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Comparative Limitations on Abortions: The United States Supreme Court v. The European Court of Human Rights

Sunaya Padmanabhan*

ABSTRACT

This Note compares the balancing tests implemented by the United States Supreme Court and the European Court of Human Rights to determine the legal status of abortion within their jurisdictions. This Note will argue that the Supreme Court's balancing test better protects a woman's legal path to an abortion because it A) limits states' restrictions to specific categories and B) regulates the extent to which states can restrict a woman's pre-viability abortion.

This Note will also examine the ways in which each court's abortion jurisprudence substantively restricts a woman's ability to obtain an abortion, even where legal avenues to the procedure exist. It will explore how anti-abortion states utilize weaknesses in the Supreme Court's undue burden framework to impose obstacles on a woman's right to an abortion. In the European context, it will review how anti-abortion countries take advantage of the discretion, granted by the European Court of Human Rights, to determine the legality of abortion and criminalize abortion care outside of particular circumstances provided by law, creating a chilling effect that substantively limits a woman's access to abortion.

This Note proposes that the Supreme Court should further develop the "effect" piece of its undue burden test such that states cannot enact laws which have the effect of preventing women from terminating their pregnancies. It also recommends that the European Court of Human Rights alter its balancing framework to reduce member-state discretion in the evaluation of whether a law violates a woman's right to privacy.

Keywords: abortion, comparative law, United States Supreme Court, European Court of Human Rights, jurisprudence, women's rights, undue burden, pregnancy, reproduction, privacy, balancing test

INTRODUCTION

Women¹ in the United States and Europe face varying statuses of legality regarding abortions² under the United States Supreme Court and the European Court of Human Rights (ECtHR). Even where abortion is legally permissible, states and countries substantively limit women's access to abortion care. This Note will compare and analyze the restrictions placed on access to abortions under the United States Supreme Court and the ECtHR. Both the Supreme Court's and the ECtHR's decisions are binding³ in their respective jurisdictions, and each oversees states and member-states that hold diverse beliefs on abortion.

Part I of this Note will compare the balancing tests currently used by the United States Supreme Court and the ECtHR. The Supreme Court balances a woman's right to an abortion against the state's interests in health, medical standards, and prenatal life,⁴ while the ECtHR weighs a woman's right to a private life against competing rights and freedoms of the member-state and the right to life of the unborn.⁵ Under the Supreme Court's framework, a court determines a violation of a woman's right to terminate under the undue burden test, which prevents states from imposing substantial obstacles that would prevent a woman from accessing abortion care pre-viability.⁶ The ECtHR's balancing test allows the member-state itself to determine whether its own law violates the European Convention on Human Rights under substantial discretion known as a "wide margin of appreciation."⁷ This Part will argue that the Supreme Court's balancing test provides better protection for a woman's legal path to an abortion because it A) limits states' restrictions to specific categories and B) regulates the extent to which states can restrict a woman's pre-viability abortion.

Part II of this Note will explore the substantive impacts of these legal tests on a woman's ability to obtain an abortion in each jurisdiction. This Part will analyze the Supreme Court's undue burden jurisprudence and the ways in which anti-abortion states have exploited weaknesses in case law to implement restrictions that present great obstacles to a woman's access to an abortion. This Part will also review how anti-abortion countries under the ECtHR have criminalized abortion care outside of narrow

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¹ Not all pregnant persons are women. This Note will oftentimes refer to "women" because of the common use of this language in cases and studies cited. However, all persons, regardless of gender identity, deserve access to abortion services.

² The Author of this Note is pro-choice and believes that all pregnant persons should have access to abortion services in all situations. Therefore, this Note is framed by that perspective.

³ Robyn Painter, Kate Mayer, and Kate Mathews, *Which Court is Binding?*, THE WRITING CTR. AT GEO. UNIV. LAW CTR. (2017), <https://www.law.georgetown.edu/wp-content/uploads/2018/07/Which-Court-is-Binding-HandoutFinal.pdf>; EUR. CT. H.R., *The Court in Brief*, https://www.echr.coe.int/Documents/Court_in_brief_ENG.pdf.

⁴ *Roe v. Wade*, 410 U.S. 113, 154 (1973).

⁵ *A, B and C v. Ireland*, 2010-VI Eur. Ct. H.R. 185, ¶ 213 (2010).

⁶ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 878 (1992).

