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CONSTITUTIONAL LAW—ABSTENTION & ABORTION:
APPLICATION OF THE UNDUE BURDEN STANDARD TO “CERTIFICATE OF NEED” REGULATIONS. Planned Parenthood of Greater Iowa, Inc. v. Atchison, 126 F.3d 1042 (8th Cir. 1997).

I. INTRODUCTION

In Planned Parenthood of Greater Iowa, Inc. v. Atchison, the Eighth Circuit Court of Appeals focused on two important principles of federal law, each markedly different from the other. The controversy centered on the construction of a proposed abortion facility by Planned Parenthood of Greater Iowa (PPI). Following the imposition of several Certificate of Need (CON) Regulations by Iowa’s Department of Health (Department), PPI filed suit in federal district court.

On appeal, the Eighth Circuit addressed two separate issues: first, whether the district court had abused its discretion in failing to abstain from hearing PPI’s claim under the principles of Younger v. Harris; and second, whether requiring the clinic to undergo CON review would impose an undue burden on the right of access to abortion, thereby qualifying as unconstitutional under the newly tailored analysis of Planned Parenthood of Southeastern Pennsylvania v. Casey. The Eighth Circuit upheld the district court’s decision allowing the injunction, as abstention under Younger was inappropriate. The court also determined that the CON regulations would impose an undue burden on a woman’s right to abortion under the Casey analysis.

This casenote discusses the scenario of facts leading up to the Eighth Circuit’s decision in Atchison. The note then reviews the application of

1. 126 F.3d 1042 (8th Cir. 1997).
2. See id.
3. See id. at 1044.
4. See id.

Certificate of need is the common name for a diverse group of state health care laws attempting to control health care costs by regulating supply. These laws require that a permit, usually called a certificate of need, be issued by a state health planning agency before a health care facility may construct or expand, offer a new service, or purchase equipment exceeding a certain cost. A CON will not be issued unless a new facility or service is genuinely needed in a given community. Although determining need can be problematic, CON laws provide statutory and rule criteria to guide the issuing agency’s discretion.

5. See Atchison, 126 F.3d at 1044.
8. See Atchison, 126 F.3d at 1048.
9. See id. For a discussion of the Court’s analysis in Casey, see infra Part III.B.3.a.
Younger abstention principles both prior to and following the decision in Younger v. Harris and the foundations for state regulation of the right to abortion. Finally, the casenote discusses Atchison’s extension of and impact on these doctrines as relating to similar CON regulations.

II. FACTS

In 1995, Planned Parenthood of Greater Iowa (PPI) announced plans to construct and operate a new health care facility in the Quad Cities area of Iowa and Illinois. The proposed facility was to provide basic family planning health services, including abortions. Because the clinic would provide pregnancy termination options for pregnant women, its establishment met great opposition in the area. Those opposed to the project wasted little time in informing various state officials in Iowa of their disapproval. This discontent led those officials to pressure the Iowa Department of Health (Department) to require that the new clinic submit to the state’s CON regulations, although those regulations were generally inapplicable to similar non-abortion facilities.

The Iowa CON statutes date back to 1977. The Iowa legislature enacted them at that time to ensure that any new offering of health care services was both necessary and accomplished in the most efficient manner possible. Before a formal CON review begins, the sponsor of a project may request a determination from the Department as to whether the new facility will be subject to the applicable regulations. In order to formally commence the CON review process, the sponsor of a project must submit a “letter of intent”

10. See Brief for Appellee at 2, Planned Parenthood of Greater Iowa, Inc. v. Atchison, 126 F.3d 1042 (8th Cir. 1997) (No. 96-4076). The Quad Cities area includes Davenport and Bettendorf, Iowa, and Moline and Rock Island, Illinois. See id.
11. See Atchison, 126 F.3d at 1043.
12. See id. at 1044. The principal opponent of PPI’s plans was the Roman Catholic Diocese of Davenport, Iowa. See Brief for Appellee at 7, Atchison (No. 96-4076).
13. See Atchison, 126 F.3d at 1044.
15. See Atchison, 126 F.3d at 1044. The CON process is designed to ensure “that the offering or development of new institutional health services be accomplished in a manner which is orderly, economical and consistent with a goal of providing necessary and adequate institutional health services to all the people of [Iowa] . . . .” Id. (citing 1977 Iowa Acts 75 (codified at IOWA CODE § 135.63 (1997))).
16. See Brief for Appellee at 6, Atchison (No. 96-4076). This is an important point because the sponsor of a project has several options upon learning that a new facility is subject to CON review, such as revising its plans or filing an action in federal court. See Atchison, 126 F.3d at 1047.
to the Department describing the proposed facility. At least sixty days thereafter, the sponsor may submit an application, pay a fee, and await the Department's determination. If the Department accepts the application, a formal review of the project will commence.

In November of 1995, PPI received a letter from the Department of Health stating that their new facility might be subject to review under the CON statutes. A second letter followed in January of 1996, as PPI had not responded to the Department's first attempt. In response to that letter, PPI sent a letter to the Department in March of 1997, requesting a determination of whether the new facility was subject to CON review. Less than one month later, the Department answered PPI's request in the affirmative. Soon thereafter, PPI filed its action in federal district court under 42 U.S.C. § 1983 and obtained an injunction prohibiting the Department from proceeding further. The Department appealed to the Eighth Circuit Court of Appeals claiming that the district court had heard the case improperly under the holding of *Younger v. Harris*.

The court of appeals rejected the Department's claim that the exchange of letters between the parties signaled the commencement of the review process.

18. *See Atchison*, 126 F.3d at 1044. The letter of intent includes a description of the new facility, its proposed location, and an estimate of its cost. *See Iowa Code § 135.65 (1997).* The Iowa Code states that this letter should be submitted as soon as possible "after initiation of the applicant's planning process . . ." *Id.* Upon receipt of an applicant's letter, the Department conducts a preliminary review of the project's status noting any factors which may result in a denial of a certificate of need. *See id.*

19. *See id.*

20. *See id.* The formal review process involves two steps. The first step requires the Department to evaluate each application against specific criteria enumerated at § 135.64 of the Iowa Code. *See Iowa Code § 135.64 (1997).* The second step involves conducting a public hearing on the matter prior to the completion of the previous step. *See id.*

21. *See Atchison*, 126 F.3d at 1044. Several Department of Health officials admitted that similar health care facilities were ordinarily not subject to CON review. *See id.* at 1045. The Iowa Code contains various exceptions that routinely remove such facilities from the text of the statutes. *See Iowa Code § 135.63 (1997).*

22. *See Atchison*, 126 F.3d at 1054.

23. *See id.* at 1044.

24. *See id.*

25. 42 U.S.C. § 1983 (1994). This section generally provides for civil actions for persons claiming their civil rights have been violated under color of state law. *See id.* In this case, the alleged violation involved the right of access to abortion. *See Atchison*, 126 F.3d at 1044.

26. *See Atchison*, 126 F.3d at 1045.

