STATE CONSTITUTIONAL LAW — ABORTION LAW — IOWA SUPREME COURT APPLIES STRICT SCRUTINY TO ABORTION RESTRICTION. — *Planned Parenthood of the Heartland v. Reynolds*, 915 N.W.2d 206 (Iowa 2018).

In *Roe v. Wade*,[1] the United States Supreme Court held that the fundamental right to privacy encompassed in the Fourteenth Amendment's liberty guarantee was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[2] In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[3] the Court reaffirmed that the right to choose to have an abortion was constitutionally protected.[4] However, the Court sought to balance that right with the state's interest in "potential life" by articulating a new "undue burden" standard: the state may regulate abortions before the point of fetal viability unless the regulation "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion."[5] Recently, in *Planned Parenthood of the Heartland v. Reynolds*,[6] the Iowa Supreme Court returned to the strict scrutiny standard used in *Roe* to invalidate a statute imposing a seventy-two-hour waiting period for women seeking abortions, finding that it violated both the due process and equal protection clauses of the Iowa Constitution.[7] In choosing to apply strict scrutiny rather than the undue burden standard, the Iowa Supreme Court intended to replace a notoriously malleable standard with one that requires a more rigorous and objective review of abortion restrictions. This case indicates that subjectivity *can* pervade strict scrutiny, and therefore that the higher standard does not resolve subjectivity problems in all cases. However, strict scrutiny is still a more objective test than the undue burden standard, and its application in abortion cases provides stability and protection to a fundamental right.

In April 2017, the Iowa legislature passed Senate File 471 ("the Act"), which mandated that women wait seventy-two hours after their informational appointment before receiving an abortion.[8] Planned Parenthood of the Heartland (PPH) moved for a temporary injunction to prevent the statute from going into effect, arguing that it violated the due process and equal protection clauses of the Iowa Constitution.[9] The district court denied the injunction, but the Iowa Supreme Court rapidly

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[1] 410 U.S. 113 (1973).
[2] *Id.* at 153.
[3] 505 U.S. 833 (1992).
[4] *See id.* at 846.
[5] *Id.* at 877 (joint opinion of O'Connor, Kennedy, and Souter, JJ.); *see id.* at 871, 876–77.
[6] 915 N.W.2d 206 (Iowa 2018).
[7] *Id.* at 212.
[8] *Id.* at 213; *see also* 2017 Iowa Acts ch. 108, § 1 (codified at IOWA CODE § 146A (2018)).
[9] *Reynolds*, 915 N.W.2d at 213–14.

granted PPH's interlocutory appeal, staying the Act's enforcement pending a district court trial.[10]

The district court held that the Act did not violate the Iowa Constitution. Pointing to several studies, the court found that the state's purpose — to promote childbirth — was adequately served by the policy, and that the burden on women seeking abortion was not great, given that the court found no evidence that the Act would cause clinics to close.[11] On this basis, the district court held that the statute violated neither the due process nor the equal protection clause of the Iowa Constitution.[12]

The Iowa Supreme Court reversed.[13] Writing for the majority, Chief Justice Cady[14] noted the court's "ultimate authority" to interpret constitutional guarantees designed to "limit the power of the majoritarian branches of government."[15] With that in mind, the Chief Justice reviewed the record below, including PPH's pre-abortion protocols[16] and data concerning access to abortion care in Iowa prior to the Act.[17] The court listed limited obstetrician and gynecologist access,[18] cost,[19] distance,[20] and domestic violence and sexual assault[21] as factors limiting abortion access in the state. Chief Justice Cady then used hypothetical sample patients from different Iowa cities to illustrate the additional burdens for patients under the Act. The waiting period would require them to make two trips to their provider[22] and incur extra, potentially

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[10] *Id.* at 214.

[11] Planned Parenthood of the Heartland v. Reynolds, No. EQCE081503, slip op. at 42–44 (Iowa Dist. Ct. Polk Cty. Sept. 29, 2017).

[12] *Id.* at 45–46.

[13] *Reynolds*, 915 N.W.2d at 212.

[14] Chief Justice Cady was joined by Justices Wiggins, Hecht, Appel, and Zager.

[15] *Reynolds*, 915 N.W.2d at 213.

[16] *Id.* at 216–17. PPH's process includes patient education and a "decisional-certainty assessment," *id.* at 216, and if the patient is not "completely firm" in the decision to have an abortion, "PPH does not perform the abortion and instead advises [the patient] to take more time with the decision," *id.* at 217.

[17] *Id.* at 218–20.

