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## Border Checkpoints and Substantive Due Process: Abortion Rights in the Border Zone

**ABSTRACT.** This Note assesses the constitutionality of Texas House Bill 2 (H.B. 2), which regulates abortion providers, as applied to clinics located in the area between the state's border with Mexico and internal federal immigration checkpoints. Should these statutory provisions go into full effect and lead to these clinics' closure, undocumented immigrants living in the border zone will need to pass through the internal checkpoints to reach abortion clinics elsewhere in the state. The Note evaluates the Texas statutory provisions as applied to border-zone clinics using two distinct analytical frameworks: the undue burden analysis specific to abortion jurisprudence and the doctrine of unconstitutional conditions. The Note concludes that under either approach, H.B. 2, as applied to these clinics, violates the reproductive rights of undocumented immigrants and is therefore unconstitutional. The rights burden created for this group by Texas's law regulating abortion clinics illuminates both the way in which federal-state allocations of power in the border zone may endanger substantive due process rights and, more broadly, the relationship between geographic space and substantive due process.

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**INTRODUCTION**

United States Border Patrol checkpoints lace the interior of Texas and other southern border states, typically lying twenty-five to seventy-five miles from the border with Mexico.<sup>1</sup> Federal law permits immigration officers “to board and search for aliens . . . any railway car, aircraft, conveyance, or vehicle” located “within a reasonable distance from any external boundary of the United States.”<sup>2</sup> At the checkpoints, agents may, pursuant to the Supreme Court’s holding in *United States v. Martinez-Fuerte*, “brief[ly] det[ain] . . . travelers” and “require[] of the vehicle’s occupants . . . a response to a brief question or two and possibly the production of a document evidencing a right to be in the United States.”<sup>3</sup> For those within the “border zone” – the area of land between federal interior immigration checkpoints and the international border – travel to the rest of the country functionally requires an encounter with federal immigration enforcement.<sup>4</sup> As a result, unauthorized immigrants living within the border zone avoid such travel and find their world effectively circumscribed by the checkpoints.<sup>5</sup> State laws and regulations with spatially disparate effects, such as recently enacted Texas legislation that compels widespread closure of abortion clinics, therefore have particular significance for undocumented immigrants in the border zone.<sup>6</sup>

1. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-05-435, BORDER PATROL: AVAILABLE DATA ON INTERIOR CHECKPOINTS SUGGEST DIFFERENCES IN SECTOR PERFORMANCE 2 (2005).
2. 8 U.S.C. § 1357(a)(3) (2012).
3. 428 U.S. 543, 558 (1976) (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 880 (1975)).
4. See *infra* Section I.A. The area between the international border and the interior checkpoints is frequently referred to as the “border zone.” See, e.g., *United States v. Orozco*, 191 F.3d 578, 584 (5th Cir. 1999) (Dennis, J., dissenting).
5. Manny Fernandez, *Checkpoints Isolate Many Immigrants in Texas’ Rio Grande Valley*, N.Y. TIMES (Nov. 22, 2015), <http://www.nytimes.com/2015/11/23/us/checkpoints-isolate-many-immigrants-in-texas-rio-grande-valley.html> [<http://perma.cc/4KYS-2TSG>] (exploring how the checkpoints limit travel for the approximately one hundred thirty thousand undocumented immigrants living in southern Texas and noting that undocumented residents refer to the border zone as “la jaula de oro”); see also Dan Solomon, *Jose Antonio Vargas, the Nation’s “Most Famous Undocumented Immigrant,” Has Been Released from Detention in McAllen*, TEX. MONTHLY (July 15, 2014), <http://www.texasmonthly.com/the-daily-post/jose-antonio-vargas-the-nations-most-famous-undocumented-immigrant-has-been-released-from-detention-in-mcallen> [<http://perma.cc/U9T6-LAHE>] (describing the challenges of passing through interior checkpoints).
6. Fernandez, *supra* note 5; see also Suzanne Gamboa, *Jose Antonio Vargas Arrest Puts Focus on Border Checkpoints*, NBC NEWS (July 15, 2014, 3:17 PM), <http://www.nbcnews.com/news/latino/jose-antonio-vargas-arrest-puts-focus-border-checkpoints-n156456> [<http://perma.cc/R3T6-HNSV>] (interviewing an undocumented resident of south Texas’s border region,

In 2013, the State of Texas enacted Texas House Bill 2 (H.B. 2), which regulates abortion providers and could result in the closure of all abortion clinics south and west of internal immigration checkpoints in the state.<sup>7</sup> H.B. 2 requires that all abortion clinics in Texas meet the facility requirements for ambulatory surgical centers and that all doctors performing abortions have hospital admitting privileges within thirty miles of their clinics.<sup>8</sup> The legislation has led to the closure of many clinics in the state<sup>9</sup> and has engendered both controversy and litigation. An as-applied challenge, focusing on the extent to which courts ought to probe legislatures' health-premised justifications for narrowing abortion availability, has reached the Supreme Court.<sup>10</sup> The abortion providers in Texas's border area are among those unable to meet H.B. 2's requirements: both the Whole Woman's Health Clinic in McAllen, a city in Texas's southern Rio Grande Valley, and the two clinics in El Paso, the metropolitan area at Texas's westernmost tip, have not been able to do so.<sup>11</sup>

Because of H.B. 2, undocumented immigrants living in southern and western Texas face the potential closures of the only three abortion clinics in the state that do not require travel through internal immigration checkpoints from the border area. Roughly 822,500 women live in the Rio Grande Valley and the nearby city of Laredo, within the border zone in the southern part of

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who explained that his family did not travel to Corpus Christi for specialized medical care and that he passed up a full scholarship at a university in Houston due to the checkpoints).

7. H. 2, 83d Leg., 2d Sess., 2013 Tex. Gen. Laws 5013 (relating to the regulation of abortion). The legislation also contained other restrictions on abortion, including a ban on the procedure past twenty weeks after fertilization (with exceptions) and restrictions on access to abortion-inducing drugs. *Id.*
8. *Id.* §§ 2, 4.
9. Alexa Garcia-Ditta, *The Texas Abortion Case, Explained: How a Texas Law Could Undo 43 Years of Access to Legal Abortion in the United States*, TEX. OBSERVER (Jan. 22, 2016), <http://www.texasobserver.org/texas-abortion-case-hb-2-explained> [<http://perma.cc/7YXH-Y9PD>] (noting that the number of abortion clinics open in Texas has decreased from more than forty to nineteen since the passage of H.B. 2).
10. *Whole Woman's Health v. Hellerstedt*, No. 15-274 (U.S. argued Mar. 2, 2016).
11. See *Whole Woman's Health v. Cole*, 790 F.3d 563, 595-96, 596 n.44 (5th Cir.) (describing the inability of clinics in El Paso and McAllen to meet ambulatory surgical center standards, as required by H.B. 2, and the inability of physicians at these clinics to obtain admitting privileges at any nearby hospital, as required by H.B. 2), *mandate stayed pending judgment by* 135 S. Ct. 2923 (2015), *and cert. granted*, 136 S. Ct. 499 (Nov. 13, 2015); Letter from Stephanie Toti, Ctr. for Reprod. Rights, to Lyle W. Cayce, Clerk, U.S. Court of Appeals for the Fifth Circuit 2-3 (June 12, 2015), <http://sblog.s3.amazonaws.com/wp-content/uploads/2015/06/Texas-abortion-impact-letter-6-12-15.pdf> [<http://perma.cc/F5GY-ELYL>] (detailing the impending closure of the McAllen clinic and the bar to reopening of an El Paso clinic in light of the Fifth Circuit's ruling in *Whole Woman's Health v. Cole*).

the state.<sup>12</sup> Roughly fifty thousand have neither citizenship nor legal immigration status and are of reproductive age.<sup>13</sup> Were the McAllen clinic to close, the border checkpoints would physically stand between these women and obtaining an abortion under medical care. The undocumented women in the area would not be able to obtain an abortion under medical care unless they were to risk deportation by traveling through the checkpoints, risk death by attempting to circumvent them, or successfully obtain lawful presence in the country before the point at which abortion becomes illegal.<sup>14</sup> In west Texas, roughly four hundred twenty-five thousand women live in the largest metropolitan area, in El Paso County.<sup>15</sup> Closure of the El Paso clinics would

12. This estimate multiplies 2014 population and gender-ratio estimates for the counties of Cameron, Hidalgo, Starr, Willacy, and Zapata and the city of Laredo, which gives a total of 822,448 women in that area; it is not limited to women of reproductive age. See *State & County QuickFacts: Texas*, U.S. CENSUS BUREAU (Dec. 1, 2015), <http://quickfacts.census.gov/qfd/states/48000.html> [<http://perma.cc/RD39-S99C>]; see also U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-824, BORDER PATROL: CHECKPOINTS CONTRIBUTE TO BORDER PATROL'S MISSION, BUT MORE CONSISTENT DATA COLLECTION AND PERFORMANCE MEASUREMENT COULD IMPROVE EFFECTIVENESS 9 fig.3 (2009) (mapping checkpoints in the southwestern United States).
13. Roughly 49,505 undocumented women of reproductive age live in the counties of Cameron, Hidalgo, and Webb, combined. See *Unauthorized Immigrant Population Profiles*, MIGRATION POL'Y INST. (2015), <http://www.migrationpolicy.org/programs/us-immigration-policy-program-data-hub/Unauthorized-immigrant-population-profiles> [<http://perma.cc/L2BG-EHH9>] (providing estimates of the total number of unauthorized immigrants in these counties and percentage breakdowns by gender and age range, using data from 2008 to 2013). In arriving at the estimates of undocumented women of reproductive age based on this data, I multiplied the total figure for each county by the percentages of that population estimated to be female and to be between ages sixteen and forty-four. (This estimate necessarily assumes that gender distribution does not change with age; gender breakdown by age for the undocumented population in these areas is not readily available.) Roughly 5.5% of the total Texas population is undocumented. See *id.* (estimating 1.464 million undocumented immigrants in Texas); U.S. CENSUS BUREAU, *supra* note 12 (estimating the population of Texas in 2013 to be 26.505 million). Assuming that ratio for the counties of Starr and Zapata, the two other counties within the border zone in the southern part of the state, the total number of undocumented women of reproductive age in southern Texas's border area is, very roughly, 50,706. See U.S. CENSUS BUREAU, *supra* note 12 (giving total population and percentage breakdowns for gender and ages eighteen through sixty-four in 2014). The estimate for these two counties is necessarily rough. More than 5.5% of the population in the other counties along the border is undocumented, see MIGRATION POL'Y INST., *supra*, and the estimate includes a slightly different age range from that for the other counties.
14. See *infra* Section I.A.
15. See U.S. CENSUS BUREAU, *supra* note 12 (estimate arrived at by multiplying the census population and gender-ratio estimates for El Paso County). There are no major metropolitan areas within the border zone between El Paso and the next closest city, Laredo, and discerning how many people live within this area is more difficult due to the location of

mean that the approximately twenty-four thousand undocumented women of reproductive age living in that area would also need to cross a border checkpoint in order to obtain an abortion in Texas.<sup>16</sup> However, these individuals can currently reach a clinic located south of border checkpoints in New Mexico.<sup>17</sup>

Whether H.B. 2 and the checkpoints create a constitutionally impermissible barrier to abortion access remains significant for this group of women three years after the statutory provisions became law. The Fifth Circuit has issued an injunction partially limiting the law's effect by preserving access to the McAllen clinic for undocumented immigrants living in some but not all of the counties within the border zone in South Texas.<sup>18</sup> However, the injunction terminates if a clinic opens closer to the Rio Grande Valley yet beyond the checkpoints and its enjoyment of the admitting privileges requirement extends only to a single, part-time doctor named in the opinion.<sup>19</sup> Because the injunction is underinclusive with respect to undocumented women in the border zone and may terminate, and because the limited relief may not prevent the closure of the McAllen clinic, the separate question of the checkpoints' import to H.B. 2's application to the clinics persists. If access to abortion rights must be evaluated within the confines of one's state,<sup>20</sup> then the El Paso clinic

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some checkpoints within border counties and the lack of available data on undocumented populations in these counties. Consequently, undocumented persons living in this area between Laredo and El Paso have been left out of these estimates.

16. See MIGRATION POL'Y INST., *supra* note 13 (providing demographic data on the undocumented population of El Paso County).
17. *Whole Woman's Health v. Cole*, 790 F.3d 563, 596 (5th Cir.) (noting the existence of the clinic in southern New Mexico), *mandate stayed pending judgment by* 135 S. Ct. 2923 (2015), *and cert. granted*, 136 S. Ct. 499 (Nov. 13, 2015).
18. *Id.*
19. *Id.*; see also Brief for Petitioners at 24, *Whole Woman's Health v. Hellerstedt*, No. 15-274 (U.S. Dec. 28, 2015) (noting that the doctor is over retirement age and cannot perform abortions full-time). The injunction has not gone into effect due to the stay of the Fifth Circuit's ruling pending the Supreme Court's decision in the case. See *Whole Woman's Health v. Cole*, 135 S. Ct. 2923, 2923 (2015). The limited nature of the injunction's relief is at issue in the *Whole Woman's Health* case in its current posture before the Supreme Court, though that case deals with health-related legislative justifications for H.B. 2 rather than any undue burden posed by the unique nature of the border zone. See Brief for Petitioners, *supra*, at 24 ("The limited relief provided to the McAllen clinic by the Fifth Circuit is likely insufficient to permit the clinic to continue providing abortion services.").
20. Compare *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 457-58 (5th Cir. 2014), *petition for cert. filed*, 83 U.S.L.W. 3705 (U.S. Feb. 18, 2015) (No. 14-997) ("[A] state cannot lean on its sovereign neighbors to provide protection of its citizens' federal constitutional rights."), with *Whole Woman's Health v. Cole*, 790 F.3d at 597 (distinguishing *Jackson* in part on the grounds that there are still abortion clinics open in Texas and in part on the fact-specific circumstances of the El Paso clinic).

poses constitutional concerns as well. From a theoretical perspective, the broader question of how to think about potential barriers to vindication of substantive due process rights posed by the conjunction of federal immigration enforcement and state regulatory law remains open as well.

This Note identifies and explicates an overlooked constitutional problem with H.B. 2, as applied to the border-zone clinics: in light of the backdrop of federal immigration enforcement, the Texas law violates the reproductive rights of more than eighty thousand women. In evaluating the potential rights burden imposed on undocumented women in the border zone by H.B. 2, the Note applies two analytical frameworks of constitutional law: the undue burden analysis specific to substantive due process abortion jurisprudence and the unconstitutional-conditions doctrine. The Note determines that H.B. 2 violates the reproductive rights of undocumented immigrants in the Texas border area under either analysis. Part I characterizes the spatially selective immigration enforcement regime that forms the backdrop to state legislation and notes the omission of the spatially disparate effect of H.B. 2 from litigation challenging the law. Under the undue burden framework, Part II argues, H.B. 2 has the effect of deterring undocumented women from seeking an abortion. Under the unconstitutional-conditions framework, as Part III explicates, the law violates undocumented women's abortion rights by conditioning abortion access on exposure to immigration enforcement. The causal set that gives rise to the rights burden is unusual: it is comprised of federal immigration enforcement, state statutory provisions regulating abortion clinics, and unauthorized immigrants' (lack of) immigration status. Part IV addresses an important set of counterarguments: it argues that on either framework analysis, and notwithstanding the other elements of the causal set, the state legislation is causally responsible for the violation. This conclusion is both doctrinally accurate and most consonant with constitutional commitments to individual rights in the border zone.

This Note is the first work to analyze the implications of the confluence of state laws with spatially disparate effects and internal checkpoints for the fundamental rights of undocumented immigrants. This confluence highlights the way in which the area along the U.S.-Mexico border inverts federalism protections for a vulnerable minority group that can exercise neither exit nor voice. It also provides one example of the significance of the undertheorized relationship between substantive due process rights and political and physical space.

**I. THE BORDER ZONE AND H.B. 2**

*A. Border Checkpoints: Spatially Selective Immigration Enforcement*

The interior Border Patrol checkpoints create a system of spatially selective immigration enforcement within the United States.<sup>21</sup> Individuals driving north from the cities, towns, and ranches along the international border must, eventually, stop at a roadblock set up along the highway.<sup>22</sup> Implementing regulations interpret the “reasonable distance” contemplated in the federal statute authorizing immigration searches as “within 100 air miles from any external boundary of the United States or any shorter distance” determined by certain Department of Homeland Security officials.<sup>23</sup> At a checkpoint within this “reasonable distance,” a Border Patrol agent asks all occupants of the vehicle if they are United States citizens.<sup>24</sup> The agent may then refer individuals to secondary screening for further questioning as to their legal status in the United States.<sup>25</sup> If the Border Patrol agent determines that there is probable cause, individuals may be searched, detained, and, eventually, either charged with a crime or entered into immigration removal proceedings.<sup>26</sup> The Supreme

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21. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 1, at 2.

22. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 12, at 6-11 (mapping checkpoints in the southwestern United States); see also U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 1, at 71, 78-79 (delineating checkpoints in the Laredo and Rio Grande Valley areas).

23. 8 C.F.R. § 287.1(a)(2) (2015) (construing 8 U.S.C. § 1357(a)(3) (2012)). A distance of over one hundred air miles may also be deemed reasonable by certain agency heads. *Id.* § 287.1(b). For an account of the authorizing statute, see *supra* notes 2-3 and accompanying text. At least one checkpoint has been noted roughly 125 miles from the (northern) border. *Department of Homeland Security Appropriations for Fiscal Year 2009: Hearings Before a Subcomm. of the S. Comm. on Appropriations*, 110th Cong. 7 (2008) (statement of Sen. Patrick Leahy).

24. See Cindy Casares, *Border Patrol Takes 'No' for an Answer at Internal Checkpoints*, TEX. OBSERVER (Mar. 7, 2013), <http://www.texasobserver.org/border-patrol-takes-no-for-an-answer-at-internal-checkpoints> [<http://perma.cc/LJP6-V2HA>] (noting that Border Patrol officers ask the questions “Are you a U.S. citizen?” and “Where are you headed?” at interior checkpoints). At least in the mid-1970s, it was possible that those whom the Border Patrol “recognize[d] as local inhabitants” would not be questioned. See *United States v. Martinez-Fuerte*, 428 U.S. 543, 550 (1976) (describing this practice in southern Texas).

25. *Martinez-Fuerte*, 428 U.S. at 545-47.

26. See *id.* at 567. A growing grassroots movement seeks to advance noncooperation at checkpoints. See Casares, *supra* note 24. The Border Patrol has stated that, notwithstanding refusals, vehicles “will not be allowed to proceed until the inspecting agent is satisfied that the occupants . . . are legally present in the U.S.” *Id.* (quoting Border Patrol spokesperson).

