

SEEING THE FOREST FOR THE TREES: WHY COURTS SHOULD CONSIDER CUMULATIVE EFFECTS IN THE UNDUE BURDEN ANALYSIS

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I. INTRODUCTION

States have imposed an unprecedented number of abortion restrictions in recent years.¹ These restrictions include pre-viability bans on abortion, “informed consent” procedures, mandatory waiting periods, and even mandatory ultrasounds.² States have also enacted less obvious, but equally odious, regulations on abortion providers in an effort to regulate them out of existence.

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1. See Heather D. Boonstra & Elizabeth Nash, *A Surge of State Abortion Restrictions Puts Providers—and the Women They Serve—in the Crosshairs*, 17 GUTTMACHER POL’Y REV. 9 (Jan. 1, 2014), <http://www.guttmacher.org/pubs/gpr/17/1/gpr170109.html> (describing the “unprecedented wave of state-level abortion restrictions” since 2011). Specifically, between 2011 and 2013, legislatures in thirty states enacted 205 abortion restrictions. *Id.*

2. *Id.* at 12–13 (explaining that nine states ban abortion at twenty weeks and two states enacted laws that ban abortion even earlier in pregnancy).

These unnecessary regulations, which are collectively referred to as Targeted Regulation of Abortion Providers (“TRAP”) laws, regulate seemingly mundane aspects of abortion care, such as the dimension of procedure rooms and parking lot requirements.³ Although many proponents of these restrictions claim that they are meant to protect women’s health, some proponents have admitted that the ultimate aim of these restrictions is to ban abortion altogether.⁴ Unfortunately, through these restrictions, states have found an effective way to erode women’s abortion rights in piecemeal fashion.⁵

When faced with constitutional challenges to these abortion restrictions, some courts have also adopted a piecemeal approach that fails to account for the cumulative effects of multiple abortion restrictions. Specifically, these courts consider only the effects of the challenged restriction in isolation when determining whether there is an “undue burden” under *Planned Parenthood v. Casey*. As this paper explains, this approach ignores the cumulative effects of, and interaction between, multiple abortion restrictions within a state. While the effects of any one of these restrictions may not seem to impose an undue burden when viewed in isolation, their combined effect is to place a substantial obstacle in the way of a woman’s choice to have an abortion, thus violating the *Casey* undue burden standard.

This paper argues that courts should consider the cumulative effects of all of a state’s abortion restrictions—that is, the regulatory scheme as a whole—when applying the undue burden standard in the context of a facial challenge.⁶ It explains how this approach is grounded in both a functional analysis of the current abortion landscape and Supreme Court precedent. It also analogizes to another area of constitutional law that considers cumulative effects under an undue burden analysis: dormant Commerce Clause jurisprudence.

3. *Id.* at 10.

4. See, e.g., *Dewhurst Tweet: Abortion Bill Is Attempt to Close Clinics*, CBS DALLAS/FORT WORTH (June 19, 2013), <http://dfw.cbslocal.com/2013/06/19/dewhurst-tweet-abortion-bill-is-attempt-to-close-clinics/> (describing a tweet from Republican Lieutenant Governor, David Dewhurst, in which he celebrated the fact that Texas’ recently-passed TRAP law would effectively close all except five abortion providers in the state); *Washington Watch with Tony Perkins*, FAMILY RESEARCH COUNCIL (July 2, 2013), <http://www.frc.org/wwlivewithtonyperkins/matt-birk-frank-wolf-phil-burress> (proponent of Ohio’s admitting privileges requirement admits that the goal is to “put pressure on hospitals to not sign agreements, and we may see some abortion clinics go out of business”); Gov. Bryant: ‘My Goal is to End Abortion in Mississippi,’ CBS DC (Jan. 23, 2014), <http://washington.cbslocal.com/2014/01/23/gov-bryant-my-goal-is-to-end-abortion-in-mississippi/>.

5. See Boonstra & Nash, *supra* note 1, at 10 (explaining that “[t]hese restrictions, especially their cumulative effects in a given state, may prove to accomplish more in terms of impeding access to care than the previous decade of restrictions, noisy clinic blockades and even outright violence ever have.”).

6. This paper focuses on facial challenges because even the courts that do not consider cumulative effects in the context of facial challenges nonetheless consider such effects in the context of as-applied challenges to abortion restrictions. See, e.g., *Whole Woman’s Health v. Cole*, 790 F.3d 563, 591 (5th Cir. 2015) (refusing to consider the cumulative effects of multiple restrictions in the context of a facial challenge, but considering cumulative effects in the context of an as-applied challenge).

This paper proceeds in the following way. Part II gives a general overview of the Supreme Court's decision in *Casey* and the undue burden standard. Then Part III discusses the two competing approaches to cumulative effects that courts have taken when applying the undue burden standard. Finally, Part IV draws from both Supreme Court precedent and dormant Commerce Clause jurisprudence to argue that courts applying the undue burden standard should consider the cumulative effects of multiple abortion restrictions.

II. THE UNDUE BURDEN STANDARD

In *Planned Parenthood v. Casey*, the Supreme Court adopted the undue burden standard for assessing the constitutionality of abortion restrictions.⁷ At the outset, the Court conceded that “[a]ll abortion regulations interfere *to some degree* with a woman’s ability to decide whether to terminate her pregnancy.”⁸ However, it went on to explain that “[n]ot all burdens on the right to decide whether to terminate a pregnancy will be *undue*.⁹ The resulting undue burden standard posits that a state abortion restriction is unconstitutional if it “has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”¹⁰ The Court reasoned that this standard would balance two competing interests: “the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State,”¹¹ on the one hand, and the ability of the states “to enact laws to provide a reasonable framework for a woman to make [that] decision,” on the other.¹²

Applying the undue burden standard, the Court in *Casey* held that Pennsylvania’s spousal notification requirement imposed a “substantial obstacle” for domestic violence victims seeking abortions and, therefore, was unconstitutional.¹³ In reaching this conclusion, the Court relied primarily on the prevalence of domestic violence against women.¹⁴ The Court feared that the threat of such violence would deter “a significant number of women” from seeking an abortion altogether if they had to get their husband’s permission as a prerequisite.¹⁵ In fact, the Court hypothesized that this requirement would be the equivalent of banning abortion altogether for victims of domestic violence.¹⁶

7. *Planned Parenthood v. Casey*, 505 U.S. 833, 874 (1992) (plurality opinion).

8. *Id.* at 875 (emphasis added).

9. *Id.* at 876 (emphasis added).

10. *Id.* at 877.

11. *Id.* at 846.

12. *Id.* at 873.

13. *Id.* at 893–95.

14. *Id.*

15. *Id.* at 893–94.

16. *Id.* at 894 (“[T]he significant number of women who fear for their safety and the safety of their children are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases.”).