27. *See id.* at 1046. As will be discussed in the following sections, the doctrine of abstention under *Younger* holds that, absent extraordinary circumstances, federal courts should resist any temptation to become involved in disputes currently subject to state judicial proceedings until those proceedings are complete. *See Younger v. Harris*, 401 U.S. 37 (1971); see also *infra* notes 29 and 32 for more information on this doctrine.

28. *See Atchison*, 126 F.3d at 1047. The Department contended that PPI's request as to
The court stated that the alleged proceedings were neither "ongoing" nor "judicial in nature" as required to trigger the abstention rules. The court further determined that the district court had not erred in holding that the arbitrary application of the CON statutes to PPI's clinic imposed an unconstitutional burden on the right of access to abortion.

III. BACKGROUND

The decision in Atchison addressed two separate areas of law. Therefore, the following is divided into two separate parts corresponding to those topics. The first part of this section discusses the history and evolution of abstention under the Younger doctrine and its subsequent extension to non-criminal proceedings. The second part of this section discusses the rise of abortion as a right guaranteed to all women and the history of state regulations levied against that right.

A. The Evolution of Younger Abstention

1. Policy Against Federal Interference with State Proceedings: History and the Younger Doctrine

Based on principles of federalism, both legislators and judges alike have consistently expressed a desire to prohibit federal court interference with ongoing state court proceedings. Apparently, the initial statutory recognition of this policy was in a 1793 Act that prohibited federal courts from issuing injunctions to stay such proceedings. That Act's modern day equivalent expresses a similar prohibition. Over the years little has changed, as courts
have consistently applied this doctrine in their rulings. The following discussion includes excerpts from the history of that application leading up to the Younger decision.

Generally, a federal court will interfere with state court proceedings only upon showing of exceptional circumstances. Beal v. Missouri Pacific Railroad Corp. involved state criminal proceedings following the violation of a Nebraska railroad employment law. The lower court enjoined the prosecution after finding a threat of irreparable injury to the defendants. The Supreme Court reversed this decision. The Court stated that interference with state court criminal proceedings should be undertaken only in exceptional circumstances and that such circumstances were not present. The Court noted that high regard must be afforded to all state proceedings in recognition of the justified independence of state governments. Two years later in Douglas v. Jeannette, the Court ruled against a party seeking to restrain enforcement of a licensing statute requiring parties to obtain a license prior to the “solicitation of orders for merchandise.” The Court held that where a criminal proceeding has not been shown to be other than in good faith, the federal courts will defer to state courts as the final arbiters subject to federal court review on constitutional issues. The Court’s decision in Douglas, while adhering to the extraordinary circumstances requirement, placed particularly heavy weight on noting that the prosecution had been brought in good faith.

injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.”

36. See id. at 46.
37. See id. at 50. The Court in Beal found “danger of irreparable injury in the threatened multiplicity of prosecutions . . . .” Id.
38. See id. at 51.
39. See id. at 50.
40. See id. In its introductory discussion of the policy against interference with state criminal proceedings, the Court pointed out that this policy extended only to criminal sanctions brought in good faith. See id. at 49. Courts consistently adhere to this good-faith requirement including the decision in Younger. See Younger, 401 U.S. at 47 (citing Douglas v. City of Jeannette, 319 U.S. 157, 164 (1943)).
41. 319 U.S. 157 (1943).
42. Id. at 159.
43. See id. at 163.
44. See id. See also supra note 40 for a discussion of this good-faith requirement. “It does not appear from the record that petitioners [in this case] have been threatened with any injury other than that incidental to every criminal proceeding brought lawfully and in good faith . . . .” Douglas, 319 U.S. at 164 (emphasis added).
Six years prior to *Younger*, the Supreme Court announced a decision that many believed struck a major blow to the policy of federal restraint.\(^{45}\) In *Dombrowski v. Pfister*,\(^{46}\) several civil rights proponents sought an injunction to restrain state officials from commencing criminal prosecutions against them.\(^{47}\) The district court dismissed the complaint stating that because irreparable harm was not imminent, the case was appropriate for application of the abstention doctrine.\(^{48}\) On appeal, the Supreme Court reviewed the longstanding policy against interfering with state court criminal proceedings.\(^{49}\) In reversing the district court’s decision, the Court applied an important exception to this policy. Appellants’ central mode of attack against the prosecution focused on the bad faith efforts of enforcing that prosecution by state officials.\(^{50}\) The Court found this to be important and determined that the necessary threat of irreparable injury had been established.\(^{51}\) Based on these findings, the Court held that abstention was improper.\(^{52}\) Although this opinion appeared to represent a major deviation from established principles at that time, the Court did little between *Dombrowski* and *Younger* to encourage that sentiment.\(^{53}\)

Following the fairly consistent history of prohibition against federal judicial interference with state proceedings, the Supreme Court’s decision in *Younger v. Harris* came as little surprise to most observers.\(^{54}\) In *Younger*, the appellant, Harris, claimed that his ongoing prosecution under a particular California criminal statute was unjust as the statute violated his constitutional rights under the First\(^ {55}\) and Fourteenth\(^ {56}\) Amendments.\(^ {57}\) With the criminal

\(^{46}\) 380 U.S. 479 (1965).
\(^{47}\) See id. at 482.
\(^{48}\) See id. at 482-83.
\(^{49}\) See id. at 483. “[T]he Court has recognized that federal interference with a State’s good-faith administration of its criminal laws is peculiarly inconsistent with our federal framework.” Id. at 484 (emphasis added).
\(^{50}\) See *Dombrowski*, 380 U.S. at 490. The Court defined prosecutions not brought in good faith as those brought “without any hope of ultimate success, but only to discourage appellants’ civil rights activities.” Id.
\(^{51}\) See id. at 490.
\(^{52}\) See id.
\(^{53}\) See Wright, supra note 45, ch. 8, § 52, at 341.
\(^{54}\) See Wright, supra note 45, ch. 8, § 52, at 341. In *Younger*, the Court appeared concerned with ensuring that the *Dombrowski* holding was not extended beyond situations involving bad faith prosecutions. See *Younger*, 401 U.S. at 48. See also George S. King, Federal Injunctive Relief Against Pending State Civil Proceedings: Younger Days Are Here Again, 44 La. L. Rev. 967, 968 (1984).
\(^{55}\) U.S. CONST. amend. I. Harris relied on the First amendment for its protections concerning free speech. See *Younger*, 401 U.S. at 39.
\(^{56}\) U.S. CONST. amend. XIV. Harris relied on the Fourteenth amendment’s provisions.
action pending in California, Harris instituted his action in federal district court seeking an injunction to halt his prosecution. The district court agreed that the statute was unconstitutional and granted the requested relief.

The Supreme Court began its opinion with a review of the strong federal policy against interference with ongoing state proceedings. The Court stated that Harris had an adequate opportunity in the present case to raise constitutional challenges and there was no indication that the prosecution had been brought in bad faith. The Court held that federal intervention in this case was inappropriate and reversed the district court’s decision. The Court’s decision in Younger was really nothing more than an application of an already widely followed federal policy. Some commentators have called the application of Younger abstention the “irreparable injury” standard.