Court has upheld warrantless vehicle stops without particularized suspicion at Border Patrol checkpoints against a Fourth Amendment challenge.<sup>27</sup>

Consequently, for those within the border zone, traveling into the interior of the United States requires reckoning with this legal and physical architecture of empire.<sup>28</sup> In Texas, the border zone encompasses the cities of El Paso and Laredo, the area of southern Texas called the Rio Grande Valley (including the cities of McAllen and Brownsville), and the smaller towns and ranches that dot the border. It is home to more than 2.4 million people in the state.<sup>29</sup> The Border Patrol maintains a web of “permanent” checkpoints—with physical buildings, electronic sensors, and remote-surveillance capabilities—and “tactical” checkpoints on secondary roads, which lack permanent physical structures.<sup>30</sup> Other than by passing through the highway checkpoints or Border Patrol screening at one of the airports in the region, there is no practical way out of the border zone and into northern Texas.<sup>31</sup> In 2012, more than 120 people died trying to evade the Rio Grande Valley’s eastern checkpoint by walking through semiarid scrubland.<sup>32</sup>

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27. *Martinez-Fuerte*, 428 U.S. at 561-62 (determining that Border Patrol checkpoint stops and questioning are permissible without “individualized suspicion,” due to the “reasonableness of the procedures,” the decreased expectation of privacy in a car, and the demonstrated “need for this enforcement technique”). *Martinez-Fuerte* notes that checkpoint stops are Fourth Amendment seizures. *Id.* at 556.
  28. The distinction between metropole and periphery is a common one in imperial and colonial studies. See, e.g., MICHAEL W. DOYLE, *EMPIRES* 11 (1986). Scholars have applied this conceptual framework to the “borderlands,” identifying the United States border as a peripheral site. See, e.g., JOSÉ DAVID SALDÍVAR, *BORDER MATTERS: REMAPPING AMERICAN CULTURAL STUDIES*, at xiii-xiv, 18 (1997). It is a distinction that federalism scholars draw on as well, though not necessarily in explicit linkage with its use in imperial history. See, e.g., Heather K. Gerken, *The Supreme Court, 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 25 (2010) (conceiving of federalism as the interaction between “the center and its variegated periphery”).
  29. See U.S. CENSUS BUREAU, *supra* note 12. This figure sums up 2014 population estimates for the counties of Cameron, El Paso, Hidalgo, Starr, Webb, Willacy, and Zapata.
  30. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 1, at 2, 10, 16.
  31. See U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 12, at 9 fig.3 (mapping permanent border checkpoints on major highways leading out of Texas’s border zone); U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 1, at 69-73, 78-81 (detailing Customs and Border Protection enforcement in Laredo and the Rio Grande Valley); Fernandez, *supra* note 5 (describing undocumented immigrants’ functional inability to leave the south Texas border zone); Gamboa, *supra* note 6 (same).
  32. Associated Press, *Bodies Pile Up in Texas as Immigrants Adopt New Routes Over Border*, N.Y. TIMES (Sept. 22, 2013), <http://www.nytimes.com/2013/09/23/us/bodies-pile-up-in-texas-as-immigrants-adopt-new-routes-over-border.html> [<http://perma.cc/P772-HQB7>]. There is a limited legal avenue to leave the border zone while remaining in the United States—parole—but due to the discretionary nature of the relief and the length of time

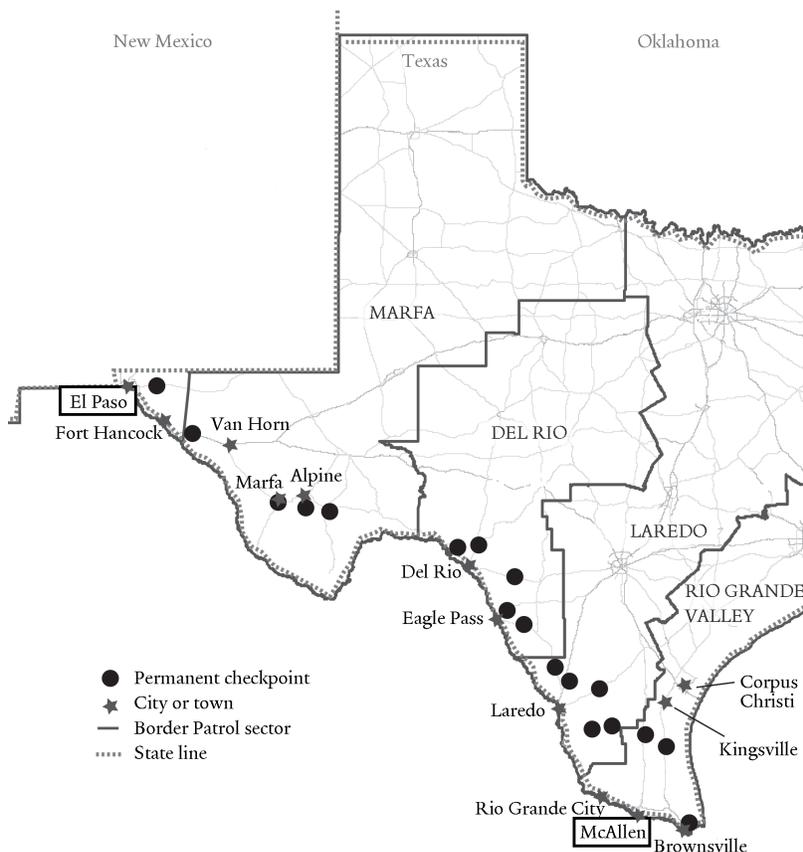
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BORDER CHECKPOINTS AND SUBSTANTIVE DUE PROCESS

**Figure 1.**  
**BORDER PATROL PERMANENT CHECKPOINTS ALONG THE SOUTHWEST BORDER**

*Courtesy of the U.S. Government Accountability Office. Note that this map includes only permanent, not tactical, checkpoints.*



As others have noted,<sup>33</sup> the Supreme Court’s treatment of Border Patrol checkpoints and standards for searches within the space between the

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involved in the application’s adjudication, it is functionally not an option in the abortion context. See 8 U.S.C. § 1182(d)(5)(A) (2012); *infra* notes 69-73 and accompanying text.

33. E.g., Philip Mayor, Note, *Borderline Constitutionalism: Reconstructing and Deconstructing Judicial Justifications for Constitutional Distortion in the Border Region*, 46 HARV. C.R.-C.L. L. REV. 647, 647 (2011) (characterizing the border area as an “anomalous zone” under Neuman’s framework and noting distortions of typical doctrine in both the Fourth Amendment and equal protection contexts, as well as the potential for perceived “threats to sovereignty” to justify other distortions in constitutional doctrine that weighs governmental

checkpoints and the international border make the area what Gerald Neuman has called an “anomalous zone”: a space “in which certain legal rules, otherwise regarded as embodying fundamental policies of the larger legal system, are locally suspended.”<sup>34</sup> In the border zone, these suspended rules include the typical Fourth Amendment limitations on searches and seizures.<sup>35</sup> In areas in Texas and other states on the southern border, Border Patrol agents require only a reasonable suspicion that an individual is a noncitizen—not probable cause—to effectuate a stop south of the checkpoints.<sup>36</sup> And exiting this area and reaching the rest of the state (and country) *requires* a warrantless seizure, without particularized suspicion, at the checkpoint.<sup>37</sup> The Supreme Court has justified these deviations from ordinary Fourth Amendment restrictions by explaining that the Border Patrol seeks to keep undocumented persons from moving into the rest of the country, beyond the border zone.<sup>38</sup>

But, as the Court has also recognized, the border zone is not just a place of transit: it is also a place where many people live and work, and that many call home.<sup>39</sup> Justice Powell’s majority opinion in *United States v. Brignoni-Ponce*, upholding roving patrols near the border, noted that major cities, including San Diego, El Paso, and the cities of the Rio Grande Valley, lie within the border zone.<sup>40</sup> In requiring reasonableness for stops in this area, Justice Powell explained that the lack of such a requirement “would subject the residents of these and other areas to potentially unlimited interference with their use of the

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interests as part of a balancing test); *see also, e.g.*, César Cuauhtémoc García Hernández, *La Migra in the Mirror: Immigration Enforcement and Racial Profiling on the Texas Border*, 23 NOTRE DAME J.L. ETHICS & PUB. POL’Y 167, 180-87 (2009) (describing the exceptional nature of immigration enforcement and doctrine permitting racial profiling in the border zone, though not explicitly invoking the anomalous zone framework).

34. Gerald L. Neuman, *Anomalous Zones*, 48 STAN. L. REV. 1197, 1201 (1996).

35. *See United States v. Brignoni-Ponce*, 422 U.S. 873, 884-85 (1975) (describing the lower “reasonable suspicion” standard for roving patrol stops of vehicles in the border zone, in order to apprehend unauthorized immigrants); *see also* García Hernández, *supra* note 33; Mayor, *supra* note 33.

36. *Brignoni-Ponce*, 422 U.S. at 884.

37. *See supra* notes 21-32 and accompanying text.

38. *Brignoni-Ponce*, 422 U.S. at 879 (describing Border Patrol checkpoints as “designed to prevent . . . inland movement” of unauthorized immigrants); *see also United States v. Martinez-Fuerte*, 428 U.S. 543, 556-57 (1976) (explaining that interior checkpoints keep highways from becoming “a quick and safe route into the interior”).

39. *See Brignoni-Ponce*, 422 U.S. at 882-83 (requiring reasonable suspicion for roving patrol stops in the border zone, in order to “protect[] residents of the border areas from indiscriminate . . . interference,” and noting cities located within the border zone).

40. *Id.* at 882. The Court accepted the same statutory authorization as for the checkpoints (8 U.S.C. § 1357(a)(1) (2012)) as justifying the roving patrol stops. *Brignoni-Ponce*, 422 U.S. at 877.

highways.”<sup>41</sup> The opinion expressed the view that while undocumented immigrants use roads in the region to obtain “transportation . . . to inland cities”—“seeking to enter the country illegally”—highways in the area “carry . . . a large volume of legitimate traffic as well.”<sup>42</sup> The next year, in upholding brief seizures at fixed checkpoints, the Court explained that the enforcement was part of a larger effort to “[i]nterdict the flow of illegal entrants from Mexico” who “seek to travel inland” for employment opportunities.<sup>43</sup>

As the conception of the border area in these opinions illustrates, courts do not necessarily recognize and respond to the border zone as a site where not just citizens and those with lawful immigration status but also undocumented persons *reside*.<sup>44</sup> The dichotomy depicted in the Fourth Amendment border-area cases—between citizens and lawful permanent residents who live in the border zone, on the one hand, and undocumented immigrants who pass through the area in order to enter into the interior to obtain work—does not capture the reality of the space. Estimates suggest that at least two hundred fifteen thousand of those living in the border zone are unauthorized immigrants—over seventy-five percent of whom have lived in the United States for at least five years, and over fifty percent of whom have resided in the country for at least ten years.<sup>45</sup> These are not individuals treating the area as a transient space.

The many undocumented persons living in southern Texas are therefore subject to an enforcement regime that this Note calls, as a shorthand, “spatially selective immigration enforcement.” This enforcement is spatially selective in that it involves specific questioning as to immigration status at the internal checkpoints, for those who attempt to travel beyond the border zone.<sup>46</sup> Within

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41. *Id.*

42. *Id.* at 879-82.

43. *Martinez-Fuerte*, 428 U.S. at 552. The repeated use of “inland” in these opinions resonates with a sense of the border zone as on the periphery of continental empire. *Cf. supra* note 28 and accompanying text.

44. *See Martinez-Fuerte*, 428 U.S. at 552; *Brignoni-Ponce*, 422 U.S. at 879-83; *United States v. Jackson*, 825 F.2d 853 (5th Cir. 1987). This conception is perhaps fueled by the checkpoint cases’ necessary focus on Fourth Amendment enforcement on highways—an inherently transitory space.

45. *See* MIGRATION POL’Y INST., *supra* note 13 (collating data from surveys administered between 2008 and 2013). The Migration Policy Institute provides figures broken down by county only for the counties of Cameron, El Paso, Hidalgo, and Webb; this estimate therefore does not include undocumented populations in the other, more rural counties in the border zone.

46. Estimates of the percentage of undocumented noncitizens not apprehended when passing through checkpoints are not readily available. In fiscal year 2008, the Border Patrol reported that close to seventeen thousand noncitizens were detained by the Border Patrol at

the border zone, an encounter with the Border Patrol is not certain and requires reasonable suspicion. It is an attempt to travel beyond the border zone that leads to exposure to spatially selective immigration enforcement and its attendant potential for deportation.<sup>47</sup> The fact that many undocumented immigrants remain in southern Texas for a decade or longer indicates that, by staying within the border zone, individuals are able to remain within the American community—but only within a spatially restricted part of that community.<sup>48</sup>

Legal scholarship has highlighted the constitutional challenges posed by “anomalous zones” more generally<sup>49</sup> and by the border zone in particular.<sup>50</sup> The border-area scholarship has primarily focused on the Fourth Amendment issues engendered by the border and the related Supreme Court jurisprudence.<sup>51</sup> Scholars have also probed race-based immigration policing in

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checkpoints for immigration violations. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 12, at 16. Undocumented immigrants living in south Texas report perceiving that risk as very high. *See supra* notes 5-6 and accompanying text.

47. *See supra* notes 35-37 and accompanying text.

48. The border zone is therefore a site of underenforcement of federal immigration law. *Cf.* Alexandra Natapoff, *Underenforcement*, 75 *FORDHAM L. REV.* 1715, 1721 n.23 (2006) (describing sites of underenforcement as “anomalous zones”). This underenforcement is consistent with broad underenforcement in the immigration context, given the choices that the federal government must make in setting deportation priorities among the eleven million unauthorized immigrants in the United States. *See* Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 *YALE L.J.* 104, 152-53 (2015).

49. *See, e.g.*, Natapoff, *supra* note 48, at 1721 & n.23; Neuman, *supra* note 34.

50. *See* García Hernández, *supra* note 33; Mayor, *supra* note 33. Sociologists, too, have attended to the way in which checkpoints create a “second border.” *See* MIKE DAVIS, *MAGICAL URBANISM: LATINOS REINVENT THE U.S. BIG CITY* 59 (2000); *see also* Guillermina Gina Núñez & Josiah McC. Heyman, *Entrapment Processes and Immigrant Communities in a Time of Heightened Border Vigilance*, 66 *HUM. ORG.* 354, 354 (2007) (describing how “processes of entrapment” along the U.S.-Mexico border “impose significant risk on movement of undocumented people”).

51. *See* Bernard E. Harcourt & Tracey L. Meares, *Randomization and the Fourth Amendment*, 78 *U. CHI. L. REV.* 809, 840 (2011) (explaining that, in the reasonableness framework that Bernard Harcourt and Tracey Meares propose, the key question for the constitutionality of checkpoints is “whether the hit rates at those checkpoints satisf[y] [a hypothetical] minimum threshold to be established by the Court”); Mayor, *supra* note 33, at 672-73 (treating constitutional distortions in the Fourth Amendment context and noting broader implications for equal protection and procedural due process); Paul S. Rosenzweig, Comment, *Functional Equivalents of the Border, Sovereignty, and the Fourth Amendment*, 52 *U. CHI. L. REV.* 1119, 1144 (1985) (arguing that “prior judicial scrutiny” of searches at interior checkpoints is necessary to balance the protection of Fourth Amendment rights against “the maintenance of territorial sovereignty”).

the border zone.<sup>52</sup> Yet, the functional restriction on undocumented immigrants' movement created by the checkpoints also implicates access to certain substantive rights where exercise of those rights requires travel. Potential ramifications of this anomalous zone for substantive due process rights remain unexplored. Analyzing H.B. 2's effect on unauthorized immigrants' abortion rights therefore provides a case study that illuminates the unique constitutional conundrum posed by the checkpoints: spatially selective immigration enforcement functionally bars movement out of the area, preventing individuals from exercising their rights.

*B. Reproductive Rights and Spatiality: H.B. 2*

In the context of H.B. 2, the spatially selective nature of immigration enforcement intersects with a spatial dimension to substantive due process—specifically, here, to abortion access.<sup>53</sup> Much recent abortion litigation has centered on how the exercise of the right depends on the ability to travel and spatial proximity to clinics. In particular, the passage of state laws aimed at closing clinics has generated litigation regarding the undue burden posed by increased travel time.<sup>54</sup> The Seventh Circuit's most recent opinion evaluating

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52. Jennifer M. Chacón, *Border Exceptionalism in the Era of Moving Borders*, 38 FORDHAM URB. L.J. 129, 134-40 (2010); García Hernández, *supra* note 33, at 195-96.

53. This “spatial dimension” to or “spatial aspect” of substantive due process is slightly different from the “spatial . . . dimensions” of the doctrine in Justice Kennedy’s discussion of spatial zones of privacy and rights that go to personal autonomy in *Lawrence v. Texas*. See *Lawrence v. Texas*, 539 U.S. 558, 562 (2003) (describing substantive due process as “liberty of the person both in its spatial and in its more transcendent dimensions”). The discussion of substantive due process’s spatiality in this Note identifies spatial access—a lack of spatial barriers—as necessary in order to exercise substantive due process rights, including rights that might be regarded as “involv[ing] liberty of the person . . . in its more transcendent dimensions.” Cf. *id.* This attention is consistent with that in other recent scholarship: Lisa R. Pruitt and Marta R. Vanegas, for example, implicate the spatial nature of abortion access in pointing out the “spatial privilege” of federal judges, located in urban centers, and the need to be cognizant of the effects of state action with spatially unequal effects on individuals in rural areas. See Lisa R. Pruitt & Marta R. Vanegas, *Urbanormativity, Spatial Privilege, and Judicial Blind Spots in Abortion Law*, 30 BERKELEY J. GENDER L. & JUST. 76, 79-88 (2015).

54. See, e.g., *Whole Woman’s Health v. Cole*, 790 F.3d 563, 588-89 (5th Cir.), *mandate stayed pending judgment* by 135 S. Ct. 2923 (2015), *and cert. granted*, 136 S. Ct. 499 (Nov. 13, 2015); *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott (Abbott III)*, 748 F.3d 583, 598 (5th Cir. 2014); *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 796 (7th Cir. 2013); *Planned Parenthood Se., Inc. v. Strange*, 33 F. Supp. 3d 1330, 1359 (M.D. Ala. 2014); cf. *State Policies in Brief: Targeted Regulation of Abortion Providers as of October 1, 2015*, GUTTMACHER INST., [http://www.guttmacher.org/statecenter/spibs/spib\\_TRAP.pdf](http://www.guttmacher.org/statecenter/spibs/spib_TRAP.pdf)

the effects of travel, in the context of a potential preliminary injunction, included a map that charted out travel distance in concentric circles from a town where a Planned Parenthood clinic would close if the law were not enjoined.<sup>55</sup> The potential closure of all abortion clinics in Mississippi implicated the spatiality of abortion rights in a slightly different manner, raising the question of whether a state must ensure access to a fundamental right within its borders.<sup>56</sup> H.B. 2, against the backdrop of the checkpoints, creates a third variant of these spatial questions: whether the closure of clinics, requiring an encounter with law enforcement in traveling to abortion clinics, violates the reproductive rights of the group of people for whom that law enforcement is relevant. Travel time raises questions in terms of spatial access as a sliding scale; H.B. 2 and the checkpoints threaten to create, for a certain group, a de facto bar to vindication of the right. The Mississippi regulations raise questions about horizontal federalism; H.B. 2 and the border zone lead to questions about rights vindication in the context of federal-state allocations of power in anomalous zones.

The significance of the closure of abortion clinics in the border zone—and deeper theoretical implications for understandings of federalism and individual rights in the border zone—is also unexplored in legal scholarship. Scholars have analyzed the significance of the Texas abortion restrictions in thinking through legal disabilities experienced by Latinas living in southern Texas<sup>57</sup> and in analyzing the ways that courts fail to perceive rights barriers created by the

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[<http://perma.cc/V2TL-HGW7>] (cataloguing the requirements placed on abortion facilities and clinicians in various states).