Despite holding that the spousal notification requirement imposed an undue burden, the Court upheld all of the other restrictions.¹⁷ In doing so, the Court explained what does *not* count as an undue burden. For example, the Court suggested that a restriction that “merely make[s] abortions a little more difficult or expensive to obtain” would not impose a substantial obstacle.¹⁸ Nor would a restriction that “increase[d] the cost of some abortions by a slight amount.”¹⁹ But the Court noted that “at some point increased cost could become a substantial obstacle.”²⁰

After *Casey*, courts and scholars alike have struggled to define what counts as an “undue burden” or a “substantial obstacle.” Scholars have described the undue burden standard as “devoid of content,” “difficult to apply,” and “susceptible to manipulation.”²¹ Because of this lack of guidance, federal appellate courts vary widely both in terms of how they articulate the undue burden standard²² and what they hold constitutes an undue burden.²³ This uncertainty exists despite the Court’s recognition in *Casey* that “[l]iberty finds no refuge in a jurisprudence of doubt.”²⁴

17. *Id.* at 879–887, 899–901 (upholding the Act’s medical emergency exception, informed consent requirement, waiting-period requirement, parental consent requirement, and the facility reporting requirements that were unrelated to the spousal notification requirement).

18. *Id.* at 893–94.

19. *Id.* at 901.

20. *Id.*

21. Caitlin E. Borgmann, *Winter Count: Taking Stock of Abortion Rights After Casey and Carhart*, 31 FORDHAM URB. L.J. 675, 681–688 (2004). See also, e.g., Leah Shabshelowitz, *The Beast of Undue Burden: Evaluating the Burden on the Physician in Planned Parenthood of the Heartland v. Heineman*, 52 B.C.L. REV. E. SUPP. 229, 238–240 (2011) (explaining that “[t]he Court in *Casey* did not define its undue burden standard, nor did it give any objective parameters to help lower courts assess state regulation of abortion[,]” and, as a result, “[C]asey’s undue burden standard has proved both malleable and vague . . . leading to inconsistent results and ambiguity.”); Paul C. Quast, *Respecting Legislators and Rejecting Baselines: Rebalancing Casey*, 90 NOTRE DAME L. REV. 913, 915 (2014) (“[N]o consensus has arisen to allow for a unified understanding of what ‘undue burden’ means. As a result, judges’ and justices’ attempts at utilizing the undue burden standard have been erratic, often yielding conflicting results from state to state and circuit to circuit.”) (internal citation omitted).

22. Compare *Greenville Women’s Clinic v. Bryant*, 222 F.3d 157, 167 (4th Cir. 2000) (describing an undue burden as one “that trammel[s] the woman’s right to choose to have an abortion”), with *Planned Parenthood v. Humble*, 753 F.3d 905, 917 (9th Cir. 2014), cert. denied, 135 S. Ct. 870 (2014) (“Neither the Supreme Court nor this court has ever held that a burden must be absolute to be undue.”).

23. Compare *Planned Parenthood v. Abbott (Abbott I)*, 734 F.3d 406, 415 (5th Cir. 2013) (holding that “[a]n increase of travel distance of less than 150 miles for some women is not an undue burden on abortion rights[.]”), with *Planned Parenthood Se., Inc. v. Strange*, 33 F. Supp. 3d 1330, 1359–60 (M.D. Ala.), as corrected (Oct. 24, 2014), supplemented, 33 F. Supp. 3d 1381 (M.D. Ala. 2014), and amended, No. 2:13CV405-MHT, 2014 WL 5426891 (M.D. Ala. Oct. 24, 2014) (holding that an increased travel distance of ninety miles was an undue burden).

24. *Casey*, 505 U.S. at 844.

III.

CUMULATIVE EFFECTS: COMPETING APPROACHES

Under the “effects” prong of the undue burden test,²⁵ courts first consider the potential effects that the challenged abortion restriction will have on a woman’s ability to obtain an abortion. Then they determine whether, given that effect, the statute imposes an “undue burden.”²⁶ However, courts are currently divided about what exactly they should consider when evaluating the effects of an abortion restriction. Some courts narrowly consider only the direct causal effects of the challenged restriction to determine whether that restriction, in isolation, imposes an undue burden on a woman’s right to obtain an abortion. In contrast, other courts have stressed the need to consider the cumulative effects of *all* of a state’s abortion restrictions. This Part discusses these two competing applications of the undue burden standard.

A. Courts That Do Not Consider Cumulative Effects

The Fifth Circuit attempts to isolate the discrete effects of the challenged restriction in isolation without considering other factors, including the cumulative effects of multiple abortion restrictions in the state.²⁷ For example, in *Abbott II*,²⁸ the Fifth Circuit held that the challenged hospital admitting-

25. This Article will focus exclusively on the effects prong of the undue burden standard. In *Casey*, the Court suggested that the purpose prong and the effect prong provide independent grounds for invalidating an abortion restriction. *Casey*, 505 U.S. at 877 (explaining that a restriction is unconstitutional if it “has the purpose *or* effect of placing a substantial obstacle in the path of a woman seeking an abortion . . .”) (emphasis added). However, courts have since made it very difficult to demonstrate that an abortion restriction was enacted for an impermissible purpose. See, e.g., *Karlin v. Foust*, 188 F.3d 446, 493 (7th Cir. 1999) (“While a plaintiff can challenge an abortion regulation on the ground that the regulation was enacted with an impermissible purpose, the joint opinion in *Casey* and the Court’s later decision in *Mazurek v. Armstrong*, 520 U.S. 968 (1997), suggest that such a challenge will rarely be successful, absent some sort of explicit indication from the state that it was acting in furtherance of an improper purpose.”) (parallel citations omitted). And meaningful consideration of the purpose prong has occurred in non-majority opinions, if at all. See, e.g., *Stenberg v. Carhart*, 530 U.S. 914, 952 (2000) (Ginsburg, J., concurring). As a result, some have argued that the purpose prong lacks teeth. See, e.g., Jenny K. Jarrard, *The Failed Purpose Prong: Women’s Right to Choose in Theory, Not in Fact, Under the Undue Burden Standard*, 18 LEWIS & CLARK L. REV. 469 (2014).

26. See, e.g., *Gonzales v. Carhart*, 550 U.S. 124, 146–150 (2007) (“We begin with a determination of the Act’s operation and effect. A straightforward reading of the Act’s text demonstrates its purpose and the scope of its provisions[.] . . . We next determine whether the Act imposes an undue burden, as a facial matter.”).

27. See *Planned Parenthood v. Abbott* (*Abbott II*), 748 F.3d 583 (5th Cir. 2014); *Whole Woman’s Health v. Lakey*, 769 F.3d 285 (5th Cir. 2014) *aff’d in part, vacated in part, rev’d in part sub nom. Whole Woman’s Health v. Cole*, 790 F.3d 563 (5th Cir. 2015) *modified*, 790 F.3d 598 (5th Cir. 2015).

28. In *Abbott I*, the Fifth Circuit stayed the district court’s issuance of a permanent injunction against the enforcement of two provisions of a Texas abortion law, finding that the state was likely to succeed on the merits of its appeal. *Abbott I*, 734 F.3d at 410–12. In *Abbott II*, the Fifth Circuit held that both of the challenged provisions were constitutional. *Abbott II*, 748 F.3d at 587.

privileges requirement²⁹ did not impose an undue burden in part because “many factors other than the hospital admitting-privileges requirement” affected abortion access in the Rio Grande Valley.³⁰ The court did not consider the interplay between those other factors and the hospital-admitting-privileges requirement.³¹ It concluded that the effect of the admitting-privileges requirement would be to close several clinics, such that some women would have to travel up to 150 miles to obtain an abortion.³² In this way, the Fifth Circuit’s approach assumes that it is possible to disentangle the combined effects of multiple abortion restrictions and socioeconomic factors.