In making its final determination, the Younger Court singled out Dombrowski to distinguish its application of this policy. The Court stated that Dombrowski did not upset the long settled doctrines of federal court abstention, but instead merely implied that certain extraordinary circumstances may call for federal interference with state criminal proceedings.

2. Extension of the Younger Doctrine Beyond Criminal Proceedings

Following the Younger decision, courts soon began expanding the Younger doctrine to cases involving pending civil actions. These cases generally involved state civil proceedings that implicated “important state interests.” The case most clearly outlining the framework for applying
Younger abstention to civil proceedings was Middlesex County Ethics Commission v. Garden State Bar Association.69

The Middlesex case involved a challenge to the constitutionality of certain disciplinary rules of a New Jersey Bar Ethics Committee.70 After having been served a complaint from the committee, Hinds, an attorney challenging the rules, filed suit in federal court.71 The district court dismissed the suit based on Younger abstention principles.72 The Third Circuit reversed the district court’s dismissal on the grounds that the proceedings did not provide Hinds with an adequate opportunity to raise his constitutional claims.73

In making its determination, the Supreme Court reviewed the policies and principles underlying Younger and its progeny.74 Based on its prior decisions, the Court laid the framework for analysis in such cases.75 The Court stated that making an appropriate determination in the dispute required answering three questions.76 These involved whether the state action constituted an ongoing judicial proceeding, whether the proceeding implicated important state interests, and whether the plaintiff was allowed an adequate opportunity to raise any constitutional challenges.77 In applying this framework, the Court first determined that the proceedings at issue in Middlesex were ongoing and judicial in nature.78 The Court also found that the issues presented were extremely important to the state of New Jersey and satisfied the second element required for the application of Younger.79 Finally, the Court held that Hinds had sufficient opportunity to raise any valid constitutional challenge.80

For the most part, courts have overwhelmingly accepted and applied the “definitive test” for Younger abstention enumerated in Middlesex.81 For the importance of a state’s interest may be shown where the civil proceeding is instituted for the protection of interests also protected by the state’s criminal laws. See id. at 604.

70. See id. at 425.
71. See id. at 429.
72. See id.
73. See id.
74. See Middlesex, 457 U.S. at 431. The Court noted that abstention under Younger should be observed absent extraordinary circumstances and that these policies applied equally well to noncriminal proceedings. See id. at 431-32.
75. See id. at 432.
76. See id.
77. See id.
78. See id. at 433. The Court made this determination without much analysis of the present case and essentially based it on New Jersey precedents. See id.
79. See id. at 434. “The State of New Jersey has an extremely important interest in maintaining and assuring the professional conduct of the attorneys it licenses . . . . [The] objective of which is ‘the protection of the public’ . . . .” Id.
80. See Middlesex, 457 U.S. at 435.
example, in *Alleghany Corp. v. McCartney*, a 1990 Eighth Circuit decision, the court applied both *Younger* abstention and the *Middlesex* criteria. The *Alleghany* decision is also noteworthy for its description of the types of proceedings that qualify as "judicial." The Eighth Circuit again applied the *Middlesex* refinements in a noncriminal proceeding in *Warmus v. Melahn*. The decision in *Warmus* provides a good example of the application of the *Middlesex* tests to a civil rights case.

B. The Establishment of Abortion as a Right and Analysis of State Regulation

Abortion in the United States has been considered a fundamental right since the Supreme Court's landmark decision in *Roe v. Wade*. This right, however, is not without limitation. This part of the note discusses the establishment of that right by *Roe* and other cases and the acceptable limitations thereto.

1. *Roe v. Wade*

In 1973 the United States Supreme Court, in a highly controversial decision, held invalid a Texas statute that made it a crime to procure or perform an abortion in most cases. In *Roe*, the Court held that such statutes violated the Due Process Clause of the Fourteenth Amendment, which protects an individual's right to privacy against state interference. The Court, however, did not state that this right was unlimited. The Court determined that some state regulation was appropriate so long as certain boundaries were not crossed.

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82. 896 F.2d 1138 (8th Cir. 1990).
83. See id. at 1141. In *Alleghany*, the court noted that the district court had applied the three requirements of *Younger as refined by Middlesex County*. See id.
84. See id. at 1143. "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist." Id. (citing New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350 (1989)).
85. 62 F.3d 252 (8th Cir. 1995). See also Fuller v. Ulland, 76 F.3d 957 (8th Cir. 1996).
86. See *Warmus*, 62 F.3d at 256-57. This case involved a § 1983 action brought against several state officials concerning allegations that those officials conspired to drive plaintiff's company out of business. See id. at 253.
88. See id. at 164-65.
89. See id. at 163. See also U.S. CONST. amend. XIV.
90. See *Roe*, 410 U.S. at 154.
91. See id. at 155.
The *Roe* decision was essentially based on the "fundamental" right to privacy, embodied in the Due Process Clause. The Court noted that this right had been extended to such activities as family relationships, child rearing, and procreation, and could properly be interpreted as including a woman's decision of whether or not to terminate her pregnancy. The Court stated that the harm that would fall upon a woman denied this right was clear.

Although the Court made clear its strong desire to provide women with the ability to make this personal decision, it strongly asserted its position that this right was not without limitation. The Court noted that the state has a strong interest in protecting both the health of the mother and the potential human life. These interests qualified as the necessary compelling state interest required for the regulation of fundamental rights.

In determining the extent to which a state could regulate this right, the Court attempted to draw bright lines between acceptable and unacceptable state regulation. After some consideration, the Court determined that the point at which the state's interest was truly compelling should be set at the end of the first trimester of the pregnancy. For the period of time prior to this point, a woman and her physician were free to determine whether or not to terminate the pregnancy. During the time subsequent to the first trimester but prior to viability, the state could regulate abortion in ways aimed at protecting only the

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92. Fundamental Rights are defined as "[t]hose rights which have their source, and are explicitly or implicitly guaranteed, in the federal Constitution . . . . [A] law will be held violative of the due process clause if it is not closely tailored to promote a compelling or overriding interest of government." *Black's Law Dictionary* 674 (6th ed. 1990).


94. *See Roe*, 410 U.S. at 152.

95. *See id.* at 153.

96. *See id.* at 155. Although the Court determined that the right to abortion was founded in the fundamental right to privacy, it noted that "the pregnant woman [is not] isolated in her privacy. She carries an embryo and, later a fetus, if one accepts the medical definitions of the developing young in the human uterus." *Id.* at 158.

97. *See id.* at 162.