55. *Van Hollen*, 738 F.3d at 796. The Seventh Circuit upheld the district court's grant of a preliminary injunction. *Id.* at 798.
56. *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 457 (5th Cir. 2014) (requiring Mississippi to ensure that there is no "substantial obstacle in the path of a woman seeking an abortion in Mississippi" (emphasis added)), *petition for cert. filed* 83 U.S.L.W. 3705 (U.S. Feb. 18, 2015) (No. 14-997).
57. Madeline M. Gomez traces the effect of H.B. 2 on women in the Rio Grande Valley, particularly undocumented women, to argue for "mov[ing] conversations about anti-abortion regulations from the doctrinal realm of 'choice' and 'undue burden' into more critical, intersectional discussions about . . . racial and gender dynamics . . ." Madeline M. Gomez, *Intersections at the Border: Immigration Enforcement, Reproductive Oppression, and the Policing of Latina Bodies in the Rio Grande Valley*, 30 COLUM. J. GENDER & L. 84, 88-90, 99-104, 113-18 (2015). Gomez identifies the checkpoints as an obstacle to vindication of abortion rights for all Latinas living in the Rio Grande Valley, due to the possibility of "overzealous enforcement," as one factor among many within a "matrix of domination." *Id.* at 107-08. Gomez recounts litigation over H.B. 2 and describes abortion jurisprudence as a "[d]octrinal [f]ailure" that fails to account for larger effects on women's health and the realities of factors limiting travel; unlike this Note, she does not doctrinally evaluate H.B. 2's constitutionality or treat the checkpoints as a distinct and separate obstacle from other restrictions on travel. *See id.* at 113-16.

nature of rural areas.<sup>58</sup> Yet, while media reports have highlighted the major hurdle that checkpoints could pose to undocumented women seeking an abortion, scholarship has not separately explored this potential burden.<sup>59</sup>

The doctrinal puzzle raised by H.B. 2 and the checkpoints—whether there is in fact a violation of fundamental rights—has also been largely missing from the litigation surrounding H.B. 2. In examining the law’s effects, the two challenges brought by reproductive-rights advocates have primarily focused on the *distance* women must travel to access abortion clinics. In the first case, *Planned Parenthood v. Abbott*, the Fifth Circuit upheld H.B. 2’s requirement that doctors performing abortions have admitting privileges at a hospital within thirty miles, against, *inter alia*, a facial Fourteenth Amendment substantive due process challenge.<sup>60</sup> At trial, a reproductive health clinic executive testified as to the barrier that women with border-crossing cards—statuses for Mexican nationals that restrict lawful presence to within a certain distance from the border—would face in attempting to cross through internal checkpoints to reach the nearest abortion clinic.<sup>61</sup> A Fifth Circuit motions panel noted this

58. Lisa R. Pruitt and Marta R. Vanegas argue that opinions emerging from the litigation over H.B. 2 reflect an urbanormativity in which federal judges living in urban areas err in applying the undue burden standard because their understanding of legal geography is clouded by spatial privilege. Pruitt & Vanegas, *supra* note 53.

59. See, e.g., Cristina Costantini, *For Undocumented Immigrants, It’s Nearly Impossible To Get an Abortion in South Texas*, FUSION (Oct. 9, 2014, 12:57 PM), <http://fusion.net/story/20689/for-undocumented-immigrants-its-nearly-impossible-to-get-an-abortion-in-south-texas> [<http://perma.cc/H3ZM-4Y9Q>]; Garcia-Ditta, *supra* note 9 (“Without clinics south of the internal border immigration checkpoints . . . undocumented patients are virtually trapped in south Texas.”); Erica Hellerstein, *The Rise of the DIY Abortion in Texas*, ATLANTIC (June 27, 2014), <http://www.theatlantic.com/health/archive/2014/06/the-rise-of-the-diy-abortion-in-texas/373240> [<http://perma.cc/GL2F-VLSR>]; Thanh Tan, *Checkpoints Deter Illegal Immigrants Seeking Abortions*, TEX. TRIB. (Aug. 24, 2012), <http://www.texastribune.org/2012/08/24/checkpoints-deter-noncitizens-seeking-abortions> [<http://perma.cc/9P3X-MN6D>].

60. *Abbott III*, 748 F.3d at 586-87. The plaintiffs also challenged the law’s bar on the use of an off-label protocol for certain abortifacients. *Id.* *Abbott* did find a violation of doctors’ procedural due process rights in the gap between the time the statutory provisions gave doctors to secure admitting privileges (one hundred days) and the time it gave hospitals to process doctors’ applications (170 days). *Id.* at 600; see TEX. HEALTH & SAFETY CODE ANN. § 241 (West 2015).

61. 2 Transcript of Bench Trial at 41, *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott (Abbott I)*, 951 F. Supp. 2d 891 (W.D. Tex. 2013) (No. 13-CV-00862-LY) (“Even for people that have—that are there legally . . . [t]here’s specific visas that people have . . . to work in the valley . . . [T]here is a checkpoint before Corpus [Christi], before San Antonio that they wouldn’t be able to pass.”). A border-crossing card permits Mexican citizens resident in Mexico to travel between the United States and Mexico but requires that they remain within a certain radius of the border. 22 C.F.R. § 41.32 (2012); *Border Crossing Card—Who Can Use It?*, U.S. CUSTOMS & BORDER

testimony but determined in one sentence, “This obstacle is unrelated to the hospital-admitting-privileges requirement.”<sup>62</sup>

The second challenge to H.B. 2, *Whole Woman’s Health v. Hellerstedt*, has involved a facial and an as-applied challenge to the provision requiring abortion facilities to meet the required standards for ambulatory surgical centers and an as-applied challenge to the statute’s hospital admitting privileges requirement, for the McAllen and El Paso clinics.<sup>63</sup> Discussion of H.B. 2’s effects in this litigation has also centered on travel distance: the Fifth Circuit’s ruling provided some relief as applied to the McAllen clinic because of the undue burden created by travel time.<sup>64</sup> The plaintiffs’ trial brief and some testimony from a witness for the plaintiffs at trial noted the barrier faced by women with border-crossing cards.<sup>65</sup> The district-court opinion listed “immigration status and inability to pass border checkpoints” among eight “practical” obstacles beyond travel distance that, together, indicated that the statute created substantial obstacles for women.<sup>66</sup> Neither the motions panel nor the merits panel at the Fifth Circuit treated “immigration status” distinctly or discussed the checkpoints. An amicus brief at the Supreme Court argues that the law creates an undue burden for Latinas in Texas in part because of “[f]ear

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PROTECTION (2015), [http://help.cbp.gov/app/answers/detail/a\\_id/1634/~border-crossing-card-documentation-requirements-for-mexican-citizens](http://help.cbp.gov/app/answers/detail/a_id/1634/~border-crossing-card-documentation-requirements-for-mexican-citizens) [<http://perma.cc/MSM7-H6KU>].

62. *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott (Abbott II)*, 734 F.3d 406, 415 (5th Cir. 2013). The footnote accompanying this statement cited Fifth Circuit precedent upholding the exclusion of abortion providers from limits under Louisiana’s Medical Malpractice Act, on the grounds that government “need not remove those obstacles, like Louisiana’s dearth of affordable insurance, that are not of the government’s own creation.” *Id.* at 415 n.49 (citations omitted); *K.P. v. LeBlanc*, 729 F.3d 427, 442 (5th Cir. 2013). The district court merits opinion, the Fifth Circuit merits opinion, and the opinion denying rehearing and rehearing en banc did not discuss the issue of the checkpoints, focusing instead on travel time and expense. *See generally* *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott (Abbott IV)*, 769 F.3d 330 (5th Cir. 2014) (denying rehearing and rehearing en banc); *Abbott III*, 748 F.3d 583; *Abbott I*, 951 F. Supp. 2d 891.

63. The case is currently docketed at the Supreme Court as No. 15-274. *See also* *Whole Woman’s Health v. Cole*, 790 F.3d 563, 567 (5th Cir.) (bearing the name of Texas’s previous commissioner of the Department of State Health Services), *mandate stayed pending judgment by* 135 S. Ct. 2923 (2015), *and cert. granted*, 136 S. Ct. 499 (Nov. 13, 2015).

64. *Id.* at 594.

65. 2 Transcript of Bench Trial at 50-51, *Whole Woman’s Health v. Lakey*, 46 F. Supp. 3d 673 (W.D. Tex. 2014) (No. 1:14-CV-284-LY); Trial Brief for Plaintiff at 30, *Lakey*, 46 F. Supp. 3d 673 (No. 1:14-CV-284-LY).

66. *Lakey*, 46 F. Supp. 3d at 683. The other obstacles enumerated were “lack of availability of child care, unreliability of transportation,” poverty, travel time and expense, a lack of available appointments at clinics, inability to get time off work, and “other, inarticulable psychological obstacles.” *Id.*

of immigration stops . . . near the Mexican border” when traveling, including fear “of passing immigration checkpoints.”<sup>67</sup>

The border checkpoints pose, though, an independent legal obstacle for rights access in the border zone. Irrespective of travel-*distance* burdens, the next three Parts argue, state legislation leading to clinic closure in the border area gives rise to problems of rights access that make that legislation constitutionally impermissible. Even if there were no travel-distance problems and no other factors burdening abortion access—even if there were clinics just on the other side of checkpoints located close to the border—state regulations forcing clinics to shutter, such that immigration enforcement is physically positioned between an undocumented individual and the locus of rights vindication, would be unconstitutional.

## II. H.B. 2 AS UNDUE BURDEN

H.B. 2 provides a case study of the relationship between a spatial administrative enforcement regime that functionally bars travel for certain individuals and access to substantive due process rights premised on a presupposition of the ability to travel. Parts II and III analyze H.B. 2 as applied to the clinics in southern and western Texas using two different doctrinal methodologies: in Part II, the undue burden test first articulated in Justice O’Connor’s plurality opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>68</sup> and in Part III, the transsubstantive unconstitutional conditions doctrine. Before reaching these two analytical frameworks, however, two preliminary clarifications are necessary: one factual and the other legal.

First, this analysis starts from the factual point of departure that the means for unauthorized immigrants to legally cross border checkpoints put forward by Customs and Border Protection, parole in place, is not a realistic alternative that enables vindication of the right to an abortion previability. Media report that Customs and Border Protection has indicated that parole may be the appropriate avenue for undocumented women in southern Texas seeking an abortion.<sup>69</sup> The executive branch has discretion to parole any applicant for admission into the United States “for urgent humanitarian reasons or

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67. Brief of National Latina Institute for Reproductive Health as Amici Curiae Supporting Petitioners at 30-31, *Whole Woman’s Health v. Hellerstedt*, No. 15-274 (U.S. Jan. 4, 2016). Oral argument at the Supreme Court addressed neither the checkpoints nor H.B. 2’s effect on undocumented women in the border zone. See Transcript of Oral Argument, *Hellerstedt*, No. 15-274 (U.S. Mar. 2, 2016).

68. 505 U.S. 833 (1992).

69. Costantini, *supra* note 59 (describing the reporter’s conversation with a Customs and Border Protection spokesperson).

significant public benefit.”<sup>70</sup> This discretionary parole is available for those already within the territory of the United States who entered without inspection.<sup>71</sup> It is less than clear that unauthorized immigrants trying to obtain abortions who sought this discretionary relief would necessarily receive it.<sup>72</sup> Even if they ultimately did receive relief, though, applications for humanitarian parole “are generally adjudicated within 90-120 business days.”<sup>73</sup> Unless one were to apply for parole within two weeks of becoming pregnant, this time frame would extend beyond the twenty-week limit on abortion in Texas created by H.B. 2.

Second, noncitizens without legal immigration status who are within the United States have substantive due process rights—as courts routinely recognize.<sup>74</sup> Though this point is well settled, because it is essential to

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70. 8 U.S.C. § 1182(d)(5)(A) (2012).

71. See Memorandum from the U.S. Dep’t of Justice Office of the Gen. Counsel to Immigration & Naturalization Serv. Officials (Aug. 21, 1998), in 76 INTERPRETER RELEASES 1050 app. (1999). Those who have overstayed a visa or who are legally within the United States on a border-crossing card are, seemingly, ineligible for parole, since they are not “applicants for admission” within the meaning of the relevant statutory provisions. See *id.*; see also Cox & Rodríguez, *supra* note 48, at 119 (2015) (analyzing the statutory rationale put forward by the Executive for exercise of the parole power as relief for those already within the country).

72. See Costantini, *supra* note 59 (noting that Customs and Border Protection is unaware of “how many women seeking abortions have ever used the program”); Memorandum from the U.S. Dep’t of Justice Office of the Gen. Counsel to Immigration & Naturalization Serv. Officials, *supra* note 71 (emphasizing the discretionary nature of parole). Recent executive guidance states that, for those already within the United States, parole “is to be granted only sparingly.” U.S. Citizenship & Immigration Servs., *Policy Memorandum*, U.S. DEP’T HOMELAND SECURITY 3 (Nov. 15, 2013), [http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2013/2013-1115\\_Parole\\_in\\_Place\\_Memo\\_.pdf](http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2013/2013-1115_Parole_in_Place_Memo_.pdf) [<http://perma.cc/LRP9-RZMV>]. Detailed statistics on parole grants, including parole-in-place grants, are unavailable. See Donald Kerwin, *Creating a More Responsive and Seamless Refugee Protection System: The Scope, Promise and Limitations of US Temporary Protection Programs*, 2 J. ON MIGRATION & HUM. SECURITY 44, 53 (2014) (noting both the lack of publicly available statistics on parole adjudications and that “neither CBP nor ICE produced parole statistics at the author’s request”).

73. See U.S. Citizenship & Immigration Servs., *Questions & Answers: Humanitarian Parole*, U.S. DEP’T HOMELAND SECURITY, <http://www.uscis.gov/humanitarian/humanitarian-parole/questions-answers-humanitarian-parole> [<http://perma.cc/P6QL-65TL>].

74. Unlike substantive due process rights, courts at times construe *procedural* due process rights for noncitizens in removal proceedings as more restricted than such rights in other contexts, due to the unique nature of federal power over the admission of immigrants. See STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, *IMMIGRATION AND REFUGEE LAW AND POLICY* 136-216 (6th ed. 2015) (describing contestation over the extent of procedural due process rights in removal proceedings); Gerald L. Neuman, *Jurisdiction and the Rule of Law After the 1996 Immigration Act*, 113 HARV. L. REV. 1963, 1990-91 (2000) (explicating the relationship between Congress’s plenary power over the admission of immigrants and procedural due

analyzing H.B. 2's constitutionality as applied to border-zone clinics, it merits explication. Textually, substantive due process's extension to all individuals within the United States seems evident on the face of the Fourteenth Amendment's Due Process Clause: "[N]or shall any state deprive *any person* of life, liberty, or property, without due process of law."<sup>75</sup> As the Supreme Court stated in 1976 in *Mathews v. Diaz*, "The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law. *Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.*"<sup>76</sup> Since *Diaz*, both the Supreme Court and lower federal courts have evaluated whether state action violates unauthorized immigrants' substantive due process rights without questioning whether the Due Process Clause extends to these individuals.<sup>77</sup> As one example, in a Ninth Circuit en banc decision, both the majority and the dissent evaluated whether a state statute barring the grant of bail to undocumented arrestees violated substantive due process as a matter of course—without any question from either side as to whether the Due Process Clause applied.<sup>78</sup> As is widely

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process and cautioning that it is not the case "that all constitutional limits evaporate in the immigration context").

75. U.S. CONST. amend. XIV, § 1; *cf.* *Plyler v. Doe*, 457 U.S. 202, 210 (1982) (explaining that the Fourteenth Amendment's protections extend to undocumented persons because "[w]hatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term").
76. 426 U.S. 67, 77 (1976) (emphasis added) (citation omitted).
77. *E.g.*, *Reno v. Flores*, 507 U.S. 292, 301-06 (1993) (upholding an INS regulation authorizing immigration detention of unaccompanied minors where certain "responsible adults" were willing to undertake custody, using rational-basis review); *Turkmen v. Hasty*, 789 F.3d 218, 239 (2d Cir. 2015) (determining that detained noncitizens without legal immigration status could bring a substantive due process conditions of confinement claim); *Aguilar v. U.S. Immigration & Customs Enforcement Div. of the Department of Homeland Security*, 510 F.3d 1, 18-24 (1st Cir. 2007) (dismissing undocumented immigrants' substantive due process claim but evaluating whether the government had in fact violated the claimants' right to family integrity, without evincing any doubt as to whether substantive due process protections extended to the claimants); *Buck v. Stankovic*, 485 F. Supp. 2d 576, 582 (M.D. Pa. 2007) (holding that an undocumented immigrant in the United States possesses the fundamental right to marry); *Theck v. Warden, Immigration & Naturalization Service*, 22 F. Supp. 2d 1117, 1122 (C.D. Cal. 1998) (holding that a noncitizen ordered deported has a fundamental right to marry); *see also Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) ("[T]he Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."); *Plyler*, 457 U.S. at 210-15 (determining that the Fourteenth Amendment's Equal Protection Clause applied to undocumented children, relying in part on and explicating how the Due Process Clauses of the Fifth and Fourteenth Amendments extend to undocumented immigrants).
78. *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 781 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 2046 (2015); *id.* at 803 (O'Scannlain, J., dissenting) ("Applying well-established substantive due

accepted, undocumented persons have substantive due process rights—and such rights encompass the right to decide whether to terminate a pregnancy.<sup>79</sup>

### A. Casey's *Undue Burden Analysis*

Evaluating H.B. 2 as applied to the border-zone clinics through the lens of abortion-specific doctrinal analysis highlights the way in which the anomalous zone in border states, created by federal administrative law and regulation, has implications for state legislation with spatially disparate effects. Under the substantive due process doctrine governing abortion, as delineated in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>80</sup> the backdrop of spatially selective federal immigration enforcement makes H.B. 2 unconstitutional as applied to these clinics. Should the McAllen and El Paso clinics close, this Section argues, undocumented women would experience a “substantial obstacle” to exercising the fundamental right to choose whether to terminate a pregnancy. The clinic closures would have the effect of deterring them from exercising that right, because they would have to pass through the internal checkpoints to do so. Applying the logic of *Casey*—particularly as articulated in its analysis of a state statutory provision requiring spousal notification, which is closely analogous to this context—shows that H.B. 2 violates the Fourteenth Amendment substantive due process rights of undocumented immigrants and therefore is unconstitutional as applied to the border-zone clinics.

Substantive due process analysis of H.B. 2 in the border area requires the use of the *Casey* framework.<sup>81</sup> Under the “undue burden” standard of review

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process principles to this record reveals that Proposition 100 . . . survives substantive due process review.”).

79. Cf. *Roe v. Wade*, 410 U.S. 113, 164 (1973).

80. 505 U.S. 833 (1992). The interpretive framework in this Note relies extensively on common law modes of interpretation, including reliance on past precedent, to interpret the open-textured areas of the Constitution implicated by this puzzle. See, e.g., David A. Strauss, *The Supreme Court 2014 Term—Foreword: Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1, 22 (2015) (characterizing the constitutional system as a “mixed system” in which “the text retains an ultimate authority” yet “constitutional law routinely proceeds without regard to the text, in a common law-like fashion”). I do not seek to enter into a debate about whether this mode of constitutional interpretation is best, but rather to apply existing lines of constitutional doctrine within this interpretive framework.

81. Courts rely on the doctrine put forward in *Casey* in analyzing whether abortion restrictions violate substantive due process, including in the context of laws leading to clinic closures. E.g., *Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908 (7th Cir. 2015); *Greenville Women’s Clinic v. Bryant*, 222 F.3d 157 (4th Cir. 2000); *Planned Parenthood Se., Inc. v. Strange*, 33 F. Supp. 3d 1330 (M.D. Ala. 2014); see also *Gonzales v. Carhart*, 550 U.S. 124, 156 (2007) (“Under the principles accepted as controlling here, the Act, as we have interpreted it, would be unconstitutional [if it violated *Casey*’s undue burden test].”); *Stenberg v.*

established in *Casey*, a regulation is a constitutionally impermissible undue burden on a woman's right to choose if it has either "the purpose or [the] effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."<sup>82</sup> While the litigation regarding H.B. 2 has centered on the purpose analysis, in thinking about the intersection of border checkpoints and state law, this aspect of the *Casey* viability test is less salient: there is little to no evidence of any legislative intent to restrict access specifically for undocumented women in the border zone.<sup>83</sup> The key question is whether, as applied to the clinics in the border zone, H.B. 2 is unconstitutional because it has the "effect of placing a substantial obstacle in the path of" women attempting to secure abortions, or whether the legislation is permissible. And, to determine the answer to that question, it is essential to consider the effect of clinic closures south of border checkpoints on a particular group of women— unauthorized immigrants for whom the clinic closures create a de facto bar to obtaining an abortion. *Casey*'s spousal-notification analysis illustrates the proper approach for assessing the burden created by clinic closures in southern Texas because of the close analogy between three elements of the undue burden analysis: (1) the relevant classes, (2) the burdens imposed on those classes, and (3) the lack of relevance of a particular legal status (marital and immigration, respectively).<sup>84</sup>

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Carhart, 530 U.S. 914, 920 (2000) ("Three established principles determine the issue before us. We shall set them forth in the language of the joint opinion in *Casey*.").

