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Case Notes & Comments

A CHILL WIND BLOWS¹: UNDUE BURDEN IN THE WAKE OF WHOLE WOMAN'S HEALTH V. HELLERSTEDT

CATHERINE GAMPER*

The Supreme Court's latest addition to its abortion jurisprudence, *Whole Woman's Health v. Hellerstedt*,² contemplated a Texas abortion regulation that required abortion providers throughout the state to meet certain standards, including ambulatory surgical center standards and admitting privileges requirements.³ The Court struck down the Texas law, grounding its decision in its application of the undue burden test⁴: the regulations were unconstitutional because they posed a substantial obstacle in the path of women seeking abortions in Texas.⁵ The Court's decision in *Hellerstedt* indicates its commitment to the application of the undue burden test. As states continue to enact abortion laws, however, the ever-evolving nature of abortion jurisprudence remains unsettled.⁶

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1. This phrase references a quote from Justice Blackmun's dissenting opinion in *Webster v. Reproductive Health Services*. 492 U.S. 490, 560 (1989) (Blackmun, J., dissenting) ("For today, at least, the law of abortion stands undisturbed. For today, the women of this Nation still retain the liberty to control their destinies. But the signs are evident and very ominous, and a chill wind blows.").

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2. 136 S. Ct. 2292 (2016).

3. *Id.*; see *infra* Part I.B.

4. *Hellerstedt*, 136 S. Ct. at 2300; see *infra* Part I.A.3 (explaining the origin of the undue burden test). A law imposes an undue burden on a woman seeking an abortion if the law has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a non-viable fetus. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992).

5. *Hellerstedt*, 136 S. Ct. at 2300; see *infra* Part I.B.

6. As of July 21, 2016, thirty-two states attempted to ban all or some abortions in 2016 and fourteen states enacted other abortion regulations such as waiting periods, restrictions on medication abortion, and regulations on abortion clinics. ELIZABETH NASH ET AL., GUTTMACHER INST. LAWS AFFECTING REPRODUCTIVE HEALTH AND RIGHTS: STATE TRENDS AT MIDYEAR, 2016 (2016), <https://www.guttmacher.org/article/2016/07/laws-affecting-reproductive-health-and-rights-state-trends-midyear-2016>.

This Comment will first examine the trends underlying both the Supreme Court's and several federal district courts' analyses of the undue burden test. The Court's review of abortion regulations has evolved from *Roe v. Wade*'s⁷ landmark holding that abortion was a fundamental right to the introduction of the undue burden test as the constitutional standard of review of statutes regulating abortion.⁸ This Comment will then demonstrate that the Court's abortion jurisprudence is at an inflection point. With the advent of a Trump presidency, and the likelihood of two Trump appointees to the Court, the undue burden standard remains subject to change.

This Comment will argue that, as the Court sits today, abortion regulations are analyzed through a dual framework. Those laws that regulate an individual's *access to* abortions will likely survive the undue burden test while those laws that restrict an abortion provider's *provision of* abortions will likely fail.⁹ The effect of the Court's current abortion jurisprudence, however, leaves open an avenue for states to fashion novel and creative approaches to regulate abortion that fall somewhere between regulating an individual's *access to* and a doctor's *provision of* abortions.¹⁰ Abortion providers in states seeking to enact such laws must anticipate and plan for such regulations or face clinic closures. Likewise, women in those states may face greater challenges to obtaining abortions in their home states if the providers cannot keep up with their legislature's continuing efforts at regulation, which reduces access to the procedure.

I. BACKGROUND

A. *The Origin of Abortion as a Fundamental Right: From Roe to Casey*

The scope of a woman's right to an abortion has shifted significantly since the mid-twentieth century, from a privacy right to a reproductive autonomy right to a quasi-fundamental right. The Court first established early contraceptive rights in *Griswold v. Connecticut*,¹¹ securing a person's right to obtain contraception because it was included within the broader right to marital privacy.¹² This Section first describes how the Court grappled with the constitutional source of the contraceptive right, ultimately deciding that

7. 410 U.S. 113 (1973).

8. *See infra* Part I.A.3.

9. *See infra* Part II. A law that survives the undue burden test means that a court finds it constitutional whereas a law that fails the undue burden test renders it unconstitutional. *See infra* Part II.

10. *See infra* Part II.C.

11. 381 U.S. 479 (1965).

12. *Id.* at 486.

strict scrutiny applies to laws regulating access to contraceptives.¹³ Next, this Section discusses the well-known decision *Roe v. Wade*, which established the fundamental right to abortion and created the trimester framework to determine which level of review to apply to abortion regulations.¹⁴ Finally, this Section focuses on the status of abortion laws after *Roe*, as states continued to enact laws restricting access to abortion.¹⁵ The Court ultimately replaced the trimester framework with the undue burden test, which the Court continues to apply today.¹⁶

1. *The Right to Abortion Was First Grounded in an Individual's Right to Privacy and Shifted to One Grounded in an Individual's Right to Reproductive Autonomy*

The foundation of the legal right to abortion grew out of the Supreme Court's examination of early contraceptive rights, specifically a married couple's right to determine when and whether to have children without intrusion from the state. In *Griswold v. Connecticut*, the Court established a married couple's right to use contraceptives based on their fundamental right to marital privacy grounded in the Due Process Clause of the Fourteenth Amendment.¹⁷ In that case, the Court struck down a state law prohibiting married couples' use of contraception based on the privacy right's "recognition" as a "penumbral right[]." ¹⁸ The majority did not articulate a standard of review, but rather indicated that because the right to marital privacy was part of the penumbral privacy rights—such as those inherent in the First Amendment, Third Amendment, and Fourth Amendment—the marital privacy right was also a fundamental right.¹⁹ In his concurring opinion, Justice Harlan called for strict scrutiny review of laws affecting the right to privacy, which he argued was protected under the liberty prong of the Fourteenth Amendment substantive due process clause.²⁰ In dissent, Justice Black warned of the implications of establishing a fundamental right not enumerated in the Constitution.²¹ Finding a fundamental right to privacy, he argued, was akin to the often-stigmatized decision in *Lochner v. New York*,²² in which the Court found a fundamental right to contract under the liberty

13. See *infra* Part I.A.1.

14. See *infra* Part I.A.2.

15. See *infra* Part I.A.3.

16. See *infra* Part I.A.3.

17. 381 U.S. 479 (1965); U.S. CONST. amend. XIV. The Fourteenth Amendment forbids states from depriving any person of "life, liberty, or property, without due process of law." *Id.*

18. *Griswold*, 381 U.S. at 485.

19. *Id.* at 483–85.

20. *Id.* at 500 (Harlan, J., concurring).

21. *Id.* at 520–22 (Black, J., dissenting).

22. 198 U.S. 45 (1905).

prong of the Fourteenth Amendment.²³ Black argued that the decision in *Lochner* to “liberally use[]” the Due Process Clause to strike down economic legislation was a finding that “threaten[ed] . . . the tranquility and stability of the Nation” and was “laid . . . to rest once and for all” when *Lochner* was overruled.²⁴ With this split between Justices who found the privacy right fundamental on the one hand and, on the other hand, those who rejected the notion that the Constitution protected the right to privacy, the future of the marital right to privacy endured on rudimentary grounds.

The Court then shifted its view on the constitutional source of contraceptives from one of privacy to one of reproductive autonomy.²⁵ In a challenge to a statute prohibiting distribution of contraceptives to unmarried couples, the Court struck down the statute on equal protection grounds in *Eisenstadt v. Baird*.²⁶ The Court found that a Massachusetts law prohibiting contraceptives to unmarried couples was unconstitutional under rational basis review.²⁷ Even though the Court did not apply strict scrutiny,²⁸ this decision demonstrated that the Court would treat the right to reproductive autonomy, or “the decision whether to bear or beget a child,” as fundamental and laws prohibiting such reproductive autonomy would fail under rational basis review.²⁹ The Court ultimately determined that strict scrutiny should be applied to laws regulating contraceptives in *Carey v. Population Services International*.³⁰ Striking down a New York statute which prohibited anyone but a licensed physician from distributing contraceptives, the Court reasoned that a state cannot interfere with an individual’s right to make decisions in matters of child-bearing.³¹

2. *Roe Established Abortion as a Fundamental Right*

The Court established abortion in the first trimester as a fundamental right under the Due Process Clause of the Fourteenth Amendment in *Roe v.*

23. *Griswold*, 381 U.S. at 522.