100. *See Roe*, 410 U.S. at 163. "One of the reasons for this finding was that the mortality rate for abortions in the first trimester is less than the mortality rate for childbirth. Thus, the state could not argue that prohibiting abortion protected maternal health, because the alternative, childbirth, was actually more dangerous." Howard, *supra* note 99, at 1468.

mother’s health.\textsuperscript{102} After the point in time following the fetus’s attainment of viability,\textsuperscript{103} the state could regulate and even prohibit abortion except where required for the life or health of the mother.\textsuperscript{104} This became known as the trimester framework, and essentially provided that a state could impose more restrictive regulations on the right to choose based on how far along a woman’s pregnancy had progressed.\textsuperscript{105}

In a companion case to \textit{Roe}, the Supreme Court strictly adhered to the trimester framework, even finding one statute unconstitutional because its regulations did not preclude the first trimester of pregnancy.\textsuperscript{106} In \textit{Doe v. Bolton}, petitioners brought an action challenging the validity of a Georgia abortion statute requiring abortions to be performed only in certain licensed facilities.\textsuperscript{107} The Court invalidated the statute as it made no provisions to remove from its grasp those abortions performed during the first trimester of pregnancy.\textsuperscript{108} Nevertheless, the Court stated that the right to abortion was far from unlimited.\textsuperscript{109} The regulation would be upheld were it redrafted to exclude abortions during the first trimester, so long as those regulations were reasonably related to the state’s interest.\textsuperscript{110}

As both the \textit{Roe} and \textit{Doe} cases illustrate, under the trimester framework, state regulations were scrutinized by focusing not on their nature or effect but on the time during the pregnancy in which they were imposed.\textsuperscript{111} Unhappy with this analysis, the Court began to lean toward imposing a different

\textsuperscript{102} See id. at 164. An interesting point concerning regulation during the second trimester was that it was allowed only so long as it was related to protecting the mother’s health. See id. The state’s interest in protecting the potential human life of the child was not sufficiently compelling at this stage in the pregnancy. See id. Examples of permissible regulation at this stage included the following: requirements concerning the person performing the abortion; requirements concerning the licensing of that individual; requirements as to the facility in which the procedure will be performed; and requirements as to the licensing of that facility. See id. at 163.

\textsuperscript{103} See id. at 164-65. Viability is defined as the point at which “the fetus... presumably has the capability of meaningful life outside the mother’s womb.” See id. at 163.

\textsuperscript{104} See id. at 164. After viability, the more compelling interest of the state shifts to that of the potential human life. Thus, at that point the state is given broadly sweeping authority in its regulation over the abortion right. See id. Earlier in its decision, the Court accepted that viability ordinarily occurred at approximately the beginning of the seventh month, or third trimester, of the pregnancy. See id. at 160. The point at which viability is attained is very important because the changes imposed by the Court in \textit{Planned Parenthood of Southeast Pennsylvania v. Casey}, 505 U.S. 833 (1992), concerning analysis of state regulation, have not affected regulations imposed after viability. See infra discussion Part III.3.a.

\textsuperscript{105} See id. at 165.


\textsuperscript{107} See id. at 184.

\textsuperscript{108} See id. at 195.

\textsuperscript{109} See id. at 189.

\textsuperscript{110} See id. at 194.

\textsuperscript{111} See Roe, 410 U.S. at 163; Doe, 410 U.S. at 195.
standard, called the undue burden standard of analysis.\textsuperscript{112} The \textit{Casey}\textsuperscript{113} decision discussed below eliminated the trimester framework of \textit{Roe}.\textsuperscript{114}

2. \textit{Evolution of the Undue Burden Standard}

\textbf{a. Defining Undue Burden}

When courts first utilized the undue burden standard, it was applied without having been sufficiently defined.\textsuperscript{115} In \textit{Casey}, the Court stated that an undue burden was one that placed a substantial obstacle in the path of a woman seeking an abortion.\textsuperscript{116} Unfortunately, a more detailed definition has not been offered. In fact, several commentators have criticized the Court’s use of this standard on precisely this point.\textsuperscript{117} It appears that the only true guide in determining what regulations impose undue burdens can be derived from the decisions and holdings of earlier courts on the subject.\textsuperscript{118}

\textbf{b. Application to Abortion Regulations in General}

Following the \textit{Roe} decision, the courts heard many cases involving state regulation of abortion. In several of these cases discussed below the Court deviated to some extent from the trimester framework of analysis as outlined in \textit{Roe}. Rather, these cases incorporated the use of the undue burden standard in analyzing state regulations.\textsuperscript{119}

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\begin{itemize}
\item \textsuperscript{112} See Valerie J. Pacer, Note, \textit{Salvaging The Undue Burden Standard—Is It A Lost Cause?}, 73 WASH. U. L. Q. 295 (1995). “[T]he term undue burden...[is generally equated]...with the concept of an obstacle in the path of a woman seeking an abortion.” Id. at 299.
\item \textsuperscript{113} 505 U.S. 833 (1992).
\item \textsuperscript{114} See id. at 873.
\item \textsuperscript{115} The decisions first incorporating this standard did so without expressly defining what would or would not constitute an undue burden. Those decisions would simply state whether or not the enactment at issue satisfied this standard without much explanation. See, e.g., Beal v. Doe, 432 U.S. 438 (1977).
\item \textsuperscript{116} See \textit{Casey}, 505 U.S. at 877. “A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.” Id. See \textit{infra} notes 154-184 for further discussion of \textit{Casey}.
\item \textsuperscript{117} See Howard, \textit{supra} note 99, at 1475. The author criticizes the “imprecision” of the \textit{Casey} opinion, stating that the Court failed to define the factors or guidelines which lower courts should consider in evaluating state regulations of abortion. See Howard, \textit{supra} note 99, at 1475.
\item \textsuperscript{118} See, e.g., \textit{Casey}, 505 U.S. at 837 (holding that spousal notification provisions of a Pennsylvania act constituted an undue burden). See also \textit{infra} Part III.B.2.b for more examples.
\item \textsuperscript{119} See Pacer, \textit{supra} note 112, at 299. According to the author, the initial use of the undue burden standard was not an attempt to add additional requirements to the \textit{Roe} framework. The courts were, however, simply attempting to draw distinctions between those burdens which
\end{itemize}
In 1977 the Supreme Court issued a decision incorporating the undue burden standard of analysis in connection with the trimester framework.\(^{120}\) In *Beal v. Doe*, the Court faced the task of determining the validity of a Pennsylvania statute that denied the use of Medicaid funds for nontherapeutic abortions.\(^{121}\) The Court recognized the important state interest in protecting the fetus as discussed in *Roe*, but stated that such an interest was not compelling enough to impose unduly burdensome restrictions on a woman’s rights until the latter stages of pregnancy.\(^{122}\)

Later cases applied the undue burden standard without making any reference to *Roe*’s trimester framework or the time period during which the burdens were imposed.\(^{123}\) In the related cases of *Bellotti I* and *Bellotti II*, the Supreme Court of the United States considered the validity of a state statute that required minor children to obtain parental consent prior to obtaining an abortion.\(^{124}\) In those cases the Court framed the question to be decided as whether the requirements of the statute unduly burdened the woman’s right to seek an abortion.\(^{125}\) In *Bellotti I*, the Court declined to rule on the validity of the Massachusetts statute, stating that the statute should first be interpreted by that state’s judiciary.\(^{126}\) Nevertheless, the Court stated that the statute at issue would not be unconstitutional unless it unduly burdened the minor’s right to abortion.\(^{127}\) The Court’s analysis was in no way similar to that of the *Roe* Court despite the fact that this decision came down only a few years after *Roe*.\(^{128}\)

The Supreme Court openly applied the undue burden standard without any attempt to incorporate that standard into *Roe*’s framework in two very similar abortion funding cases.\(^{129}\) In *Maher v. Roe*, the Court contrasted *Roe*’s

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\(^{120}\) *See Beal, 432 U.S. 438 (1977).* The *Roe* Court apparently did not foresee this development as the undue burden standard is not mentioned in that opinion. *See Roe*, 410 U.S. at 113.