⁷ *A, B and C*, 2010-VI Eur. Ct. H.R. at ¶¶ 232, 234.

circumstances, which creates a chilling effect that prevents women from receiving even lawful abortions.⁸

Part III of this Note will propose solutions that each court can enact to better protect a woman's legal path to an abortion. It argues that the Supreme Court should expand upon its undue burden framework so that the test is more likely to vindicate a woman's right to an abortion. The ECtHR should alter its balancing test in two ways: first, by no longer allowing member-states to make their own evaluations on whether their laws violate the Convention, and second, by disregarding the substantial discretion or wide margin of appreciation granted to countries on abortion issues.

I. AN OVERVIEW AND COMPARISON OF THE GOVERNING LEGAL FRAMEWORKS FOR ABORTION UNDER THE UNITED STATES SUPREME COURT AND THE EUROPEAN COURT OF HUMAN RIGHTS

Part I of this Note will outline the tests that the United States Supreme Court and ECtHR use to regulate the legality of abortion within their jurisdictions. Both courts implement balancing tests to determine whether a woman's right to terminate or right to a private life outweighs the interests of the state or country, respectively. In the United States, while states can limit access to abortion based on certain restrictions or conditions, states do not have discretion to rule on the actual legal status of abortion, as the Supreme Court recognizes a woman's constitutional right to an abortion.⁹ The Court has established a balancing test which weighs the woman's right to an abortion against the state's interest in health, medical standards, and prenatal life.¹⁰ Courts evaluate state abortion regulations for pre-viability abortions based on an undue burden analysis, such that a state cannot impose a restriction that creates a substantial obstacle to a woman's decision to terminate.¹¹

Unlike the Supreme Court, the ECtHR does not recognize a woman's positive right to an abortion. The ECtHR allows each of its member-states to decide whether a woman can lawfully obtain an abortion and under what conditions. The court evaluates abortions under Article 8 of the European Convention on Human Rights,¹² which states that "[e]veryone has the right to respect for his private and family life, his home and his correspondence."¹³ Where countries have legalized abortions, even in a restrictive manner, the court balances a woman's right to her private life against rights and freedoms of the member-state, allowing the country itself to determine if a violation exists.¹⁴ The country receives significant discretion, known as a "wide margin of appreciation," from the ECtHR when making its decision.¹⁵

This Part will argue that the Supreme Court's balancing test provides greater protection to women seeking an abortion because it limits the extent to which states can restrict abortion care, and because it institutes an evaluation procedure meant to protect a

⁸ *Id.* at ¶ 254.

⁹ *Roe*, 410 U.S. at 153.

¹⁰ *Id.* at 154.

¹¹ *Casey*, 505 U.S. at 878.

¹² *A, B and C*, 2010-VI Eur. Ct. H.R. at ¶ 212.

¹³ Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention on Human Rights].

¹⁴ *A, B and C*, 2010-VI Eur. Ct. H.R. at ¶ 241.

¹⁵ *Id.* at ¶¶ 232, 234.

woman's right to an abortion. The ECtHR's test, by comparison, grants extensive discretion to member-states in determining what interests weigh against a woman's right to a private life and in evaluating violations of the Convention.

A. The Supreme Court Limits the States' Interests, While the European Court of Human Rights Grants Broad Discretion to Member-States to Determine Their Interests

The Supreme Court utilizes a balancing test that weighs a woman's right to terminate her pregnancy against the state's interest in health, medical standards, and prenatal life.¹⁶ The balancing framework in the United States seeks to retain a woman's right to terminate by restricting the reasons why a state can regulate abortions. The ECtHR weighs a woman's Article 8 right "to respect for her private life . . . against other competing rights and freedoms . . . including those of the unborn child."¹⁷ The Supreme Court's balancing test provides greater protection to a woman's legal path to an abortion because it limits the interests states can have in regulating a woman's right to terminate, while the ECtHR's balancing test grants countries broad discretion to determine what interests will weigh against a woman's right to a private life.