24. *Id.* (citations omitted) (citing *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); and then citing *Olsen v. Nebraska ex rel. W. Reference & Bond Ass’n*, 313 U.S. 236 (1941)).

25. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

26. *Id.* at 454–55.

27. *Id.* at 443–45. Rational basis review requires a law to be rationally related to a legitimate state interest. *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938).

28. Strict scrutiny requires a law to be narrowly tailored to meet a compelling state interest. *Roe v. Wade*, 410 U.S. 113 (1973). As discussed in Part I.A.3, since *Planned Parenthood of Southeastern Pennsylvania v. Casey*, laws regulating abortion are not subject to rational basis nor strict scrutiny, but rather to the undue burden test. 505 U.S. 833 (1992).

29. *Id.* at 453 (citing *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Jacobson v. Massachusetts*, 197 U.S. 11, 29 (1905)).

30. 431 U.S. 678, 686 (1977).

31. *Id.* at 688–89.

Wade.³² The Court grounded the decision in its creation of a trimester framework for determining when the state has a legitimate interest in regulating abortion.³³ Based on the substantive due process clause of the Fourteenth Amendment, Justice Blackmun's majority opinion found a fundamental right to terminate a pregnancy during the first trimester of pregnancy.³⁴ During the first trimester, the state did not have a compelling interest to prohibit abortion.³⁵ During the second trimester, the state could regulate abortion to protect the woman's health, but the state could not regulate to protect the fetus until viability.³⁶ During the third trimester, when viability was expected, the state could regulate or prohibit abortion except when the life or health of the woman was at stake.³⁷ In dissent, Justice Rehnquist argued that because abortion is a medical procedure, the state had an interest in regulating it just like any other medical procedure and, therefore, the Court should have deferred to the states.³⁸

The right to abortion remained a fundamental right for over twenty years, during which time the Court consistently struck down state attempts to regulate or prohibit the procedure. The Court considered cases involving state statutes that required second trimester abortions to be performed in a hospital, prohibited a doctor from performing an abortion until twenty-four hours after the pregnant woman signed a consent form, and required prior written consent from a woman's spouse.³⁹ The Court struck down these regulations under the trimester framework established in *Roe*.⁴⁰ In a handful of cases involving a minor's access to abortion, however, the Court upheld statutes that required parental consent.⁴¹

32. 410 U.S. at 155–56, 164–65.

33. *Id.* at 164–66.

34. *Id.*

35. *Id.* at 163–64 (“With respect to the State’s important and legitimate interest in potential life, the ‘compelling’ point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother’s womb.”).

36. *Id.* (“With respect to the State’s important and legitimate interest in the health of the mother, the ‘compelling’ point, in the light of present medical knowledge, is at approximately the end of the first trimester.”).

37. *Id.* at 164–65.

38. *Id.* at 172–73 (Rehnquist, J., dissenting).

39. *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) (finding informed consent requirements unconstitutional); *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416 (1983) (finding twenty-four hour waiting period requirement and hospital requirement unconstitutional); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) (finding spousal consent requirement unconstitutional).

40. *Thornburgh*, 476 U.S. at 759–71; *Akron Ctr. for Reprod. Health*, 462 U.S. at 430–31; *Danforth*, 428 U.S. at 67–72.

41. *H.L. v. Matheson*, 450 U.S. 398 (1981); *Bellotti v. Baird*, 443 U.S. 622 (1979). In *Bellotti*, the Court upheld a minor consent requirement because “the constitutional rights of children cannot be equated with those of adults” based on their “peculiar vulnerability” and “their inability to make critical decisions in an informed, mature manner.” *Bellotti*, 443 U.S. at 634.

3. *Abortion Is No Longer a Fundamental Right After Casey Discarded the Trimester Framework and Created the Undue Burden Test*

The Court ultimately discarded the trimester framework in *Planned Parenthood of Southeast Pennsylvania v. Casey*⁴² and instituted the undue burden test, which analyzes the purpose of and burdens imposed by abortion regulations.⁴³ Before *Casey* was decided, however, the Court first considered reformulating the trimester framework in *Webster v. Reproductive Health Services*,⁴⁴ a case that challenged the status of the definition of viability relied on in *Roe*.⁴⁵ Failing to muster a majority vote to overrule *Roe*, Justice Blackmun warned that *Roe*'s decision would be eroded through state legislative initiatives that would enact increasingly restrictive abortion laws as "test cases" to challenge *Roe*'s framework.⁴⁶

The reformulation of the trimester framework that began in *Webster* was completed in *Casey*. The *Casey* Court changed the language of the abortion debate when, writing for the majority, Justice O'Connor explained that a state regulation will impose an undue burden on a woman seeking an abortion if it has the purpose or effect of placing a *substantial obstacle* in the path of a woman seeking an abortion of a non-viable fetus.⁴⁷ In dissent, Chief Justice Rehnquist, joined by Justices Thomas and White, opined that the majority had significantly altered *Roe*'s meaning, that the right to abortion was no longer fundamental, and that the new test will serve only to complicate the abortion debate.⁴⁸ The Court ultimately struck down only one provision of the law at issue as imposing an undue burden: the spousal notification requirement.⁴⁹

The Court first applied the undue burden test in *Stenberg v. Carhart*,⁵⁰ when it considered the constitutionality of a Nebraska statute banning partial-

42. 505 U.S. 833 (1992).

43. *Id.* at 870.

44. 492 U.S. 490 (1989).

45. *Id.* at 501, 518. The *Webster* Court explained:

The key elements of the *Roe* framework—trimesters and viability—are not found in the text of the Constitution or in any place else one would expect to find a constitutional principle. Since the bounds of the inquiry are essentially indeterminate, the result has been a web of legal rules that have become increasingly intricate, resembling a code of regulations rather than a body of constitutional doctrine.

Id. at 518.

46. *Id.* at 538.

47. *Casey*, 505 U.S. at 846.

48. *Id.* at 944 (Rehnquist, J., dissenting).

49. *Id.* at 898 (majority opinion) ("A State may not give to a man the kind of dominion over his wife that parents exercise over their children.").

50. 530 U.S. 914 (2000).

birth abortions.⁵¹ Justice Breyer found the statute unconstitutional because it posed an undue burden on women by failing to provide a health exception for the mother and because its language could be read to prohibit common pre-viability procedures.⁵² The Court applied the undue burden test for a second time in *Gonzales v. Carhart*,⁵³ but upheld the challenged ban on partial-birth abortions.⁵⁴ The decision came following the retirement of Justice O'Connor and the appointment of Justice Alito, and concerned a statute that banned the practice of partial-birth abortions, even in cases where the health of the mother was at stake.⁵⁵ Justice Kennedy's majority opinion applied rational basis review to the partial-birth abortion ban and ultimately deferred to legislative findings on the procedure, such as its gruesome nature and threat to the dignity of the medical profession.⁵⁶ Justice Ginsburg's dissent decried the majority's neglect of the need to make medical decisions on a case-by-case basis, and failure to favor a woman's health in situations where a partial-birth abortion may be medically advised.⁵⁷

B. *The Hellerstedt Decision*

In 2013, the Texas legislature passed House Bill 2 ("H.B. 2"),⁵⁸ which, among other provisions, required that all abortion providers have active admitting privileges at a hospital no further than thirty miles from the abortion provider's location ("the admitting privileges requirement").⁵⁹ The bill also mandated that abortion centers meet the minimum standards adopted by ambulatory surgical centers ("the surgical center requirement").⁶⁰ The legislature's stated purpose of the bill was to "raise the standard and quality

51. *Id.* at 920–22. Partial-birth abortions or "intact dilation and evacuation (D&X)" or "D&E" involves deliberate dilation of the cervix and removal of the fetus from the cervix either intact in one pass by partially evacuating the intracranial contents of the living fetus (collapsing the fetus' skull) so that the skull may pass through the cervix. *Id.* at 926–29. At the time of decision, there was no reliable reporting on the number of D&X abortions performed annually, but estimates ranged between 640 and 5,000 per year. *Id.* at 929.