\(^{121}\) *See Beal, 432 U.S. at 441.

\(^{122}\) *See id. at 446.


\(^{124}\) *See Bellotti I, 428 U.S. at 133.

\(^{125}\) *See Bellotti II, 443 U.S. at 640.

\(^{126}\) *See Bellotti I, 428 U.S. at 147.* Following the state court’s rehearing of the issue, the federal district court found the statute unconstitutional. The Supreme Court later affirmed this decision in *Bellotti II*. *See Bellotti II, 443 U.S. at 651.*

\(^{127}\) *See Bellotti II, 443 U.S. at 651.

\(^{128}\) *See supra Part III.B.1. for a discussion of the holding in *Roe*.*

\(^{129}\) *See Maher v. Roe, 432 U.S. 464 (1977); Harris v. McRae, 448 U.S. 297 (1980).* *See Pacer, supra note 112, at 297.* The author suggests that these cases represent the first explicit use of the undue burden standard within the abortion context. This is incorrect as the case of *Beal v. Doe* was decided prior to these decisions. However, these cases very well may have
limited right to choose with state regulations regarding abortion funding.\textsuperscript{130} In that action,\textsuperscript{131} the statute at issue prohibited state funding of abortions that were not medically necessary.\textsuperscript{132} The Court held that because the prohibition did not place pregnant women in any less favorable position, it did not give rise to an undue burden.\textsuperscript{133} The women would simply have to depend on private sources to obtain the procedure.\textsuperscript{134} The Court in \textit{Maher} briefly mentioned the \textit{Roe} trimester framework, but that analysis did not appear to influence its decision.\textsuperscript{135}

In a similar case decided three years later, the Court upheld the \textit{Maher} analysis as applied to prohibitions against the funding of certain abortions.\textsuperscript{136} In \textit{Harris v. McCrae}, the Court focused on particular federal legislation that prohibited the use of Social Security funds to finance medically unnecessary abortions.\textsuperscript{137} The \textit{Harris} Court recognized the right established in \textit{Roe} and the trimester framework analysis.\textsuperscript{138} Despite this recognition, the Court based its upholding of the funding prohibitions on the reasoning of \textit{Maher}.\textsuperscript{139} The Court stated that the mere denial of funds for abortion purposes did not place an obstacle in the path of a woman seeking to terminate her pregnancy.\textsuperscript{140}

c. The Undue Burden Standard as a substitute for \textit{Roe}'s Trimester Framework

The cases discussed above generally incorporated the undue burden standard of analysis in conjunction with \textit{Roe}'s application of the trimester

\textsuperscript{130} See \textit{Maher}, 432 U.S. at 474.
\textsuperscript{131} See \textit{id.} at 466. This action was instituted by several indigent women who were residents of Connecticut. \textit{See id.}
\textsuperscript{132} See \textit{id.} at 474. "An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision . . . [not to fund abortion]; she continues as before to be dependent on private sources for the service she desires." \textit{Id.}
\textsuperscript{133} See \textit{id.} at 478. Nevertheless, the Court expressly stated that the conclusion in \textit{Maher} was not intended as a retreat from the central holding of \textit{Roe}. The \textit{Maher} Court made a distinction between direct state interference and the right of a state to encourage alternative forms of activity (e.g., childbirth). \textit{See id.} at 475.
\textsuperscript{134} See \textit{Harris v. McRae}, 448 U.S. 297 (1980).
\textsuperscript{135} See \textit{id.} at 300. This legislation, known as the "Hyde Amendment," is discussed in detail within the opinion. \textit{See id.} at 302.
\textsuperscript{136} See \textit{id.} at 313.
\textsuperscript{137} See \textit{id.} at 314.
\textsuperscript{138} See \textit{Maher}, 432 U.S. at 474.
framework. Even those cases that made no attempt to facilitate this incorporation still clearly distinguished their situation from that of Roe.\textsuperscript{141} None of the cases discussed went so far as to do away with the Roe framework or even hint that such a step was necessary.\textsuperscript{142} Justice O’Connor took this task upon herself in her dissenting opinions in two cases decided during the 1980's.\textsuperscript{143} In each of those cases, Justice O’Connor’s dissent differed drastically from the majority opinion.

In \textit{Akron v. Akron Center for Reproductive Health, Inc.}, the majority of the Court upheld Roe’s trimester framework, stating that the state’s interest does not become sufficiently compelling to allow regulation until the end of the first trimester.\textsuperscript{144} The Court stated that this framework continued to provide a reasonable standard of analysis for regulating the state’s interference with the exercise of this right.\textsuperscript{145} Justice O’Connor, however, did not agree.\textsuperscript{146} In her dissent, Justice O’Connor observed that the Court’s recent decisions had imposed an undue burden standard in analyzing state regulation of abortion.\textsuperscript{147} O’Connor stressed that this standard should be applied to all challenged regulations regardless of the stage of pregnancy at which the regulation was imposed.\textsuperscript{148} Justice O’Connor argued that the trimester framework was not adequate to serve the competing interests of woman and state.\textsuperscript{149} She further stated that the trimester approach was inappropriate in light of the Court’s acceptance of the fact that technological advancement in abortion procedures changed many facets of the issue.\textsuperscript{150}

\begin{itemize}
\item[141.] \textsuperscript{See, e.g., Maher, 432 U.S. at 475.}
\item[142.] \textsuperscript{See Pacer, supra note 112, at 297-308.}
\item[143.] \textsuperscript{See Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986); Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983).}
\item[144.] \textsuperscript{See Akron, 462 U.S. at 429.}
\item[145.] \textsuperscript{See id. at 430.}
\item[146.] \textsuperscript{See id. at 452 (O’Connor, J., dissenting). “[I]t is apparent from the Court’s opinion that neither sound constitutional theory nor our need to decide cases based on the application of neutral principles can accommodate an analytical framework that varies according to the ‘stages’ of pregnancy . . . .” Id. (O’Connor, J., dissenting). This dissenting opinion marked Justice O’Connor’s first articulation of her undue burden standard of analysis. See Mark H. Woltz, Note, \textit{A Bold Reaffirmation? Planned Parenthood v. Casey Opens The Door For States To Enact New Laws To Discourage Abortion}, 71 N.C. L. REV. 1787, 1802 (1993).}
\item[147.] \textsuperscript{See Akron, 462 U.S. at 453 (O’Connor, J., dissenting) (citing Maher, 432 U.S. at 464; Bellotti I, 428 U.S. at 132; and Harris, 448 U.S. at 297).}
\item[148.] \textsuperscript{See id. (O’Connor, J., dissenting).}
\item[149.] \textsuperscript{See id. at 453-54 (O’Connor, J., dissenting).}
\item[150.] \textsuperscript{See id. at 455 (O’Connor, J., dissenting). In what would be possibly the most damaging of assessments against Roe’s trimester framework, Justice O’Connor pointed out that the “bright line” drawn by Roe had become “blurred” in light of the Court’s acceptance of advancements in medical technology. See id. (O’Connor, J., dissenting); see also supra note 100 for a discussion of the impact of medical technology on the Roe decision. With the acceptance of medical advancements in the safety of early-term abortions, the original}
\end{itemize}
Justice O'Connor made similar arguments in favor of the new standard in her dissenting opinion in *Thornburgh v. American College of Obstetricians & Gynecologists*,\(^{151}\) decided just three years after *Akron*. In that dissent, Justice O'Connor discussed how the unduly burdensome standard had been applied consistently in favor of *Roe*’s “outmoded” trimester framework in several recent opinions.\(^{152}\)