Once the Fifth Circuit isolated the effect of the challenged admitting-privileges requirement, it compared that effect to previously established constitutional baselines. The court pointed out that the Supreme Court upheld Pennsylvania’s waiting period in *Casey* even though it required that women travel between one and three hours to obtain an abortion.³³ The court then rigidly used this one-to-three-hour time frame as the benchmark for analyzing the effect of Texas’ admitting-privileges requirement. Because it would take less than three hours for Texas women to travel up to 150 miles to obtain an abortion, the effect of the requirement in *Abbott II* was comparable to the effect upheld by the Court in *Casey*.³⁴ Therefore, the Fifth Circuit concluded that the admitting-privileges requirement did not impose an undue burden.³⁵ In fact, the court announced a new categorical rule: “[A]n increase of travel of less than 150 miles for some women is not an undue burden under *Casey*.³⁶

After the Fifth Circuit decided *Abbott II*, a Texas district court took a very different approach in *Lakey*.³⁷ In that case, the court addressed the constitutionality of yet another Texas abortion restriction that had recently gone into effect: an ambulatory-surgical-center requirement.³⁸ The plaintiffs brought a facial and as-applied challenge to the ambulatory-surgical-center requirement³⁹

29. These laws require clinicians offering abortion services to obtain the right to admit patients to a local hospital in order to legally provide abortions. Opposition to Requirements for Hospital Admitting Privileges and Transfer Agreements for Abortion Providers, American Public Health Association (APHA) Policy Statement, <https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2015/12/14/11/04/opposition-to-requirements-for-hospital-admitting-privileges-for-abortion-providers>.

30. *Abbott II*, 748 F.3d at 599 (quoting *Abbott I*, 734 F.3d at 415).

31. *Id.*

32. *Id.* at 597–98.

33. *Id.* at 598.

34. *Id.* at 597.

35. *Id.* at 598.

36. *Id.*

37. Whole Woman’s Health v. Lakey, 46 F. Supp. 3d 673 (W.D. Tex. 2014) *aff’d in part, vacated in part, rev’d in part sub nom.* Whole Woman’s Health v. Cole, 790 F.3d 563 (5th Cir. 2015) *modified*, 790 F.3d 598 (5th Cir. 2015).

38. *Id.*

39. An ambulatory surgical center (“ASC”) is a health care facility that provides surgical services outside of the hospital setting. *Ambulatory Surgery Centers*, Ambulatory Surgery Center

and an as-applied challenge to the same hospital admitting-privileges requirement at issue in *Abbott I* and *II*.⁴⁰ Although the only facial challenge before the district court was the validity of the ambulatory-surgical-center requirement, the court decided to “consider whether the act *as a whole* [including the previously upheld admitting-privileges requirement] operates to place before the women of Texas a substantial obstacle to an abortion of a nonviable fetus.”⁴¹ The court ultimately held that “the act’s ambulatory-surgical-center and admitting-privileges requirements *operate together* to place an unconstitutional undue burden on women throughout Texas and must be enjoined.”⁴² In reaching this conclusion, the district court in *Lakey* considered the “cumulative effects” of mounting state restrictions, which it characterized as “substantial obstacles [which had] reached a tipping point that threaten[ed] to ‘chip away at the private choice shielded by *Roe*[.]’”⁴³ Specifically, the court framed the undue burden analysis “in the context of the other state-imposed obstacles a woman faces when seeking an abortion in Texas—including a sonogram requirement, a waiting period, and the reduced number of abortion-performing physicians resulting from the admitting-privilege requirement[.]”⁴⁴ The court acknowledged that “[t]he act operates in conjunction with Texas’s other regulations on abortion, some of which provide significant burdens in their own right.”⁴⁵ The court also considered that the resulting “increased travel distances *combine* with practical concerns unique to every woman.”⁴⁶ Indeed, the court pointed out the futility of the Fifth Circuit’s approach in *Abbott II*: “It is . . . impossible to divine exactly how many women in Texas may be affected by any individual factor or combination of factors to the point of not being able to exercise their right to obtain an abortion. . . . The proverbial ‘last straw’ that encumbers a woman’s choice to have an abortion is unknowable to anyone other than that individual woman.”⁴⁷ The court concluded that “the act’s ambulatory-surgical-center requirement, *combined with the already in-effect admitting-privileges requirement*, creates a brutally effective system of abortion regulation that reduces access to abortion clinics thereby creating a statewide burden for

Association, <http://www.ascassociation.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=2e3fb5b2-0332-4af2-9537-86b8ba077a38&forceDialog=0>. ASCs are highly regulated at both the federal and state level, and the Centers for Medicare and Medicaid Services (“CMS”) requires that ASCs be certified in order to qualify for federal reimbursement for services. *Id.* at 4.

40. *Lakey*, 46 F. Supp. 3d. at 678.

41. *Id.* (emphasis added).

42. *Id.* (emphasis added).

43. *Id.* at 681, 686 (noting “the cumulative effect of clinic closures and the lessened geographic distribution of abortion services in the wake of the act’s two major requirements[.]”) (quoting *Stenberg v. Carhart*, 530 U.S. 914, 952 (Ginsburg, J., concurring)).

44. *Id.* at 686.

45. *Id.* at 683.

46. *Id.*

47. *Id.*

substantial numbers of Texas women.”⁴⁸ In sum, the court took the opposite approach of the Fifth Circuit in *Abbott II*, which tried to isolate the effects of an individual abortion restriction.

The Fifth Circuit rejected the district court’s approach in *Lakey* when the preliminary injunction was appealed.⁴⁹ The Fifth Circuit’s opinion on appeal demonstrates the dangerous progression of its narrow and incremental undue burden analysis. The court held that Texas had shown a substantial likelihood of success on its claim that the state’s ambulatory-surgical-center requirement for abortion providers did *not* impose an undue burden.⁵⁰ In reaching this conclusion, the court did not consider the regulatory scheme for abortion as a whole; in fact, it held that the district court improperly reconsidered the admitting-privileges requirement, which was a foregone conclusion because it had already been upheld in *Abbott II*.⁵¹ With respect to the ambulatory-surgical-center requirement, the court noted that the effect of this additional restriction would be to increase the total travel distance for some women to around 250 miles.⁵² However, the court did not frame the question before it as whether a *total* travel distance of 250 miles was an undue burden; rather, it framed the question before it as “whether the State is likely to prevail on its argument that *this incremental increase* of 100 miles in distance does not constitute an undue burden.”⁵³ In this way, the court relied on the categorical 150-mile rule articulated in *Abbott II* as a new constitutional floor; each additional abortion restriction would only be assessed relative to that baseline.⁵⁴ And, by considering only the *relative* increase in the burden imposed by a new restriction, the court suggested that the *absolute*, or cumulative, burden imposed by the admitting-privileges and ambulatory-surgical-center requirements—that is, a *total* travel distance of 250 miles—was irrelevant to the undue burden analysis.⁵⁵

48. *Id.* at 684 (emphasis added).