Abortion jurisprudence in the United States also derives from the right to privacy. In *Roe v. Wade*, the plaintiff brought suit under the "First, Fourth, Fifth, Ninth, and Fourteenth Amendments," alleging that the Texas Penal Code, which criminalized abortions, except to save the life of the mother, violated her right to privacy.¹⁸ The Court extended the right to privacy to encompass a woman's right to an abortion.¹⁹

However, the Court did not recognize a woman's absolute right to terminate. Instead, the *Roe* Court instituted a balancing test, which assessed "a woman's decision whether or not to terminate her pregnancy" against the state's "interest in . . . protecti[ng] . . . health, medical standards, and prenatal life."²⁰

The Court graded the strength of the state interest by trimester. In the first trimester, the state lacked any recognized interest in the health of the mother or in medical standards because at such an early stage of pregnancy, maternal mortality in abortion was lower than in childbirth due to the safety of modern medical abortions.²¹ In the second trimester, the Court recognized the state's interest, so the state could "regulate the abortion procedure to the extent that the regulation reasonably relate[d] to the preservation and protection of maternal health."²² In the final trimester, since the fetus had the potential to live outside the womb, the state's interest in the life of the fetus outweighed the mother's right to an abortion, subject to the health and life of the mother.²³

While the Court later rejected the trimester framework, in favor of the undue burden test, the Court continues to balance the same interests under its current method of

¹⁶ *Roe*, 410 U.S. at 154.

¹⁷ *A, B and C*, 2010-VI Eur. Ct. H.R. at ¶ 213.

¹⁸ *Roe*, 410 U.S. at 120.

¹⁹ *Id.* at 153.

²⁰ *Id.* at 154.

²¹ *Id.* at 163.

²² *Id.*

²³ *Id.* at 160, 163–64.

evaluation.²⁴ The trimester framework illustrates how the Court's balancing test limits state interference with a woman's right to a pre-viability abortion because the state cannot impose abortion regulations for reasons outside of an interest in health, medical standards, and prenatal life. Additionally, the framework demonstrates that only at viability, not during all stages of pregnancy, does a state's interest outweigh the rights of the mother.

Unlike the Supreme Court's balancing framework, which restricts state's interests to specific categories, the ECtHR's balancing test considers a wide variety of factors and grants countries discretion to determine what interests to weigh against a woman's right to a private life. *A, B and C. v. Ireland* lists the potential interests a country could assert to weigh against a woman's Article 8 right. The Irish Constitution recognizes the "right to life of the unborn" and *only* allows women to have an abortion if their lives are threatened.²⁵ Applicants A and B both became unintentionally pregnant and traveled to England to receive abortions because they did not think that Irish law would permit them to terminate their pregnancies because their lives were not at risk.²⁶ A and B alleged that Ireland's unwillingness to recognize abortion for "health and/or well-being reasons disproportionately restricted their right to respect for their private lives."²⁷

The ECtHR outlined the competing interests as the applicants' right to respect for their private lives and the "[Irish] morals [against abortion and] the right to life of the unborn."²⁸ The Irish Constitution explicitly creates a right to life for the fetus, so the ECtHR's consideration of this right against a woman's right to a private life logically follows from the relevant authority. However, the ECtHR's inclusion of "Irish morals" indicates that the "competing rights and freedoms" of member-states could include social views of the country rather than just its explicit constitutional rights.

While states under the Supreme Court's test can restrict abortions after fetal viability, the fetus itself does not have rights. The ECtHR's framework, however, allows anti-abortion countries to position the right of the fetus as relevant and as a competing interest at all stages in a woman's pregnancy. Furthermore, *Roe's* balancing test directly communicates the valid interests a state may articulate in its abortion legislation, whereas women under the ECtHR's framework face a set of ill-defined interests that range from stated constitutional rights to cultural stances of the member-state. Therefore, the Supreme Court's balancing test provides greater protection to a woman's legal path to abortion because it limits what interests weigh against a woman's right to terminate, whereas European women's right to a private life is balanced against a variety of possible interests.

*B. The Supreme Court's Balancing Test Regulates How to Evaluate an
Infringement on the Right to an Abortion, While the European Court Grants a
"Wide Margin of Appreciation" to Find a Violation Regarding Legal
Abortions*

Under the Supreme Court's test, courts determine whether state regulations have violated a woman's right to terminate under an undue burden analysis.²⁹ The ECtHR allows

²⁴ *Casey*, 505 U.S. at 873.

²⁵ *A, B and C*, 2010-VI Eur. Ct. H.R. 185 at ¶ 55.

²⁶ *Id.* at ¶¶ 13–14, 18–19.

²⁷ *Id.* at ¶ 216.

²⁸ *Id.* at ¶ 222.

²⁹ *Casey*, 505 U.S. at 878.

the member-state itself to decide whether its law violates Article 8 under remarkable discretion or a wide margin of appreciation. Therefore, the balancing framework articulated by the Supreme Court better protects a woman's legal path to abortion because it does not allow a state to determine if its own law violates a woman's right, and it provides a method meant to protect women's access to abortion to make that evaluation.

The Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey* retained the method of balancing the state's interest against the right of the mother but evaluated the state's interest according to the undue burden test. An undue burden exists if a state law's "purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."³⁰ The Court found that the undue burden test better effectuated the balance between a woman's right to an abortion and the state's interest because it was less rigid and in some cases, after *Roe*, the state's interest in the potential life of the fetus had not been recognized.³¹

However, the Court specified that the purpose of the undue burden analysis is not to tip the balance in favor of the state's interest. *Casey* stated that a statute which places a substantial obstacle in the path of a woman seeking to terminate "is invalid because the means chosen by the State to further its interest in potential life must be calculated to inform the woman's free choice, not hinder it."³² The Court explained that statutes that place an undue burden do "not serve legitimate ends" even when they attempt to further valid state interests.³³ These statements indicate the Court's belief that even when a regulation supports a state interest, a legitimate pre-viability abortion law cannot effectively deny women their ability to exercise their right to an abortion. By adding the undue burden analysis to the balancing framework, the Court retained the practice of weighing a woman's right to terminate against the state's interests, but it limited the extent to which a state could block a woman from obtaining a pre-viability abortion.

In contrast to the Supreme Court, the ECtHR's balancing framework allows the country to decide if its law violates a woman's right to a private life under a wide margin of appreciation. In *A, B and C v. Ireland*, as noted above, the ECtHR agreed with applicants A and B that the restrictive Irish abortion laws interfered with their Article 8 rights.³⁴ However, the Court found no *violation* of the Convention because Ireland did not find that its own law failed to strike a fair balance between the competing interests.³⁵ In order to explain why it allowed member-states to decide on violations, the Court suggested that local legislatures could better effectuate the values of their people than could an international court.³⁶ The ECtHR granted Ireland significant discretion when making its determination in accordance with the "wide margin of appreciation" that the Court found appropriate for a "sensitive moral issue[]" like abortion.³⁷ Therefore, the ECtHR held that, even though Irish law clearly interfered with A and B's right to a private life, no violation

³⁰ *Id.*

³¹ *Id.* at 876.

³² *Id.* at 877.

³³ *Id.*

³⁴ *A, B and C v. Ireland*, 2010-VI Eur. Ct. H.R. 185, ¶ 216 (2010).

³⁵ *Id.* at ¶ 241.

³⁶ *Id.* at ¶ 205.

³⁷ *Id.* at ¶ 232.

had occurred because of the wide margin of appreciation given to member-states to determine if a fair balance exists.³⁸

The case of A and B reveals the extent to which the ECtHR's balancing framework does not protect women's access to abortion, even where countries make abortion legal. While A and B did not have a legal path to abortion—because their lives were not endangered—the Court's analysis suggests that even women seeking lawful abortions would be unlikely to access abortion care under the balancing framework.

The ECtHR allows member-states to assert a broad base of interests in the abortion context and provides significant discretion to countries in weighing those interests. Ireland not only decides whether its own law violates the Convention but also enjoys a “wide margin of appreciation” in its analysis. Since Ireland created the law, an inherent bias exists in its balancing evaluation. Furthermore, the additional wide margin of appreciation given to the country when making that determination allows Ireland to simply claim that the Irish legislation reflects “Irish morals,”³⁹ which staunchly oppose abortion practices, and so the legislation brings about a fair balance between a woman's Article 8 right and the interests of the country.

The undue burden analysis articulated by the Supreme Court provides better protection for a woman's legal path to abortion because states cannot implement regulations that create an undue burden on a woman's pre-viability abortion. However, the ECtHR allows member-states to decide if a violation occurred based on a wide margin of appreciation. The United States' method prohibits states from preventing women from obtaining an abortion if the statute at issue presents an undue burden even if it furthers a state interest. In the ECtHR, it is the opposite. If the law vindicates a state interest, there is no protection or requirement that member-states do not impose a burden; rather, those member-states receive a wide margin of appreciation to do what they feel “best effectuates” the values of their people.