82. 505 U.S. at 846.

83. The relationship between the purpose and the effects prongs of *Casey*, particularly in the context of regulations premised on health justifications, is intertwined with the H.B. 2 litigation. See Brief for Petitioners, *supra* note 19, at 44 (arguing that "[w]hether an obstacle is substantial depends in part on the strength of a state's interest in imposing it"). The doctrinal analysis of H.B. 2 as applied to border clinics in this Note does not depend on the existence or strength of that relationship.

84. By contrast, *Casey*'s determination regarding a mandated twenty-four hour waiting period between an initial consultation with a physician and obtaining an abortion is neither factually analogous nor particularly illuminating. The *Casey* joint opinion determined that "on the record before us, and in the context of this facial challenge, we are not convinced that the 24-hour waiting period constitutes an undue burden," because "the District Court did not conclude that the waiting period is [a substantial] obstacle even for the women who are most burdened by it." *Casey*, 505 U.S. at 887. The district court had determined that for particular groups of women— those with "the fewest financial resources"; those who needed to "travel long distances" to reach a clinic; and "those who have difficulty explaining their whereabouts to husbands, employers, or others," the twenty-four hour waiting period created "increased costs and potential delays." *Id.* at 886. However, the *Casey* joint opinion explained in three terse sentences, particular burdens and substantial obstacles are not the same, and the district court had not determined that the costs and delays reached the level of a substantial obstacle. *Id.* at 887. The opinion does not explain what facts would have been sufficient to demonstrate that the costs and delays were a "substantial obstacle." See *id.*

In evaluating whether a statute or other state action has the effect of creating a substantial obstacle, *Casey* explains, the relevant inquiry is not the effect on all women but rather the effect on a subset of women to whom the legal restriction matters.<sup>85</sup> In *Casey*, the Court struck down the spousal-notification provision in the Pennsylvania law at issue because it created a “substantial obstacle” to obtaining an abortion for women who were at risk of spousal abuse.<sup>86</sup> The statute required that a married woman provide her physician with a signed statement, affirming that she had informed her spouse that she would be obtaining an abortion, before the procedure could be performed.<sup>87</sup> The woman could alternatively provide a signed statement averring that she met one of the statutory exceptions to the requirement.<sup>88</sup> However, those exceptions did not cover all conditions of spousal abuse, nor

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Because of this failure to explain what would have sufficed, and because the Court apparently viewed the failure to satisfy an undue burden standard in this instance as in part grounded in an underdeveloped record, the twenty-four hour waiting period analysis is rather unhelpful to subsequent efforts to discern the contours of an undue burden. This Note does not utilize *Casey*'s discussion of the waiting period in the analysis of border checkpoints and H.B. 2 for two reasons. First, with respect to the waiting period, the *Casey* Court did not engage in any analysis beyond faulting the district court's record development—there is neither explication of the legal standard nor robust precedential argument to which analogy is possible. Second, the Court's holding that the “particular burden” of “increased costs and potential delays” did not on the record constitute a “substantial obstacle” for the particular groups of women affected seems to implicate some sort of sliding-scale analysis—*degrees* of cost and delay—rather than the but-for bar implicated by both the spousal-notification requirement and the need to cross border checkpoints.

Subsequent Supreme Court jurisprudence has not analyzed, under the effects prong of the *Casey* test, situations in which the potential obstacle gives rise to a but-for bar to women's access to abortion. In *Gonzales v. Carhart*, the Court upheld a ban on a particular procedure due to what it characterized as the continued availability of “standard medical options . . . that are considered to be safe alternatives.” 550 U.S. at 166-67. *Stenberg v. Carhart* struck down criminal sanctions on physicians' use of particular abortion procedures. 530 U.S. at 945-46. Neither of these cases analyzes the effects prong in depth or does so in an analogous context, involving a bar on access—but-for or otherwise—for either women in general or a subset of women. Rather, they involve restrictions on particular medical procedures. Consequently, these cases are not analytically instructive in the H.B. 2 context.

85. 505 U.S. at 894.

86. *Id.* at 887.

87. *Id.*

88. Under the statute, a signed statement that a woman had informed her spouse was not required where she instead indicated in a signed statement that she could not find her spouse; that her spouse was biologically unrelated to the fetus; that her pregnancy was due to spousal sexual assault and that she had reported the assault; or that she believed that informing her spouse would lead to her bodily injury, perpetrated by either him or a third party. *Id.*

did they cover situations in which a woman otherwise would not have chosen to notify her spouse due to “the husband’s illness, concern about her own health, the imminent failure of the marriage, or the husband’s absolute opposition to the abortion.”<sup>89</sup>

The State of Pennsylvania argued that, in determining whether the statute had the effect of creating a substantial obstacle, the key question was the percentage of women who sought an abortion who would be affected by the law.<sup>90</sup> The *Casey* opinion, though, explained that this approach was incorrect.<sup>91</sup> Rather, the scope of the inquiry properly focused on “the group for whom the law is a restriction, not the group for whom the law is irrelevant”—the key question was, out of the group affected by the law, whether in “a large fraction of cases” the statutory provision gave rise to a substantial obstacle.<sup>92</sup> It was only once the group “of women upon whom the statute operates” or, in other words, “those whose conduct [the legislation] affects” was determined that a court could then determine whether the imposed burden was undue.<sup>93</sup> For the spousal-notification requirement, the scope of the undue burden inquiry was not all women in Pennsylvania or even all married women seeking abortions.<sup>94</sup> For most married women, the Court explained, the statute would not change their behavior, because “[i]n well-functioning marriages, spouses discuss important intimate decisions.”<sup>95</sup> Consequently, in ascertaining whether the spousal-notification requirement posed an undue burden, the inquiry as to potential burden was limited to “married women seeking abortions who do not wish to notify their husbands of their intentions and who do not qualify for one of the exceptions to the notice requirement.”<sup>96</sup>

Similarly, in determining whether the statutory provisions compelling the closure of the McAllen and El Paso clinics are constitutionally permissible, one does not evaluate the effect of the closures on all women in Texas, all women in

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89. *Id.* at 888 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 744 F. Supp. 1323, 1361 (E.D. Pa. 1990), *aff’d in part, rev’d in part*, 947 F.2d 682 (3d Cir. 1991), *aff’d in part, rev’d in part*, 505 U.S. 833 (1992)).

90. *Id.* at 894.

91. *Id.*

92. *Id.*

93. *Id.*

94. *See id.* at 894-95 (“The proper focus of constitutional inquiry is the group for whom the law is a restriction . . . . By selecting as the controlling class women who wish to obtain abortions, rather than all women or all pregnant women, respondents in effect concede that § 3209 must be judged by reference to those for whom it is an actual rather than an irrelevant restriction.”).

95. *Id.* at 892-93.

96. *Id.* at 895.

those cities, or all women in the border zone. Rather, the scope of the inquiry focuses on “the group for whom the law is a restriction, not the group for whom the law is irrelevant.”<sup>97</sup> Following *Casey*, federal courts have applied *Casey*’s limited-inquiry approach in the context of clinic closures.<sup>98</sup> In evaluating the appropriateness of a preliminary injunction of admitting privileges requirements in Wisconsin that would lead to clinic closures, for example, a district court explained that the scope of the relevant inquiry was “women seeking abortions who are impacted by the closure of [two clinics], and the reduction of capacity of [a third] clinic. The question is what percentage of those women will be *substantially* impacted.”<sup>99</sup> Similarly, in evaluating the closure of the clinics in the border zone, the appropriate focus is the group of women seeking abortions “for whom the law is a restriction” – the group that experiences *some* sort of burden due to the law, whether due to travel time or the need to pass through border checkpoints.<sup>100</sup> Once the group

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97. *Id.* at 894. The idea that choice architecture ought to focus on “the preferences of the subgroup of decision makers whose choices are affected by the nudge” perhaps provides an apposite analogy. Cf. Jacob Goldin, *Which Way To Nudge? Uncovering Preferences in the Behavioral Age*, 125 YALE L.J. 226, 230 (2015).

98. *E.g.*, *Greenville Women’s Clinic v. Bryant*, 222 F.3d 157, 165 (4th Cir. 2000) (“[W]e nevertheless conclude in this case that the record provides no evidence from which to conclude that Regulation 61-12 would present a ‘substantial obstacle.’ The record contains evidence from several abortion providers, only one of which would be adversely affected in any significant way . . . . Moreover, even for women [in that provider’s town], no evidence suggests that they could not go to the clinic in Charleston, some 70 miles away . . . .”); *Planned Parenthood Se., Inc. v. Bentley*, 951 F. Supp. 2d 1280, 1286 (M.D. Ala. 2013) (“[N]or can a serious burden be ignored because some women of means may be able to surmount this obstacle while poorer women (who constitute a majority of the plaintiffs’ patients and thus a ‘large fraction’ of those affected by this law) cannot.”).

99. *Planned Parenthood of Wis., Inc. v. Van Hollen*, No. 13-cv-465-wmc, 2013 WL 3989238, at \*16 n.30 (W.D. Wis. Aug. 2), *aff’d*, 738 F.3d 786 (7th Cir. 2013).

100. *See Whole Woman’s Health v. Lakey*, 46 F. Supp. 3d 673, 683 (W.D. Tex. 2014) (enumerating barriers to access with clinic closures due to increased travel time, checkpoints and immigration status, poverty, and other obstacles), *aff’d in part, vacated in part, rev’d in part sub nom. Whole Woman’s Health v. Cole*, 790 F.3d 563 (5th Cir. 2015), *mandate stayed pending judgment by* 135 S. Ct. 2923 (2015), *and cert. granted*, 136 S. Ct. 499 (Nov. 13, 2015). The Fifth Circuit’s analysis in *Whole Woman’s Health v. Lakey* seems to have misunderstood *Casey*’s scope of analysis. The Fifth Circuit explained, “[W]e used all women of reproductive age or women who might seek an abortion as the denominator,” since “H.B. 2 applies to all abortion providers and facilities in Texas.” *Whole Woman’s Health v. Cole*, 790 F.3d 563, 589 (5th Cir.), *mandate stayed pending judgment by* 135 S. Ct. 2923 (2015), *and cert. granted*, 136 S. Ct. 499 (Nov. 13, 2015). The *Casey* Court made clear, though, that a controlling class is certainly narrower than “all women of reproductive age.” *See Casey*, 505 U.S. at 894-95 (noting that the respondents implicitly understood, by drawing the class as “women who wish to obtain abortions,” that the scope of the class at issue was narrower than “all women” and then drawing the class yet more narrowly).

that experiences some sort of burden is ascertained, the effects analysis asks whether, for a “significant number” or “large fraction” of the group who experiences some sort of effect, the burden is undue.<sup>101</sup> The *Casey* Court determined that Pennsylvania’s spousal-notification requirement was invalid because, “in a large fraction of the cases in which [the statutory provision was] relevant, it . . . operate[d] as a substantial obstacle.”<sup>102</sup> This “large fraction” language has been the subject of attempts at judicial line drawing since *Casey*.<sup>103</sup> *Casey* itself, though, did not give any precise ratio or number—there was no calculation in the opinion as to the percentage or absolute number of women who experienced an undue burden from the spousal-notification requirement.<sup>104</sup> As noted above, *Casey* quoted the district court’s findings as to a number of circumstances in which the spousal-notification requirement might change women’s behavior—most significantly, in spousal-abuse situations, but also in instances where the marriage was disintegrating, the spouse was ill or opposed to abortion, or the woman was concerned with her own health.<sup>105</sup> In determining that spousal abuse meant that, in a “large fraction” of cases, the law gave rise to an undue burden, *Casey* did not estimate the numerical ratio of spousal abuse versus the other situations it delineated.<sup>106</sup> Rather, it reasoned that women who were subject to potential domestic abuse were “likely to be deterred from procuring an abortion,” that there were many such women in the United States (“millions”), and that, consequently, in a “large fraction” of the relevant cases, where behavior might change, the law created a substantial obstacle to obtaining an abortion.<sup>107</sup>

The nature of this effects analysis—looking to some subset of the burdened population for whom the burden may be undue—is what makes the interior checkpoints so salient to analysis of the potential clinic closures in the border zone. For undocumented women, closure of the McAllen and El Paso clinics—

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<sup>101.</sup> See *Casey*, 505 U.S. at 894-95.

<sup>102.</sup> *Id.* at 895.

<sup>103.</sup> *E.g.*, *Cincinnati Women’s Servs., Inc. v. Taft*, 468 F.3d 361, 372-74 (6th Cir. 2006) (defining a large fraction as “something more than the 12 out of 100 women identified here”); *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1462-63 (8th Cir. 1995) (determining that affidavits as to the inability of abused minors to use an abuse exception and studies showing the ability for parent-child relationships to become abusive indicated that “a large fraction of minors seeking pre-viability abortions would be unduly burdened by South Dakota’s parental-notice statute”). *But see Abbott III*, 748 F.3d at 588-89 (doubting whether the large-fraction test applied at all in the context of facial invalidation).

<sup>104.</sup> 505 U.S. at 894-96.

<sup>105.</sup> *Id.* at 888.

<sup>106.</sup> *Id.* at 894-96.

<sup>107.</sup> *Id.* at 894-95.

of the clinics south and west of checkpoints—means that they are “likely to be deterred from procuring an abortion,” as those at risk of spousal abuse were likely to be deterred under the Pennsylvania provision at issue in *Casey*. Crossing border checkpoints to obtain an abortion risks detention and deportation, including the possibility of permanent separation from family members in the United States.<sup>108</sup> As was apparently true for those subject to spousal abuse in *Casey*, there appears to be no readily available empirical evidence on the precise effect of this choice on women’s actions or the number or percentage of undocumented women seeking an abortion in the border zone who will be deterred from doing so.<sup>109</sup> As in the case of those at risk of spousal abuse, unauthorized immigrants are not easily identifiable and likely reluctant to come forward for such research. Nevertheless, the high stakes for undocumented women in crossing checkpoints, coupled with anecdotal evidence that the checkpoints do function as a deterrent,<sup>110</sup> indicate that—like those deterred by spousal abuse in *Casey*—undocumented women who would otherwise obtain an abortion are, if the clinics close, likely to be deterred from doing so.

For undocumented immigrants seeking abortions in light of possible clinic closures and the background reality of internal immigration checkpoints, the analogy to the spousal-notification requirement in *Casey* and its effect on potential spousal abuse victims is particularly apt. Just as, in *Casey*, the background reality of a condition in certain women’s lives meant that a new statutory burden made such women “likely to be deterred from procuring an abortion,”<sup>111</sup> the background reality of the border checkpoints means that a significant number of the women living in southern Texas without legal status will probably be deterred from obtaining an abortion. *Casey* noted that those in abusive situations “may have very good reasons for not wishing to inform their husbands,” including possible abuse of themselves or their children and their spouses’ ability to leverage potential disparities in economic power. Similarly, the consequences of removal from the United States are potentially enormous; undocumented women may also “have very good reasons” for avoiding contact with internal border checkpoints.

The parallel between the two statuses is especially appropriate in that, just as married women “do not lose their constitutionally protected liberty”<sup>112</sup>

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108. See *infra* Section II.B.

109. See 505 U.S. at 888–96; cf. Tan, *supra* note 59 (noting the difficulty of determining the number of undocumented immigrants seeking second-trimester abortions).

110. See sources cited *supra* note 59.

111. 505 U.S. at 894.

112. *Id.* at 898.

because of their legal status, neither do undocumented women. Governmental action on behalf of the underlying legal regime related to a woman's status—whether that be marital status and regulation of marriage or immigration status and regulation of immigration—may not, *Casey* indicates, be a means of depriving women of their fundamental rights, where they maintain those rights regardless of that legal status. While this point is certainly not essential to the large-fraction analysis, it suggests the particular aptness of the analogy to the spousal-notification requirement.

If the analogy to *Casey* is relatively straightforward, though, what should we make of the Fifth Circuit's brief analysis of the issue, which quickly discarded the "obstacle" of border checkpoints as "unrelated to the hospital-admitting-privileges requirement"?<sup>113</sup> This determination reflects—in addition to a lack of record information on the point<sup>114</sup>—an erroneous understanding of *Casey*, relying too much on language in the selective-funding case *Harris v. McRae*<sup>115</sup> without considering *Casey*'s later analysis.<sup>116</sup> It fails to recognize that *Harris*'s language that the government "may not place obstacles in the path of a woman's exercise of her freedom of choice, [but] it need not remove those not of its own creation"<sup>117</sup> is at odds with *Casey*, unless read in the broader context of the selective-funding cases. Abusive spouses are not the creation of the government, yet *Casey* found that where their actions combined with Pennsylvania's spousal-notification requirement, the burden was undue.<sup>118</sup> *Harris*, in determining that the availability of federal Medicaid funds for pregnancy-related expenses but not for abortion was constitutionally permissible, decided that such funds' availability "leaves an indigent woman with at least the same range of choice" as to whether to obtain an abortion;<sup>119</sup> the spousal-notification requirement in *Casey* and the closure of clinics south of

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113. See *Abbott II*, 734 F.3d at 415.

114. See *supra* notes 60-62 and accompanying text (detailing the scarce record evidence as to border checkpoints in the *Abbott* litigation).

115. 448 U.S. 297 (1980); see *Abbott II*, 734 F.3d at 415 n.49 (citing *K.P. v. LeBlanc*, 729 F.3d 427, 442 (5th Cir. 2013)).

116. See *Gonzales v. Carhart*, 550 U.S. 124, 167-68 (2007) (confirming the continued relevance of "large fraction of relevant cases" analysis); see also *supra* notes 92-96 (discussing this aspect of the *Casey* analysis).

117. See 448 U.S. at 316.

118. Both *Casey* and the doctrine of unconstitutional conditions demonstrate that an "unrelated" obstacle may play a role in undue burden analysis. As Part III of this Note argues, that *lack* of relatedness is precisely what makes the combination of the causal events creating an undue burden constitutionally impermissible.

119. 448 U.S. at 317.

border checkpoints, by contrast, *restrict* choice by removing access, such that the option of abortion is functionally unavailable.

H.B. 2 creates a substantial obstacle for a “significant number” or “large fraction” of the women for whom the law is relevant: the undocumented immigrants for whom the clinic closures impose a virtually per se bar to obtaining an abortion. The numbers here cannot be obtained with precision, but *Casey* indicates that they need not be. The closure of clinics in the border zone creates obstacles for those seeking an abortion, due to increased travel distance.<sup>120</sup> That group of individuals—those burdened by distance—is analogous to the group of women in *Casey* who might have wished not to notify their spouse for reasons unrelated to domestic violence. *Casey* did not attempt to calculate this group’s precise number, or to compare it mathematically to the number for whom the provision was a de facto per se bar due to spousal abuse. Consequently, under *Casey*, it is not necessary to determine the exact number of undocumented women in Texas’s border zone. Rather, the point is that undocumented immigrants in southern Texas who are burdened by the clinic closures—whether that group is framed as a “large fraction” or a “significant number” of those burdened by the closures—experience the burden on their right to abortion as a virtual bar.