52. *Id.* at 930.

53. 550 U.S. 124 (2007).

54. *Id.* at 132–33.

55. *Id.* at 141. The partial-birth abortion ban allowed an exception for cases where the woman's life was at stake. *Id.*

56. *Id.* at 156–58.

57. *Id.* at 170–71 (Ginsburg, J., dissenting).

58. TEX. HEALTH & SAFETY CODE ANN. §§ 171.0031, 245.010(a) (West Supp. 2016).

59. *Whole Woman's Health v. Lakey*, 46 F. Supp. 3d 673, 677 (W.D. Tex. 2014), *vacated sub nom. Whole Woman's Health v. Hellerstedt*, 833 F.3d 565 (5th Cir. 2016) (citing HEALTH & SAFETY § 171.0031(a)(1); 25 ADMIN. CODE §§ 139.53(c), .56(a)).

60. *Id.* (citing HEALTH & SAFETY §§ 245.010(a), 243.010; 25 ADMIN. CODE § 139.40). The bill also included a medication abortion provision. HEALTH & SAFETY § 171.0061. A discussion of medication abortions is beyond the scope of this Comment, as this Comment focuses only on surgical abortions.

of care for women seeking abortions and to protect the health and welfare of women seeking abortions.”⁶¹ Abortion clinics had to comply with the admitting privileges requirement beginning on October 31, 2013.⁶² Abortion clinics, however, had roughly fourteen months after enactment of the bill (September 2014) to meet the standards of the surgical center requirement.⁶³ This Section first addresses the initial challenges to the bill, which were largely unsuccessful and created various preemptive issues for later abortion providers challenging the bill.⁶⁴ This Section then traces and focuses on the procedural posture of the second challenge to the bill.⁶⁵ Finally, this Section outlines the Court’s reasoning and analysis of the current undue burden standard in the abortion context.⁶⁶

1. *Initial Challenges to H.B. 2: Abbott I and Abbott II*

Shortly after enactment of H.B. 2, several abortion providers filed suit in the Western District of Texas, seeking declaratory and injunctive relief from the admitting privileges requirement of the bill.⁶⁷ The court granted injunctive relief to the abortion providers.⁶⁸ Three days later, the Fifth Circuit vacated the district court’s injunction, allowing the admitting privileges requirement to take effect.⁶⁹ Several months later, the Fifth Circuit issued an opinion reversing in part and affirming in part the district court’s decision.⁷⁰ The plaintiffs did not challenge the surgical center provision and they did not seek certiorari from the Supreme Court.⁷¹

61. *Whole Woman’s Health v. Cole*, 790 F.3d 563, 576 (5th Cir. 2015), *modified*, 790 F.3d 598 (5th Cir. 2015), *rev’d and remanded sub nom.* *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (citing SENATE COMM. ON HEALTH & HUMAN SERVS., BILL ANALYSIS, TEX. H.B. 2, 83d Leg., 2d C.S., at 1 (2013)).

62. *Id.* at 576 n.12.

63. *Id.* at 576–77. The surgical center standards fall into three categories of regulation: first, “operating requirements” such as record keeping systems, staffing, and cleanliness, 25 TEX. ADMIN. CODE §§ 135.4 to .17, 135.26 to .27, second, “fire prevention and general safety requirements,” *id.* §§ 135.41 to .43, and third, “physical plant and construction requirements” such as electrical, and plumbing, *id.* §§ 135.51 to .56.

64. *See infra* Part I.B.1.

65. *See infra* Part I.B.2.

66. *See infra* Part I.B.3.

67. *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 951 F. Supp. 2d 891, 909 (W.D. Tex. 2013), *rev’d in part*, 748 F.3d 583 (5th Cir. 2014). Plaintiffs also sought relief from the medication abortion provision of the bill. *Id.*

68. *Id.*

69. *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott (Abbott I)*, 734 F.3d 406, 419 (5th Cir. 2013).

70. *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott (Abbott II)*, 748 F.3d 583, 605 (5th Cir. 2014).

71. *Whole Woman’s Health v. Cole*, 790 F.3d 563, 577 (5th Cir. 2015), *modified*, 790 F.3d 598 (5th Cir. 2015), *rev’d and remanded sub nom.* *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

2. Procedural Posture

In April 2014, a group of abortion providers, some of whom were also plaintiffs in the *Abbott* cases, filed suit in the Western District of Texas seeking to enjoin the admitting privileges requirement on physicians at two abortion facilities and the surgical center requirement.⁷² The plaintiffs claimed that the two provisions violated the Fourteenth Amendment of the Constitution as interpreted in *Casey*.⁷³ After a bench trial, the district court granted the plaintiffs injunctive relief, finding sufficient evidence that the two provisions were unconstitutional because the act, operating as a whole, placed an “impermissible obstacle” on women seeking pre-viability abortions.⁷⁴

Relying on the Court’s decisions in *Roe* and *Casey*, the district court placed considerable weight on the stipulated facts of the case.⁷⁵ The court highlighted the low number of abortion facilities (eight) that would exist in Texas if the surgical center requirement went into effect, as well as statistics showing that 60,000 to 72,000 legal abortions are performed annually in Texas, the second highest rate in the United States.⁷⁶ Additionally, the court found that once the surgical center requirement went into effect, two million women would live farther than fifty miles from a legal abortion provider.⁷⁷ Arguing that “*Roe*’s essential holding guarantee[d that] all women, not just those of means, [have] the right to a previability abortion,” and distinguishing the regulations at issue in *Casey*,⁷⁸ the court found that the two provisions at issue “erect[ed] a particularly high barrier for poor, rural, or disadvantaged women throughout Texas, regardless of the absolute distance they may have to travel to obtain an abortion.”⁷⁹ Accordingly, the court found that the act as a whole created obstacles to pre-viability abortion and the “severity of the burden imposed by both requirements [was] not balanced by the weight of the interests underlying them.”⁸⁰

72. *Whole Woman’s Health v. Lakey*, 46 F. Supp. 3d 673 (W.D. Tex. 2014), *aff’d in part, vacated in part, rev’d in part sub nom.* *Whole Woman’s Health v. Cole*, 790 F.3d (5th Cir. 2015), *modified*, 790 F.3d 598 (5th Cir. 2015), *rev’d and remanded sub nom.* *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

73. *Id.* at 687.

74. *Id.* at 687–88.

75. *Id.* at 680–82.

76. *Id.* at 681.

77. *Id.*

78. *Id.* at 683–84 (contrasting the statutes at issue in *Casey* with the act at issue in *Lakey* by arguing that the challenged requirements in *Lakey* “are solely targeted at regulating the performance of abortions, not the decision to seek an abortion,” as was the case in *Casey*).

79. *Id.* at 683.

80. *Id.* at 684.

The Fifth Circuit stayed the district court's injunction, but the providers appealed to the Supreme Court.⁸¹ The Supreme Court vacated the Fifth Circuit's stay, which reinstated the district court's injunction.⁸² Back before the Fifth Circuit, that court found both provisions of the law to be constitutional.⁸³ Despite the fact that the Fifth Circuit found that res judicata barred plaintiffs from bringing the suit, the court addressed the merits of the case, finding that the district court erred in concluding that the statutes were unconstitutional.⁸⁴ Under rational basis review, the Fifth Circuit found that both provisions were rationally related to the legitimate state interest of ensuring the health and safety of women seeking pre-viability abortions.⁸⁵ Further, the court concluded that the plaintiffs failed to prove that the legislature had an improper purpose in passing the law and also failed to prove that the surgical center requirement imposed an undue burden on a large fraction of women for whom it is relevant.⁸⁶ Regarding the as-applied challenges, the challenge to the surgical center requirement as applied to the Whole Woman's Health clinic in McAllen, Texas, and the challenge to the admitting privileges requirement as applied to a specific doctor, Dr. Lynn, when working at the McAllen clinic, the court affirmed the district court's injunction.⁸⁷ The court reasoned that the factual contexts of those challenges were not yet developed when the *Abbott* decisions were handed down.⁸⁸ The abortion providers sought certiorari, which the Supreme Court granted.⁸⁹

3. *The Hellerstedt Court's Reasoning*

The Court held that the Texas law posed an undue burden on a woman's right to obtain a pre-viability abortion. First finding that the claims brought by petitioners were not precluded by res judicata, the Court proceeded to the merits of the case, grounding its undue burden analysis in three Supreme Court decisions⁹⁰ on abortion.⁹¹ On the issue of claim preclusion, the Court argued that the claims were significantly different from those raised in the

81. *Whole Woman's Health v. Cole*, 790 F.3d 563, 567 n.3 (5th Cir. 2015), *modified*, 790 F.3d 598 (5th Cir. 2015), *rev'd and remanded sub nom.* *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

82. *Whole Woman's Health v. Lakey*, 135 S. Ct. 399 (2014) (mem).