II. WOMEN FACE SUBSTANTIVE RESTRICTIONS ON THEIR ABILITY TO OBTAIN AN ABORTION WITHIN BOTH COURTS' JURISDICTIONS

Part II of this Note will explore the substantive impacts of each jurisdiction's laws on a woman's ability to obtain an abortion. While the Supreme Court's legal framework governing abortions provides greater protection to secure an abortion than does the ECtHR's, both courts oversee extensive and substantive restrictions on women's access to abortion. The undue burden test implemented by the Supreme Court should in theory provide great protection to a woman seeking to terminate. However, this Part argues that anti-abortion states have utilized weaknesses in *Casey* to formulate successful abortion restrictions. These regulations greatly limit a woman's ability to access abortion care, even in the United States, where she has a recognized constitutional right to terminate.⁴⁰

³⁸ *Id.* at ¶ 241.

³⁹ *Id.* at ¶ 222.

⁴⁰ This Author recognizes that at the time of this Note's publishing, Texas passed S.B. 8, which banned abortions after six weeks, effectively making abortions illegal in the state. S.B. 8 side-steps the *Casey* test by insulating government officials from enforcing the law, instead deputizing private citizens to enforce the law against abortion providers or those that aid or abet a woman in obtaining an abortion. In response to an

Similarly, under the ECtHR, even where member-states have presented legal avenues to abortion, the chilling effect of laws from anti-abortion countries prevent women from obtaining abortions. Countries that wish to limit access to abortion enact measures that criminally sanction providers who perform abortions outside of narrow exceptions. These repercussions dissuade doctors from performing abortions for fear of criminal punishment, especially where the law does not guide providers to determine whether a woman qualifies for an exception. This Part will examine how, even where women have a legal path to abortion, the chilling effect may prevent European women from actually obtaining the procedure.

A. *State Restrictions Limit Women’s Right to an Abortion in the United States
Despite the Supreme Court’s Decision in Roe v. Wade*

While women enjoy a right to abortion in the U.S., some states continue to substantively restrict access to abortions. As noted above, the Supreme Court’s undue-burden balancing test should preclude states from imposing obstacles that prevent women from obtaining pre-viability abortions. However, anti-abortion states take advantage of the weaknesses in the Court’s “undue burden” case law to substantively restrict access to abortion.

The *Casey* Court established the undue burden analysis but found that many of the restrictions proposed by the statute did not pose substantial enough obstacles in the path of a woman seeking to terminate. In *Casey*, a Pennsylvania statute required that, prior to obtaining an abortion, a woman must provide informed consent, receive informational materials twenty-four hours prior to the procedure, and notify her husband.⁴¹ The statute also required parental consent for minors seeking an abortion and imposed certain reporting requirements for abortion facilities.⁴² The Court held *only one* provision unconstitutional: the duty to notify the husband.⁴³ Since women could have a legitimate fear of physical, psychological, and financial abuse,⁴⁴ the *Casey* Court found that the spousal notification requirement likely prevents “a significant number of women from obtaining an abortion. It does not merely make abortions a little more difficult or expensive to obtain; for many women, it will impose a substantial obstacle.”⁴⁵

However, anti-abortion states have, in practice, leveraged weaknesses in the undue burden framework to undermine a woman’s right to an abortion, specifically in areas that *Casey* did not find “undue.” The *Casey* Court did not find waiting periods for information, parental consent for minors, or reporting requirements for abortion facilities to constitute undue burdens on abortion care. As a result, some states require women to wait “up to 72

emergency application, the Supreme Court was asked to determine if the challenge could be brought in federal court, and the Court provisionally refused to block this blatantly unconstitutional law from going into effect. See Maggie Astor, *Here’s What the Texas Abortion Law Says*, N.Y. TIMES (Sept. 9, 2021), <https://www.nytimes.com/article/abortion-law-texas.html>; Adam Liptak, J. David Goodman, & Sabrina Tavernise, *Supreme Court, Breaking Silence, Won’t Block Texas Abortion Law*, N.Y. TIMES (Sept. 1, 2021), <https://www.nytimes.com/2021/09/01/us/supreme-court-texas-abortion.html>.

⁴¹ *Casey*, 505 U.S. at 844.

⁴² *Id.*

⁴³ *Id.* at 893.

⁴⁴ *Id.*

⁴⁵ *Id.* at 893–94.

hours” after their initial doctor consultation before going through with termination.⁴⁶ Since abortions are time-sensitive procedures, as states can prohibit abortions after viability, waiting periods have the potential to bar women from terminating their pregnancies. For women forced to travel to receive an abortion, waiting periods extend their trips by days, creating additional financial barriers to accessing the procedure for women unable to afford such elongated stays. Certain states also require women seeking abortions to go through mandatory biased counseling from doctors or unregulated “crisis pregnancy centers.”⁴⁷ While making an informed decision is critical, biased counseling laws can shame women into not choosing an abortion.⁴⁸ Thirty-seven states require some form of parental consent for a minor’s abortion, which gives the decision to the parent as opposed to the mother.⁴⁹ These policies substantively diminish and inhibit women’s access to abortion in the United States, even though the women affected have a constitutional right to terminate.