There are likely more than eighty thousand undocumented women of reproductive age in Texas’s border zone. Just as the *Casey* court was able to infer from the high number of women who are subject to spousal abuse in the United States that a “large fraction” of those who would not otherwise inform their spouses belonged to this group, in the H.B. 2 context we can infer that a “large fraction” of those affected by the clinic closures in the border zone are undocumented immigrants who now may be functionally unable to obtain an abortion.

### *B. Immigration Enforcement as Obstacle*

A potential objection to this doctrinal understanding of the burden posed by immigration checkpoints is the nature of the obstacle: one might say that immigration enforcement is no obstacle to rights vindication in this context at all, due to the availability of abortion in immigration detention. Federal immigration-detention standards provide that “[a] pregnant detainee in custody shall have access to pregnancy services including . . . abortion services”

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120. See *Whole Woman’s Health v. Lakey*, 46 F. Supp. 3d 673, 683 (W.D. Tex. 2014), *aff’d in part, vacated in part, rev’d in part sub nom.* *Whole Woman’s Health v. Cole*, 790 F.3d 563 (5th Cir. 2015), *mandate stayed pending judgment by* 135 S. Ct. 2923 (2015), *and cert. granted*, 136 S. Ct. 499 (Nov. 13, 2015).

and that every place of detention “shall . . . provide its female detainees with access to” abortion.<sup>121</sup> Either undocumented women will not be detained at a checkpoint and will continue driving until they reach an abortion clinic, or they will be detained and may avail themselves of access to abortion care while detained. Consequently, the objection might run, undocumented women in the Rio Grande Valley and El Paso face unfortunate circumstances, but there is no absolute bar to abortion access: either outcome could end in exercise of the right. How could there be any rights pressure, then—let alone an undue burden? Evaluating the nature of immigration enforcement as an obstacle implicates the functional nature of undue burden analysis, which takes into account not whether there is some possible avenue to rights vindication but rather the probability of deterrence due to cost-benefit analysis associated with the barrier to vindication of the right.

The key question in evaluating whether state action gives rise to an undue burden under *Casey*’s effects prong is whether the action “impose[s] a substantial obstacle,” such that individuals are “likely to be deterred from procuring an abortion.”<sup>122</sup> *Casey* explained that because those subject to potential spousal abuse were likely to weigh the cost-benefit analysis and not notify their spouses, out of “fear for their safety and the safety of their children,” the requirement meant they were “likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases.”<sup>123</sup> Formally, women in this situation *could* tell their spouses, potentially incur abuse, and obtain abortions; functionally, the Court recognized, the potential cost of doing so was so great that these women were “likely to be deterred”—likely to choose not to vindicate the abortion right.<sup>124</sup>

Similarly, the rights burden created in this situation by H.B. 2 is not because there is no possible way for an unauthorized immigrant living in southern Texas to vindicate her right to obtain an abortion. Instead, the rights burden exists because, due to both the perceived very high risk of detention and deportation in passing through checkpoints<sup>125</sup> and the magnitude of the repercussions of detention and deportation, undocumented women are “likely to be deterred” from obtaining an abortion *at all*. Removal from the United States can be personally catastrophic: an individual is

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121. *Performance-Based National Detention Standards 2011*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT 304-05 (2011), <http://www.ice.gov/doclib/detention-standards/2011/pbnds2011.pdf> [<http://perma.cc/UB3L-6BMF>].

122. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 893-94 (1992).

123. *Id.* at 894.

124. *Id.* at 893-95.

125. *See supra* note 59 and accompanying text.

separated, perhaps permanently,<sup>126</sup> from her home, her family, her community, and her work—in short, from the life that she has created for herself.<sup>127</sup> Those in families of mixed citizenship and immigration statuses face an especially wrenching choice: to uproot everyone, potentially moving to a country where some or all family members do not have ties or even speak the predominant language, or to leave some family members behind for an indefinite period of time.<sup>128</sup> The Supreme Court has described deportation as “the equivalent of banishment or exile.”<sup>129</sup> It has recognized that deportation may cause the “loss of both property and life; or of all that makes life worth living.”<sup>130</sup> When a woman may obtain an abortion only by placing herself at risk of losing “all that makes life worth living,” it is reasonable to surmise that many women who would otherwise choose to terminate that pregnancy will not do so.

Moreover, even beyond the enormous harm of deportation, the probability of losing one’s liberty<sup>131</sup> by being placed in immigration detention is likely

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126. A noncitizen who is ordered removed, or one who is unlawfully present in the United States for more than one year and then departs voluntarily, is typically ineligible to reenter the United States for ten years. 8 U.S.C. § 1182(a)(9) (2012). Moreover, even if this restriction is lifted, individuals seeking to reenter are subject to the grounds of inadmissibility for noncitizens, which may be disqualifying from any subsequent reentry. *See id.* § 1182(a). Waivers of some inadmissibility grounds, at the discretion of executive-branch officials, may be available. *See, e.g., id.* § 1182(g)(1), (h).

127. *See, e.g.,* Gonzalez Recinas, 23 I. & N. Dec. 467, 471-73 (B.I.A. 2002) (describing hardships faced by noncitizens upon deportation, in evaluating eligibility for cancellation of removal); Monreal-Aguinaga, 23 I. & N. Dec. 56, 63-65 (B.I.A. 2001) (cataloguing “extreme” hardship faced by the respondent, which nevertheless did not rise to the level necessary for relief from removal, including school-age U.S. citizen children being required to relocate to Mexico and consequently “likely . . . hav[ing] fewer opportunities,” loss of employment, loss of community after living in the United States for twenty years, and separation from parents and siblings living in the United States). The burden may be particularly acute for those who were brought to the United States as young children and who have little or no connection to or memory of their country of origin. *Cf. Gonzalez Recinas*, 23 I. & N. Dec. at 472-73 (describing the potential difficulties faced by a family lacking a support network in Mexico).

128. *See, e.g.,* Andazola-Rivas, 23 I. & N. Dec. 319, 321-22 (B.I.A. 2002); *Monreal-Aguinaga*, 23 I. & N. Dec. at 57.

129. *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010) (quoting *Delgado v. Carmichael*, 332 U.S. 388, 390-91 (1947)).

130. *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922). *Ng Fung Ho* made this point in the context of the deportation of an individual claiming citizenship. *Fiswick v. United States* applied this language to the deportation of noncitizens. *Fiswick v. United States*, 329 U.S. 211, 222 n.8 (1946).

131. Entering into immigration detention involves not only losing liberty but also losing privacy along a different dimension, in the form of intrusive health examinations for all pregnant women. While, outside of detention, a woman deciding whether to terminate her pregnancy may choose to refuse medical care at any point, those identified in immigration detention as

to function as a deterrent in traveling through the checkpoints for abortion purposes.<sup>132</sup> Even for those without legal status who are not ultimately deported, because they are granted a form of affirmative relief— asylum or withholding of removal—the process for receiving affirmative relief may take years, and if the immigration judge determines that they are a flight risk or a danger to the community, they may spend those years in detention.<sup>133</sup> Federal courts have recognized that, for sentencing purposes, time spent in immigration detention either may be equivalent to time spent in prison<sup>134</sup> or may qualify a convicted individual for a downward departure in sentencing.<sup>135</sup>

When weighing, in combination, the threat of removal and the hazard of detention in passing through internal checkpoints, a “significant number” of women without legal status are “likely to be deterred.”<sup>136</sup> Even if potential detention is not an absolute bar to abortion, for many women the utility analysis of the magnitude and probability of harm from being detained and likely deported will itself function as a bar. Under the current doctrinal analysis for violations of the substantive due process right to choose whether to terminate a pregnancy, undocumented women—a “relevant fraction” of the population affected by H.B. 2’s admitting privileges and ambulatory surgical center requirements—experience an undue burden. This specific doctrinal analysis demonstrates how, taking into account the backdrop of federal checkpoints, state legislation may burden rights in the border zone.

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pregnant “shall” receive “an initial health appraisal . . . includ[ing] a thorough evaluation and assessment of the reproductive system” within twenty-four hours of being detained. U.S. IMMIGR. & CUSTOMS ENFORCEMENT, *supra* note 121, at 305-06.

132. See Tan, *supra* note 59 (discussing women’s unwillingness to risk crossing checkpoints).
133. See, e.g., Christie Thompson, *The Long and Winding Detainment of Diana Ramos*, MARSHALL PROJECT, <http://www.themarshallproject.org/2015/05/08/the-long-and-winding-detainment-of-diana-ramos> [<http://perma.cc/E9ZL-XPNE>] (describing the detention for over four years of an undocumented woman seeking relief from removal); see also 8 U.S.C. § 1226(a), (c) (2012) (establishing the criteria for discretionary and mandatory detention during removal proceedings).
134. See, e.g., *Zavala v. Ives*, 785 F.3d 367, 380 (9th Cir. 2015).
135. *United States v. Estrada-Mederos*, 784 F.3d 1086, 1091-92 (7th Cir. 2015) (noting that “uncredited confinement” in immigration detention could potentially serve as grounds for a downward departure from the sentencing guidelines); *United States v. Montez-Gaviria*, 163 F.3d 697, 702 (2d Cir. 1998) (same); cf. Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 43 (2010) (“For many noncitizens, detention now represents a deprivation as severe as removal itself.”).
136. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 893-99 (1992).

### III. H.B. 2 AND BORDER CHECKPOINTS AS UNCONSTITUTIONAL CONDITION

In the specific doctrinal context of abortion jurisprudence, then, H.B. 2 as applied to the border zone violates the Fourteenth Amendment's substantive due process guarantee because it has the effect of creating a substantial obstacle for undocumented women. Another means of thinking of the harm of H.B. 2 for undocumented women in the border zone, though, is not merely through the ramifications of the legislation—the functional inability to access abortion services—but, more broadly, as creating a choice that is constitutionally suspect: a choice between exercising one's fundamental right and avoiding exposure to immigration enforcement. Thus, another way to conceive of the problem—ultimately arriving at the same conclusion, but with an analysis generalizable to rights burdenings beyond the abortion context—is through the doctrine of unconstitutional conditions. Framing the problem in more general terms and examining H.B. 2 on these grounds demonstrates the way that state legislation with spatially disparate effects may, more generally, create constitutional problems given the reality of internal checkpoints. Such legislation gives rise to unconstitutional conditions that impermissibly pressure rights. The key insight of this Part is that we ought to conceive of barriers to access engendered by the confluence of spatially disparate state legislation and federal internal immigration checkpoints as an unconstitutional-conditions problem.

Evaluating the problem through the lens of unconstitutional conditions provides a separate ground for H.B. 2's unconstitutionality, independent of the *Casey* analysis. Whether undocumented women are in fact deterred from seeking an abortion by the closure of all clinics south of border checkpoints is not the relevant inquiry under unconstitutional-conditions doctrine—instead, the question is whether women must choose between a discretionary benefit and the exercise of a constitutional right.<sup>137</sup> The de facto requirement created

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137. See *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2595 (2013); *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994); see also Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1421–22 (1989) (“[A proffered governmental] ‘exchange’ [in an unconstitutional-conditions problem] has two components: the conditioned government benefit on the one hand and the affected constitutional right on the other. . . . [A] location of the benefit would normally be subject to deferential review, while imposition of a burden on the constitutional right would normally be strictly scrutinized. Which sort of review should apply? The doctrine of unconstitutional conditions says the latter.”). Even in the absence of empirical data as to which choice undocumented women make—as to whether they choose detention, deportation, and abortion, or remain in their homes and carry a pregnancy to term—unconstitutional-conditions doctrine provides a means to evaluate whether the requirement that they make that choice at all is constitutionally permissible.

by Texas law that a woman without legal status must pass through an internal Border Patrol checkpoint to reach abortion services creates an unconstitutional condition on the exercise of the fundamental right, because of the coercive nature of the choice. Such an unconstitutional condition is a violation of a woman's right to choose to terminate her pregnancy.

This mode of analysis indicates that the situation that H.B. 2 creates for undocumented women in southern Texas is one instantiation of a larger problem: the way that the conjunction of internal checkpoints and state legislation with spatially disparate effects on access to rights may create a constitutionally impermissible choice for undocumented individuals. This insight—that unconstitutional-conditions doctrine provides an alternative means of evaluating the problem—and the subsequent evaluation require further interrogation. This Part's analysis turns first to the nature of the benefit at stake, then to an evaluation of whether there is sufficient germaneness for an unconstitutional condition, and finally to the additional complication of the multiple state actors who together give rise to the condition.

The functional requirement that an individual choose between exercising a fundamental right—in this case, the right to obtain an abortion—and forgoing questioning by Border Patrol officers as to one's immigration status implicates this transsubstantive doctrine. The underlying idea of unconstitutional-conditions doctrine is, essentially, that the government cannot create an impermissibly rights-pressuring choice.<sup>138</sup> As the Supreme Court recently explained in *Koontz v. St. Johns River Water Management District*, in the individual-rights context the doctrine bars “the government [from] deny[ing] a benefit to a person because he [or she] exercises a constitutional right.”<sup>139</sup> For example, a state may not make public employment contingent on an individual's giving up her right to free speech.<sup>140</sup> Such a choice is impermissible even if the benefit is not one to which the person has a “right . . . and even though the government may deny him the benefit for any number of

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138. *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 59 (2006) (“[T]he government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit.” (quoting *United States v. Am. Library Ass'n*, 539 U.S. 194, 210 (2003))); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); see also Sullivan, *supra* note 137, at 1415 (also making this point).

139. 133 S. Ct. at 2594 (citing *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 545 (1983)); see also *Dolan*, 512 U.S. at 385 (“[T]he government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the [right at issue].”).

140. *Perry*, 408 U.S. at 597-98.

reasons.”<sup>141</sup> Moreover, it is impermissible regardless of *what* the individual ultimately chooses – whether she opts to pass up the benefit or instead to forgo exercise of the right.<sup>142</sup> Recent takings cases have required a “nexus” and “rough proportionality” between the relinquishment of the rights exercise and the granting of the benefit.<sup>143</sup>

Originally applied in the context of economic substantive due process,<sup>144</sup> unconstitutional-conditions doctrine – or, as it is sometimes termed, the conditional-offer problem<sup>145</sup> – applies to a situation in which the exercise of an individual constitutional right is conditioned. Apparently not limited to any particular subset or constellation of rights, the doctrine is a “multi-function doctrine”<sup>146</sup> useful in evaluating situations in which state action leads to a situation that conditions rights on forgoing a benefit, or vice versa. The Supreme Court has used unconstitutional-conditions analysis to evaluate claims that state action violates freedom of speech,<sup>147</sup> free exercise of religion,<sup>148</sup> the right to refrain from self-incrimination,<sup>149</sup> the right to travel,<sup>150</sup> and the

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141. *Id.* (“We have applied the principle regardless of the public employee’s contractual or other claim to a job. . . . Thus, the respondent’s lack of a contractual or tenure ‘right’ to re-employment for the 1969-1970 academic year is immaterial.”); *see also Koontz*, 133 S. Ct. at 2596.

142. *Koontz*, 133 S. Ct. at 2595 (noting that a biconditional may be constitutionally impermissible “regardless of whether the government ultimately succeeds in pressuring someone into forfeiting a constitutional right”).

143. *Id.* at 2591; *Dolan*, 512 U.S. at 383, 395.

144. Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1307 (1984). *Frost & Frost Trucking Co. v. Railroad Commission of California*, 271 U.S. 583 (1926), which struck down a California requirement that a private carrier take on the duties of a common carrier in order to use state highways, is frequently regarded as one of the seminal cases on unconstitutional conditions – if not the seminal case. *See Sullivan*, *supra* note 137, at 1428-30.

145. Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1, 8 (2001).

146. Samuel L. Bray, *On Doctrines That Do Many Things*, 18 GREEN BAG 2D 141, 142 (2015).

147. *See, e.g.*, *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 133 S. Ct. 2321, 2324, 2330-32 (2013); *Perry v. Sindermann*, 408 U.S. 593, 597-98 (1972).

148. *See, e.g.*, *Sherbert v. Verner*, 374 U.S. 398, 403-04 (1963) (finding that a South Carolina statute imposed an unconstitutional burden on an individual’s free exercise of religion by withholding unemployment benefits from those who could not work on Saturday due to religious reasons).

149. *See, e.g.*, *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967) (finding that giving police officers a choice between self-incrimination and losing their jobs constituted a constitutionally impermissible coercion because “[t]here are rights of constitutional stature whose exercise a State may not condition by the exaction of a price”).

Takings Clause.<sup>151</sup> Federal courts of appeals have recognized the applicability of unconstitutional-conditions analysis to claims of violations of freedom of speech, petition, assembly, and association;<sup>152</sup> the Establishment Clause;<sup>153</sup> freedom from unreasonable search and seizure;<sup>154</sup> the Takings Clause;<sup>155</sup> the

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150. See, e.g., *Mem'l Hosp. v. Maricopa County*, 415 U.S. 250, 269 (1974) (“The Arizona durational residence requirement for eligibility for nonemergency free medical care creates an ‘invidious classification’ that impinges on the right of interstate travel by denying newcomers ‘basic necessities of life.’”); see also *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594 (2013) (characterizing *Memorial Hospital* as an unconstitutional-conditions case).
  151. See, e.g., *Koontz*, 133 S. Ct. at 2603; *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837, 841-42 (1987) (finding that the respondent’s permit condition violated the Takings Clause); see also *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994) (explaining that *Nollan* held that the government cannot require a person to give up a constitutional right “to receive just compensation when property is taken for a public use” in exchange for a benefit that has little to no relationship to the property).
  152. See, e.g., *Autor v. Pritzker*, 740 F.3d 176, 183 (D.C. Cir. 2014) (finding a viable First Amendment unconstitutional-conditions claim where plaintiffs alleged “that the government ha[d] conditioned their eligibility for the valuable benefit of [advisory-committee] membership on their willingness to limit their First Amendment right to petition government”); *Bourgeois v. Peters*, 387 F.3d 1303, 1325 (11th Cir. 2004) (holding unconstitutional the conditioning of the rights to freedom of speech and assembly on submitting to an unreasonable search); *Cuffley v. Mickes*, 208 F.3d 702, 709 (8th Cir. 2000) (overturning state refusal to permit the Ku Klux Klan to participate in the Adopt-A-Highway program in part because “[t]he State simply cannot condition participation in its highway adoption program on the manner in which a group exercises its constitutionally protected freedom of association”); *Buckley v. Coyle Pub. Sch. Sys.*, 476 F.2d 92, 96-97 (10th Cir. 1973) (holding that the state cannot condition continued public employment on limiting speech).
  153. See, e.g., *Anderson v. Laird*, 466 F.2d 283, 293 (D.C. Cir. 1972).
  154. See, e.g., *United States v. Scott*, 450 F.3d 863, 866-68, 874-75 (9th Cir. 2005) (finding that imposing searches and drug testing as conditions of pretrial release constitutes an unconstitutional condition without probable cause); *Burgess v. Lowery*, 201 F.3d 942, 947-48 (7th Cir. 2000) (“[A] general conditioning of prison visitation on subjection to a strip search is manifestly unreasonable.”).
  155. See, e.g., *Philip Morris, Inc. v. Reilly*, 312 F.3d 24, 47 (1st Cir. 2002) (“Massachusetts cannot condition the right to sell tobacco on the forfeiture of any constitutional protections the appellees have to their trade secrets.”).