49. Whole Woman’s Health v. Lakey, 769 F.3d 285, 303 (5th Cir. 2014). The U.S. Supreme Court stayed this decision pending appeal, and later reversed the Fifth Circuit, holding that both the admitting-privileges requirement and the ambulatory-surgical-center requirement were unconstitutional. See Whole Woman’s Health v. Lakey, 135 S. Ct. 399 (2014); Whole Woman’s Health v. Hellerstedt, 136 S. Ct. 2292, 2318 (2016), *as revised* (June 27, 2016).

50. *Lakey*, 769 F.3d. at 295.

51. *Id.* at 293.

52. *Id.* at 303.

53. *Id.* (emphasis added).

54. A partially dissenting judge on the Sixth Circuit engaged in a similar analysis with respect to relative, incremental burdens and baselines. See *Planned Parenthood v. DeWine*, 696 F.3d 490, 512–13 (6th Cir. 2012) (Moore J., partially dissenting) (“I agree with the district court that requiring a third doctor’s visit adds an insubstantial cost to procuring a medical abortion. The extra visit appears no different from the extra visit caused by a twenty-four hour waiting period, which the Supreme Court has explicitly deemed a valid regulation.”).

55. The Fifth Circuit rejected the consideration of cumulative effects again when it considered the merits of the facial challenge to the ambulatory-surgical-center requirement. See Whole Woman’s Health v. Cole, 790 F.3d 563, 586 (5th Cir. 2015) (disapproving of the district

B. Courts That Do Consider Cumulative Effects

In contrast to the Fifth Circuit, some courts have considered the cumulative effects of multiple abortion restrictions. In fact, the Sixth Circuit may have been the first to raise a concern about cumulative effects more than a decade before the Supreme Court even adopted the undue burden standard in *Casey*. In *City of Akron v. Akron Center for Reproductive Health*, a case that eventually made its way up to the Supreme Court,⁵⁶ but was later overruled by *Casey*, the Sixth Circuit addressed the constitutionality of an Akron city ordinance that required some abortions to be performed in hospitals instead of abortion clinics, required parental consent for minors seeking an abortion, required informed written consent from the woman seeking an abortion, required the physician to make certain disclosures to the woman seeking an abortion, and imposed a twenty-four hour waiting period.⁵⁷ The Sixth Circuit quoted the district court's statement that it was "necessary to consider the combined effect of all the various sections not independently unconstitutional to determine whether their combined impact results in such a degree of interference with the constitutional right at issue to result in a finding of invalidity."⁵⁸ Immediately after quoting this language, the Sixth Circuit echoed the district court's concern about the cumulative effects problem in a footnote that stated the following: "If the combined weight of a number of regulations, not independently unconstitutional, were to serve to make it unduly burdensome for a woman to carry out her decision, those sections would be invalid."⁵⁹ In doing so, the Sixth Circuit suggested that courts need to consider the cumulative effects of multiple abortion restrictions. However, despite this apparent concern about cumulative effects, the court nonetheless failed to consider the cumulative effects of the various restrictions in the ordinance.⁶⁰

The Seventh and Ninth Circuits have taken it a step further by actually considering the cumulative effects of multiple abortion restrictions in their

court's application of the undue burden test in part because it "based its holding on a finding that the two requirements worked together, along with other state requirements," to impose an undue burden). However, it suggested that the consideration of cumulative effects would be appropriate for as-applied challenges. *Id.* at 591 (explaining that factual development was different in the context of the as-applied challenges because "the actual impact of the combined effect of the admitting privileges and ASC requirements on abortion facilities, abortion physicians, and women in Texas can be more concretely understood and measured[] than it could have been in the initial facial challenge). Again, the court refused to reconsider the facial validity of the admitting-privileges requirement, explaining that the validity of the admitting-privileges requirement was "put to rest" in *Abbott II*. *Id.* at 581.

56. *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416 (1983).

57. *Akron Ctr. for Reprod. Health, Inc. v. City of Akron*, 651 F.2d 1198, 1201–02 (6th Cir. 1981) *aff'd in part, rev'd in part*, 462 U.S. 416 (1983).

58. *Id.* at 1203 (quoting *Akron Ctr. for Reprod. Health, Inc. v. City of Akron*, 479 F. Supp. 1172, 1200 (N.D. Ohio 1979)).

59. *Id.* at 1203, n. 22.

60. *See id.* at 1204–1210 (analyzing each of the restrictions separately).

analysis.⁶¹ For example, in *Van Hollen* the Seventh Circuit held that Wisconsin's admitting-privileges requirement would impose an undue burden.⁶² In reaching this conclusion, the court explained that "[w]hen one abortion regulation compounds the effects of another, the aggregate effects on abortion rights must be considered."⁶³ With this principle in mind, the court examined the cumulative burden imposed by Wisconsin's admitting-privileges requirement and the twenty-four hour waiting period that was already in effect in the state.⁶⁴ The court first reasoned that the admitting-privileges requirement would shut down more than half of the state's abortion clinics and, as a result, women would have to travel longer distances to obtain an abortion—sometimes an additional 100 miles each way.⁶⁵ However, the court did not stop its analysis there; it further explained that, because "Wisconsin law requires two trips to the abortion clinic . . . with at least twenty-four hours between them[,]" these two requirements actually required that women travel a total of 400 miles (two round-trips).⁶⁶ In this way, the Seventh Circuit took a completely different approach than the Fifth Circuit: it considered the total, cumulative burden imposed on women by the regulatory scheme as a whole, rather than just the incremental effect of the new restriction in isolation.

Similarly, in *Humble*, the Ninth Circuit "consider[ed] the ways in which an abortion regulation interacts with women's lived experience, socioeconomic factors, and *other abortion regulations*."⁶⁷ In that case, the court held that the plaintiffs were likely to succeed on the merits of their claim that Arizona's medication abortion restrictions imposed an undue burden.⁶⁸ Arizona's medication statute required that a woman visit a clinic three times to obtain a medication abortion.⁶⁹ The court noted that another abortion restriction already in effect—Arizona's twenty-four hour waiting period requirement—compounded this burden because it required yet *another* visit to the clinic, for a total of four visits.⁷⁰ Based on these cumulative effects and other practical concerns, the court granted the plaintiff's preliminary injunction against enforcement of the medication abortion restrictions.⁷¹

61. See *Planned Parenthood v. Van Hollen*, 738 F.3d 786, 796 (7th Cir. 2013) *cert. denied*, 134 S. Ct. 2841 (2014); *Planned Parenthood v. Humble*, 753 F.3d 905, 915 (9th Cir. 2014) *cert. denied*, 135 S. Ct. 870 (2014) (citing *Van Hollen*, 738 F.3d at 796).

62. *Van Hollen*, 738 F.3d at 798–99.

63. *Id.* at 796.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Humble*, 753 F.3d at 915 (emphasis added).

68. *Id.* at 918.

69. *Id.* at 907.