Anti-abortion states have also implemented targeted restrictions on abortion provider (“TRAP”) laws, which aim to “shut down abortion providers and make it more difficult for people to access abortion.”⁵⁰ TRAP laws enact medically unnecessary building requirements on abortion clinics, require certain hospital relationships from providers, and impose specific location and reporting requirements.⁵¹ These laws substantively restrict a woman’s ability to access an abortion by creating obstacles that make it nearly impossible, in some cases, for a woman to terminate.

In fact, the Supreme Court has found that TRAP laws may impose an undue burden on a woman’s right to terminate. In *Whole Women’s Health v. Hellerstedt*, the Court found that Texas House Bill 2, which required abortion providers to have admitting privileges at a hospital within thirty miles of the procedure and for abortion clinics to meet requirements for ambulatory surgical centers, created an undue burden on a woman’s right to an abortion.⁵² Some abortion providers lack the requisite referral rates necessary to have admitting privileges because abortions are such safe procedures.⁵³ As a result, the Court found that decreasing the number of abortion providers under this law created a significant obstacle and an undue burden to a woman’s right to an abortion.⁵⁴ Furthermore, the heightened facility requirements created a substantial obstacle because the restrictions would decrease the available number of clinics.⁵⁵

⁴⁶ Planned Parenthood Action Fund, *Types of State Attacks on Abortion*, <https://www.plannedparenthoodaction.org/issues/abortion/types-attacks#biasedcounseling> (last visited July 8, 2021).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Planned Parenthood, *Parental Consent and Notification Laws*, <https://www.plannedparenthood.org/learn/teens/stds-birth-control-pregnancy/parental-consent-and-notification-laws> (last visited July 8, 2021).

⁵⁰ Planned Parenthood Action Fund, *What are TRAP Laws?*, <https://www.plannedparenthoodaction.org/issues/abortion/trap-laws> (last visited July 8, 2021).

⁵¹ *Id.*

⁵² *Whole Women’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2316 (2016). *See also* *June Medical Services L.L.C. v. Russo*, 140 S. Ct. 2103 (2020) (holding that Louisiana Act 620, which was almost identical to the Texas law in *Whole Women’s Health*, imposed an undue burden on a woman’s right to an abortion).

⁵³ *Whole Women’s Health*, 136 S. Ct. at 2310–12.

⁵⁴ *Id.*

⁵⁵ *Id.* at 2314–16.

While the Supreme Court’s undue burden test should provide significant protection to a woman’s right to an abortion, anti-abortion states have utilized the areas that *Casey* did not find undue as a roadmap to substantively limit abortion access. *Casey* did not find that the TRAP restriction in the Pennsylvania statute constituted an undue burden; however, the Court in *Whole Women’s Health* found that the Texas TRAP law presented a substantial obstacle in the path of a woman seeking to terminate. Therefore, even if *Casey* did not find a type of restriction undue in that circumstance, the category of regulation may still create an undue burden in other legislation. Many states continue to institute laws that substantively limit a woman’s access to terminate even though women in the United States have a Constitutional right to an abortion.

B. In the European Union, the Chilling Effect Inhibits Access to Abortion

The ECtHR allows its member-states to define not only what legal avenues to abortion exist, but it also gives countries significant discretion over the implementation of the law. In the ECtHR’s jurisdiction, since women do not retain a legal right to an abortion, anti-abortion member-states create narrowly tailored laws that produce a chilling effect by criminalizing the procedure outside of specific circumstances, which makes providers within these member-states reticent to perform even legal abortions. As a result of individual countries’ discretion to govern abortion law and access, women living in anti-abortion nations within the ECtHR’s jurisdiction sometimes cannot obtain abortions, even where legal options exist in their countries.