83. *Cole*, 790 F.3d at 567.

84. *Id.* at 583–84, 598.

85. *Id.* at 585–86.

86. *Id.*

87. *Id.*

88. *Id.* at 592–98.

89. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

90. *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Gonzales v. Carhart*, 550 U.S. 124 (2007).

91. *Hellerstedt*, 136 S. Ct. at 2300.

Abbott cases because they arose from a set of facts developed subsequent to the enforcement of the admitting privileges requirement, and which were “unknowable” prior to enforcement of the law.⁹² Further, the two provisions had “meaningful differences” with different enforcement dates, and although they are part of one overall regulatory scheme, courts should still treat challenges to each provision as “separate claims.”⁹³ Writing for the majority, Justice Breyer argued that both the admitting privileges and the surgical center requirements imposed an undue burden on a woman’s right to a pre-viability abortion, given the “virtual absence of any health benefit” of the two provisions.⁹⁴

Regarding the admitting privileges requirement, the Court reasoned that the purpose of the requirement was to ensure that women have easy access to a hospital in the event complications arise during an abortion procedure.⁹⁵ The Court, however, relying on the studies and expert testimony on abortion complications considered by the district court, emphasized the district court’s finding that the law brought about no such health-related benefit.⁹⁶ Considering the surgical center requirement, the Court found that the requirement was not based on any differences between abortion procedures or other similar surgical procedures related to preserving women’s health.⁹⁷ Rather, the requirements such as mandating scrub facilities, having a one-way traffic pattern, and requiring safeguards for heavily sedated patients are both inappropriate and unnecessary because abortions are not performed under general anesthesia or deep sedation.⁹⁸ Finally, the Court argued that the high costs of instituting the surgical center standards would result in clinics closing, which would neither ensure better care nor increase the frequency of better outcomes because the current clinics could have to serve five times their usual number of patients.⁹⁹ In a concurring opinion, Justice Ginsburg criticized the Court’s judicial review of any “laws like H.B. 2 that ‘do little or nothing for health, but rather strew impediments to abortion’” and warned that such laws “cannot survive judicial inspection.”¹⁰⁰

92. *Id.* at 2306–07.

93. *Id.* at 2308 (quoting 18 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4408 (2d ed. 2002, Supp. 2015)).

94. *Id.* at 2311–19.

95. *Id.* at 2311 (citing Brief for Respondents at 32–37, *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (No. 15-0274)).

96. *Id.* at 2312–13.

97. *Id.* at 2315.

98. *Id.* at 2315–16.

99. *Id.* at 2317–18.

100. *Id.* at 2320–21 (Ginsburg, J., concurring) (quoting *Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908, 921 (7th Cir. 2015)).

In his dissent, Justice Thomas argued that the majority failed to apply the correct standard of review to the law at issue.¹⁰¹ Arguing that the majority “rewrote” the undue burden test espoused in *Casey* in such a way that it makes the test “much more akin to strict scrutiny,” Justice Thomas highlighted three reasons why the majority erred in its application of the test.¹⁰² First, he argued that the balancing test used by the majority was not in line with the undue burden test in *Casey* because *Casey* did not weigh the benefits and burdens of the spousal notification law it considered. Rather, *Casey* focused on the likelihood that the law would prevent women from obtaining an abortion.¹⁰³ Second, he argued that the majority did not respect the legislature’s judgment in this situation that involved a medical uncertainty.¹⁰⁴ Finally, he argued, “the majority overrule[d] another central aspect of *Casey* by” instituting a higher standard than rational basis for abortion laws, “even if they do not substantially impede access to abortion.”¹⁰⁵

Justice Alito authored a separate dissent joined by Chief Justice Roberts and Justice Thomas in which he argued that the *Abbott II* decision precluded the petitioners from bringing suit in *Whole Woman’s Health v. Lakey*.¹⁰⁶ Finding that the two claims were part of the very same transaction (the enactment of the two requirements), and that “new and better evidence” does not give a plaintiff a new claim on the same set of operative facts, the dissent reasoned that issue preclusion barred petitioners from bringing the suit in the first place.¹⁰⁷ Justice Alito argued further that even if *res judicata* did not apply to the claims, the Texas law was nonetheless constitutional because petitioners failed to show that the law posed an undue burden on women seeking pre-viability abortions.¹⁰⁸ Highlighting that what matters is not the law’s effect on the petitioners as abortion providers, but rather the effect on *patients*, the dissent found the petitioners failed to show that the provisions had “an unconstitutional impact on at least a ‘large fraction’ of Texas women of reproductive age.”¹⁰⁹

In summation, while the abortion right was deemed fundamental in *Roe* because it derived from a woman’s right to privacy and reproductive

101. *Id.* at 2324 (Thomas, J., dissenting).

102. *Id.*

103. *Id.* (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 893 (1992)).

104. *Id.* at 2325.

105. *Id.*

106. *Id.* at 2330 (Alito, J., dissenting).

107. *Id.* at 2339–40.

108. *Id.* at 2342–43.

109. *Id.* at 2343 (quoting *Gonzales v. Carhart*, 550 U.S. 124, 167–68 (2007)).

autonomy,¹¹⁰ the abortion right is no longer fundamental.¹¹¹ Instead, the Court grants that the state has a legitimate interest in regulating abortion in certain instances,¹¹² such as the use of partial-birth abortions or requiring informed parental consent for a minor's abortion. The Court, however, requires that an abortion regulation not create an undue burden for a woman seeking an abortion.¹¹³ The Court has found that regulations that pose an undue burden include spousal notification requirements, admitting privileges requirements, and ambulatory surgical center requirements.¹¹⁴

II. ANALYSIS

In the wake of the *Hellerstedt* decision, state laws aiming to regulate abortion are in a precarious position. This is because, as a result of the holding, future application of the undue burden test remains unclear. The Court currently reviews abortion regulations through a dual framework. First, it tends to uphold abortion regulations that relate to women's safety and wellbeing on an individual basis, such as parental consent and waiting periods.¹¹⁵ Second, it tends to strike down abortion regulations that are aimed at regulating the institutional implementation and accessibility of abortion, such as the ambulatory surgical center and admitting privileges requirements in *Hellerstedt*.¹¹⁶ Additionally, the Court is more likely to find an undue burden in a law that regulates an aspect of the broader institutional *provision* of abortion, but it is not as likely to find an undue burden in a law that regulates an individual's *access* to abortion.¹¹⁷

The difference between provision and access is a subtle one, but the dual framework represents the Court's refusal to treat abortion as a fundamental right and instead as a right that can be regulated by states so long as the right is not substantially burdened.¹¹⁸ If the dual framework trend continues, the future of the abortion right will remain "trapped"¹¹⁹ between states continuing

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

111. *See supra* Part I.A.

112. *See supra* Part I.A.

113. *See supra* Part I.A.

114. *See supra* Part II.B.

115. *See infra* Part II.A.

116. *See infra* Part II.B.

117. *See infra* Parts II.A–B.

118. *See infra* Parts II.A–B.