70. *Id.* at 907, 916 (considering that, because of the clinics that would close as a result, "women in northern Arizona who want medication abortions will have to make four visits to the Glendale clinic[.]").

71. *Id.* at 918.

A handful of district courts have similarly considered the cumulative impact of multiple abortion restrictions when engaging in the undue burden analysis.⁷² The Western District of Texas' opinion in *Lakey* is just one such example.⁷³ In *Planned Parenthood Southeast, Inc. v. Strange*, a federal district court in Alabama held that Alabama's admitting-privileges requirement imposed an undue burden.⁷⁴ At the outset, the court emphasized the general need to "examin[e] the regulation in its real-world context[.]"⁷⁵ The court then analyzed the effect that the admitting-privileges requirement would have on abortion providers.⁷⁶ The state argued that, even if the doctors at the plaintiff clinics could not obtain admitting-privileges, doctors might be willing to perform abortions outside of the clinics altogether. However, the court explained that this alternative was not practically feasible because Alabama's TRAP laws, including its ambulatory-surgical-center requirement, already created "significant regulatory barriers to entry for a new doctor."⁷⁷ Since the "regulatory landscape" already imposed stringent architectural, safety, personnel, and record-keeping requirements on reproductive health facilities, the court concluded that it was highly unlikely that doctors would be able to hang out their own shingle to provide abortions.⁷⁸ Based on this interaction between the state's admitting-privileges requirement and other TRAP laws, the court concluded that, "if the staff-privileges requirement were to go into effect, it would wipe out the availability of abortion services in Montgomery, Birmingham, and Mobile."⁷⁹ Next, the court analyzed the effect of the admitting-privileges requirement on women seeking abortions. In its analysis, the court again considered the cumulative effect of multiple abortion restrictions. Specifically, the court analyzed the interaction between the admitting-privileges requirement and Alabama's twenty-week abortion ban.⁸⁰ It noted that the admitting-privileges

72. Although I have not addressed them at length in this paper, some state courts have similarly considered the cumulative effects of multiple abortion restrictions. *See, e.g.*, *Planned Parenthood v. Sundquist*, No. 01A01-9601-CV-00052, 1998 WL 467110, at *50 (Tenn. Ct. App. Aug. 12, 1998) (finding "that the combined effect of the physician-only counseling requirement in Tenn. Code Ann. § 39-15-202(b) and the mandatory waiting period in Tenn. Code Ann. § 39-15-202(d) unconstitutionally burdens women's procreational autonomy by unduly delaying their ability to obtain an abortion[,]") and that until the Tennessee General Assembly makes the decision as to which of the policies is most important, "neither the waiting period in Tenn. Code Ann. § 39-15-202(d) nor the requirement in Tenn. Code Ann. § 39-15-202(b) that only physicians may provide the required pre-abortion counseling may be enforced[.]").

73. This case is described in depth above in Part III.A.

74. 33 F. Supp. 3d 1330, 1342 (M.D. Ala. 2014).

75. *Id.* at 1337 (quoting *Planned Parenthood v. Strange*, 9 F. Supp. 3d 1272, 1287 (M.D. Ala. 2014)).

76. *Id.* at 1342-55.

77. *See id.* at 1348, 1353 (describing "Barriers to Entry" which would prevent doctors from performing abortions outside of clinics).

78. *See id.* at 1348, 1353-54.

79. *Id.* at 1355.

80. *See id.* at 1356.

requirement would result in fewer abortion clinics which would, in turn, require women to travel longer distances to obtain an abortion.⁸¹ Although such an effect was sufficient on its own to deter women—especially poor women—from seeking an abortion, the court noted that the effect would be further compounded in light of Alabama’s twenty-week abortion ban.⁸² After all, “increased travel distance causes delays” and “delay past a certain point [the twenty-week mark] would make it illegal for a woman to obtain an abortion.”⁸³

In sum, courts have taken two different approaches when applying the undue burden standard. On the one hand, the Fifth Circuit attempts to isolate the effects of the individual abortion restriction that is being challenged. In other words, it views the effects of each abortion restriction as discrete and disconnected and it measures the burden on abortion access in relative, rather than in absolute, terms. As a result, once an individual abortion restriction has survived a facial challenge, it is impervious from subsequent facial challenges. In contrast, the Seventh and Ninth Circuits (as well as some state and federal district courts) consider how a challenged abortion restriction interacts with other abortion restrictions in the state. This approach uses the regulatory scheme as a whole—rather than the individual abortion restriction—as the proper unit of analysis for the undue burden standard. Rather than focusing on the incremental, relative burden imposed by each abortion restriction in isolation, this approach considers whether the cumulative effects of multiple restrictions collectively amount to an undue burden. As explained below, the difference between these two approaches has significant real-world implications for women seeking abortions.

IV.

ARGUMENT FOR CONSIDERING CUMULATIVE EFFECTS OF MULTIPLE ABORTION RESTRICTIONS

The Fifth Circuit currently engages in an undue burden analysis that ignores something crucial: the combined effect of, and interaction between, multiple abortion restrictions. This Part argues that courts applying the undue burden analysis should consider the cumulative effects of the state’s regulatory scheme as a whole for three reasons. First, from a practical perspective, women who are seeking abortions do not experience individual restrictions in isolation. Rather, they experience the collective pressure of various limitations on their reproductive freedom and autonomy. Therefore, any judicial attempt to quantify the burden that an abortion restriction imposes on women must take this reality into account. Second, the Supreme Court’s opinion in *Casey* emphasized the need to consider the broader societal context when applying the undue burden standard, and the existing regulatory scheme is undoubtedly part of that context.

81. *Id.* at 1356–57.

82. *Id.* at 1356.

83. *Id.*

Finally, courts *already* consider cumulative effects while assessing burdens in other areas of constitutional law. This Part presents these three arguments in greater detail.

A. Practical Considerations

Given the multitude of state abortion restrictions described above in the Introduction, a woman's ability to choose to terminate her pregnancy will not be affected solely by the challenged restriction in isolation, but rather by *all* of the restrictions that operate to limit her ability to obtain an abortion. To borrow the Supreme Court's language in *Casey*, while each of these restrictions may "merely make abortions a little more difficult or expensive to obtain[]" when viewed in isolation, their combined effect is to impose a substantial obstacle—that is, an undue burden—on a woman's decision to have an abortion.⁸⁴

A practical example illustrates this point. Imagine you are a woman living in Lubbock, Texas (the eleventh most populous city in Texas with around a quarter-of-a-million people) and you want to have an abortion.⁸⁵ As a result of Texas' TRAP laws, including the admitting-privileges requirement and ambulatory-surgical-center requirement discussed above, there were only ten abortion providers in Texas as of June 2015,⁸⁶ a state that spans over 260,000 square miles.⁸⁷ The only cities that had clinics were Austin, San Antonio, Dallas, Fort Worth, Houston, and McAllen, which were all on the other side of the state.⁸⁸ Therefore, you would have had to drive four-and-a-half hours to get to the nearest clinic in Fort Worth. Once you got to Fort Worth, you would have had to undergo state-directed counseling and then waited another twenty-four hours before you could actually have the abortion procedure.⁸⁹ This means that you would have to either spend at least one night in Fort Worth or make the 600-

84. Planned Parenthood v. Casey, 505 U.S. 833, 893–94 (1992).

85. *List of Cities in Texas by Population*, WIKIPEDIA (last updated Sept. 2, 2009, 6:50 AM) https://en.wikipedia.org/wiki/List_of_cities_in_Texas_by_population.