The ECtHR has noted that Article 8 requires that member-states provide “accessible means of protecting the right for respect for private life . . . including both the provision of a regulatory framework . . . and the implementation, where appropriate, of specific measures in an abortion context.”⁵⁶ In *A, B and C v. Ireland*, the Irish Constitution did not supply a framework for a woman and her doctor to resolve a dispute concerning whether she could receive an abortion under the law.⁵⁷ The law introduced a significant “chilling factor” because if either party violated Article 40.3.3, the patient or provider could face criminal repercussions.⁵⁸ The ECtHR found that because the Irish law did not “implement[] [a] legislative or regulatory regime . . . by which the third applicant could have established whether she qualified for lawful abortion in Ireland,”⁵⁹ the country had violated C’s right to a private life. The chilling factor presented by the criminalization of providing abortion services to women who do not qualify under Irish law makes doctors incredibly reticent to perform the procedure. Without procedural frameworks that guide the patient and provider through whether a woman qualifies for an abortion, many women like C will not be able to terminate their pregnancies even if they fall within the legal exceptions provided by their countries.

In a similar vein, Polish law restricts women from terminating their pregnancies. Under the 1993 Family Planning Act, women can only obtain abortions 1) when the pregnancy endangers the mother’s life or health, 2) when prenatal tests indicate a high risk of irreversible and severe fetal damage, or 3) when there are strong grounds for believing

⁵⁶ *A, B and C v. Ireland*, 2010-VI, Eur. Ct. H.R. 185, ¶ 245 (2010).

⁵⁷ *Id.* at ¶ 253.

⁵⁸ *Id.* at ¶ 254.

⁵⁹ *Id.* at ¶ 267.

that the pregnancy resulted from rape or incest.⁶⁰ Just as in Ireland, violating the Act could result in criminal penalties for both physicians and patients.⁶¹ The legal framework in Poland creates a similar “chilling effect” for providers because, if they perform an abortion on a woman who does not meet the exceptions under Polish law, then they could face criminal repercussions.

While the Polish legislation significantly restricts a woman’s ability to have an abortion, the chilling effect further minimizes the realization of those restrictions. In *Tysiac v. Poland*, the ECtHR found that the Polish government had not provided an adequate procedural framework for women who want to access lawful abortions.⁶² Tysiac suffered from severe myopia and became pregnant, which she feared would worsen her vision.⁶³ Her ophthalmologists found that “the pregnancy and delivery constituted a risk to her eyesight.”⁶⁴ However, none of them issued a certificate allowing her to terminate her pregnancy.⁶⁵ The applicant could not obtain such a certificate in time to receive an abortion and carried the pregnancy to term.⁶⁶ After delivering the baby, Tysiac’s “eyesight deteriorated badly[,]” and she faced a high risk of blindness.⁶⁷

Under Article 8, Tysiac alleged that Poland had violated her right to private life because Poland had not provided a “comprehensive legal framework to guarantee her rights by appropriate procedural means.”⁶⁸ The ECtHR noted that the criminal sanctions placed on those who violate the Act deterred physicians from implementing procedures to determine when a woman could receive an abortion and that no structure existed to resolve conflicts where a doctor and patient disagreed about a woman’s ability to obtain an abortion.⁶⁹ The Court held that, “[o]nce the legislature decides to allow abortion, it must not structure its legal framework in a way which would limit real possibilities to obtain it.”⁷⁰ Since Polish law created a chilling effect by criminalizing abortions performed outside of the exceptions, the Court found Poland needed to provide procedural structure allowing a provider and patient to determine whether she qualified for an abortion.⁷¹

While the ECtHR continuously upholds member-states’ positive obligations to enact procedural frameworks where countries create legal paths to abortions, member-states persist in refusing to implement regulatory measures that enable providers and patients to determine whether women qualify for abortions under a country’s law.⁷² The chilling effect greatly prevents women in anti-abortion countries from obtaining abortions even

⁶⁰ *Tysiac v. Poland*, 2007-I Eur. Ct. H.R. 219, ¶ 35 (2007).

⁶¹ *Id.* at ¶ 41.

⁶² *Id.* at ¶ 130.

⁶³ *Id.* at ¶ 8–9.

⁶⁴ *Id.* at ¶ 9.

⁶⁵ *Id.*

⁶⁶ *Id.* at ¶ 15.

⁶⁷ *Id.* at ¶ 16–17.

⁶⁸ *Id.* at ¶ 76.

⁶⁹ *Id.* at ¶ 114–16.

⁷⁰ *Id.* at ¶ 116.

⁷¹ *Id.* at ¶ 128–30.

