A *HELLERSTEDT* TALE: THERE AND BACK AGAIN?

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Abstract

In Whole Woman's Health v. Hellerstedt*, 136 S.Ct. 2292 (2016), the Supreme Court's first major abortion decision in over two decades, Justice Anthony Kennedy allied with its liberal wing to strike down a set of abortion health regulations many States had adopted in anticipation of a Court more receptive to such restrictions. Writing for the five-justice majority, Justice Steven Breyer purported to apply the Court's undue burden analysis adopted in the watershed decision of* Casey v. Planned Parenthood*, 505 U.S. 833 (1992). With Kennedy's critical vote, the lead plurality in* Casey *had adopted the undue burden approach as a compromise that allowed it to reaffirm the commitment of* Roe v. Wade*, 410 U.S. 113 (1973), to a previability abortion right, but at the same time allowed States to place greater restrictions on it. The* Casey *plurality was particularly concerned that the Court would show substantial deference to State "persuasion regulations"—those designed to influence a woman's choice in favor of having her child—but also ruled that maternal health regulations—those designed to promote the safety of the abortion procedure—were entitled to deference as well.*

In his Hellerstedt *opinion, however, Breyer transformed the* Casey *undue burden approach from one requiring substantial deference to abortion regulations—only overturning them if a plaintiff could prove they unduly burdened her abortion right—to a form of heightened scrutiny balancing that shifts much of the burden of proof back to States to show the regulations' benefits. This was the same approach to maternal health regulations the Court had taken under the discarded* Roe *trimester framework—hence taking that tribunal "there and back again" in terms of its approach to such regulations. The problem, however, is that Breyer did not differentiate between health and persuasion regulations in his opinion, raising the critical question of whether the Court intends to return to* Roe*'s stricter treatment of persuasion regulations as well.*

This Article argues that even though Kennedy joined Breyer's opinion without qualification, he would not subscribe to applying the new form of heightened scrutiny balancing to persuasion regulations. To do so would risk gutting the core of the Casey *compromise he was instrumental to fashioning—allowing lower courts to weigh their benefits in promoting fetal life against their burdens on a woman's decisional autonomy. Moreover, while health regulations can*

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readily be imposed as a pretext to obstruct women's access to abortions, persuasion regulations attempt to prevent abortions in a fairly transparent way. Hence, until the Court speaks more clearly on this matter, I believe lower courts would be advised to read Hellerstedt *as requiring its new balancing approach solely for the type of regulation at issue in that case—maternal health regulations—and to continue applying* Casey*'s deferential approach to persuasion regulations.*

I. INTRODUCTION

On the last day of its 2015–16 Term, the Supreme Court issued its decision in *Whole Woman's Health v. Hellerstedt*,[1] arguably its most important abortion rights ruling since its 1992 decision in *Planned Parenthood v. Casey*.[2] In a five–three ruling, with swing Justice Anthony Kennedy joining his more liberal colleagues, the Court struck down a Texas law that required abortion clinic doctors to have admitting privileges at local hospitals and clinics to meet the same safety standards as surgical facilities.[3] The majority invalidated the law despite the fact that it was applying the more "regulation-friendly" undue burden test adopted in *Casey* as a substitute for the more "abortion-friendly" approach established in *Roe v. Wade*.[4] The *Hellerstedt* majority reasoned that the burden the law placed on women's access to abortion far outweighed any of its benefits in terms of providing greater health protections for women undergoing the procedure.[5]

The decision was a great disappointment for abortion opponents, and

1. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016).
2. Planned Parenthood v. Casey, 505 U.S. 833 (1992).
3. *See Hellerstedt*, 136 S. Ct. at 2300.
4. Roe v. Wade, 410 U.S. 113 (1973); *see Hellerstedt*, 136 S. Ct. at 2309–10.
5. *See Hellerstedt*, 136 S. Ct. at 2310–20.

particularly for the great swath of states that have been tightening their abortion restrictions in anticipation of a Court less receptive to abortion rights.[6] This anticipation was not unwarranted. After all, Kennedy had played a critical role in *Casey* in getting the Court to jettison the *Roe* approach precisely because it had made the regulation of abortions too difficult—and particularly with respect to regulations designed to persuade women to have their babies.[7]

Moreover, in the time between *Casey* and *Hellerstedt*, Kennedy had joined his conservative colleagues in upholding stricter regulations of abortion by the government. In *Mazurek v. Armstrong*,[8] for instance, Kennedy voted with the conservative majority in upholding a Montana law limiting the performance of abortions to licensed physicians.[9] And in a pair of decisions challenging bans on a highly controversial late-term abortion procedure,[10] Kennedy initially lambasted the liberal wing of the Court for striking down a ban,[11] and then led a conservative majority to overturn that ruling just seven years later—depriving abortion doctors of a procedure they claimed was necessary to safeguard a woman's health in certain instances.[12] In other words, states with conservative attitudes towards abortion believed they had Justice Kennedy on their side, and that