86. *Abortion Clinic Map*, FUND TEXAS CHOICE (last updated June 15, 2015), <http://fundtexaschoice.org/resources/texas-abortion-clinic-map/>. At the time of publication, it was unclear whether many Texas clinics would reopen after the Supreme Court's decision in *Whole Woman's Health* and how long that process would take. While the clinics navigate the financial and logistical hurdles of reopening, Texas legislators have been gearing up to pass even more abortion restrictions. *What the Supreme Court abortion ruling means for Texas*, THE WASHINGTON POST (June 27, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/06/27/what-the-supreme-court-abortion-ruling-means-for-texas/>. As of November 2016, the National Abortion Federation lists just nine abortion clinics in Texas. Texas Provider Information, National Abortion Federation, <https://prochoice.org/think-youre-pregnant/find-a-provider/>.

87. *Texas*, WIKIPEDIA (last updated Aug. 31, 2016), <https://en.wikipedia.org/wiki/Texas>.

88. *Abortion Clinic Map*, *supra* note 86.

89. See *State Facts About Abortion: Texas*, GUTTMACHER INSTITUTE (last visited Sept. 16, 2016), <https://www.guttmacher.org/pubs/sfaa/texas.html>.

mile round trip twice. You would also have to undergo an ultrasound before you could obtain an abortion.⁹⁰

Because Texas has regulated abortion in this piecemeal fashion, and because the Fifth Circuit has similarly *reacted* to each individual state restriction in piecemeal fashion (as described above in Part III.A.), there is effectively no way to challenge the state's overall hostile scheme before it goes into effect.⁹¹ As a result, courts that ignore the cumulative effects of multiple abortion restrictions create a severe imbalance between the two overarching interests that the U.S. Supreme Court initially emphasized in *Casey*: "the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State[]"⁹² and the ability of the states "to enact laws to provide a reasonable framework for a woman to make [that] decision[.]"⁹³ At some point, the state's overall framework is no longer reasonable and there is no longer any "real substance to the woman's liberty to determine whether to carry her pregnancy to full term."⁹⁴ This undermines a woman's right to terminate her pregnancy, which the Court in *Casey* reaffirmed as the "central principle" of *Roe* and described as "a rule of law and a component of liberty we cannot renounce."⁹⁵

B. Supreme Court Precedent Endorses the Consideration of Cumulative Effects

In addition to this simple functional argument based on *Casey*'s overall interest-balancing goal, Supreme Court precedent provides support for the consideration of cumulative effects in the undue burden analysis. First, and perhaps most importantly, the Court's holding in *Casey* demonstrated that the undue burden analysis hinges on practical concerns, social context, and "common sense[.]"⁹⁶ After all, the Court's rationale for striking down the spousal notification requirement was that women would be deterred from obtaining abortions out of fear that their husbands would retaliate against them with domestic violence.⁹⁷ To support its rationale, the Court provided more than three pages of factual findings about the prevalence of domestic violence,

90. *See id.* Because in this hypothetical scenario you do not live within 100 miles of an abortion provider, you will not have to wait another twenty-four hours after the ultrasound to have an abortion. *See id.*

91. As mentioned above in Part III.A., one could still bring an as-applied challenge that would consider the cumulative effects of multiple abortion restrictions after they have gone into effect.

92. *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992).

93. *Id.* at 873 (emphasis added); *see also id.* at 846 (explaining that the undue burden standard would promote a "reconciliation of the liberty of the woman and the interest of the State in promoting prenatal life[.]").

94. *Id.* at 869.

95. *Id.* at 871.

96. *Id.* at 892.

97. *See id.* at 893–94.

specifically in the context of pregnancy notification.⁹⁸ In sum, the Court concluded that the spousal notification requirement imposed a substantial obstacle because of its practical effect in light of the broader societal context.

In turn, consideration of how the challenged abortion restriction interacts with the broader societal context cannot ignore how the same restriction interacts with the state's already-existing regulatory scheme. After all, like the spousal notification requirement at issue in *Casey*, a state's overall scheme for regulating abortion can similarly become "likely to prevent a significant number of women from obtaining an abortion."⁹⁹ And, just as women may be deterred from seeking an abortion out of fear for their own safety, they may similarly be deterred by fewer clinics, significant travel distances, multiple trips to the clinic, mounting bureaucratic hurdles, the elimination of non-surgical options, and humiliating practices like "informed consent" requirements and mandatory ultrasounds. Each of these restrictions are arguably enough of a deterrent in their own right; when considered collectively they undoubtedly impose a substantial obstacle in front of a woman seeking an abortion.

Second, and relatedly, this outcome is still unconstitutional even if a court is unable to identify an individual restriction in the overall scheme that is *wholly* responsible for the resulting burden or the restriction that operates as the "last straw." In addition to establishing a practical, context-based approach to the undue burden standard, the Court in *Casey* repeatedly acknowledged that the undue burden standard turns on the "degree" of interference with the woman's choice to have an abortion.¹⁰⁰ For example, the Court acknowledged that "*at some point* increased cost could become a substantial obstacle[.]"¹⁰¹ In other words, the undue burden analysis is not "all or nothing"; it is a matter of degree. This further suggests that mounting individual restrictions could "at some point" constitute a substantial obstacle.

Finally, the organization of the *Casey* opinion might further support this argument. Again, in *Casey* the Supreme Court addressed the constitutionality of several individual provisions in the Pennsylvania Abortion Control Act of 1982: an "informed" consent and twenty-four-hour waiting period requirement, a parental consent requirement and accompanying judicial bypass procedure, a spousal notification requirement, a medical emergency exception, and facility reporting requirements.¹⁰² At first glance, it appears as though the Court analyzed each of the respective provisions separately in piecemeal fashion,

98. See *id.* at 888–891. Note that the Court considered all of these practical concerns in the context of a *facial* challenge to the restrictions, not an as-applied challenge.

99. *Id.* at 893.

100. *Id.* at 875 (explaining that "[a]ll abortion regulations interfere *to some degree* with a woman's ability to decide whether to terminate her pregnancy[.]").

101. *Id.* at 901 (emphasis added).

102. See *id.* at 844.

thereby ignoring their combined effects.¹⁰³ In this way, the organization of the *Casey* opinion initially suggests that, when presented with a facial challenge to a statute that restricts abortion access, courts should consider each restriction in isolation, rather than in the aggregate.