Sixth Amendment right to trial;<sup>156</sup> the right to appeal;<sup>157</sup> and the right to access to a federal forum.<sup>158</sup>

One theorist has described unconstitutional-conditions doctrine as triggered when governmental action creates the biconditional “if  $\sim x$ , then  $y$ ; and if  $x$ , then  $\sim y$ .”<sup>159</sup> This formulation dovetails with the Supreme Court’s most recent explication of the doctrine, in Justice Alito’s majority opinion in *Koontz*: that whether the individual whose rights are under pressure chooses the benefit or the right is irrelevant.<sup>160</sup> Under this conceit, the sort of situation created by border checkpoints and H.B. 2 is a quintessential unconstitutional-conditions problem. If the individual chooses to undergo questioning as to immigration status by the Border Patrol, she may travel north to access abortion services; if she declines to exercise her right to access an abortion, she may protect herself from such immigration enforcement by remaining in the border zone.<sup>161</sup> A state actor presumably could not directly create a barrier to an individual’s travel to access abortion.<sup>162</sup> The unconstitutional-conditions doctrine means that the indirect creation of a barrier, by legislating out of existence all the clinics within a given area and consequently giving rise to the biconditional, is likewise impermissible.<sup>163</sup>

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156. See, e.g., *United States v. Whitten*, 610 F.3d 168, 194-95 (2d Cir. 2010) (finding that conditioning the Sixth Amendment right to trial on an increased sentence is constitutionally impermissible).

157. See, e.g., *United States v. Melancon*, 972 F.2d 566, 577 (5th Cir. 1992) (determining that conditioning the right to appeal on a plea decision is unconstitutional).

158. See, e.g., *1616 Reminc Ltd. P’ship v. Atchison & Keller Co.*, 704 F.2d 1313, 1318 n.14 (4th Cir. 1983) (“We do not construe the seeking of protection in a bankruptcy proceeding as an implied consent to trial by an otherwise unconstitutional tribunal, lest we move towards condonation of unconstitutional conditions on access to a federal forum.”).

159. Berman, *supra* note 145, at 10. Others who view the doctrine as requiring the grant or denial of affirmative governmental benefits might disagree with this formulation. Cf. Sullivan, *supra* note 137, at 1422 (describing the Supreme Court in the late 1980s as taking “a narrow view of affirmative government obligations” in the unconstitutional-conditions context).

160. 133 S. Ct. 2586, 2595 (2013) (“The principles that undergird our decisions in *Nollan* and *Dolan* do not change depending on whether the government *approves* a permit on the condition that the applicant turn over property or *denies* a permit because the applicant refuses to do so.”).

161. The situation highlights the significance of travel as a predicate right or privilege on which the meaningful exercise of other rights depends. Cf. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 177-79 (1980).

162. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992) (“An undue burden exists, and therefore a provision of law is invalid, if its . . . effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.”).

163. Cf. *Jackson Women’s Health Org. v. Currier*, 760 F.3d 448 (5th Cir. 2014), *petition for cert. filed*, 83 U.S.L.W. 3705 (U.S. Feb. 18, 2015) (No. 14-997); *Planned Parenthood of Wis., Inc.*

This straightforward formulation, though, elides some of the messiness of the unconstitutional-conditions doctrine as formulated and explicated by the federal courts.<sup>164</sup> First, and least problematically, we might question whether abortion access is a right that falls within the scope of unconstitutional-conditions doctrine at all. Next, we might wonder whether the biconditional formulation is appropriate here—whether not having to cross immigration checkpoints is a “discretionary benefit” for the purposes of the doctrine. We might then ask whether there is any conditioning at all and, if so, whether that conditioning is in fact constitutionally impermissible. And, lastly, we ought to consider the fact that the application of the unconstitutional-conditions doctrine in this circumstance, where the decisions as to the grant or denial of the benefit and the creation of the condition are due to the independent actions of a state and a federal actor, implicates the role of intentionality in the doctrine.

The unconstitutional-conditions analysis deserves a caveat. The doctrine both is part of constitutional common law and applies in a variety of doctrinal contexts regarding individual rights.<sup>165</sup> Consequently, it is not the most straightforward area of doctrinal analysis; like all human constructs, it is imperfectly articulated. But it is a methodological tool that sheds particular light on situations in which individual rights seem constrained rather than expanded by choice. This Part’s analysis starts from the basic premises that unconstitutional-conditions doctrine, while not perfectly contoured in all respects, is an ordinary feature of constitutional law, and that its implications for the border zone deserve attention.<sup>166</sup>

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v. Van Hollen, 738 F.3d 786 (7th Cir. 2013). Recall, too, that undocumented status is irrelevant to substantive due process rights. See *supra* notes 74-79 and accompanying text.

164. Cf. *Planned Parenthood Ass’n of Hidalgo Cty. Tex., Inc. v. Suehs*, 692 F.3d 343, 349 (5th Cir. 2012) (describing an “unfortunate lack of clarity” in unconstitutional-conditions doctrine despite the “clear threshold premise” that “[a] funding condition cannot be unconstitutional if it could be constitutionally imposed directly” (quoting *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 59-60 (2006))); Renée Lettow Lerner, *Unconstitutional Conditions, Germaneness, and Institutional Review Boards*, 101 NW. U. L. REV. 775, 775 (2007) (terming the unconstitutional-conditions doctrine “a doctrinal and scholarly morass”).

165. See *supra* notes 138-158 and accompanying text.

166. Twenty-two years ago, the Supreme Court described the existence of unconstitutional-conditions doctrine as “well-settled.” *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994). The opinions in the seven Supreme Court cases discussing the doctrine since *Dolan* confirm that interpretation: in none of them does any Justice call into question the basic conceit of the doctrine, or that the government may not condition the grant of a benefit on not exercising a right. See *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 133 S. Ct. 2321 (2013); *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013); *Forum for Acad. & Institutional Rights*, 547 U.S. 47; *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005); *United*

*A. The Right*

Unconstitutional-conditions doctrine has particular salience in the abortion context, as is relevant to the fact-specific problem of H.B. 2. Two selective-funding cases—*Maher v. Roe*, challenging Connecticut’s funding of pregnancy expenses but not abortions for indigent women,<sup>167</sup> and *Harris v. McRae*, challenging similar federal funding restrictions in the Medicaid program<sup>168</sup>—have been interpreted as paradigmatic unconstitutional-conditions cases that shed light on a germaneness requirement for a condition to be constitutional.<sup>169</sup> *Rust v. Sullivan*, which held that restrictions on federal funding for abortion counseling did not violate individuals’ abortion rights because the restrictions did not change women’s available choices, also used unconstitutional-conditions reasoning.<sup>170</sup> More recently, the Seventh and Eighth Circuits have applied unconstitutional-conditions reasoning to determine whether abortion rights were impermissibly burdened.<sup>171</sup> The *benefit*

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States v. Am. Library Ass’n, 539 U.S. 194 (2003); Bd. of Cty. Comm’rs v. Umbehr, 518 U.S. 668 (1996); O’Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712 (1996); see also Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 279, 286 (1998) (noting the Sixth Circuit’s application of the unconstitutional-conditions doctrine to what the court of appeals characterized as “a ‘Hobson’s choice’ between asserting . . . Fifth Amendment rights and participating in the clemency review process” but concluding that reaching the unconstitutional-conditions analysis was “unnecessary”). Lower courts have analyzed potential constitutional violations using the doctrine many times. See, e.g., Dep’t of Tex., Veterans of Foreign Wars of the U.S. v. Tex. Lottery Comm’n, 760 F.3d 427, 437 (5th Cir. 2014); Planned Parenthood of Kan. & Mid-Mo. v. Moser, 747 F.3d 814 (10th Cir. 2014); Blaisdell v. Frappiea, 729 F.3d 1237 (9th Cir. 2013); Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509 (6th Cir. 2012); L.L. Nelson Enters., Inc. v. County of St. Louis, 673 F.3d 799 (8th Cir. 2012); Pareja v. Att’y Gen. of the U.S., 615 F.3d 180 (3d Cir. 2010); Johnston v. Tampa Sports Auth., 530 F.3d 1320 (11th Cir. 2008); DKT Int’l, Inc. v. U.S. Agency for Int’l Dev., 477 F.3d 758 (D.C. Cir. 2007); O’Connor v. Pierson, 426 F.3d 187 (2d Cir. 2005); Kirby v. City of Elizabeth City, 388 F.3d 440 (4th Cir. 2004); Boy Scouts of Am. v. Wyman, 335 F.3d 80 (2d Cir. 2003); Koveleskie v. SBC Capital Mkts., Inc., 167 F.3d 361 (7th Cir. 1999); Clifton v. FEC, 114 F.3d 1309 (1st Cir. 1997). Not all of these cases find that the unconstitutional-conditions doctrine invalidates state action in the fact-specific scenario, but all probe whether it does apply and view such application leading to invalidation as possible, either on those facts or on a different set of facts.

167. 432 U.S. 464 (1977).

168. 448 U.S. 297 (1980).

169. Berman, *supra* note 145, at 103-10; see also Kreimer, *supra* note 144, at 1346; Sullivan, *supra* note 137, at 1416.

170. 500 U.S. 173, 201-02 (1991); see also *Am. Library Ass’n*, 539 U.S. at 211 (relying on *Rust* for its unconstitutional-conditions analysis).

171. *Planned Parenthood of Ind., Inc. v. Comm’r of Ind. State Dep’t of Health*, 699 F.3d 962 (7th Cir. 2012) (ultimately finding an unconstitutional-conditions claim unlikely to succeed because, since the government could directly refuse to subsidize abortion, conditioning of

involved in these cases, selective funding, is different from that at stake in the context of border checkpoints and H.B. 2. But the cases demonstrate that for the *right* at issue—abortion—application of the unconstitutional-conditions doctrine is not unusual.<sup>172</sup>

*B. The Benefit*

More significantly, both case law and much of the academic literature consistently describe the forbidden choice in an unconstitutional-conditions problem as one between a right and a “discretionary benefit.”<sup>173</sup> Is nonexposure to spatially selective immigration enforcement a “discretionary benefit,” within the meaning of unconstitutional-conditions doctrine?<sup>174</sup> It is—or, at the least, we ought to recognize it as such. The doctrine is unclear, and there appears to have been no case implicating the border checkpoints in which courts have applied unconstitutional-conditions analysis.<sup>175</sup> But the best interpretation, most consonant with the purposes that underlie unconstitutional-conditions doctrine, is to view it as such. In a way, such extension would be novel—but it both is consistent with case law and makes sense in light of the constitutional common-law nature of the doctrine.<sup>176</sup>

Most case law deals with situations involving governmental withholding of affirmative benefits due to exercise of a right, rather than governmental

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abortion-related funding was permissible); *Planned Parenthood of Mid-Mo. & E. Kan., Inc. v. Dempsey*, 167 F.3d 458, 463–64 (8th Cir. 1999) (applying an unconstitutional-conditions analysis in evaluating a state statute barring grants of family-planning funds to organizations providing abortion services).

172. The broad formulation of the unconstitutional-conditions doctrine indicates that the doctrine would still apply even in the absence of precedential cases. *See supra* notes 138–143 and accompanying text.
173. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2605 (2013) (quoting *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 547 (2005)).
174. This analysis is unrelated to a separate debate as to whether systematized grants of deferred action “confer ‘lawful presence’ and associated benefits” such as “driver’s licenses and unemployment insurance” and therefore are reviewable agency actions. *See Texas v. United States*, No. 15-40238, 2015 WL 6873190, at \*16 (5th Cir. Nov. 9, 2015) (evaluating whether the Deferred Action for Parents of Americans program is a presumptively unreviewable act of prosecutorial discretion). That debate draws on an unrelated line of case law on administrative actions “committed to agency discretion.” *See id.* at \*12.
175. The leading cases analyzing whether interior checkpoints constitute a Fourth Amendment violation, for example, do not use such an approach. *See United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).
176. *See generally* Strauss, *supra* note 80 (detailing common-law methods of interpretation under a framework that views the Constitution as a mixed system).

withholding of enforcement or punishment.<sup>177</sup> Some cases, however, indicate that the denial of withholding of enforcement qualifies as a “benefit.” At least two Supreme Court opinions have appeared to apply unconstitutional-conditions doctrine in an enforcement or punishment context, though neither explicitly situates itself within the doctrine. *Zablocki v. Redhail* overturned a state statute requiring court approval of marriage for those required to pay child support on the grounds that the statute “unnecessarily impinge[d] on the right to marry”;<sup>178</sup> *United States v. Jackson* overturned the portion of the Federal Kidnapping Act that took the death penalty off the table only if the defendant forewent exercising the right to a jury trial.<sup>179</sup>

This case law and, more broadly speaking, the common-law nature of the doctrine’s elaboration counsel against an overly restrictive interpretation of cases’ “discretionary benefit” language. Unconstitutional-conditions doctrine has developed over time as a judicial understanding of a particular way that governmental action may engender a harm rising to the level of a constitutional violation.<sup>180</sup> And, while academic commentators have diverged over the underlying logic of the unconstitutional-conditions doctrine,<sup>181</sup> recent moves toward more coherent and systematizing understandings of the doctrine as one of framing suggests such a broader scope for “benefit.”<sup>182</sup> Indeed, some scholars view the doctrine as, on a best understanding, encompassing discretionary enforcement decisions.<sup>183</sup>

Interpreting the avoidance of a certain encounter with immigration enforcement as a discretionary benefit therefore fits well within the contours of existing unconstitutional-conditions doctrine. It also makes sense in terms of the harm that courts describe unconstitutional-conditions doctrine as

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177. See *supra* notes 138–158 and accompanying text. Despite recent, seemingly widespread application of the unconstitutional-conditions doctrine in the courts of appeals, there seems to be no recent comprehensive analysis of how courts have applied the doctrine across constitutional provisions.

178. 434 U.S. 374, 388 (1978).

179. 390 U.S. 570, 581–83, 591 (1968); see also Berman, *supra* note 145, at 102 n.438 (interpreting *Jackson* as an unconstitutional-conditions case).

180. See Kreimer, *supra* note 144, at 1301–04 (describing the doctrine’s early development).

181. Compare Berman, *supra* note 145, and Adam B. Cox & Adam M. Samaha, *Unconstitutional Conditions Questions Everywhere: The Implications of Exit and Sorting for Constitutional Law and Theory*, 5 J. LEGAL ANALYSIS 61 (2012), with Kreimer, *supra* note 144, and Sullivan, *supra* note 137, and Cass R. Sunstein, *Is There an Unconstitutional Conditions Doctrine?*, 26 SAN DIEGO L. REV. 337 (1989) (provocatively questioning the doctrine’s very existence).

182. Cox & Samaha, *supra* note 181, at 69 (“[A]most any constitutional question can be turned into an unconstitutional conditions question by expanding the frame of reference.”); Daryl J. Levinson, *Framing Transactions in Constitutional Law*, 111 YALE L.J. 1311, 1345–50 (2002).

183. Cox & Samaha, *supra* note 181, at 15–16.

intending to capture—the pressure that an individual experiences to make a particular choice, given the incentive structure set up by the choice architecture.<sup>184</sup>

C. *Conditioning*

In a situation like that engendered by H.B. 2, then, where governmental action forecloses access to rights within the border zone, an individual faces a choice between exercise of the right and avoiding spatially selective immigration enforcement—the kind of “Hobson’s choice” that courts have deemed impermissible.<sup>185</sup> Under the legal regime created by the current intersection of federal immigration enforcement and state law—both of which have spatially distortive effects—a person may either refrain from passing through border checkpoints and therefore refrain from undergoing a search that exposes her to the risk of selective immigration enforcement, or she may obtain an abortion. She cannot do both.

Consequently, the intersection of border checkpoints and fundamental rights falls squarely on the nongermaneness side of the germaneness or nexus requirement running through the case law. Case law indicates that, for a condition placed upon a right to be constitutionally permissible, there must be some sort of “nexus” and “rough proportionality” between the condition and the right.<sup>186</sup> For example, in the exactions context, a court must determine whether there is a connection “between the legitimate state interest and the permit condition” and then “must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.”<sup>187</sup> Relying on this test, the Supreme Court determined in *Dolan v. City of Tigard* that requiring the grant of a pedestrian and bike easement in order to obtain a permit for commercial expansion did not exhibit the requisite rough proportionality.<sup>188</sup>

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<sup>184.</sup> See *supra* notes 138-143 and accompanying text.

<sup>185.</sup> E.g., *Philip Morris, Inc. v. Reilly*, 312 F.3d 24, 50 (1st Cir. 2002) (finding that a “Hobson’s choice” created by the conditional choice that one “either comply with the Disclosure Act and forfeit [one’s] valuable trade secrets or withdraw from the lucrative Massachusetts market” constituted an unconstitutional condition). The “Hobson’s choice” framing of the problem also recurs in academic literature. E.g., Sullivan, *supra* note 137, at 1438.

<sup>186.</sup> *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2591 (2013); *Dolan v. City of Tigard*, 512 U.S. 374, 383, 391 (1994).

<sup>187.</sup> *Dolan*, 512 U.S. at 386.

<sup>188.</sup> *Id.* at 395 (stating that “the city has not met its burden of demonstrating that the additional number of vehicle and bicycle trips generated by [the] development reasonably relate to the [easement] requirement”).

The distinction between germaneness and nongermaneness is particularly vivid in the abortion-funding cases *Maier v. Roe*<sup>189</sup> and *Harris v. McRae*.<sup>190</sup> In these cases, the Supreme Court upheld funding restrictions in which government-subsidized healthcare programs recompensed individuals for pregnancy and childbirth expenses but not for elective abortions.<sup>191</sup> The Court in *Maier* characterized the statute at issue as creating no further obstacles to abortion, explaining that “[a]n indigent woman . . . continues as before to be dependent on private sources.”<sup>192</sup> It differentiated cases striking down durational-residency requirements to receive welfare benefits on, apparently, germaneness grounds: denial of “bus fares” to travelers, the Court implied, would have been permissible, but denial of welfare was closer to “a criminal fine.”<sup>193</sup> Similarly, *Harris* emphasized that the denial of general benefits to anyone who secured an abortion would create a “substantial constitutional question.”<sup>194</sup> These cases—and the manner in which they differentiate the durational-residency cases—indicate that something akin to the “nexus” and “rough proportionality” requirements in the Takings Clause cases applies, as well, in the abortion-rights context. While they do not use that specific language, the underlying requirement of a sufficiently strong connection between the right conditioned and the benefit appears to be the same. More broadly, the cases suggest—particularly in combination with the later Takings Clause cases—that the unconstitutional conditions doctrinal inquiry keys, at least in part, to germaneness.<sup>195</sup>

There is no nexus between the enforcement of immigration law and the seeking of access to abortion services. Unlike in the selective-funding cases, state-generated closure of clinics within the border zone leads to consequences beyond state “refusal to subsidize certain protected conduct.”<sup>196</sup> Abortion

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189. 432 U.S. 464 (1977).

190. 448 U.S. 297 (1980).

191. Though *Harris* and *Maier* do not explicitly use the phrase “unconstitutional conditions,” academic commentators have frequently interpreted the cases as unconstitutional-conditions cases. See, e.g., Berman, *supra* note 145, at 103-10; David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675, 695 (1992); Sullivan, *supra* note 137, at 1466-67.

192. 432 U.S. at 474.

193. *Id.* at 474 n.8.

194. 448 U.S. at 317 n.19.

195. This interpretation is in line with that of scholars who note germaneness’s salience to judges, even while attempting to theorize a clearer or more comprehensive framework. E.g., Berman, *supra* note 145, at 42; Cox & Samaha, *supra* note 181, at 80; Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. REV. 1784, 1870 (2008).

196. *Harris*, 448 U.S. at 317 n.19.

access and immigration enforcement are not linked by a common policy concern. The consequences if one exercises the right are simply not germane.

