to this commercial speech restriction. The Court closely

examined the state's justifications, including the need to protect medical privacy, avoid harassment, safeguard the integrity of the doctor-patient relationship, improve public health, and reduce healthcare costs. The Court rejected all of these, concluding that Vermont's interest "turns on nothing more than a difference of opinion" with pharmaceutical marketers. Similarly, in *City of Cleburne v. Cleburne Living Center, Inc.*, the Supreme Court invalidated the city's refusal to grant a special use permit for a group home for the developmentally disabled. The Court cited a lack of factual support for the city's justifications, even though the Court applied rational basis review.

Judges may come to regret their decisions if they defer blindly to a state's purported justifications for targeting constitutional rights while skeptically viewing plaintiffs' predictions of harm. The story of one renowned federal judge in an analogous context is instructive: In 2008, the Supreme Court rejected a challenge to an Indiana voter identification requirement, even though the state produced no evidence of in-person voter impersonation fraud to support the need for the law. At the same time, the Court dismissed plaintiffs' allegations that the law would hamper the right to vote. In a recent book, Judge Posner, who had voted with the majority on the Seventh Circuit to uphold the law before the case reached the Supreme Court, admitted that he had made a mistake and that the requirement is "a type of law now widely regarded as a means of voter suppression rather than of fraud prevention."

As abortion restrictions have become ever more extreme in recent years, some federal courts reviewing these measures have begun to examine the legislatures' stated justifications more closely, finding even under *Gonzales's* "rational basis" approach that they lack sufficient factual support. This has been particularly true in cases addressing requirements that abortion providers secure admitting privileges at nearby hospitals. These laws purport to promote patients' safety, even though such privileges are not required for comparable or even significantly riskier out-patient procedures. Their stated purpose is further called into question by the fact that they tend to result in clinic closures, because many hospitals refuse to grant the privileges. After signing such a law in Mississippi, a state with a single abortion provider that has been unable to secure admitting privileges, Governor Bryant tellingly declared: "This is a historic day to begin the process of ending abortion in Mississippi." A federal court has preliminarily enjoined the Mississippi law based on its predicted unconstitutional effects. But other courts have looked beyond these laws' effects to examine their purpose and factual justifications. A Wisconsin federal district judge temporarily blocked a similar law after carefully reviewing the evidence and concluding that the state was unlikely to prove the law is "reasonably related to maternal health." The Seventh Circuit, in an opinion by Judge Posner, upheld the district court's injunc-

tion. The court noted the absence of evidence in the legislative or judicial records to show that admitting privileges would improve patient safety and asserted that “the medical grounds thus far presented . . . are feeble.”

A challenge to Texas’s admitting privileges requirement — which the Supreme Court will likely review later this year — demonstrates how outcomes can turn on whether a court defers to a state’s factual justifications or skeptically reviews them. The Texas federal district court concluded, after a three-day trial, that “admitting privileges have no rational relationship to improved patient care.” The Fifth Circuit panel, in contrast, credited the state’s assertions that the law promotes women’s health when it granted Texas an emergency, temporary stay of the district court’s injunction. To support its departure from the trial court’s conclusion, the Fifth Circuit panel relied upon *FCC v. Beach Communications*, in which the Supreme Court asserted that “a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.” However, that case addressed an equal protection challenge that involved neither a suspect classification nor a fundamental constitutional right. Courts should require that the state put forward evidence supporting its factual claims, especially when important constitutional rights are at stake.

Four decades after *Roe v. Wade*, abortion remains a controversial constitutional right. Many state legislatures are eager to curb the procedure as much as possible. It stands to reason that some legislators will promote abortion restrictions based on pretextual purposes. It is also predictable that their zeal to harass abortion providers or restrict abortion access will overwhelm their interest in the real facts, or that even moderate legislators will be swayed by the biased factual assertions of abortion opponents. A standard that looks skeptically at plaintiffs’ fact-based predictions of harm, while smiling generously upon the state’s fact-based assertions of legislative need, has things backwards. It is the courts’ job to protect unpopular constitutional rights from legislative encroachment. They can only do this job well if they examine carefully the factual premises supposedly justifying burdensome abortion laws.