119. "Trapped" is the name of a 2016 documentary produced and directed by Dawn Porter, which highlights the "TRAP" ("Targeted Regulation of Abortion Providers") laws in several southern states, including Texas, Alabama, and Louisiana. TRAPPED (Trilogy Films 2016). The documentary provided key insight for this Comment into the professional lives of abortion providers, physicians, nurses and administrators and the day-to-day impact of abortion laws in their clinics. *Id.*

to fashion new and creative laws regulating abortion on the one hand, and courts aiming to make sense of the undue burden standard on the other.¹²⁰

Gauging the current Court's approach to abortion regulations is two-fold. First, one must determine what *type* of abortion regulation is at issue: an individual-based regulation or an institutional-based regulation. Second, a court should evaluate the overall impact of the regulation on a woman's access to abortion, weighing the *burden* of the regulation on a woman seeking abortion against the *benefit* it aims to achieve for that same woman. This Part first discusses the individual-based abortion laws that are consistently upheld by the Court.¹²¹ Next, this Part examines the institutional-based regulations and their failure to pass the undue burden test as espoused in *Hellerstedt*.¹²² Finally, this Part explores possible policy consequences of the undue burden standard after *Hellerstedt*.¹²³

A. *The Court Upholds Laws Regulating Access to Abortions on Individual Basis*

Casey's undue burden standard peeled away the layer of fundamental right protection from the right to abortion, making it possible for states to pass more restrictive laws regulating an individual's access to abortion. Several federal appellate courts have found laws that require counseling, twenty-four- to forty-eight-hour waiting periods, or parental consent requirements, do not impose an undue burden on women seeking abortions.¹²⁴ In applying the undue burden standard, for example, the Court in *Casey* upheld Pennsylvania's informed consent, twenty-four-hour waiting period, and parental consent laws.¹²⁵ The *Casey* Court reasoned that while a woman has a right to an abortion before viability, states are not prohibited from "taking steps to ensure that this choice is thoughtful and informed" and "[s]tates are free to enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning."¹²⁶ Therefore, the Court found that regulations such as requiring a woman to wait twenty-four hours between the provision of informed consent information

120. *See infra* Part II.C.

121. *See infra* Part II.A.

122. *See infra* Part II.B.

123. *See infra* Part II.C.

124. *See, e.g.*, *Planned Parenthood Minn., N. Dakota, S. Dakota v. Rounds*, 686 F.3d 889 (8th Cir. 2012) (finding constitutional a Minnesota law requiring disclosures of the increased risk of suicide to women seeking abortions); *Cincinnati Women's Servs. v. Taft*, 468 F.3d 361 (6th Cir. 2006) (finding constitutional an Ohio law requiring a twenty-four-hour waiting period prior to an abortion procedure); *Manning v. Hunt*, 119 F.3d 254 (4th Cir. 1997) (upholding a North Carolina statute requiring parental or judicial consent for a minor's abortion).

125. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 880, 887, 899 (1992).

126. *Id.* at 872–73.

and the performance of the abortion did not create an undue burden.¹²⁷ Although such regulations may pose “particularly burdensome” financial and travel restrictions on women, the twenty-four-hour waiting periods were not *substantial* obstacles to women seeking abortions.¹²⁸ The Court does not ignore the fact that such regulations may make it harder for women to access abortions.¹²⁹ The Court did not find, however, that such obstacles left women with no realistic choice.¹³⁰

Casey enabled states to increase the barriers to an individual’s decision to have an abortion. States continue to enact laws that institute mandatory waiting periods, informed consent procedures, and parental involvement regulations, and these laws are considered constitutional because the restrictions they place do not amount to an undue burden on the individual’s choice to procure an abortion. For example, the Guttmacher Institute reported that as of January 1, 2017, thirty-five states require counseling before an abortion, twenty-seven of which also require waiting periods (usually twenty-four hours), and thirty-seven states require some type of parental involvement in a minor’s decision to have an abortion.¹³¹ Further, twenty-nine of the thirty-five states that require counseling also require that providers give specific information to women seeking abortions, fourteen states require that clinics provide in-person counseling before the waiting period begins, and three states mandate that an abortion provider perform an ultrasound on a woman seeking an abortion.¹³²

Casey is instructive in these situations, because there the Court made clear that even if “a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it.”¹³³ Likewise, though waiting period and informed consent laws may delay

127. *Id.* at 886–87.

128. *Id.* at 886.

129. *Id.* at 877–78.

130. *See id.* (“Regulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman’s exercise of the right to choose.”).

131. *Counseling and Waiting Periods for Abortion*, GUTTMACHER INST., <https://www.guttmacher.org/state-policy/explore/counseling-and-waiting-periods-abortion> (last updated Jan. 1, 2017); *Parental Involvement in Minors’ Abortions*, GUTTMACHER INST., <https://www.guttmacher.org/state-policy/explore/parental-involvement-minors-abortions> (last updated Jan. 1, 2017). The Guttmacher Institute is a “research and policy organization committed to advancing sexual and reproductive health and rights in the United States and globally.” *About Us*, GUTTMACHER INST., <https://www.guttmacher.org/about> (last visited Apr. 2, 2017). All data is as of January 1, 2017.

132. *Counseling and Waiting Periods for Abortion*, *supra* note 131; *Requirements for Ultrasound*, GUTTMACHER INST., <https://www.guttmacher.org/state-policy/explore/requirements-ultrasound> (last updated Jan. 1, 2017).

133. *Casey*, 505 U.S. at 874.

the abortion procedure, the effect on individuals exercising their choice to obtain an abortion, without more, is not substantial enough to invalidate them.¹³⁴ In a study conducted by the Guttmacher Institute in 2014, researchers found that seventy-six percent of patients could obtain abortions within seven days of making the appointment.¹³⁵ Further, fifty-four percent of these women lived in a state without a waiting period, twenty-four percent lived in a state with a waiting period that required in-person counseling, and twenty-two percent lived in a state with a waiting period but no required in-person counseling.¹³⁶ On an individual basis, women who face obstacles, such as having to wait twenty-four hours before the abortion, are still able to access the abortion clinics and providers, thereby not unduly restricting their right to choose an abortion.

B. The Court Finds That Laws Regulating Institutional Aspects of the Provision of Abortion Impose an Undue Burden

Hellerstedt represents the Court's most recent analysis and application of the undue burden standard, and highlights the Court's unwillingness to uphold state laws that require providers to meet standards that it views as unrealistic, difficult to implement, or result in closing abortion clinics statewide. The *Hellerstedt* Court found the Texas admitting privileges and ambulatory surgical center requirements imposed an undue burden on women in the state because, once the law went into effect, only about seven or eight abortion clinics in the state could remain open.¹³⁷ These remaining clinics would not be able to meet the demand for abortion in the State of Texas, where 60,000 to 72,000 women seek abortions every year.¹³⁸ The Court emphasized the drastic effect such laws would have on abortion clinics and their consequent failure to adequately meet the demonstrated demand of Texas women for abortions.¹³⁹ If the Texas law were to go into effect, women seeking abortions in Texas would have to "travel long distances to get abortions in crammed-to-capacity superfacilities" and such facilities, "attempting to accommodate sudden, vastly increased demand, may find that

134. *See id.* ("Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.")

135. RACHEL K. JONES & JENNA JERMAN, GUTTMACHER INST., TIME TO APPOINTMENT AND DELAYS IN ACCESSING CARE AMONG U.S. ABORTION PATIENTS 1 (2016).

136. *Id.*

137. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2316 (2016).