There is also a lack of proportionality between the exercise of abortion rights and the enforcement of immigration law. The idea that conditioning the right to abortion on hazarding detention and deportation unconstitutionally “coerc[es]” undocumented women “into giving . . . up” a substantive due process right is intuitive.<sup>197</sup> Both the magnitude and the perceived likelihood of the harms of detention and deportation are great.<sup>198</sup> Requiring individuals, for the exercise of the right, to risk the loss of home, community, and potentially family and livelihood—potentially “all that makes life worth living”<sup>199</sup>—seems more analogous to the “criminal fine” that the *Maier* Court suggested was impermissible.<sup>200</sup> These costs are greater than others that the Court has found unconstitutional, such as requiring that individuals give up a tax exemption,<sup>201</sup> public employment,<sup>202</sup> or the possibility of unemployment benefits to exercise a fundamental right.<sup>203</sup> A state actor could not directly impose a bar on an unauthorized immigrant’s access to abortion, since doing so would be a violation of substantive due process rights.<sup>204</sup> The current choice architecture conditions exercise of a constitutional substantive due process right on the denial of something of great value—*not* having the government assuredly perform a search to detect one’s immigration status, a search that is likely to lead to civil enforcement of the immigration laws.<sup>205</sup> Such a state-structured choice, if the absence of selective enforcement is a benefit, is an unconstitutional conditioning of a person’s right to terminate her pregnancy.

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197. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594 (2013).

198. See *supra* notes 125-135 and accompanying text.

199. *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

200. *Maier v. Roe*, 432 U.S. 464, 474 n.8 (1977).

201. See *Speiser v. Randall*, 357 U.S. 513, 528-29 (1958).

202. See *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

203. See *Sherbert v. Verner*, 374 U.S. 398, 404 (1963). The Sixth Circuit has found conditioning the grant of a liquor license on giving up a property interest in operating during certain hours constitutionally impermissible. *R.S.W.W., Inc. v. City of Keego Harbor*, 397 F.3d 427, 434-35 (6th Cir. 2005).

204. Again, unauthorized immigrants possess substantive due process rights. See *supra* notes 74-79 and accompanying text.

205. See *supra* note 46 and accompanying text for a discussion of the difficulties in determining the likelihood of enforcement.

*D. Intentionality?*

The choice created for undocumented immigrants by the checkpoints and potential clinic closures thus fits relatively comfortably within unconstitutional-conditions doctrine, given the existing doctrinal ambiguities and the open question as to this kind of administrative enforcement discretion as benefit. Most if not all unconstitutional-conditions cases, though, involve both a benefit and a rights burden engendered by a *single* state actor.<sup>206</sup> Here, the federal administrative enforcement scheme provides the benefit, while the state's regulation places the burden on the right. Does a choice between rights exercise and benefit brought about by the separate actions of two different actors—one state and one federal—create an unconstitutional condition? This question implicates whether unconstitutional-conditions doctrine bars a coercive *purpose* or a coercive *effect*—an area of the doctrine that is unclear. If the doctrine is effects oriented, then H.B. 2 is an unconstitutional condition. Even if it is purpose oriented, though, there are reasons to think that on either analysis H.B. 2's conditioning is constitutionally problematic, due to the Texas legislature's knowledge of the border area.

In analyzing governmental actions through an unconstitutional-conditions lens, courts have not clearly distinguished between a coercive *purpose* and a coercive *effect*.<sup>207</sup> This lack of clarity matters to situations with multiple actors, like the border zone and H.B. 2. On the one hand, without purpose, the choice that individuals face is no less rights pressuring—it presumably does not matter to one's decision as to whether to go through an immigration checkpoint or forgo obtaining an abortion which governmental entities are responsible for creating the choice. On the other, if the point of the unconstitutional-conditions doctrine is to bar governmental actors from threatening or coercing individuals—from tilting incentives in a way that the government prefers, because of the asymmetrical power to grant or deny a benefit that the governmental actor holds—then perhaps the presence of multiple actors does matter.

This unresolved tension is on display in *Koontz*. In one sentence, Justice Alito's majority opinion explains, "By conditioning a building permit on the owner's deeding over a public right-of-way . . . the government can pressure an

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206. A comprehensive accounting of unconstitutional conditions case law in the federal courts is beyond the scope of this Note—possibly, one or more cases exist that would fit within the unconstitutional-conditions rubric that involve multiple actors.

207. See Berman, *supra* note 145, at 20-21 (describing how governmental action may be unconstitutional due to its purpose, effect, or particularized conduct). While this invocation of purpose and effect sounds, on its face, very similar to the *Casey* test, the doctrinal inquiries are independent.

owner into voluntarily giving up property for which the Fifth Amendment would otherwise require just compensation.”<sup>208</sup> The emphasis here seems to be on what the opinion then characterizes as “the government’s demand”<sup>209</sup> – on a governmental *action*. At the end of that paragraph, though, the opinion concludes, “Extortionate demands of this sort *frustrate the Fifth Amendment right to just compensation*, and the unconstitutional conditions doctrine prohibits them.”<sup>210</sup> This concluding sentence places the emphasis not on the *act* of demanding or some sort of mens rea requirement—not on governmental purpose—but rather on the loss of just compensation.<sup>211</sup> The tension is, perhaps, best encapsulated in *Koontz’s* characterization of the “overarching principle”: “the unconstitutional conditions doctrine . . . vindicates the Constitution’s enumerated rights by preventing the government from coercing people into giving them up.”<sup>212</sup>

Whether such “coerci[on]” requires governmental intentionality is not resolved in the constitutional common law of unconstitutional-conditions doctrine. The Supreme Court’s unconstitutional-conditions cases appear not to have explicitly confronted the issue. Language in lower-court opinions diverges—some seem to place some emphasis on “purpose,” while others do not require purpose.<sup>213</sup> The opinions in both Supreme Court and lower-court cases tend not to probe legislative history to discern bad motive or otherwise engage in some sort of familiar motive-based inquiry. Many cases focus on the situation created for individuals, from needing to give up a right to just compensation in exchange for a land-use permit, to being required to engage in certain speech to receive money, to having to forgo unemployment benefits due to practicing one’s religion.<sup>214</sup> Among academic commentators, some view the intent of the state actor as essential—as *the* constitutional problem with

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208. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594 (2013).

209. *Id.* at 2595.

210. *Id.* (emphasis added).

211. See Berman, *supra* note 145, at 20-21 (noting that a rights-based framing is one of *effect*, not purpose).

212. 133 S. Ct. at 2594.

213. Compare, *Planned Parenthood of Ind., Inc. v. Comm’r of Ind. State Dep’t of Health*, 699 F.3d 962, 986 (7th Cir. 2012) (“[T]he denial of a public benefit may not be used by the government for the purpose of creating an incentive enabling it to achieve what it may not command directly.” (quoting *Elrod v. Burns*, 427 U.S. 347, 361 (1976) (plurality opinion))), with *Bourgeois v. Peters*, 387 F.3d 1303, 1324-25 (11th Cir. 2004) (describing unconstitutional-conditions doctrine as “prevent[ing] the Government from subtly pressuring citizens, whether purposely or inadvertently, into surrendering their rights”).

214. See, e.g., *Koontz*, 133 S. Ct. at 2603; *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 133 S. Ct. 2321, 2332 (2013); *Sherbert v. Verner*, 374 U.S. 398, 403-04 (1963).

unconstitutional conditions.<sup>215</sup> Others see intent as not required for a rights-pressuring choice to be an unconstitutional condition.<sup>216</sup>

Due to the doctrinal ambiguities and the lack of a specific textual grounding for this multipurpose doctrine, whether one thinks intent matters in unconstitutional-conditions doctrine may ultimately hinge on whether one views the doctrine as rights regarding or regulatory. If the purpose is to shield the individual from governmental choice, then governmental intent may not matter, while a purpose of barring governmental actions with bad intent may make intent more salient.<sup>217</sup> The lack of focus on governmental purpose or mens rea in case law may point to an existing understanding of the doctrine as rights regarding. The coercion language, though, is less clear. The idea that a pressured choice forced on an individual by a governmental actor—regardless of the actor’s motivation—creates an impermissible constitutional burden on a right may have intuitive resonance. It parallels duress doctrine in contract law.<sup>218</sup> Particularly, where liberty is at stake as the “benefit,” as in the detention and deportation context, the conditioned choice may seem especially constitutionally suspect: the *effects* of the choice are likely far more pronounced. There are very good reasons to think that intent does not matter;<sup>219</sup> and if it does not, then H.B. 2 and the border checkpoints create an unconstitutional condition.

Even if intent does matter, though, state actors’ disregard for the spatially disparate effects of H.B. 2 could conceivably cross a requisite level of intent. The line for a governmental actor’s improper mens rea in creating coercive conditions may not necessarily cut through specific intent to deprive individuals of the right. Texas legislators are—or at least ought to be—well aware of the conditions in their state, including the conditions in the Rio Grande Valley, the many unauthorized immigrants who live there, and

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215. See, e.g., Nelson, *supra* note 195, at 1861-71 (arguing that “[m]uch of the modern doctrine of unconstitutional conditions is best understood in terms of restrictions on the reasons for which government can act” because such an understanding best explains, inter alia, germaneness).

216. See, e.g., Berman, *supra* note 145, at 20-21.

217. Cf. William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 12 (1997) (drawing a similar division in constitutionalized criminal procedure).

218. See Sullivan, *supra* note 137, at 1443-44.

219. Such a view of the doctrine is particularly consonant with an understanding of constitutional structure, including federalism, as rights protective. See *Bond v. United States*, 131 S. Ct. 2355, 2364 (“Federalism secures the freedom of the individual.”); see also *infra* Section IV.B (discussing the implications of this view of federalism for a state’s action in the border zone).

the existence of border checkpoints.<sup>220</sup> Media coverage surrounding undocumented women and access to abortion began before the passage of H.B. 2.<sup>221</sup> The debate over H.B. 2 focused in part on the particular challenges that the bill would pose to individuals living in the Rio Grande Valley and El Paso in reaching clinics.<sup>222</sup> If knowledge or recklessness, not purpose or specific intent to deprive, suffices for intentionality in the unconstitutional-conditions context,<sup>223</sup> then H.B. 2—and other regulations with spatially disparate effects—crosses that threshold. Because of the lack of doctrinal clarity, under a view of the doctrine as regulatory or intent based, states' reckless or knowing actions with effects on undocumented immigrants' choices in the border zone may satisfy intent and give rise to an unconstitutional condition. On an effects-based view, of course, no such intentionality is required—and the choice between exercising the right to an abortion and avoiding exposure to immigration enforcement is an unconstitutional condition.

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Viewing spatially selective immigration enforcement as an unconstitutional-conditions problem—not only in the H.B. 2 context but more broadly—comports with the underlying “nexus” or “germaneness” thread running through the doctrine and concomitant intuitions as to which government-structured choice architectures for rights are permissible. One's immigration status and the exercise of one's right to determine whether to carry a pregnancy to term are unrelated.

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220. See, e.g., TEX. SECRETARY STATE, COLONIA LEGIS. TEX., <http://www.sos.state.tx.us/border/colonias/legislation.shtml> [<http://perma.cc/CN3G-FBZ6>] (listing the legislative enactments from 1987 to 2005 dealing specifically with extreme poverty in the Rio Grande Valley).

221. See *supra* note 59 and accompanying text.

222. See 83 TEX. LEG. H.J. S36 (July 9, 2013) (statement of Rep. Farrar) (“In other words, Lubbock, El Paso, McAllen, Corpus Christi, Lufkin, those folks in those places would not have access.”); *id.* at S37 (statement of Rep. Menéndez) (“[I]f they do close, and we take away the only place, the only clinic where someone in a rural city, whether it be Lubbock or El Paso or the Valley, wherever, then we, as a state, should say we did this and we need to step up . . .”). See generally *id.* at S35-42 (discussing the effect of H.B. 2 on communities, including the Rio Grande Valley and El Paso, far from major cities with abortion clinics projected to remain open).

223. See MODEL PENAL CODE § 2.02 (AM. LAW INST. 1962) (describing categories of culpability); cf. Pamela S. Karlan, Note, *Discriminatory Purpose and Mens Rea: The Tortured Argument of Invidious Intent*, 93 YALE L.J. 111, 112, 124 (1983) (advocating that equal-protection doctrine take into account the varying degrees of intentionality recognized in criminal law and arguing that “[a] legislature should be charged with either actual or constructive knowledge of potential burdens its acts will impose on minorities”).

This characterization of the problem, while apparently novel in the immigration-enforcement context, also sounds in constitutional norms of due process and an underlying anticaste principle.<sup>224</sup> In considering the problem from a due-process perspective, it is possible that deprivation of an unrelated fundamental right is the penalty that one pays for an immigration violation, for a tax penalty, or for punishment for the commission of a crime. But, even assuming that is the case,<sup>225</sup> such deprivation should be due *after* the government has determined that an individual is culpable, not before. The group of people who will be ensnared through exposure to civil or criminal law enforcement is larger than the group of people who will be eligible for deportation, who will be guilty of the crime, or who will need to pay income taxes—the list of potential “suspects” is almost always longer than the list of those actually convicted or liable. In the immigration context, individuals who are eligible for asylum may not be aware of the prevailing law or may not have the resources to go through the legal process; those eligible for withholding of removal may not want to risk exposing themselves to immigration enforcement for the chance of receiving this discretionary relief.<sup>226</sup> These persons are in fact able to obtain status and remain in the United States, but they too will be swept up in the enforcement and will need to extricate themselves, losing their liberty in the meantime.

From an antisubordination perspective, as Kathleen Sullivan observes in the context of affirmative benefits,<sup>227</sup> allowing the conditioning of fundamental rights on exposure to an enforcement mechanism creates a two-tiered system of rights, in which only those subject to enforcement face the coercive pressure. Because undocumented immigrants not only have, as a class, less political power than those with legal status, but also face potential enforcement consequences by asserting political voice, they are, as a class, particularly at risk for the creation of impermissible choices.<sup>228</sup> The unconstitutional-conditions

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224. See Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2411 (1994) (characterizing the anticaste principle as an “understanding of equality [and] liberty,” which “forbids social and legal practices from translating highly visible and morally irrelevant differences into systemic social disadvantage” without “very good reason for society to do so”).

225. The lack of germaneness between the two in the checkpoints context and the lack of evidence of specific legislative intent suggests that, at least for H.B. 2, the Texas legislature did not intend to create such a penalty.

226. See 8 U.S.C. § 1158 (2012) (asylum process); *id.* § 1231(b)(3) (withholding of removal).

227. See Sullivan, *supra* note 137, at 1499.

228. Cf. *Developments in the Law—Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286, 1444 (1983) (“[T]he illegal status of undocumented aliens prevents them from claiming an effective voice in the political process.”).

framework does not doctrinally require either of these underlying resonances, but they provide a sense that the doctrinal evaluation of the border-checkpoints problem fits with the larger constitutional system. The checkpoints and state legislation careless to its spatial effects, when they combine to pressure individual rights in the border zone, are best understood as constitutionally impermissible.

#### IV. CAUSATION AT CHECKPOINTS

Finally, part of the puzzle as to whether H.B. 2—or any spatially disparate state regulation that removes access to a fundamental right from within the border zone—violates undocumented immigrants’ rights is a question of causation, which in turn implicates federalism questions. The bar to rights vindication is the conjunction of state regulatory action and a federal administrative enforcement scheme, predicated on spatiality, that problematizes travel for individuals subject to enforcement. For purposes of constitutional analysis, is a deprivation of the right to reproductive choice *caused by* Texas’s law leading to clinic closures? The Fourteenth Amendment provides that no state “shall . . . deprive any person of life, liberty, or property, without due process of law.”<sup>229</sup> But do the Texas abortion restrictions themselves “deprive any person” of the right to reproductive choice—given that, in the absence of the checkpoints, the closure of clinics requiring travel out of the border zone could<sup>230</sup> pose no barrier at all?

This Part argues that when a state passes a law, like H.B. 2, that removes access to a right within its borders from the area between the international border and the checkpoints, the state is legally responsible for that rights deprivation. This legal responsibility exists notwithstanding the federal government’s actions in creating the anomalous zone and the lack of immigration status that places individuals at risk of enforcement action. Both the doctrinal-causation principles applied in evaluating Fourteenth Amendment violations and larger constitutional commitments—to the vindication of individual rights notwithstanding federal-state allocations of power—lead to this conclusion.

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<sup>229</sup>. U.S. CONST. amend. XIV, § 1.

<sup>230</sup>. Whether other obstacles to obtaining an abortion caused by the clinic closures ensuing from H.B. 2 make H.B. 2 unconstitutional is beyond the scope of this Note.

### A. Doctrinal Causation

The Fourteenth Amendment and 42 U.S.C. § 1983 together create a “species of tort liability” for those “deprived of rights,” as well as the possibility of injunctive relief against state action.<sup>231</sup> In this context, to determine whether there is sufficient causation to constitute a “depriv[ation]” of rights, courts are “governed by . . . common-law tort principles,”<sup>232</sup> including proximate cause<sup>233</sup> and the idea of a causal chain.<sup>234</sup> Consequently, a state’s action that removes access to rights in the border zone must be both a factual and a proximate cause of the resultant harm in order to constitute a substantive due process violation, and there must be no superseding cause that breaks the causal chain.<sup>235</sup>

H.B. 2 is plainly a factual cause of the resultant harm—the infringement on the abortion rights of a particular segment of Texas’s population.<sup>236</sup> Were H.B. 2 not to take full effect, women living in south Texas would still have access to abortion clinics within the border zone; they would not need to

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231. *Carey v. Phipus*, 435 U.S. 247, 253 (1978) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976)). Section 1983 provides a private right of action for those deprived of constitutional rights by a person acting under color of state law. See 42 U.S.C. § 1983 (2012). Prospective injunctive relief is also available under the cause of action pursuant to the *Ex parte Young* doctrine. See *Quern v. Jordan*, 440 U.S. 332, 338 (1979) (“[I]n a 42 U.S.C. § 1983 action . . . a federal court’s remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective [and not retrospective] injunctive relief, *Ex parte Young* . . .”).

232. *Wallace v. Kato*, 549 U.S. 384, 388 (2007) (explaining that “federal rules conforming in general to common-law tort principles” apply to § 1983 actions, where state-law principles do not).

233. See *Malley v. Briggs*, 475 U.S. 335, 344-45 n.7 (1986) (“[Section] 1983 ‘should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.’” (quoting *Monroe v. Pape*, 365 U.S. 167, 187 (1961))).

234. See *id.* (applying common-law tort principles to determine that a judicial decision regarding a warrant issuance does not “break[] the causal chain” between an officer’s application for the warrant and the arrest pursuant to the warrant).

235. Cf. *Malley*, 475 U.S. at 344 n.7 (noting that § 1983 “should be read against the background of tort liability that makes a man responsible for the natural consequences of his action”); *Monroe*, 365 U.S. at 187 (noting that superseding causes can break the causal chain, but holding that a judge’s decision to issue a warrant does not break the causal chain between a law enforcement officer’s application for a warrant and an improvident arrest). See generally RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM §§ 26-36 (AM. LAW INST. 2011) (discussing the basic causation principles of tort law).

236. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 26 (AM. LAW INST. 2011) (defining conduct as a factual cause where harm would not have occurred if the conduct in question had not occurred).

travel beyond the checkpoints. The legislation is also a proximate cause.<sup>237</sup> As in situations in which the Supreme Court has found sufficient proximate cause for constitutional liability,<sup>238</sup> the encumbrance on undocumented women’s reproductive rights is a “natural consequence[.]” of Texas’s action in enacting H.B. 2.<sup>239</sup> As noted above, the state legislature was aware both that the checkpoints existed and that the legislation threatened to close the clinics south and west of the checkpoints.<sup>240</sup> The potential for clinic closures to ensue from H.B. 2 and the resultant inability of undocumented women to continue to access abortion services were “reasonably foreseeable,” in the language of tort law.<sup>241</sup>

The sharper (and more interesting) doctrinal question is whether the two other factual causes of the rights violation—the federal immigration enforcement scheme and individuals’ immigration status—break the causal chain. Were there no border checkpoints, H.B. 2 would cause no particular infringement on the abortion rights of unauthorized immigrants. And if undocumented immigrants instead had lawful immigration status, the interior checkpoints would give rise to no particular undue burden or unconstitutional condition. Ultimately, both on a technical causation analysis and—as Section IV.B argues—consistent with constitutional allocations of power, neither suffices to overcome state legal responsibility for the deprivation of the right. The State of Texas, or any state with internal checkpoints, is responsible for substantive due process violations due to actions that remove access to rights in the border zone.<sup>242</sup>

Under common-law tort analysis, intervening acts by independent actors typically do not foreclose tort liability where those actions were foreseeable.<sup>243</sup>

237. See *id.* § 29 (“An actor’s liability is limited to those harms that result from the risks that made the actor’s conduct tortious.”); RESTATEMENT (SECOND) OF TORTS § 431 (AM. LAW INST. 1965); DAN B. DOBBS ET AL., *THE LAW OF TORTS* § 199 (2d ed. 2011).