3. *Changing of the Guard*

   a. The *Casey* Decision

With Justice O'Connor and her already well known disapproval of the *Roe* analysis leading the way,\(^{153}\) the Court eliminated the trimester framework in the 1992 decision of *Planned Parenthood of Southeastern Pennsylvania v. Casey*.\(^{154}\) In its place, the Court adopted the undue burden standard as the appropriate analysis of state regulation of abortion prior to fetal viability.\(^{155}\) The *Casey* suit involved a challenge to five provisions of the Pennsylvania Abortion Control Act, which placed various restrictions and requirements on women seeking abortions.\(^{156}\) The Court upheld the central ruling in *Roe*, that women have a right to choose whether or not to terminate their pregnancy prior to fetal viability.\(^{157}\) The Court looked past the trimester framework of *Roe* and outlined several principles that they felt were better suited to an analysis of state regulation of abortion.

Arguments for prohibiting state regulation in the first trimester were no longer valid. See *supra* note 100 for further discussion of these arguments.


152. *See* id. at 828 (O'Connor, J., dissenting). “These principles for evaluating state regulation of abortion were not newly minted in my dissenting opinion in Akron. Apart from Roe’s outmoded trimester framework, the ‘unduly burdensome’ standard had been articulated and applied with fair consistency by this Court in cases such as Harris *v.* McRae, . . . Maher *v.* Roe, . . . [and] Beal *v.* Doc. . . .” *See* id. (O'Connor, J., dissenting).

153. *See* supra Part III.B.2.c for discussion of O'Connor’s earlier opinions.


156. *See* Casey, 505 U.S. at 844.

157. *See* id. at 871. Recall that *Roe*’s trimester framework prohibited any regulation over a woman’s right to choose during the first trimester and substantially broadened the restrictions that could be imposed on that right prior to viability, i.e., the beginning of the third trimester. *See* supra Part III.B.1 for a discussion of *Roe*. 
The Court recanted the rigid trimester framework as set out in Roe.\(^{158}\) Although this framework was aimed at proper balancing of the competing interests of mother and state, the Court determined that it had failed to meet that objective.\(^{159}\) The Court stated that the state’s profound interest in human life extended throughout the term of the pregnancy.\(^{160}\) Consistent with this sentiment, the Court expressly rejected the trimester framework espoused in Roe.\(^{161}\) The Court made clear that the recognition of this substantial state interest throughout pregnancy precluded the conclusion that all regulations were unwarranted.\(^{162}\) Therefore, Roe’s prohibition against any state regulation during the first trimester of pregnancy could not be upheld.\(^{163}\)

With the trimester framework now out of her way, Justice O’Connor took advantage of the opportunity to replace it with the undue burden standard.\(^{164}\) In her opinion, Justice O’Connor declared that the undue burden standard was the most appropriate means by which to balance the competing interests of mother and state.\(^{165}\) Justice O’Connor stated that an undue burden is an unconstitutional one.\(^{166}\) Such a burden will be found where a law effectively places a substantial burden in the path of a woman seeking an abortion.\(^{167}\)

The imposition of this new standard was not as drastic a change as some may have believed.\(^{168}\) Although the analysis now focuses on whether a regulation imposes an undue burden on a woman’s right to abortion, this only applies to the woman’s decision prior to viability.\(^{169}\) The provisions in Roe dealing with post-viability regulations remain in effect.\(^{170}\) Further, the regulations that now may be imposed prior to viability do not extend to blanket prohibitions of abortion.\(^{171}\) As the Casey decision seemed to imply, the pre-

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\(^{158}\) See Casey, 505 U.S. at 872.

\(^{159}\) See id.

\(^{160}\) See id. at 876. “[T]here is a substantial state interest in potential life throughout pregnancy.” Id.

\(^{161}\) See id. at 873.

\(^{162}\) See id. at 876.

\(^{163}\) See id. at 878.

\(^{164}\) See Casey, 505 U.S. at 878.

\(^{165}\) See id. at 876. “In our view, the undue burden standard is the appropriate means of reconciling the State’s interest with the woman’s constitutionally protected liberty.” Id.

\(^{166}\) See id. at 877.

\(^{167}\) See id. Unfortunately, the Court does not supply a more precise definition in this opinion. See supra Part III.B.2.a, and infra Part III.3.b for related discussions.

\(^{168}\) See Woltz, supra note 146, at 1808. The author points out how, even after Casey, a woman still has a fundamental right to obtain an abortion prior to viability. See Woltz, supra note 146, at 1808.

\(^{169}\) See Casey, 505 U.S. at 877. In defining undue burden, the Court explicitly states that such a burden must be placed in the path of a woman seeking an abortion of a nonviable fetus. See id.

\(^{170}\) See id. at 879.

\(^{171}\) See id. at 872. “Though the woman has a right to choose to terminate or continue her
viability impositions by the state mainly apply to ensuring that the woman’s choice is an informed one.  

What the *Casey* decision essentially means for states attempting to regulate or influence a woman’s choice is that there is now a possibility that regulations prior to viability may be enacted assuming they do not impose an undue burden.  

This holding has not affected regulations imposed subsequent to the attainment of viability.  

The Court, however, made it clear that it would not draw a precise line in determining when viability had been reached.  

Unlike *Roe*, which essentially set viability as occurring by the beginning of the third trimester, the *Casey* Court did not set a precise time but left the door open for future advances in medical technology.  

Essentially, this requires a determination of when viability has occurred as to each individual fetus.

b. The Aftermath of *Casey*

Since its establishment in *Casey*, the undue burden standard has met with disapproval from both commentators and judges. Harsh criticisms have been aimed at this new test for its imprecision in defining the factors to be evaluated by lower courts in applying the standard to state regulations. Even at the time of the *Casey* decision, Justice Scalia described the undue burden standard as one that would prove unworkable in practice.