138. *Id.*

139. *Id.* at 2318.

quality of care declines.”¹⁴⁰ Contrary to laws requiring women be fully informed and wait twenty-four hours before proceeding with their choice to have an abortion, the laws struck down in *Hellerstedt* created an undue burden on women. The Court found the obstacles so substantial to women seeking an abortion in Texas that the laws could be seen as eliminating the woman’s ability to choose an abortion in the first place.¹⁴¹

As states enact similar laws that regulate physician and hospital requirements, *Hellerstedt* appears to sound the death knell for the constitutional status of those laws. For example, the Virginia Board of Health recently voted in an 11-4 decision to remove regulations on abortion facilities.¹⁴² The Virginia regulations included provisions similar to those at issue in *Hellerstedt*, such as requiring abortion providers “to meet hospital-like building standards.”¹⁴³ An attorney speaking on behalf of the Virginia Attorney General’s Office stated that in light of *Hellerstedt*, Virginia’s regulations “would not likely survive a constitutional challenge.”¹⁴⁴ Similarly, in *Burns v. Cline*,¹⁴⁵ the Supreme Court in Oklahoma struck down abortion provisions requiring strict licensing and inspection schemes for abortion facilities.¹⁴⁶ In a concurring opinion, Vice Chief Justice Combs pointed to *Hellerstedt*’s espousal of *Casey*’s undue burden standard, and conducted an undue burden analysis of the Oklahoma law, stating that the law “create[d] an open-ended array of regulatory hurdles that subject practitioners to harsh penalties for any potential violation” and that the law “will make it considerably more difficult for providers to operate, and accordingly will make it more difficult for the women of Oklahoma to exercise their federally-recognized constitutional right to control their own reproductive futures.”¹⁴⁷

Finally, the most recent and relevant federal case since the *Hellerstedt* decision is one from the U.S. District Court for the Middle District of

140. *Id.* (citation omitted) (citing *Whole Woman’s Health v. Lakey*, 46 F. Supp. 3d 673, 682 (W.D. Tex. 2014), *vacated sub nom.* *Whole Woman’s Health v. Hellerstedt*, 833 F.3d 565 (5th Cir. 2016)).

141. *Id.*

142. Katie Demeria, *Virginia Board of Health Votes to Remove Contested Abortion Regulations*, RICH. TIMES-DISPATCH (Oct. 24, 2016, 10:15 PM), http://www.richmond.com/news/virginia/government-politics/article_c49cb635-65d6-5b25-b344-e00f48afe8cc.html; VIRGINIA STATE BOARD OF HEALTH, MEETING MINUTES 6 (Oct. 24, 2016).

143. Demeria, *supra* note 142.

144. *Id.* (quoting a statement by Cynthia Bailey with the state Attorney General’s office to the Virginia Board of Health during a specially scheduled meeting to vote on pending abortion regulations in the state).

145. 382 P.3d 1048 (Okla. 2016).

146. *Id.*

147. *Id.* at 1057 (Combs, V.C.J., concurring).

Alabama, *West Alabama Women's Center v. Miller*,¹⁴⁸ in which a federal district court found that two abortion regulation provisions, a school-proximity provision and a fetal-demise provision, imposed undue burdens on women seeking abortions in the state.¹⁴⁹ The court relied on *Hellerstedt* to show that “imposing substantial costs on abortion providers to comply with a statute places burdens on women’s access to abortion—regardless of the financial circumstances of the clinics.”¹⁵⁰ Because the Alabama law would force two out of only five abortion clinics in the State to close, the court found two important results making this effect an undue burden on women in Alabama.¹⁵¹ First, the closure of the two clinics would eliminate a woman’s right to choose to have an abortion after fifteen weeks of pregnancy because those were the only clinics performing such abortions in Alabama.¹⁵² Second, the closure of the two clinics would force women in Alabama to travel great distances to obtain pre-fifteen week abortions.¹⁵³ The federal court also made a significant commentary on the nature of the undue burden standard: that the “analysis must have bite.”¹⁵⁴ This case seems to suggest that in the wake of *Hellerstedt*, a stricter undue burden test is at play in abortion jurisprudence, and laws that burden abortion providers and women through large-scale institutional regulations will not survive.

C. Policy Consequences

In states aiming to continue enforcing abortion regulations, abortion providers and women seeking abortions will face challenging obstacles that a potentially right-leaning Court could uphold as constitutional. While *Hellerstedt* was celebrated as a “win” for women’s reproductive rights advocates,¹⁵⁵ the legal challenges will continue as states and courts grapple

148. No. 2:15cv497-MHT (WO) (M.D. Ala. Oct. 27, 2016), *appeal filed* No. 16-17296 (11th Cir. Nov. 29, 2016).

149. *Id.* at 97–101. The school-proximity law prohibited the health department from issuing or renewing licenses to abortion clinics that perform abortions located within 2,000 feet of a K-8 public school. *Id.* at 15. The fetal-demise law imposed a criminal penalty on physicians who “purposely perform ‘dismemberment abortions’” which would include the banning of the standard D&E method “if used without first inducing fetal demise.” *Id.* at 60–61.

150. *Id.* at 35.

151. *Id.* at 36.

152. *Id.* at 36–37.

153. *Id.* at 38–39.

154. *Id.* at 49.

155. See, e.g., Samantha Allen, *Supreme Court’s Texas Decision Is the Greatest Victory for Abortion Rights Since Roe v. Wade*, DAILY BEAST (June 27, 2016, 11:06 AM), <http://www.thedailybeast.com/articles/2016/06/27/supreme-court-s-texas-decision-is-the-greatest-victory-for-abortion-rights-since-roe-v-wade.html> (praising the Court’s decision); Melissa Batchelor Warnke, Opinion, *The Supreme Court Ruling Is an Abortion-Rights Victory. But It Doesn’t Guarantee Access to Services*, L.A. TIMES (June 28, 2016, 2:36 PM), <http://www.latimes.com/opinion/opinion-la/la-ol-supreme-court-abortion-texas-clinics-20160628->

with which regulations constitute an undue burden and which regulations do not. Planned Parenthood has filed several lawsuits in state and federal court challenging abortion regulations in Alaska, Missouri, and North Carolina that are markedly similar to the regulations struck down in *Hellerstedt*.¹⁵⁶ Alaska's law bans abortion in the first trimester of pregnancy, which forces many women to travel outside the state to obtain an abortion.¹⁵⁷ North Carolina's law bans abortions after the twentieth week of pregnancy and includes a narrow health exception in extreme health emergencies.¹⁵⁸ In Missouri, the restrictions have closed all but one health center that provides abortions in the state.¹⁵⁹

Even with the dual framework discussed above,¹⁶⁰ one can ponder the myriad new ways in which a state may seek to regulate abortion. Even though Justice Ginsburg's concurrence warned about the unconstitutionality of future "laws like H.B. 2,"¹⁶¹ the future of such laws are still at the mercy of the undue burden test.

1. *States Continue to Pass Restrictive Abortion Legislation Which Tests the Boundaries of the Undue Burden Test*

The Court added a new dimension to its undue burden jurisprudence when it upheld the partial-birth abortion ban.¹⁶² The earliest application of the undue burden test was in the Court's review of the distinctive partial-birth abortion ban in *Stenberg v. Carhart*.¹⁶³ Finding the ban imposed an undue burden on women seeking abortion, the Court struck down the law because it lacked a life and health exception for the woman.¹⁶⁴ With new

snap-story.html (noting that the Court's decision was an "abortion-rights victory"); Sara Rosenbaum, *When Common Sense and Public Health Prevail: Whole Woman's Health v. Hellerstedt*, HEALTH AFF. BLOG (July 1, 2016), <http://healthaffairs.org/blog/2016/07/01/when-common-sense-and-public-health-prevail-whole-womens-health-v-hellerstedt/> (explaining the Court's decision); Mary Tuma, *An Undue Burden: Supremes Vindicate Pro-Choice Texans*, AUSTIN CHRON. (July 1, 2016), <http://www.austinchronicle.com/news/2016-07-01/an-undue-burden-supremes-vindicate-pro-choice-texans/> (explaining that "Texas women won a rare victory").

156. John Kennedy, *Alaska, Missouri, North Carolina Sued over Abortion Laws*, LAW360 (Nov. 30, 2016), <https://www.law360.com/articles/867414/alaska-missouri-north-carolina-sued-over-abortion-laws>.

157. *Id.*

158. *Id.*

159. *Id.*

160. *See supra* Part II.B.

161. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2321 (2016) (Ginsburg, J., concurring).

162. 550 U.S. 124, 168 (2007); *see supra* note 51 (describing the partial-birth abortion procedure).

163. 530 U.S. 914 (2000); *see supra* note 51 and accompanying text.