238. See, e.g., *Malley*, 475 U.S. at 344 n.7.

239. *Monroe*, 365 U.S. at 187; accord *Malley*, 475 U.S. at 344 n.7; *Pierson v. Ray*, 386 U.S. 547, 556–57 (1967).

240. See *supra* notes 222–223 and accompanying text.

241. See DOBBS ET AL., *supra* note 237, § 204.

242. Whether the state would have an affirmative duty to provide access to services in the border zone—for example, to provide abortion clinics should none exist in the area—is a different question. Such affirmative provision of benefits would likely not be required under existing doctrine, at least where the state does not undertake to provide such benefits for all individuals within its territory. Cf. *Harris v. McRae*, 448 U.S. 297 (1980) (not requiring Medicaid to cover abortion expenses); *Maher v. Roe*, 432 U.S. 464 (1977) (same).

243. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 34 (AM. LAW INST. 2011) (“When a force of nature or an independent act is also a factual cause . . . an actor’s liability is limited to those harms that result from the risks that made the actor’s

The Supreme Court has previously followed such common-law interpretations of the significance of actions by independent state actors that potentially break the causal chain.<sup>244</sup> It has determined that where “the common law recognized the causal link . . . we read § 1983 as recognizing the same causal link.”<sup>245</sup> Internal immigration checkpoints are foreseeable to legislators in states that contain them. Indeed, the checkpoints have existed in some form for decades—their presence is not a surprise.<sup>246</sup> Moreover, the effects of the checkpoints on movements of persons are well known in the areas where they exist.<sup>247</sup> Additionally, the presence of significant numbers of undocumented immigrants in the border area is easily anticipatable from history and present demographics.<sup>248</sup> The harm of certain persons in the border zone being deprived of the ability to obtain abortions is a foreseeable risk of passing a bill that closes clinics in the border zone—and so the foreseeable actions of the federal government in maintaining spatially selective immigration enforcement do not remove legal responsibility from the State of Texas for the deprivation of rights.

Nor does the nature of immigration status obviate the rights violation engendered by cutting off access to abortion within the border area. A potential objection to seeing H.B. 2 as causal in this context might be, essentially, a contributory-negligence argument. Sure, one might argue, unauthorized immigrants might have substantive due process rights—but, the objection might run, they are responsible for their presence in the border zone. Consequently, any spatially uneven effects of state regulation—anything that removes rights access from the border zone—is not a constitutional problem, because the salient cause of the rights violation is not the legislation but the action or presence of undocumented persons.

This argument fails both doctrinally, as a matter of common-law causation, and constitutionally, in light of existing substantive due process doctrine. Doctrinally, in the move from contributory negligence to comparative fault in tort law, the plaintiff’s own actions are typically no longer regarded as an

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conduct tortious.”); *DOBBS ET AL.*, *supra* note 237, § 204; *cf.* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 19 (AM. LAW INST. 2011) (“The conduct of a defendant can lack reasonable care insofar as it foreseeably combines with or permits the improper conduct of the plaintiff or a third party.”).

<sup>244</sup>. *Malley*, 475 U.S. at 345 n.7.

<sup>245</sup>. *Id.*

<sup>246</sup>. *See, e.g.*, *Fernandez v. United States*, 321 F.2d 283, 286 (9th Cir. 1963) (stating that an interior checkpoint in southern California had “been in operation at least since” 1929).

<sup>247</sup>. *See United States v. Martinez-Fuerte*, 428 U.S. 543, 552 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873, 879 (1975).

<sup>248</sup>. *See supra* notes 12–16 and accompanying text.

intervening cause sufficient to break a causal chain and give rise to liability.<sup>249</sup> Instead, the plaintiff's actions are ordinarily regarded as part of the causal set and evaluated accordingly.<sup>250</sup> As with other potential superseding causes, the actions will not foreclose liability (in this instance, liability on the part of the State of Texas) due to "risks that made the actor's conduct tortious."<sup>251</sup> Again, the presence of undocumented immigrants in the border area is foreseeable.<sup>252</sup> Constitutionally, to the extent that this interpretation is predicated in a sense of moral or legal delict, it does not mesh with substantive due process doctrine any more than it does with common-law doctrine. It makes little sense to construe substantive due process doctrine as encompassing undocumented immigrants,<sup>253</sup> but then to exclude certain undocumented immigrants from substantive due process protections, based on where in the United States – and in which part of a particular state – they happened to reside.

*B. Individual Rights: Federalism's Failure?*

The border zone represents the failure of federal-state allocations of power alone to protect or further individual rights. In *Bond v. United States*, Justice Kennedy wrote for a unanimous Court, "By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power."<sup>254</sup> The opinion theorized

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249. See DOBBS ET AL., *supra* note 237, § 215.

250. *Id.*; see also RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 19 (AM. LAW INST. 2011).

251. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 34 (AM. LAW INST. 2011).

252. Even if unauthorized immigration were construed as a culpable act, because the presence of undocumented immigrants in the border zone is foreseeable, that act would not break the causal chain. See *id.* § 19 (viewing the touchstone of an actor's liability as foreseeability, even in light of other actors' culpable acts). This outcome makes sense in light of the Constitution's protection of substantive due process rights for unauthorized immigrants within the United States. See *supra* notes 74-79 and accompanying text. An alternative result would be inconsistent with prior cases, in which courts have viewed governmental actions singling out undocumented immigrants, like denial of bail, as violations of substantive due process—even though the governmental action would not have occurred but-for the individual's undocumented status. See *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 781 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 2046 (2015); *supra* notes 77-78 and accompanying text.

253. See *supra* notes 74-79 and accompanying text.

254. 131 S. Ct. 2355, 2364 (2011). The *Bond* Court held that an individual had standing to challenge the validity of the federal criminal statute under which she was indicted as a violation of the Tenth Amendment. *Id.* at 2360. *Bond's* holding refers to an "individual." *Id.* at 2363. The language in the opinion toggles between "individual" and "citizen" in describing the benefits of diffuse federal power. Compare *id.* at 2364 ("[F]ederalism secures

federalism as rights protecting for individuals, both through this diffusion of power and in the fueling of state innovation and responsiveness to individual voice.<sup>255</sup> Federalism scholars have viewed the LGBT marriage-equality movement as exemplifying this kind of rights-protecting function of federal-state allocations of power. Heather Gerken sees marriage equality as an instantiation of how “[f]ederalism and rights have long served as interlocking gears moving us forward.”<sup>256</sup> Ernest Young describes how exit and voice in the federal system furthered the interests of same-sex couples and fueled the LGBT-rights movement, because people were able to move to jurisdictions where advocates had exercised power to enact marriage equality locally.<sup>257</sup> Under this version of the story, Albert Hirschman’s familiar framework<sup>258</sup> indicates—in one way or another<sup>259</sup>—how federalism may provide safeguards for minority rights.

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to citizens the liberties that derive from the diffusion of sovereign power.” (quoting *New York v. United States*, 505 U.S. 144, 181 (1992))), *with id.* (“Federalism secures the freedom of the individual.”). This linguistic switching highlights the continued need to account for the rights of noncitizens not only on a doctrinal level but also in theorizing the relationship between distributions of state power and rights allocation.

255. *Id.* at 2364 (describing federalism as “ensuring that laws enacted in excess of delegated governmental power cannot direct or control [individuals’] actions,” as “enabl[ing] greater citizen involvement in democratic processes,” and as “mak[ing] government more responsive by putting the states in competition for a mobile citizenry” (citation omitted)). This framing echoes Albert Hirschman’s framing of means for expressing discontent. *See generally* ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970) (describing options for those dissatisfied with governmental policy choices).
256. Heather K. Gerken, Windsor’s *Mad Genius: The Interlocking Gears of Rights and Structure*, 95 B.U. L. REV. 587, 594 (2015); *see also* Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 28 (2015) (observing that Justice Kennedy’s opinions interpret federalism as “ensur[ing] . . . the *negative* liberty of shielding persons from government subordination that invades their equal dignity” and that “the dialogue in the states and the lower courts [following the invalidation of the Defense of Marriage Act] had begun to allow equal dignity to shake off its constraining armature”). Gerken notes that federalism does not inexorably lead to the realization of individual rights or success of social movements at the national level, since “the gears of rights and structure can move backwards” to state and local “[r]etrenchment.” Gerken, *supra*, at 599-600.
257. Ernest A. Young, *Exit, Voice, and Loyalty as Federalism Strategies: Lessons from the Same-Sex Marriage Debate*, 85 U. COLO. L. REV. 1133, 1137-48 (2014).
258. HIRSCHMAN, *supra* note 255.
259. Gerken emphasizes the way in which federalism may enable minority groups to influence a national debate but does not explicitly invoke Hirschman in discussing the marriage-equality movement, *see* Gerken, *supra* note 256, at 600, while Young stresses the importance of the specific components of Hirschman’s framework to that debate, *see* Young, *supra* note 257, at 1136-37.

These posited means for the federal system to protect the rights of particularly vulnerable individuals break down, though, for undocumented immigrants in the border zone. First, the combination of a federal administrative enforcement scheme and unrelated state regulation here does not create the diffusion of power preventing “government act[ion] in excess of . . . lawful powers” described in *Bond*.<sup>260</sup> Instead, in order for federalism to safeguard individual rights in this context, *increased* state attention to the effects of federal exercise of power—and action in accordance with that attention—is necessary. H.B. 2 demonstrates how the diffusion of power between the federal and state governments may cause the rights of an especially vulnerable minority group to fall through the political cracks.

Second, functionally, both exit and voice are greatly restricted for undocumented immigrants in this space—these individuals are limited in both political participation and movement. The posited consumer protections of federalism—shopping for the locale that maximizes utility<sup>261</sup>—are unavailable due to the restrictions on movement created by the checkpoints. Politically, undocumented persons cannot vote, and speaking out risks exposing one’s immigration status.<sup>262</sup> As a result, any “democratic churn” is unlikely to be availing for this particular minority group.<sup>263</sup>

Yet, the area between the internal checkpoints and the international border is also within both the United States and a particular state. And the Fourteenth Amendment is a constitutional commitment to shield *all* individuals, vis-à-vis state governments, from the deprivation of substantive due process rights.<sup>264</sup> The anomalous zone created by the border checkpoints may be an example of “immigration exceptionalism” in the Fourth Amendment context.<sup>265</sup> Border checkpoints and roving patrols by Border Patrol agents south of the checkpoint are justified under the Fourth Amendment, the Supreme Court has said, by the

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260. 131 S. Ct. at 2364.

261. *See id.*

262. This problem, of course, parallels an issue for the LGBT-rights movement before the decriminalization of same-sex sexual intimacy. *See* Rose Cuison Villazor, *The Undocumented Closet*, 92 N.C. L. REV. 1, 28 (2013) (sketching the similarities between undocumented status and sexuality in terms of stigma and criminal penalty).

263. *Cf.* Gerken, *supra* note 28, at 47 (describing the potential for local minority control, if achieved, to give rise to “a dynamic form of contestation, the democratic churn”).

264. *See supra* notes 74-79 and accompanying text (discussing how undocumented immigrants hold substantive due process rights).

265. *See* Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361, 1363 (1999) (characterizing “immigration exceptionalism” as “the view that immigration and alienage law should be exempt from the usual limits on government decisionmaking”).

“valid public interest” in restricting the “inland movement” of undocumented immigrants.<sup>266</sup> There is no congruent justification, though, for deprivation of access to a substantive due process right. First, unlike Fourth Amendment or procedural due process inquiries,<sup>267</sup> substantive due process analysis is not a balancing test that gives weight to a governmental interest.<sup>268</sup> And even if it were, the abortion right itself is not linked in any way to the checkpoints’ concern with movement into the rest of the country—unlike Fourth Amendment rights.<sup>269</sup> Immigration exceptionalism—some sort of idea that the federal governmental interest in creating and maintaining the administrative scheme overshadows the vindication of individual rights—has no doctrinal purchase. It especially does not make sense to read the federal interest as somehow overwhelming in light of the federal government’s continued exercise of discretion in allowing individuals to live for years or decades in the border zone.

By contrast, construing Texas’s action in enacting H.B. 2 as a “depriv[ation]” of undocumented immigrants’ abortion rights is consistent with a federalism that “protects the liberty of the individual from arbitrary power.”<sup>270</sup> Understanding state regulatory action that burdens rights access in this physical space as causal, such that it constitutes a “deprivation,” reflects the constitutional guarantee of substantive due process protections notwithstanding state exercises of power embodied in the Fourteenth Amendment. The details of the causation doctrine cohere with constitutional commitments.

This analysis, like the unconstitutional-conditions analysis of rights infringement, extends beyond the specificity of abortion and H.B. 2. One could imagine state regulations that diminish or foreclose access in the border zone to other rights that depend on travel for vindication—particularly contraception,

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266. *United States v. Martinez-Fuerte*, 428 U.S. 543, 545 (1976) (checkpoint stops); *United States v. Brignoni-Ponce*, 422 U.S. 873, 879 (1975) (roving patrols).

267. Both the Fourth Amendment and the procedural due process contexts are arguably areas of immigration exceptionalism. Courts have construed the procedural due process rights of those in immigration proceedings as narrower than typical procedural due process protections. *See Yamataya v. Fisher*, 189 U.S. 86, 100 (1903); *see also supra* note 74 and accompanying text. The border zone may be an example of immigration exceptionalism regarding Fourth Amendment protections given the anomalies of the roving patrols and the checkpoints. *Cf. Mayor*, *supra* note 33, at 647, 650-56 (characterizing Fourth Amendment rights, in particular, as “work[ing] differently near the border” due to “[their] connection to sovereignty concerns that are seen as fundamental to the nation-state’s survival”).

268. *See, e.g., supra* note 81 and accompanying text (outlining the *Casey* analysis).

269. *Cf. supra* notes 189-196 and accompanying text (discussing the germaneness requirement in the unconstitutional-conditions context).

270. *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011).

marriage, or access to medical care.<sup>271</sup> Individuals report forgoing specialized medical treatment due to fear of exposure to immigration enforcement at checkpoints.<sup>272</sup> If California, Arizona, New Mexico, or Texas passed legislation limiting who could dispense contraception, for example—such that the individuals who fulfilled that role in portions of the border area no longer could—a very similar problem would arise. Similarly, imagine a situation in which the only available marriage officiants offered by a state were located beyond the checkpoints. To the extent that other fundamental rights are predicated on spatial access, state actions that remove access in the border zone may pose constitutional problems.

### CONCLUSION

Texas's restrictions on abortion clinics, if they reach full effect, will impose constitutionally impermissible limitations on access to abortion for undocumented women in the border zone. Under doctrinal analysis specific to substantive due process, they create an undue burden on this group's right to obtain an abortion—such that the law is invalid as applied to the clinics in the border area. At a greater level of abstraction, they give rise to a constitutionally impermissible choice between vindication of the abortion right and lack of certain exposure to immigration enforcement—impermissibly conditioning a right within the denial of a “benefit,” under a broad construal of that word that is most consistent with the unconstitutional-conditions doctrine and an underlying purpose of preventing rights-pressuring choices. This framework is applicable not only in the abortion context but also to other substantive due process problems engendered by the checkpoints. Using either framework, and irrespective of any other constitutional flaws, H.B. 2 deprives more than eighty thousand spatially and legally marginalized women of the right to decide whether to terminate a pregnancy.

The border zone is a site of overlapping sovereigns' regulatory actions—of federal immigration enforcement efforts and of state regulation pursuant to state-level legislative goals. The pressure that the independent exercise of these

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271. Whether the negative right of access to medical care is in fact a fundamental right may be an open question. See *Washington v. Harper*, 494 U.S. 210, 221-22 (1990) (describing the “significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment”); cf. Joseph Blocher, *Rights To and Not To*, 100 CALIF. L. REV. 761, 770 (theorizing that a constitutional right may be construed as “a right to, a right not to, or a right to and not to”). H.B. 2 itself diminishes access to reproductive care, beyond the abortion context, for undocumented women in the border zone. See Gomez, *supra* note 57, at 99-100.

272. See Fernandez, *supra* note 5; Gamboa, *supra* note 6.

powers may place on the substantive due process rights of those caught in the spatial vise of the border zone has not been taken up. Spatially selective immigration enforcement's cabining of the movements of a certain set of individuals—undocumented immigrants—poses problems for theories of how federal choice may enable rights vindication for marginalized groups. As H.B. 2 demonstrates, federal-state allocations of power in the border space may endanger fundamental rights. The application of unconstitutional-conditions doctrine, in particular, provides a way to think through the constitutional problems posed by that endangerment.

The relationship between spatial access and substantive due process—and, inversely, between barriers to travel and rights burdens—is not unique to the space between internal immigration checkpoints and the border. Abortion cases frequently hinge on travel distances.<sup>273</sup> Recent North Carolina legislation permitting state magistrates to decline to marry same-sex couples might lead to similar travel problems burdening the right to marry.<sup>274</sup> The Fifth Circuit has struggled with the question of whether and when “a state can[] lean on its sovereign neighbors to provide protection of its citizens” substantive due process rights;<sup>275</sup> may a state ever foreclose all in-state options for abortion, knowing that out-of-state options exist?<sup>276</sup> In the extraterritorial context, the Supreme Court has weighed but reached no majority consensus as to whether a citizen has a substantive due process right to live in the United States with a noncitizen spouse.<sup>277</sup> The per se bar to undocumented immigrants' movement out of the border area throws into sharp relief a burden on vindication of substantive due process rights, in the form of barriers to travel, that typically take the form of a sliding scale.

This Note provides a case study of how the spatial immigration enforcement regime created by interior checkpoints may burden fundamental rights. This conclusion indicates that states that border other countries must

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273. *E.g.*, *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 796 (7th Cir. 2013) (reproducing a map of Wisconsin with charted travel distances in concentric circles in a decision granting a preliminary enjoining of a state statute requiring admitting privileges at a nearby hospital).

274. Act of June 11, 2015, ch. 75, 2015 N.C. Sess. Laws 2015.

275. *Jackson Women's Health Org. v. Carrier*, 760 F.3d 448, 457 (5th Cir. 2014), *petition for cert. filed*, 83 U.S.L.W. 3705 (U.S. Feb. 18, 2015) (No. 14-997).

276. *Compare Jackson Women's Health Org.*, 760 F.3d at 457 (finding that a Mississippi law that would lead to the closure of all state abortion clinics created an undue burden), *with Whole Woman's Health v. Cole*, 790 F.3d 563, 597-98 (5th Cir.) (finding no undue burden where a clinic remains available in the same larger metropolitan area, though out of state, and other clinics are available in the state), *mandate stayed pending judgment by* 135 S. Ct. 2923 (2015), *and cert. granted*, 136 S. Ct. 499 (Nov. 13, 2015).

277. *Kerry v. Din*, 135 S. Ct. 2128 (2015).

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think carefully about the spatially disparate effects of legislation that may place pressure on rights. More broadly, it demonstrates the need to take into account the spatial nature of substantive due process: the ways in which the exercise of fundamental rights depends in part on political and physical geography.