6. *See SCOTUS Strikes Down Texas Statute in Whole Woman's Health v. Hellerstedt*, GREATER PACTHOGUE (June 29, 2016), http://greaterpatchoguenews.com/2016/06/scotus-strikes-down-texas-statute-in-whole-womans-health-v/ (noting that as of the decision in *Hellerstedt*, "14 states require physicians that perform abortions have admitting privileges or some other relationship with a nearby hospital, while 22 states have facility requirements that are near or exactly what is required to be an ambulatory surgical center")*; see also State Policies in Brief: Targeted Regulation of Abortion Providers*, GUTTMACHER INSTIT. (Feb. 1, 2016), https://www.guttmacher.org/state-policy/explore/targeted-regulation-abortion-providers; Elizabeth Nash et al., *Laws Affecting Reproductive Health and Rights: 2014 State Policy Review*, GUTTMACHER INSTIT. (Jan. 5, 2015), https://www.guttmacher.org/laws-affecting-reproductive-health-and-rights-2014-state-policy-review; John A. Robertson, *Whole Woman's Health and the Future of Abortion Regulation*, HARV. LAW: BILL OF HEALTH (July 11, 2016), https://blogs.harvard.edu/billofhealth/2016/07/11/whole-womens-health-and-the-future-of-abortion-regulation/#more-19308.

7. *See Casey*, 505 U.S. at 869–79 (joint opinion of O'Connor, Kennedy, and Souter, JJ.). Indeed, it is widely reputed that Justice Kennedy had initially provided the fifth vote for Chief Justice William Rehnquist's opinion to explicitly overrule *Roe*, and then changed his mind to join the *Casey* plurality and provide the fifth vote for retaining the *Roe* previability right as modified in that decision. Rehnquist's opinion then became the lead dissent in that case. As might be expected, cries of Kennedy's betrayal could soon be heard from conservative groups. *See* Linda J. Wharton et al., *Preserving the Core of Roe: Reflections on Planned Parenthood v. Casey*, 18 YALE J.L. & FEMINISM 317, 340 n.119 (2006) (citing to the papers of Justice Blackmun held in the Library of Congress that reveal a first draft of a five-member majority opinion, dated May 27, 1992, authored by Chief Justice Rehnquist, in which Justice Kennedy joins the draft opinion that effectively overrules Roe); *see also* Terry Eastland, *The Tempting of Justice Kennedy*, AM. SPECTATOR (July 13, 2012), http://spectator.org/35188_tempting-justice-kennedy/.

8. Mazurek v. Armstrong, 520 U.S. 968 (1997) (per curiam).

9. *See Mazurek*, 520 U.S. at 969–81.

10. *See* Stenburg v. Carhart, 530 U.S. 914 (2000); Gonzalez v. Carhart, 550 U.S. 124 (2007).

11. *See Stenburg*, 530 U.S. at 956–80 (Kennedy, J., dissenting).

12. *See Gonzalez*, 550 U.S. at 132–69.

they finally had a majority of Justices who might be willing to reconsider *Roe*'s recognition of an abortion right in the first place.[13]

When known abortion opponent, Justice Antonin Scalia, died while the *Hellerstedt* decision was pending,[14] those states likely did not totally despair because even a four–four decision where Kennedy allied with his three remaining conservative colleagues would result in upholding the new Texas abortion regulations being challenged there.[15] A three judge panel of the lower court, the U.S. Court of Appeals for the Fifth Circuit, had held, with minor exceptions, that those regulations did not impose an undue burden on the abortion right[16]—a decision that would be left standing with an evenly split Supreme Court ruling.[17]

So what happened to cause Justice Kennedy to vote with the liberal bloc of the Court to invalidate the Texas law? Was this another alleged instance of what others have derided as unprincipled Kennedy-esque flip-flopping?[18] By assigning the majority opinion to Justice Stephen Breyer[19] and joining it (Breyer was the author of *Stenberg*, which Kennedy's own opinion in *Gonzalez* effectively overruled), was Kennedy betraying the undue burden compromise he was key to crafting in *Casey* that reaffirmed a previability abortion right but subjected it to stricter government regulation?[20] Was dissenting Justice Clarence Thomas correct in objecting that "[t]he majority's undue-burden test looks far less like our post-Casey precedents and far more like the [*Roe*] strict-scrutiny standard that Casey rejected?"[21]

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13. *See, e.g.*, David G. Savage, *Supreme Court Agrees to Hear Biggest Abortion Case in Two Decades*, L.A. TIMES (Nov. 13, 2015), http://www.latimes.com/nation/.

14. *See* Michael S. Leonard, *Sharply Divided 8-Justice Supreme Court Sends Mixed Signals in Abortion Case*, 23 WESTLAW J. HEALTH L. 1–2 (2016) (noting that the eight-justice Supreme Court heard arguments for Hellerstedt on March 2, 2016, less than three weeks after the death of Antonin Scalia).