⁷² See *R.R. v. Poland*, 2011-III Eur. Ct. H.R. 209, ¶¶ 199–200, 20–27 (2011) (holding that Poland violated R.R.’s Article 8 right because she did not receive reliable information to determine whether she qualified for an abortion under Polish law, and because of the confusion and the doctor’s fear of criminal sanctions, the providers refused to perform the test necessary to determine if a fetal malformity existed).

where they may legally qualify because providers fear criminal sanctions that result from performing abortion services not in line with their country's exceptions.

III. SOLUTIONS TO ADDRESS RESTRICTIONS ON ABORTION ACCESS IN THESE JURISDICTIONS

Part III of this Note advocates for both courts to implement a multifaceted approach to ensure widespread and effective abortion access, especially considering abortion's varied legal status in each jurisdiction and the significant limitations that currently prevent women from obtaining abortions. First, in the United States, the Supreme Court should further the "effect" part of the undue burden test such that states cannot enact laws which have the effect of preventing women from terminating their pregnancies. Second, the ECtHR should revise the method of evaluation prescribed to judge whether a law violates a woman's Article 8 right to eliminate extensive member-state discretion.

The United States Supreme Court's abortion jurisprudence has evolved greatly from finding that the right to privacy included the right to an abortion to creating the undue burden test. The undue burden test itself prevents states from enacting laws whose "purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."⁷³ However, as noted in Part II, many states impose restrictions like waiting periods, biased counseling, and parental consent, which have the effect of placing a substantial obstacle in the way of, and in some cases altogether preventing, women from accessing abortion care. The Court should bolster the "effect" part of its balancing framework by clearly stating that regulations, like those allowing biased counseling, for example, are undue burdens and are therefore invalid.⁷⁴ If the Supreme Court focused on how laws impact women's ability to obtain abortions, more anti-abortion state laws would clearly create undue burdens, allowing more women to actualize their right to an abortion.

The ECtHR can also expand women's ability to obtain abortions by altering its present balancing framework. While the ECtHR cannot prevent member-state legislatures from determining what their country's interests may be, it could change the method of evaluation in its balancing test. It could allow a neutral court, one not from the country accused of violating the Convention, to evaluate whether a member-state's law creates a fair balance between the relevant interests. Additionally, the ECtHR could revoke the "wide margin of appreciation," in favor of the Court's traditional method of considering European consensus.⁷⁵ Since the "vast majority" of the forty-seven member-states "recognize a woman's right to choose to terminate her pregnancy or permit abortion on broad grounds[,]"⁷⁶ this would allow more women to have increased access to abortions as

⁷³ *Casey*, 505 U.S. at 878 (emphasis added).

⁷⁴ Planned Parenthood Action Fund, *Types of State Attacks on Abortion*, <https://www.plannedparenthoodaction.org/issues/abortion/types-attacks#biasedcounseling> (last visited July 8, 2021) (finding that "[a]n evaluation of Texas' 2011 biased counseling law found the law does not enhance health information, but . . . mak[es] a woman feel ashamed.").

⁷⁵ Center for Reproductive Rights, *A, B and C Fact Sheet*, <https://www.womenslinkworldwide.org/files/1138/ficha-del-caso-a-b-c-vs-irlanda-solo-en-ingles.pdf> (last visited July 8, 2021) (explaining that the "Court disregarded the existence of a European consensus in determining the scope of the margin of appreciation to accord to a state").

⁷⁶ *Id.*

the evaluation would not favor the individual country but would consider the member-state's law under the more liberal views of the European Union.

CONCLUSION

Both the United States Supreme Court and the ECtHR oversee varying levels of legality in regard to abortion. The Supreme Court's balancing test better protects a woman's legal path to an abortion because it A) limits state restrictions to specific categories of regulation and B) regulates the extent to which a state can regulate a woman's pre-viability abortion. However, in both courts' jurisdictions, states and member-states functionally deny women the ability to obtain abortions, even where abortion is legal. Anti-abortion states in the U.S. have taken advantage of *Casey's* holding and have implemented laws which substantially restrict abortion. Countries under the ECtHR that oppose abortion have criminalized the performance of abortions outside of narrow legal exceptions, creating a chilling effect that prevents women from obtaining even lawful abortions. The Supreme Court could strengthen a woman's right to abortion by focusing on the effects of state laws and how they substantively prevent women from obtaining abortions. The ECtHR could increase access to abortion for women by altering its balancing test such that member-states do not determine whether a violation has occurred for their own laws, and by disregarding the wide margin of appreciation in favor of European consensus.