[18] *Id.* at 218 ("At the time this suit was filed, Iowa ranked forty-sixth in the nation for obstetrician and gynecologist (OB/GYN) access for reproductive-age women.").

[19] *Id.* at 219. "Cost" includes not only the cost of the procedure, but also "collateral costs such as transportation, child care, lodging, . . . subsequent medical costs," and lost wages. *Id.*

[20] *Id.* ("Approximately 35% of surgical patients and 25% of medication patients in Iowa travel more than fifty miles to their needed clinic.").

[21] The court noted that abusers often "carefully monitor[]" their partners in order to control them, and that survivors may have heightened interests in speed and confidentiality when choosing to terminate a pregnancy. *Id.* at 220.

[22] Patients would need to make one trip for a pre-abortion certification appointment and another for the procedure. *Id.* at 227, 229–30.

cost-prohibitive financial burdens,[23] and could delay them beyond the twenty-week cutoff.[24]

Although *Reynolds* was a facial challenge, for which a petitioner must normally prove that a statute is "incapable of any valid application,"[25] the court noted that *Casey* considered the law as applied to "the group for whom the law is a restriction, not for whom the law is irrelevant,"[26] and that "[t]here are few hurdles that are of level height for women of different races, classes, and abilities."[27] It therefore followed *Casey*'s approach, measuring the restriction's constitutionality by "its impact on those whose conduct it affects."[28]

The court then addressed PPH's due process claim, determining first, "the nature of the individual right involved," and second, "the appropriate level of scrutiny to apply."[29] Following the relevant federal jurisprudence, the court concluded that the restriction implicated the fundamental privacy right encompassed by Iowa's due process clause.[30] Breaking with federal jurisprudence, though, the court concluded that the undue burden standard "fails to guarantee that the objective of the regulation is, in fact, being served and is inconsistent with the protections afforded to fundamental rights,"[31] and that it likewise fails "to offer an objective standard by which the [regulation's] effect should be judged."[32] The court therefore applied strict scrutiny, which requires that the restriction be "narrowly tailored to serve a compelling state interest."[33]

The court determined that the district court's reliance on several studies presented at trial was "misplaced" because the studies failed to establish that waiting periods caused patients seeking abortions to change their minds.[34] Furthermore, the lower court failed to consider other studies that came to different conclusions.[35] Regarding the only

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[23] *Id.* at 227–29.

[24] *Id.* at 229. This problem is exacerbated in the case of medication abortions, for which the cutoff is ten weeks. *Id.* at 230. Delay is also associated with increased medical risks — while abortion is a safe procedure, the risks increase with advancing gestational age, and limited abortion access also contributes to decisions to self-induce an abortion. *Id.* at 230–31. The court also noted that the waiting period increased risks for domestic violence and assault survivors. *Id.* at 231.

[25] *Id.* at 232 (quoting Santi v. Santi, 633 N.W.2d 312, 316 (Iowa 2001)).

[26] *Id.*

[27] *Id.*

[28] *Id.* (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 894 (1992)); *see also* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2320 (2016) (endorsing the *Casey* formulation of the "relevant denominator").

[29] *Reynolds*, 915 N.W.2d at 233 (quoting Hensler v. City of Davenport, 790 N.W.2d 569, 580 (Iowa 2010)).

[30] *Id.* at 234–37.

[31] *Id.* at 240.

[32] *Id.* (quoting Planned Parenthood of Middle Tenn. v. Sundquist, 38 S.W.3d 1, 16 (Tenn. 2000)).

[33] *Id.* at 241 (quoting Santi v. Santi, 633 N.W.2d 312, 318 (Iowa 2001)).

[34] *Id.* at 242.

[35] *Id.*

study that inquired into why some patients chose not to have an abortion ("the Roberts study"), the court emphasized that the district court had erroneously included patients who had come to their first appointments already intending to continue their pregnancies or conflicted about the decision when calculating how many patients changed their minds because of the waiting period.[36]

The court concluded that the seventy-two-hour waiting period would "not result in a measurable number of women choosing to continue a pregnancy they would [otherwise] have terminated," and that "the burdens imposed on women by the waiting period [would be] substantial, especially for women without financial means."[37] For these reasons, the court held that, although the state had compelling interests in promoting potential life and informed decisionmaking, the restriction was not narrowly tailored to serve those interests.[38] Similarly, the court held that the statute violated the state constitution's equal protection clause, as the impediment to women's fundamental right to autonomy was not narrowly tailored to any compelling state interest.[39]