Justice Scalia’s opinion as to the application of the new standard has proven correct to a great extent. Of those post-*Casey* decisions that attempt to

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172. See id.
173. See id. at 879.
175. See *Casey*, 505 U.S. at 860.
176. See supra note 104 for *Roe*’s discussion of viability.
177. See *Casey*, 505 U.S. at 846.
178. See id. at 860. “Whenever it may occur, the attainment of viability may continue to serve as the critical fact, just as it has done since Roe was decided . . . ." Id.
179. See Howard, supra note 99, at 1475; see also *Casey*, 505 U.S. at 979 (Scalia, J., dissenting).
180. See Howard, supra note 99, at 1475.
181. See *Casey*, 505 U.S. at 985 (Scalia, J., dissenting). In obvious disapproval, Justice Scalia stated that the Court had failed in its attempt to clarify the meaning of the term undue burden and that requiring federal district judges to apply this standard was “really more than one should have to bear.” Id.
employ the undue burden standard, few do so with much detail as to its actual application. The majority of cases that take on the undue burden standard directly tend to look for similarities in the statute at issue and those involved in Casey. Where sufficient similarity exists, lower courts will generally hold consistently with the Casey decision.

IV. REASONING OF THE COURT

In Planned Parenthood of Greater Iowa, Inc. v. Atchison the Eighth Circuit dealt with two distinctly different issues, finding in favor of PPI as to each one. The first involved the appropriate application of Younger abstention to the district court's actions. The second focused on the determination of what type of certificate of need (CON) regulations should be held invalid as creating an unconstitutional burden to the right of access to abortion.

A. Doctrine of Abstention

The Department's main argument on appeal asserted that the district court had erred in failing to abstain from hearing PPI's complaint until the CON process was complete. The Eighth Circuit Court of Appeals disagreed with this assessment and held that abstention was not required, as there were no ongoing state proceedings that qualified as judicial in nature.

The court began its analysis with a look at the case of Younger v. Harris, which essentially laid the foundation for the type of abstention at issue in this case. In Younger, the Court held that principles of federalism

182. See, e.g., Planned Parenthood, Sioux Falls Clinic v. Miller, 63 F.3d 1452 (8th Cir. 1995); Barnes v. Mississippi, 992 F.2d 1335 (5th Cir. 1993); Jane v. Bangerter, 809 F. Supp. 865 (D. Utah 1992).

183. See Tholen & Baird, supra note 155, at 1003. When faced with an abortion regulation substantially similar to those at issue in Casey, most courts simply rely on the fact that since the Supreme Court upheld a similar provision in Casey, the one at issue must likewise be constitutional; what we term the 'looks like Casey, smells like Casey, must be constitutional' approach.

184. See Tholen & Baird, supra note 155, at 1003.

185. 126 F.3d 1042 (8th Cir. 1997).

186. See id. at 1046.

187. See id. at 1048.

188. See id. at 1046.

189. See id. at 1048.


191. See supra Part III.A.1 for a discussion of the evolution of Younger abstention. For an interesting discussion of the various types of abstention which have arisen in American jurisprudence see WRIGHT, supra note 45, ch. 8, §§ 52, 52A; see also Walker, supra note 34,
require that federal courts abstain from hearing a case where state court proceedings relative thereto are pending.192 This holding extends to civil suits so long as certain conditions are satisfied.193 A 1982 United States Supreme Court decision194 provided that the Younger doctrine could be applied to state civil proceedings, including those administrative in nature, where the following factors were present: the state proceedings were ongoing and were judicial in nature; the state proceedings involved important state interests; and the state proceedings themselves provide a sufficient opportunity to raise federal claims.195

The court’s abstention analysis focused on the first criteria enumerated in the Middlesex decision.196 That criteria requires that the state proceedings be ongoing.197 The Iowa CON statutes provide that a project’s sponsor must submit a letter of intent describing the proposed project.198 Sixty days following the submission of that letter, the sponsor may submit a formal application that, if accepted by the Department, will initiate a formal review of the project.199 In its response to various letters received from the Department, PPI submitted a request for a determination as to the likelihood that it would be subject to CON review.200 The Department claimed that this request was the required letter of intent, thereby initiating the CON application and review process.201 The Department thus concluded that this was the type of process that should be considered ongoing for purposes of abstention under Middlesex.202

at 219.

192. See Atchison, 126 F.3d at 1046. "[T]he National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. . . ." Id. (quoting Younger, 401 U.S. at 44).

193. See id.


195. See Atchison, 126 F.3d at 1046, 1047 (citing Middlesex, 457 U.S. at 423). The Middlesex case involved the appropriateness of applying Younger abstention to proceedings instituted against an attorney by a local professional conduct committee. See Middlesex, 457 U.S. at 427; see also supra Part III.A.2 for a discussion of the Middlesex decision.

196. See Atchison, 126 F.3d at 1047.

197. See id. at 1046. Several cases have dealt with the determination of what is considered as “ongoing.” In Telco Communications, Inc. v. Carbaugh, the court held that state proceedings were not ongoing while at the preliminary stage. See Telco Communications, Inc. v. Carbaugh, 885 F.2d 1225, 1228 (4th Cir. 1989). Six years later, the Fifth Circuit Court of Appeals agreed with that ruling stating that where a state agency had merely contacted a party to inform him of a complaint entered against him no ongoing proceedings existed. See Louisiana Debating and Literary Ass’n v. New Orleans, 42 F.3d 1483 (5th Cir. 1995).

198. See Atchison, 126 F.3d at 1047 (citing IOWA CODE § 135.65(1) (1997)).

199. See id. (citing IOWA CODE § 135.66(3) (1997)).

200. See id.

201. See id.

202. See id.
The court disagreed with this assessment and found that neither the contact initiated by the Department nor PPI's request constituted ongoing state proceedings. The court stated that although contact between the two parties had been established, that contact, by itself, was not sufficient to begin the CON proceedings. The court cited several authorities announcing similar holdings. The court also stated that it did not agree that PPI's request constituted a letter of intent as required by the CON statutes. Upon learning that its proposal would fall under CON review, PPI had several options, including revising its plans to remove itself from those regulations. Taken together, these factors did not convince the court that state administrative proceedings were in fact ongoing and did not require the district court to abstain.

The court also found that the proceedings involved were not "judicial" in nature. The court cited Alleghany Corp. v. McCartney for interpretation as to the type of proceedings that are considered to be judicial. The court stated that because the Department had conducted no investigation, held no hearings, neither received nor collected any evidence, and kept no record, the proceedings would not be considered judicial in nature.

Based on these findings, the court refused to accept the Department's contention that the district court erred in granting PPI's injunction. Younger abstention did not apply in this instance as the first Middlesex criterion was not satisfied.