164. *See supra* note 52 and accompanying text.

appointments to the Court,¹⁶⁵ and a new challenge to a similar partial-birth abortion ban, the Court again applied the undue burden test in *Gonzales v. Carhart*.¹⁶⁶ The second time around, the Court *upheld* the partial-birth abortion ban.¹⁶⁷ With no discernible difference between the two statutes at issue in *Carhart* and *Gonzales*, the Court reflected a shift in its rationale as new Justices applied the same undue burden test in different ways. Relying on legislative findings as to partial-birth abortion's gruesome nature and its potential threat to the dignity of the medical profession, the Court found that the ban did not pose an undue burden on women, even in cases where the health of the mother was at stake.¹⁶⁸

Gonzales thus represents a high-water mark in the Court's abortion jurisprudence. While the Court found that a law requiring spousal notification imposed an undue burden,¹⁶⁹ it did not find an undue burden in a law that entirely prohibited a form of abortion, even when the mother's health is at risk.¹⁷⁰ Contrary to *Casey*'s finding that a spousal notification provision imposed an undue burden on a woman because it potentially endangered the life of the mother in an abusive relationship, the *Gonzales* Court seems to shift its focus away from this concern. What is unique about *Gonzales* is the moral and ethical problem posed by the partial-birth abortion procedure.¹⁷¹ The Court noted that "Congress could nonetheless conclude that the type of abortion proscribed by the Act requires *specific regulation* because it implicates additional ethical and moral concerns that justify a special prohibition."¹⁷² A comprehensive exploration and analysis of the ethical and moral considerations of abortion are beyond the scope of this Comment,¹⁷³ but the Court will not avoid drawing boundaries when legislative findings

165. See *supra* note 54 and accompanying text.

166. 550 U.S. 124 (2007); see *supra* note 54 and accompanying text.

167. See *supra* note 54 and accompanying text.

168. See *supra* notes 55–56 and accompanying text.

169. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

170. *Gonzales*, 550 U.S. at 168.

171. *Id.* at 158.

172. *Id.* (emphasis added).

173. One possible explanation for the seemingly contradictory holdings of *Casey* and *Gonzales* is the pervasive stigma against abortion. See Scott Skinner-Thompson, Sylvia A. Law & Hugh Baran, *Marriage, Abortion, and Coming Out*, 116 COLUM. L. REV. ONLINE 126, 149–50 (2016). As one group of commentators has surmised:

Why does Justice Kennedy, and society more broadly, seem to accept sexual minorities but not women who avoid pregnancy? We believe that the answer lies, at least partly, in the lack of general exposure to the importance of abortion to many women's lives and the well-being of their already-existing children . . . More needs to be done . . . to help destigmatize the right to reproductive freedom, lest that right continue to be eroded through legislative and judicial action.

Id.

indicate a close proximity between “practices that extinguish life” and “actions that are condemned.”¹⁷⁴

Likewise, some recent state laws regulating abortion shift the focus from ensuring the health and safety of the mother to preserving the dignity of the fetus. The Texas Department of State Health Services instituted new requirements for the disposal of fetal remains, including prohibiting the disposal of fetal tissue in landfills and eliminating other forms of fetal tissue disposition to “afford protection and dignity to the unborn consistent with the Legislature’s expression of its intent.”¹⁷⁵ Initially drafted to go into effect by the end of December 2016, the U.S. District Court for the Western District of Texas delayed the implementation of the rule until January 27, 2017.¹⁷⁶ Abortion rights groups filed suit against the State of Texas, citing *Hellerstedt* as declaring “that medically unnecessary restrictions on abortion access are unconstitutional.”¹⁷⁷ These groups claim that requiring fetal burials or cremations imposes a cost on abortion providers that may then be passed on to women, and further, that such requirements serve no health benefit.¹⁷⁸ The Texas Attorney General issued a statement that he is confident that the court will rule for the state as “Texas values the dignity of the remains of the unborn and believes that fetal tissue should be disposed of properly and humanely.”¹⁷⁹

Without a court opinion on the validity of these laws, one can only hypothesize whether they constitute an undue burden or not. What remains clear is that the undue burden standard is the applicable standard, and if a law can be fashioned that does not create a substantial obstacle to a woman seeking an abortion, then it should be constitutional.¹⁸⁰ If the fetal burial laws

174. *Gonzales*, 550 U.S. at 158 (comparing the Court’s jurisprudence on abortion with its jurisprudence on end-of-life decisions in *Washington v. Glucksberg*, 521 U.S. 702, 732–35 (1997)).

175. Definition, Treatment, and Disposition of Special Waste from Health Care-Related Facilities, 41 Tex. Reg. 9709 (Dec. 9, 2016).

176. Marissa Evans, *Judge Delays Texas’ Fetal Remains Rule Until Jan. 6*, TEXAS TRIB. (Dec. 15, 2016, 3:28 PM), <https://www.texastribune.org/2016/12/15/federal-judge-delays-texas-fetal-remains-rule-unti/>; Akira Tomlinson, *Federal Judge Extends Order Blocking Texas Fetal Burial Rule*, JURIST (Jan. 5, 2017, 4:16 PM), <http://www.jurist.org/paperchase/2017/01/federal-judge-extends-order-blocking-texas-fetal-burial-rule.php>.

177. Jennifer Ludden, *Lawsuit Challenges Fetal Burial Rule in Texas*, NPR (Dec. 12, 2016, 5:52 PM), <http://www.npr.org/sections/thetwo-way/2016/12/12/505304688/lawsuit-challenges-fetal-burial-rule-in-texas> (quoting Nancy Northrup, president and CEO of the Center for Reproductive Rights, an abortion rights groups).

178. *Id.*

179. Tomlinson, *supra* note 176 (quoting Press Release, Attorney Gen. of Tex., AG Paxton Releases Statement on Fetal Remains Disposition Hearing (Jan. 4, 2017), <https://www.texasattorneygeneral.gov/news/releases/ag-paxton-releases-statement-on-fetal-remains-disposition-hearing>).

180. *See supra* notes 121–134 and accompanying text.

do not impose such an extraordinary cost on abortion providers that they will need to close their clinics, then these laws may be upheld.

2. *Abortion Providers' Ability to Stay Open Statewide Will Be Integral to Determining Whether an Abortion Regulation Imposes an Undue Burden*

As *Hellerstedt* shows, the Court has not pinpointed a statistical threshold for when a regulation creates an undue burden. But, the Court will take seriously those statistics that reflect abortion clinic closures statewide and a drastic increase in travel times to clinics—for example, if a woman would need to travel to another state. When an abortion regulation forces a clinic closure, the regulation entirely removes a place that a woman could go to get an abortion. Therefore, the Court has considered forced closure to be the greatest burden. As states fashion innovative abortion regulations,¹⁸¹ abortion providers may have the ability to anticipate and plan for such restrictions. Consequently, providers would be unable to argue that the laws will force them to close down, and thus these new laws may not meet the undue burden standard as applied in *Hellerstedt*. This situation “traps” abortion providers, for if they *can* meet the regulations, even at the risk of treating a smaller number of women, then some individual women will face greater obstacles in securing an abortion. If the providers can meet the regulations, but decide *not* to in order to meet as much of the demand for the procedure as possible, the providers may lose any constitutional basis for challenging the regulations.

An instructive example of this issue is the Ohio Department of Health’s closure of the only remaining abortion clinic in Dayton in November 2016 because the clinic failed to obtain a required transfer agreement with a nearby hospital in cases of emergency.¹⁸² While the lawyer for the clinic is “confident” that the clinic will remain open during an appeal of the Department of Health’s decision, the closure of this facility would bring the total number of abortion providers in the state to eight, of which several are already involved in legal fights to remain open.¹⁸³ The regulations at issue

181. Missouri passed a measure that would create a ballot initiative on abortion that would “establish fetal person, and thereby ban abortion.” *State Policy Updates: Major Developments in Sexual and Reproductive Health*, GUTTMACHER INST., <https://www.guttmacher.org/state-policy> (last updated Dec. 31, 2016). Ohio’s Senate passed a measure that would require abortion tissue to be cremated or interred. *Id.* Utah’s governor Gary Herbert signed a bill requiring fetal anesthesia during abortions at or after twenty weeks of pregnancy, which may require increased anesthesia for the woman as well. *Id.*

182. Katie Wedell, *Dayton Area’s Only Abortion Clinic Ordered to Shut Down*, DAYTON DAILY NEWS (Dec. 1, 2016, 11:20 AM), <http://www.daytondailynews.com/news/local/dayton-area-only-abortion-clinic-ordered-shut-down/9kMF5bJn9cPFyIOao2VbHK/>.