Justice Mansfield dissented,[40] asserting first that the framers of the Iowa Constitution would not have understood the document to protect abortion rights and that it is for the legislature, not the judiciary, to respond to changing conditions.[41] Justice Mansfield also claimed that the majority's analysis failed to give sufficient weight to the state's interest in the potential life of the fetus, given that many Iowans view abortion as ending a life.[42] Finally, Justice Mansfield argued that this decision was out of step with precedent: most courts have applied the undue burden standard in abortion cases and have upheld similar restrictions.[43] States that apply strict scrutiny generally have explicit privacy rights language in their constitutions, which Iowa does not.[44] Applying the undue burden standard, then, Justice Mansfield gave "considerable weight" to the Roberts study (concluding, unlike the majority, that it showed that mandatory waiting periods *do* cause women to choose not to have abortions) and other courts' decisions on similar

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[36] *Id.* at 241–42. After the Iowa Supreme Court subtracted those patients, the percentage of women who changed their minds was comparable to the percentages in jurisdictions without mandatory waiting periods. *Id.* at 241.

[37] *Id.* at 242.

[38] *Id.* at 243–44.

[39] *Id.* at 244–46.

[40] Justice Mansfield was joined by Justice Waterman.

[41] *Reynolds*, 915 N.W.2d at 247–49 (Mansfield, J., dissenting).

[42] *Id.* at 249.

[43] *Id.* at 250–54. Justice Mansfield noted that this was true in *Casey* itself, where the Court explicitly addressed the fact that the restriction would require someone seeking an abortion to make two trips to the provider. *Id.* at 253.

[44] *Id.* at 254–55.

restrictions.[45] Justice Mansfield noted that "the issue is indeed close," but concluded that the restriction's "emotional and financial costs" did not constitute an undue burden.[46]

The court characterized its use of strict scrutiny instead of the undue burden standard as "replac[ing] a judge's subjective understandings as to what obstacles women can conceivably withstand" with a "well-established framework that measures the relationship between the government's objective and its chosen means."[47] But *Reynolds* is an example of a case in which strict scrutiny does not completely remedy the subjectivity inherent in the undue burden test. Even on the question of whether the restriction served a compelling state interest, the Justices came to fundamentally different conclusions. However, strict scrutiny is certainly a more objective standard than undue burden. Moreover, it provides strength and stability to the state's abortion jurisprudence and insulates Iowa from the national undue burden standard at a time when that standard may be used to undermine abortion rights.

Since it was first advanced in *Casey*, the undue burden standard has drawn criticism for its "inherently standardless nature."[48] Justice Scalia noted in *Casey* that, "[b]y finding and relying upon the right facts," a district judge can invalidate "almost any abortion restriction that strikes him as 'undue.'"[49] This concern holds equally true for judges upholding restrictions that heavily burden those seeking abortions. According to the *Reynolds* court, the undue burden standard "offers . . . no real guidance and engenders no expectation among the citizenry that governmental regulation of abortion will be objective, evenhanded, or well-reasoned"[50] and "in effect, [it] allows judges to impose their own subjective views of the propriety of the legislation in question."[51] It has been said that "*Roe v. Wade* today describes two ways to cross a river, not the law governing abortion,"[52] because the discretion built into the undue burden standard has ensured that states' preferred restrictions are upheld, regardless of the burden.[53]

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[45] *Id.* at 258; *see id.* at 255–58.

[46] *Id.* at 258.

[47] *Id.* at 240 (majority opinion).

[48] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 992 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part).

[49] *Id.*

[50] *Reynolds*, 915 N.W.2d at 240 (omission in original) (quoting Planned Parenthood of Middle Tenn. v. Sundquist, 38 S.W.3d 1, 17 (Tenn. 2000)).

[51] *Id.* at 239 (quoting *Sundquist*, 38 S.W.3d at 16).

[52] Rich Barlow, *Trump's SCOTUS Nominee Can't Kill* Roe v. Wade*. It's Already Dead*, WBUR (July 9, 2018), http://www.wbur.org/cognoscenti/2018/07/09/brett-kavanaugh-abortion-rich-barlow [https://perma.cc/UC9L-CL4S].