203. See id.
204. See Atchison, 126 F.3d at 1047.
205. See id.; see also supra note 197 for a discussion of these authorities.
206. See id. The court noted that this letter request by PPI was completely voluntary and was simply an inquiry as to whether its project was reviewable. See id.
207. See id.
208. See id.
209. See id. at 1048 (citing Middlesex, 457 U.S. at 432).
210. 896 F.2d 1138 (8th Cir. 1990).
211. See Atchison, 126 F.3d at 1048. "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist." Alleghany, 896 F.2d at 1143.
212. See Atchison, 126 F.3d at 1048.
213. See id.
214. See id. at 1046-47 (citing Middlesex, 457 U.S. 423). "[T]he Supreme Court extended the [Younger] doctrine to those non-criminal state court proceedings, including administrative proceedings, where: (1) there are ongoing state proceedings that are judicial in nature . . . ." Id.
B. CON Review as Imposing Unconstitutional Burden on Right of Access to Abortion

The Eighth Circuit also reviewed the district court’s holding that by requiring PPI to submit to the CON review process, the Department had imposed an unconstitutional burden on the right of access to abortion. The court found that the district court had not erred on this issue and upheld the lower court’s decision.

The court stated that actions by a state that have the effect or purpose of establishing a substantial barrier in the path of a woman seeking abortion may be deemed unconstitutional. The court noted that where a law enacted to serve a legitimate state interest has the incidental effect of causing such a burden, there is no presumption of unconstitutionality. The final determination of constitutionality depends on whether the state enactment places an undue burden on an individual’s right of access to abortion.

Historically CON statutes are upheld as legitimate methods by which to further valid state interests. While the mere validity of CON-like statutes was not the central issue, the court stated that its main concern was with the application of those statutes to the particular situation presented. Several Department of Health officials testified at trial that PPI’s clinic would have been exempt under the tests normally applied to determine whether a proposed project is subject to CON review. Those same officials could not explain why PPI’s clinic was required to submit to the CON requirements.

The court determined that the arbitrary application of the CON review procedures presented in this case qualified as an unconstitutional burden and

215. See id. at 1048.
216. See id. at 1049.
217. See id. at 1048.
218. See Atchison, 126 F.3d at 1048 (citing Casey, 505 U.S. at 833). The Casey Court stated that although it recognized a woman’s right to abortion without undue interference, the state’s interest in protecting both mother and child provided it with some power to restrict abortions after fetal viability. See Casey, 505 U.S. at 846.
219. See Atchison, 126 F.3d at 1048. “Only where state regulation imposes an undue burden on a woman’s ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.” Casey, 505 U.S. at 874.
220. See Atchison, 126 F.3d at 1048. For authorities upholding this proposition, see Madarang v. Bermudes, 889 F.2d 251 (9th Cir. 1989) (holding that CON regulations did not violate equal protection provisions as method of preventing establishment of unneeded health care facilities); Women’s Community Health Center v. Texas Health Facilities Commission, 685 F.2d 974 (5th Cir. 1982) (recognizing CON laws as important in furthering “[t]he state’s interest in ensuring economical health care for its citizens . . . .”).
221. See Atchison, 126 F.3d at 1049.
222. See id.
223. See id.
were not merely incidental in effect.\textsuperscript{224} The court also stated that the impositions served no purpose other than to make it more difficult for those involved to gain access to abortion and could not be upheld.\textsuperscript{225} Based on this reasoning, the court held that the district court did not err in deciding that PPI would not have been subject to CON review had it not proposed to offer abortions at its new clinic.\textsuperscript{226}

V. SIGNIFICANCE

The most significant of the various aspects of the \textit{Atchison} opinion is the analysis and application of the controversial undue burden standard.\textsuperscript{227} This decision should have a sustaining impact in three important areas. First, the Eighth Circuit's adherence to the controversial undue burden standard solidifies the standard's position in abortion law. As mentioned, the \textit{Casey} Court's adoption of this standard received some measure of criticism.\textsuperscript{228} This criticism was largely based on the ambiguity as to its application.\textsuperscript{229} While the \textit{Atchison} opinion failed to elaborate on the specific application of this standard, it does signal that the Eighth Circuit will follow the \textit{Casey} standard in a manner consistent with that of the \textit{Casey} opinion.\textsuperscript{230}

Second, \textit{Atchison} provides some measure of insight into the application of the undue burden standard to CON regulations in place in many states.\textsuperscript{231} The widespread use of these regulations makes it vitally important to ensure that they are not found to impose undue burdens under the \textit{Casey} standard.\textsuperscript{232} CON regulations, if properly established, are generally considered as furthering legitimate state interests.\textsuperscript{233} The \textit{Atchison} opinion makes it clear that where the CON requirements are imposed in an arbitrary manner they will not be upheld.\textsuperscript{234} To avoid undue burden status, the application of such regulations should be undertaken in a manner that is fair and evenhanded to all parties.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{224} See \textit{id.} The court stated that although the district court did not find that the state had acted in bad faith, the totality of the circumstances suggested that subjecting PPI to CON review "had the intended effect of impeding or preventing access to abortions." \textit{Id.}
\item \textsuperscript{225} See \textit{id.} at 1049.
\item \textsuperscript{226} See \textit{id.}
\item \textsuperscript{227} See \textit{Atchison}, 126 F.3d at 1048.
\item \textsuperscript{228} See \textit{supra} notes 179-81 and accompanying text for a discussion of the disapproval of this standard by Justice Scalia and other commentators.
\item \textsuperscript{229} See Tholen \& Baird, \textit{supra} note 155, at 1003.
\item \textsuperscript{230} See \textit{Atchison}, 126 F.3d at 1048.
\item \textsuperscript{231} See McGinley, \textit{supra} note 4, at 145.
\item \textsuperscript{232} See McGinley, \textit{supra} note 4, at 143. As of 1995, thirty-eight states had some form of CON laws in place. See McGinley, \textit{supra} note 4, at 143.
\item \textsuperscript{233} See \textit{Atchison}, 126 F.3d at 1049.
\item \textsuperscript{234} See \textit{id.}
\end{itemize}
\end{footnotesize}
Finally, the *Atchison* decision provides some guidance to state legislatures in determining the type of abortion-related regulations that they may enact. The Eighth Circuit’s adherence to the *Casey* standard could possibly encourage state legislatures to exercise their increased power to restrict early-term abortions.\(^2\) At least one commentator has suggested that the very wording of the *Casey* standard may encourage such attempts.\(^3\) Whether they exercise this power or not, state legislatures are now free to enact legislation consistent with this opinion and *Casey* that will regulate early-term abortions.\(^4\)

Unfortunately, it is not clear what the true effect of the *Atchison* decision will be on future litigation. On one hand, the court’s application of the undue burden standard, modeled after *Casey*, implies that the Eighth Circuit will treat similar abortion regulation cases in the manner suggested by some commentators.\(^5\) On the other hand, given the great criticism surrounding the new standard, future interpretations by the courts expanding on its application should have an even greater impact on this area of the law. The Eighth Circuit’s application of this standard to CON regulations will, however, have certain emphasis on similar cases. With the widespread reliance on CON regulations by the states,\(^6\) future litigation concerning this area is certain to arise.

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236. See Howard, *supra* note 99, at 1498. The author suggests that the *Casey* Court’s statement that a law purposefully enacted to hinder a woman’s right would be unconstitutional would encourage state legislatures to enact laws without such an express purpose. See Howard, *supra* note 99, at 1498.
237. See *supra* Part III.B.3.a for a discussion of the implications of the *Casey* decision.
239. See McGinley, *supra* note 4, at 144.