However, upon further analysis, this is an overly simplistic reading of the *Casey* opinion. In fact, the Court in *Casey* did consider the overall regulatory scheme and how the different restrictions in the statute would interact with one another. However, unlike the opinions considered up to this point in the paper, the Court in *Casey* reasoned that other abortion statutes might *decrease*, rather than *increase*, the burden that the challenged restriction would impose on the woman. For example, the Court discussed the medical emergency exception first because its interpretation was “central to the operation of various other requirements[]” in the statute.¹⁰⁴ And the Court later relied on the broad medical emergency exception to conclude that the waiting period did *not* impose an undue burden (since women with medical emergencies would arguably be exempt from the waiting period).¹⁰⁵ In this way, the Court considered how the existence of another statutory provision *decreased* the burden, whereas the appellate courts in *Van Hollen* and *Humble* considered how another statutory provision *increased* the burden. Either way, both analyses acknowledge that state abortion statutes interact with each other to affect whether or not there is an undue burden, and both analyses recognize that the overall regulatory scheme is the proper unit of analysis.

The Court has similarly acknowledged the relevance of the overall regulatory scheme by considering whether the state provides adequate alternative means for a woman to obtain an abortion. For example, in *Gonzales* the Court relied on the fact that there were alternative abortion procedures available to women to conclude that the ban on one abortion method—the intact dilation and extraction (“intact D& E”) procedure—did *not* impose an undue burden.¹⁰⁶ Similarly, in *Stenberg*, Justice O’Connor concluded that Nebraska’s statute was unconstitutional; however, she noted that it likely would *not* be unconstitutional “[i]f there were adequate alternative methods for a woman to safely obtain an abortion before viability[.]”¹⁰⁷ In short, the Court looked to the regulatory

103. See *id.* at 879, 879–901 (“consider[ing] the separate statutory sections at issue[]” and analyzing each restriction in a different section).

104. *Id.* at 879.

105. *Id.* at 886 (“In light of the construction given the statute’s definition of medical emergency by the Court of Appeals . . . we cannot say that the waiting period imposes a real health risk.”).

106. See *Gonzales*, 550 U.S. at 164 (“The conclusion that the Act does not impose an undue burden is supported by other considerations. Alternatives are available to the prohibited procedure.”).

107. *Stenberg v. Carhart*, 530 U.S. 914, 951 (2000) (O’Connor, J., concurring).

scheme as a whole—including the state’s decision to *not* regulate other aspects of the abortion decision—to determine whether there was an undue burden.¹⁰⁸

In sum, the Court has repeatedly emphasized the need to consider practical concerns and context in the undue burden analysis, and it has previously considered the state’s overall regulatory scheme as part of that context. Having acknowledged that the state’s overall regulatory scheme affects whether there is an undue burden, courts should consider not only how that regulatory scheme might *mitigate* a burden, but also how that regulatory scheme might *exacerbate* a burden. Moreover, the presence of multiple abortion restrictions in a state’s overall regulatory scheme is directly relevant to this context-based approach because it reduces the availability of “adequate alternatives” and, therefore, makes it more likely that the challenged restriction imposes an undue burden. In short, courts applying the undue burden analysis should not pick and choose the context they like, and ignore the context they do not like, to reach a preordained outcome.

C. Argument From Analogy: The Dormant Commerce Clause

In addition to the arguments already outlined above, it is important to note that courts already look at cumulative burdens in similar areas of constitutional law. Dormant Commerce Clause jurisprudence provides a fruitful analogy for three reasons.¹⁰⁹ First, like the undue burden analysis in the abortion context, the overarching goal of the dormant Commerce Clause jurisprudence is to balance two competing interests. Second, like the undue burden analysis, dormant Commerce Clause jurisprudence considers both the “purpose” and “effect” of the challenged state restriction. Lastly, and perhaps most importantly, both the dormant Commerce Clause and the undue burden analysis analyze the degree of the “burden” imposed by the challenged statute to determine its constitutionality. This Part introduces the basic elements of the dormant Commerce Clause test and explains how it considers the cumulative effects of state restrictions.

The Constitution’s Commerce Clause grants Congress the authority “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[.]”¹¹⁰ Because the framers gave the federal government the exclusive power to regulate interstate commerce, and because federal law preempts state law, the United States Supreme Court has inferred the existence

108. Federal appellate courts have similarly considered the availability of alternatives to determine whether there is an undue burden. For example, the Sixth Circuit has held that restrictions on the availability of medical abortions did not impose an undue burden because women could still pursue an alternative: surgical abortion. *See DeWine*, 696 F.3d at 515–16.

109. Other legal doctrines similarly consider cumulative effects. *See, e.g.*, *United States v. Al-Maliki*, 787 F.3d 784, 797 (6th Cir. 2015) (“Our circuit’s case law says that the cumulative effect of harmless errors can be so prejudicial that it violates the Due Process Clause.”). However, for the reasons explained above, I have chosen dormant Commerce Clause jurisprudence because it is most analogous to the abortion restriction context.

110. U.S. CONST. art. I, § 8, cl. 3.

of a “dormant” Commerce Clause that limits states’ abilities to restrict interstate commerce.¹¹¹ The justification for the dormant Commerce Clause is twofold: It ensures that the federal government is given exclusive control of interstate commerce in accordance with the Commerce Clause,¹¹² and it promotes economic integration among the several states.¹¹³ The dormant Commerce Clause seeks to balance a state interest (state sovereignty) on the one hand, and constitutional interests (the Commerce Clause and the framers’ emphasis on interstate commerce) on the other.¹¹⁴ The Supreme Court has recognized that balancing these two interests “depends upon delicate judgments.”¹¹⁵

Like the undue burden analysis in the abortion context, the dormant Commerce Clause considers both the “purpose” and “effect” of state restrictions.¹¹⁶ And the dormant Commerce Clause test incorporates both of these prongs in its two-tiered burden-shifting analysis. First, courts consider whether the restriction has a discriminatory *purpose*—that is, whether the restriction is motivated by economic protectionism.¹¹⁷ If so, the restriction is “virtually *per se* invalid” and will only be upheld if it advances a local interest that cannot be advanced by nondiscriminatory alternatives.¹¹⁸ Second, if the state restriction does not have a discriminatory purpose, courts consider the

111. See *New Energy Co. v. Limbach*, 486 U.S. 269, 273 (1988) (explaining that the Commerce Clause “not only grants Congress the authority to regulate commerce among the States, but also directly limits the power of the States to discriminate against interstate commerce[.]”).

112. *Wardair Canada, Inc. v. Florida Dep’t of Revenue*, 477 U.S. 1, 7 (1986) (“[I]t is the responsibility of the judiciary to determine whether action taken by state or local authorities unduly threatens the values the Commerce Clause was intended to serve.”).

113. *See id.* (“The few simple words of the Commerce Clause . . . reflected a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.”) (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 325–326 (1979). *See also Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 299 (1997) (noting “the dormant Commerce Clause’s fundamental objective of preserving a national market for competition[.]”).

114. *See Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328, 337–38 (2008) (explaining that the dormant Commerce Clause “is driven by concern about ‘economic protectionism[,]’” but that “[t]he law has had to respect a cross-purpose as well, for the Framers’ distrust of economic Balkanization was limited by their federalism favoring a degree of local autonomy[.]”) (quoting *New Energy Co.*, 486 U.S. at 273–74). *See also Kassel v. Consol. Freightways Corp. of Delaware*, 450 U.S. 662, 669 (1981) (“When a State ventures excessively into the regulation of these aspects of commerce, it ‘trespasses upon national interests[.]’”) (quoting *Great A P Tea Co. v. Cottrell*, 424 U.S. 366, 373 (1976)).