[53] The Guttmacher Institute, a research and policy organization focused on promoting reproductive rights, found that, between 2011 and 2017, states enacted 401 abortion restrictions, accounting for 34% of the restrictions passed since *Roe* was announced in 1973. ELIZABETH NASH ET

Although on its own, strict scrutiny does not solve the subjectivity problem, it does rein it in. While the undue burden standard "left open the possibility of informal deference" to state legislatures, especially "in cases involving the state's interest in respecting potential life,"[54] like *Reynolds*, forcing the state to closely tie its means to its stated ends provides at least one measurable dimension to guide judicial interpretations.[55]

However, *Reynolds* shows that even when judges must determine whether the state's policy is narrowly tailored to serve its compelling interest, room for subjectivity remains. The *Reynolds* court's strict scrutiny analysis, though it acknowledged that the Act "swe[pt] with an impermissibly broad brush"[56] and was therefore not "narrowly tailored," in fact hinged on whether the restriction served the state's interest in potential life at all.[57] The majority and the dissent came out on opposite sides of even the seemingly objective issue of whether waiting periods reduced the incidence of abortion. This discrepancy is not explained away by the fact that the majority applied strict scrutiny and the dissent applied the undue burden standard — the Justices read the same studies, but their different interpretations of the data presented led them to fundamentally different conclusions.[58] Both groups looked at the Roberts study and saw that approximately 8% of the women surveyed reported that they were no longer seeking an abortion after a mandatory seventy-two-hour waiting period.[59] The majority counted only the patients who came in having decided to have an abortion and changed their minds after the waiting period, on the theory that the others would have been screened out by PPH's decisional-certainty measures.[60] As

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AL., GUTTMACHER INST., POLICY TRENDS IN THE STATES, 2017 (Jan. 2, 2018), https://www.guttmacher.org/article/2018/01/policy-trends-states-2017 [https://perma.cc/U4NV-34YV]; *see also Casey*, 505 U.S. at 986 (Scalia, J., concurring in the judgment in part and dissenting in part) (calling the standard "inherently manipulable" and "unworkable in practice").

54 *The Supreme Court, 2015 Term — Leading Cases*, 130 HARV. L. REV. 397, 406 (2016).

55 *See Reynolds*, 915 N.W.2d at 240–41. *But see* Khiara M. Bridges, *"Life" in the Balance: Judicial Review of Abortion Regulations*, 46 U.C. DAVIS L. REV. 1285, 1337–38 (2013) (arguing that strict scrutiny is fundamentally a balancing test and may not effectively protect abortion rights when fetal life is the state interest on the other side).

56 *Reynolds*, 915 N.W.2d at 243.

57 *See id.* at 241 ("[T]he factual issue in this case is whether requiring all women to wait at least three days between the informational and procedural appointments will impact patient decision-making.").

58 Although the undue burden standard does not formally incorporate a means-ends test in cases involving the state's interest in protecting potential life, Justice Mansfield still concluded that mandatory waiting periods would be effective in preventing abortions. *Id.* at 258 (Mansfield, J., dissenting).

59 *Id.* at 255–56 (citing Sarah C.M. Roberts et al., *Utah's 72-Hour Waiting Period for Abortion: Experiences Among a Clinic-Based Sample of Women*, 48 PERSP. ON SEXUAL & REPROD. HEALTH 179 (2016)).

60 *See id.* at 241–42 (majority opinion).

such, the majority concluded that the remaining number was 2%, comparable to the numbers in jurisdictions without waiting periods (between 1% and 3%).[61] The dissent characterized this interpretive move as comparing "apples to oranges . . . . If 8% decide not to have an abortion when *there is a waiting period* and 1 to 3% decide not to have an abortion when *there is no waiting period*, the difference made by the waiting period is 5 to 7%."[62] Justice Scalia's prediction regarding "finding and relying upon the right facts"[63] has come to fruition. Even in interpreting seemingly objective studies to determine whether the restriction really furthers the state's goals, there is ample room for subjective analysis.

That said, strict scrutiny provides a more stable rule for courts to follow by unlinking Iowa from a federal standard that may soon evolve dramatically. The undue burden standard's deference to judges puts abortion rights at risk, particularly as anti-abortion views become a litmus test for judges appointed to the federal bench.[64] The Supreme Court could (and soon may) completely gut *Roe* simply by holding that an extreme restriction does not impose an undue burden under *Casey*.[65] In fact, in May 2018, the Iowa legislature passed the nation's most restrictive abortion regulation in hopes of making it to the U.S. Supreme Court and overturning *Roe*.[66]

Although federal precedent does not bind the Iowa Supreme Court in interpreting the Iowa Constitution, federal undue burden cases doubtless influence courts' analyses, especially in the absence of state precedent. The *Reynolds* dissent relied heavily on the fact that other courts applying the undue burden standard, including in *Casey* itself,

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[61] *Id.*

[62] *Id.* at 256 (Mansfield, J., dissenting).

[63] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 992 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part).