183. *Id.*

resemble Texas' H.B. 2 in that they require abortion clinics to have "emergency backup agreements with nearby hospitals," and specific physicians listed as able and willing to perform the abortions.¹⁸⁴ The Dayton abortion clinic has been unable to fulfill this requirement since 2002, because many physicians are targeted or harassed by anti-abortion activists if their names are publicized as part of the emergency backup agreement.¹⁸⁵ Ohio's State Representative Greta Johnson doubted the regulation's ability to withstand legal scrutiny in light of the *Hellerstedt* decision.¹⁸⁶ The closure of the last remaining Dayton abortion clinic is significant because the burden posed by this closure is indicative of finding the same undue burden found in *Hellerstedt*.

3. *The Future of the Abortion Right Under the Trump Administration May Be Upped by a Review of the Undue Burden Test and Abortion Jurisprudence*

The Trump administration may upend the undue burden jurisprudence entirely and usher in a new era of abortion regulations, which would return abortion regulation to the states.¹⁸⁷ Then President-elect Trump stated, in a *60 Minutes* interview in December 2016, that the abortion right is not settled whereas the same-sex marriage law is.¹⁸⁸ With his ability to appoint only one Justice at this time, however, whom he has noted "will be pro-life,"¹⁸⁹ President Trump will be limited by the Court's complicated abortion framework and its consistent, albeit somewhat fragmented, protection of a woman's right to choose. For example, President Trump indicated that a woman might have to go to another state to get an abortion if she cannot get

184. *Id.*

185. *Id.*

186. *Id.* (quoting State Rep. Greta Johnson); Press Release, Ohio House of Representatives 132nd General Assembly, State Stands on Shaky Legal Ground to Shutter Women's Health Clinic (Dec. 1, 2016), <http://www.ohiohouse.gov/greta-johnson/press/state-stands-on-shaky-legal-ground-to-shutter-womens-health-clinic> ("[T]he state of Ohio [is] acting on likely-unconstitutional laws . . . jeopardizing the health and safety of Ohio women for political gain." (quoting Rep. Greta Johnson)).

187. See S.M., *How States, Emboldened by Trump, Are Challenging Abortion Rights*, ECONOMIST (Dec. 13, 2016, 3:31 PM), <http://www.economist.com/blogs/democracyinamerica/2016/12/roe-rows> (highlighting how several states may challenge abortion rights under the Trump administration).

188. S.M., *Donald Trump Says the Law Is Settled on Gay Marriage but Not on Abortion*, ECONOMIST (Nov. 15, 2016, 11:19 AM), <http://www.economist.com/blogs/democracyinamerica/2016/11/president-elect-and-supreme-court?zid=318&ah=ac379c09c1c3fb67e0e8fd1964d5247f>; Emily Schultheis, *Trump Talks to "60 Minutes" About Same-Sex Marriage, Abortion and the Supreme Court*, CBS NEWS (Nov. 13, 2016, 6:58 PM), <http://www.cbsnews.com/news/trump-promises-pro-life-justices-supreme-court-same-sex-marriage/>.

189. S.M., *supra* note 188.

one in her own state.¹⁹⁰ With the appointment of Judge Neil Gorsuch to the Supreme Court, President Trump has tapped a Justice that is known for his conservative jurisprudence on religion, physician-assisted suicide, and the “right” to die.¹⁹¹ For example, in Judge Gorsuch’s 2006 book on physician-assisted suicide, he “outline[s] the moral, legal, and logistical challenges that emerge at the end of life.”¹⁹² Gorsuch’s position on the Tenth Circuit in the *Hobby Lobby v. Sebelius*¹⁹³ case further highlights the role that religion may play in his future Supreme Court jurisprudence.¹⁹⁴

President Trump has noted that the abortion debate “has a long, long way to go.”¹⁹⁵ *Hellerstedt*’s decision shows just how long, because the Court found that women resorting to out of state abortions constituted an undue burden and were thus unconstitutional.¹⁹⁶ To get around this impediment, future appointees to the Court, including Judge Gorsuch, will likely follow Justice Alito’s statistical approach¹⁹⁷ in which he looked at the small fraction of all women of reproductive age whom the regulations affect, rather than the much larger fraction of women *seeking abortion* whom the regulations affect.¹⁹⁸ Either way, the future of the undue burden test may rely on the Justices’ views on which statistics govern the analysis.

III. CONCLUSION

Although a woman no longer has a fundamental right to abortion,¹⁹⁹ Supreme Court abortion jurisprudence has reflected a steady commitment to protecting a woman’s right to choose whether to have an abortion in the early stages of pregnancy.²⁰⁰ This choice, however, does not come without a cost

190. *Id.*

191. See Emma Green, *Trump Picks a Bioethicist for the Supreme Court*, ATLANTIC (Feb. 1, 2017), <https://www.theatlantic.com/politics/archive/2017/02/trump-bioethics-supreme-court/515250/> (noting Judge Gorsuch’s interest in “matters of life and death”).

192. *Id.* (citing NEIL GORSUCH, *THE FUTURE OF ASSISTED SUICIDE AND EUTHANASIA* (2006)).

193. 723 F.3d 1114 (10th Cir. 2013); see also *Burwell v. Hobby Lobby*, 134 S. Ct. 2751 (2014) (holding that closely held for-profit companies may be exempt from a regulation imposing mandatory insurance coverage for contraceptive care based on religious objections).

194. Green, *supra* note 191 (“His most lasting legacy from his time on the Tenth Circuit Court of Appeals is likely *Hobby Lobby vs. Sebelius*, a case about religious objections to the rules on birth-control coverage in the Affordable Care Act, which later became a landmark Supreme Court decision.”).

195. S.M., *supra* note 188.

196. *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

197. *Id.* at 2330 (2016) (Alito, J., dissenting).

198. *Id.*; see also Neil S. Siegel, *The Distinctive Role of Justice Alito: From a Politics of Restoration to a Politics of Dissent*, 126 YALE L.J. F. 164, 166 (2016) (discussing Justice Alito’s methodology and jurisprudence).

199. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

200. See *supra* Part I.B.

nor without significant conditions to both women and abortion providers.²⁰¹ The undue burden test guides policymakers to fashion laws that do not place a substantial obstacle in the path of women seeking abortion.²⁰² The dual framework analysis suggested in this Comment cannot encompass every possible abortion regulation that may fit neatly into one of the two categories, either individually based regulations or institutionally based regulations. As *Gonzales* shows, certain unique situations, such as the partial-birth abortion procedure, reflect the Court's commitment to protecting the state's interest in protecting the life of a fetus.²⁰³

In the wake of *Hellerstedt*, abortion providers had cause to celebrate,²⁰⁴ as many clinics remained open and no longer had to meet restrictive regulations.²⁰⁵ The Court's application of the undue burden test reflects a rejection of "TRAP" laws, and the consequent legal battles over laws like Texas H.B. 2 further reflect judicial disapproval of these laws.²⁰⁶ Nevertheless, restrictive regulations of abortion are increasing.²⁰⁷ Rather than enacting laws that impose significant restrictions which often lead to automatic closures of abortion providers,²⁰⁸ states are fashioning laws that are not as strict, and do not produce as drastic an effect on abortion providers.²⁰⁹ The laws, however, place a burden on abortion providers by imposing a hard choice between serving much fewer women or closing.²¹⁰ Unless clinics are forced to close in a clear and sweeping fashion, as often results from regulations aimed at the institutional and foundational aspects of the clinics,²¹¹ the undue burden standard may not offer much relief.

201. See *supra* Part II.C.

202. See *supra* Part I.A.3

203. *Gonzales v. Carhart*, 550 U.S. 124, 158 (2007) (explaining that: "Where [the state] has a rational basis to act, and it does not impose an undue burden, [it] may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn.").

204. See *supra* note 155.

205. See *supra* Part II.C.

206. See *supra* Part II.B.

207. See *supra* Part II.B.

208. See *supra* Part II.B.

209. See *supra* Part II.C.2.

210. See *supra* Part II.C.2.

211. See *supra* Part II.B.