115. *United States v. Lopez*, 514 U.S. 549, 580 (1995).

116. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (“Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree.”) (internal citations omitted).

117. *United Haulers Ass’n., Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007). *See also Davis*, 553 U.S. at 338–39.

118. *Davis*, 553 U.S. at 338–39 (internal quotation marks and citations omitted).

practical effects that the restriction has on interstate commerce,¹¹⁹ including increased costs.¹²⁰ This second step is most relevant for the purposes of this paper.

Under the second step, courts engage in a “balancing approach” that asks whether “the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.”¹²¹ As in the abortion restriction context, courts applying the dormant Commerce Clause test have recognized that not all burdens are unconstitutional.¹²² But the restriction is unconstitutional if the burden imposed on interstate commerce is “more significant” than the state’s proffered justification for the restriction.¹²³ In short, courts consider the “practical effect” of the restriction to determine whether it imposes an “undue burden.”¹²⁴

However, unlike in the abortion restriction context, courts applying the dormant Commerce Clause test uniformly consider the state’s “regulatory scheme” as a whole, rather than just the challenged statute in isolation.¹²⁵ For example, in *Granholm v. Heald*, the U.S. Supreme Court addressed a dormant Commerce Clause challenge to New York and Michigan’s laws restricting wine shipments from outside of their states.¹²⁶ In that case, the states allowed in-state wineries to sell wine directly to consumers but made it difficult for out-of-state

119. *Id.* (quoting *Pike*, 397 U.S. at 142) (alteration in *Davis*).

120. See *Hunt v. Washington State Apple Adver. Comm’n*, 432 U.S. 333, 350–51 (1977) (considering the “practical effect[s]” of the challenged statute, including “the statute’s consequence of raising the costs of doing business in the North Carolina market for Washington apple growers and dealers[.]”).

121. *Pike*, 397 U.S. at 142 (“[T]he extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.”). See also *Hunt*, 432 U.S. at 350 (“[W]hen such state legislation comes into conflict with the Commerce Clause’s overriding requirement of a national common market, we are confronted with the task of effecting an accommodation of the competing national and local interests.”) (internal citations and quotation marks omitted).

122. See, e.g., *W. Live Stock v. Bureau of Revenue*, 303 U.S. 250, 255 (1938) (“All of these taxes in one way or another add to the expense of carrying on interstate commerce, and in that sense burden it; but they are not for that reason prohibited.”).

123. *Pike*, 397 U.S. at 145 (concluding that Arizona’s law requiring that cantaloupe producers pack their cantaloupes in Arizona was unconstitutional because “the nature of th[e] burden” imposed—which required a California company to “build and operate an unneeded \$200,000 packing plant in the State[]”—was “more significant” than the extent of “the State’s tenuous interest.”).

124. See *Tracy*, 519 U.S. at 298, n. 12 (referring to the “*Pike* undue burden test”); *Davis*, 553 U.S. at 365 (“The undue burden rule, however, remains an essential safeguard against restrictive laws.”); *Lopez*, 514 U.S. at 579–80 (“One element of our dormant Commerce Clause jurisprudence has been the principle that the States may not impose regulations that place an undue burden on interstate commerce[.]”).

125. *Granholm v. Heald*, 544 U.S. 460, 471 (2005) (framing the dormant Commerce Clause issue before the Court in the following way: “Does a State’s regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate the dormant Commerce Clause. . .?”) (emphasis added); *Kassel*, 450 U.S. at 667 (addressing the constitutionality of “Iowa’s statutory scheme”).

126. *Heald*, 544 U.S. at 465.

wineries to do so.¹²⁷ The Court began by explaining how each state's regulatory scheme operated. Michigan had completely banned out-of-state wine shipments directly to consumers, so out-of-state wineries had to find a Michigan wholesaler, who would then sell the wine to a Michigan retailer.¹²⁸ However, the Court concluded that the wholesaler's markup and the difficulty of finding a wholesaler rendered this option "economically infeasible[]"¹²⁹ and "impractical from an economic standpoint."¹³⁰ As a result, the Court concluded that Michigan's regulatory scheme "effectively bar[red] small wineries from the Michigan market."¹³¹ The New York scheme did not completely ban out-of-state wine shipments directly to consumers, but it required that out-of-state wineries open a branch office and warehouse in New York to ship directly to consumers.¹³² The Court noted that the cost of opening a new establishment in New York would be "prohibitive[]" for most wineries.¹³³

Throughout its analysis, the Court in *Granholm* considered how multiple restrictions in the overall regulatory schemes interacted to impose a burden on interstate commerce. For example, when assessing the burden of the New York scheme, the Court considered how the in-state presence requirement was compounded by a separate licensing requirement.¹³⁴ It reasoned that, even if some out-of-state wineries *could* overcome the practical, financial hurdles of establishing an office and a warehouse in New York, they would still be subject to yet another restriction that limited their ability to ship to consumers: a more restrictive licensing scheme.¹³⁵ Specifically, out-of-state wineries would not be eligible for a farm winery license but rather only a commercial winery license.¹³⁶ In turn, a commercial winery license required that the winery obtain a separate certificate from the state liquor authority before shipping directly to consumers.¹³⁷ In sum, the Court considered the cumulative effects of all of the state's restrictions on out-of-state wineries. And it concluded that both states' regulatory schemes imposed an undue burden on interstate commerce and, therefore, violated the dormant Commerce Clause.¹³⁸

As explained above, these two areas of constitutional law have much in common. Both areas of jurisprudence seek to balance two competing interests through the language of "undue burdens." To do so, both areas look to the

127. *Id.* at 465–66.

128. *Id.* at 468.

129. *Id.*

130. *Id.* at 466.

131. *Id.* at 474.

132. *Id.* at 474–75 (referring to this as the "in-state presence requirement").

133. *Id.* at 475.

134. *Id.*

135. *Id.* at 475–76.

136. *Id.* at 475.

137. *Id.*

138. *Id.* at 493.

practical effect that state restrictions have on the ground. However, the undue burden analysis in the abortion restriction context has failed to take a holistic approach that considers the cumulative effects of, and interaction between, multiple abortion restrictions within a state. The reason for this difference is unclear.

V. CONCLUSION

In conclusion, courts' failure to consider cumulative effects in the undue burden analysis has resulted in a severe imbalance between the two competing interests at stake, a gradual (but no less harmful) erosion of women's reproductive rights, and an approach that is inconsistent with the practical, holistic approach that the U.S. Supreme Court advocated in *Casey*. Both the practical realities of the current piecemeal abortion landscape and Supreme Court precedent suggest that courts should consider the cumulative effects of multiple abortion restrictions when engaging in the undue burden analysis. In other words, the proper unit of analysis is the state's regulatory scheme as a whole, not the challenged abortion restriction in isolation. This conclusion is further supported by the fact that courts *already* consider cumulative effects while assessing burdens in other areas of constitutional law—namely, while applying the dormant Commerce Clause test.