[64] *See* Sean Sullivan & Mike DeBonis, *With Little Fanfare, Trump and McConnell Reshape the Nation's Circuit Courts*, WASH. POST (Aug. 14, 2018), https://wapo.st/2KYp7io [https://perma.cc/6Q4E-YF5P]. Anti-abortion activists have welcomed this trend. *See* AMS. UNITED FOR LIFE, DEFENDING LIFE 351 (Steven H. Aden et al. eds., 2018).

[65] *See* Mark Joseph Stern, *The End of* Roe, SLATE (June 27, 2018, 6:03 PM), https://slate.com/news-and-politics/2018/06/kennedys-retirement-ensures-roe-v-wade-will-be-overturned.html [https://perma.cc/6S7X-VPNP].

[66] Stephen Gruber-Miller, *Republicans Hope a Challenge to Iowa's Fetal Heartbeat Bill Will Overturn* Roe v. Wade. *How Would That Work?*, DES MOINES REG. (May 2, 2018, 7:37 PM), https://www.desmoinesregister.com/story/news/crime-and-courts/2018/05/01/roe-v-wade-fetal-heartbeat-lawsuit-supreme-court-iowa-republican/442359002/ [https://perma.cc/KG4A-ACB4]. The law would prohibit abortion after a fetal heartbeat is detectable (about six weeks into a pregnancy), *id.*, but has been temporarily enjoined by a Polk County judge, *see* Bill Chappell, *Judge Temporarily Blocks Iowa's "Fetal Heartbeat" Abortion Law*, NPR (June 1, 2018, 2:07 PM), https://www.npr.org/sections/thetwo-way/2018/06/01/616136014/court-puts-temporary-stop-on-iowas-heartbeat-abortion-law [https://perma.cc/TDQ3-XF4L].

found mandatory waiting periods permissible.[67] Most of these were federal cases, and all came from outside Iowa.[68] By adopting strict scrutiny, the Iowa Supreme Court has insulated Iowa from a growing body of persuasive authority that chips away at abortion access's status as an implied fundamental right under *Roe*.

Furthermore, choosing to apply strict scrutiny does send a strong normative message about the value of the right. The *Reynolds* court put it this way: "[A]dopting the undue burden standard would relegate the individual rights of Iowa women to something less than fundamental."[69] While its doctrinal elements leave room for subjectivity, strict scrutiny's normative force as the highest level of constitutional scrutiny may make judges think twice before upholding abortion restrictions.[70] The undue burden standard arguably ended the treatment of abortion access as a fundamental right, but applying strict scrutiny symbolically restores its treatment as such.[71]

In a time when federal abortion law appears vulnerable to significant revision, state constitutional law may be a way forward. *Reynolds* is one example of what this could look like.[72] Just as culture influences constitutional rulings, constitutional rulings can influence culture.[73] And, though technically separate from federal constitutional law, "state court opinions about state law are venues within which national values are continually contested and reshaped."[74] Although some subjectivity remains, strict scrutiny untethers Iowa from a weak and vulnerable federal standard and provides a stronger layer of protection for abortion rights in a state where abortion access is already limited. In the face of potentially evolving federal abortion jurisprudence, *Reynolds* is a laudable example of a state court's contribution to the constitutional discourse.

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[67] *Reynolds*, 915 N.W.2d at 250–53 (Mansfield, J., dissenting).

[68] *See id.* at 251–52.

[69] *Id.* at 240 (majority opinion).

[70] *Cf.* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 795, 814–15 (2006) (examining the perception of strict scrutiny as "inevitably deadly," *id.* at 795, and providing an empirical analysis showing the test has about a 30% survival rate).

[71] However, since *Casey* abrogated *Roe*'s trimester framework and brought the state interest in fetal life back to the moment of conception, courts applying strict scrutiny now must contend with a state interest that, under *Roe*, wouldn't properly be considered a state interest in the first trimester. *See* Nina Martin, *The Supreme Court Decision that Made a Mess of Abortion Rights*, MOTHER JONES (Feb. 29, 2016, 11:00 AM), https://www.motherjones.com/politics/2016/02/supreme-court-decision-mess-abortion-rights/ [https://perma.cc/ZU58-7D9F].

[72] *See, e.g.*, Mark Joseph Stern, *A Post-*Roe *Road Map*, SLATE (July 9, 2018, 5:55 AM), https://slate.com/news-and-politics/2018/07/in-planned-parenthood-v-reynolds-the-iowa-supreme-court-gives-states-a-post-roe-road-map.html [https://perma.cc/YAW5-XJAA].

[73] *See* Robert Post & Reva Siegel, Essay, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 395 (2007).

[74] *Id.* at 382.