15. When the vote of Justices to affirm or reverse a lower court opinion is evenly split in a case, the Court's practice is that the lower court judgment is affirmed by an evenly divided Court without a written opinion being issued. *See* Justin R. Pidot, *Tie Votes and the 2016 Supreme Court Vacancy*, 101 MINN. L. REV. 107, 109–10 (2016).

16. *See* Whole Women's Health v. Cole, 790 F.3d 563, 566–98 (5th Cir. 2015) (per curiam).

17. *See* Pidot, *supra* note 15.

18. *See, e.g.*, John L. Horan, *A Jurisprudence of Doubt: Planned Parenthood v. Casey*, 26 CREIGHTON L. REV. 479, 517–18 (1993); *see also* John Yoo, *SCOTUS's Fisher Ruling a Blow to the Constitution*, NAT'L REV. (June 23, 2016), http://www.nationalreview.com/corner/437033/supreme-courts-fisher-v-university-texas-affirmative-action-case.

19. The Court's practice is for the Chief Justice to assign majority opinions to the various Justices to write except when he is not voting with the majority in a particular case. In the latter instances, the senior Justice voting with the majority assigns the opinion. *See* Paul J. Wahlbeck, *Strategy and Constraints on Supreme Court Opinion Assignment*, 154 U. PA. L. R. 1729, 1731 (2006). Hence, since Chief Justice Roberts was in dissent in *Hellerstedt*, as the Justice with the highest seniority following the death of Justice Scalia, Kennedy would have assigned the majority opinion to Justice Breyer to write.

20. For a more in-depth discussion of this compromise, *see infra* notes 56–72 and accompanying text.

21. *Hellerstedt*, 136 S.Ct. at 2326 (Thomas, J., dissenting).

This Article will demonstrate Thomas was indeed correct that the *Hellerstedt* majority transformed the undue burden approach of *Casey*, which required substantial deference towards state regulations of abortion, into a form of "heightened-scrutiny balancing" which shifts the burden of proof back to the state on many critical issues.[22] In other words, *Hellerstedt* subtly changed the treatment of the previability abortion right from one where, under *Casey* and its progeny, it was being analyzed as something akin to a non-fundamental right where alleged infringements are subject to deferential rational basis review, into one of greater substance where alleged infringements require a form of intermediate scrutiny that transfers the ultimate burden of proof back to the state.[23] Moreover, this Article will show that the latter approach was the one dictated by *Roe* and its progeny with respect to maternal health regulations directed at the abortion process.[24] In other words, with Kennedy's key votes, the Court has gone "there and back again."

The critical question lower courts will be left to struggle with, however, is to what extent the Court has gone there and back again. In other words, *Hellerstedt* dealt with regulations of the abortion process to purportedly enhance the safety of the procedure for women, and not with regulations designed to influence a woman's choice in favor of carrying her fetus to term (call these "persuasion regulations").[25] The *Casey* compromise, moreover, was all about giving states more leeway to impose the latter type of regulation, although the Court also swept maternal health regulations under the undue burden rubric in the course of adopting it.[26] But now that the *Hellerstedt* majority has essentially reverted to the *Roe* framework in assessing health regulations by modifying the undue burden analysis, the key question will be to what extent it also intended to raise the level of judicial scrutiny on persuasion regulations as well. Justice Breyer was very unclear about this in his opinion for the Court that Kennedy joined without qualification.[27] Yet to interpret that opinion as also covering persuasion regulations risks gutting the core of the compromise in *Casey* that Kennedy was key to engineering. It would allow lower courts to second-guess the validity of a state's interest in attempting to influence a woman's abortion decision in favor of the fetus, something Kennedy would be unlikely to countenance.[28]

This Article urges lower courts to resolve this dilemma by making a

22. *See infra* notes 110–147 and accompanying text.
23. *See infra* notes 145–147 and accompanying text.
24. *See infra* notes 46–48 and accompanying text.
25. *See infra* notes 145–159 and accompanying text.
26. *See infra* notes 63–64 and accompanying text.
27. *See infra* notes 108–147 and accompanying text.
28. *See infra* note 149 and accompanying text.

distinction between health regulations covering the abortion process and those designed to inform and influence a woman's choice as to whether to undergo that procedure.[29] It seems likely Kennedy still adheres to the view that the state has a legitimate interest in promoting fetal life during a woman's decision-making process so long as it does not overcome her free and voluntary will on the matter.[30] Once a woman exercises her will to obtain an abortion, however, the state has no business attempting to make abortions more difficult to obtain by adding procedural requirements of marginal or uncertain health benefit—just what many had accused Texas and other states of doing by adopting the regulations challenged in *Hellerstedt*.[31] Hence, until the Court speaks with more clarity, lower courts would do well to continue applying the deferential undue burden analysis dictated by *Casey* to persuasion regulations, while subjecting maternal health regulations to the more rigorous scrutiny required by *Hellerstedt*.

This Article proceeds in four main parts. Part II describes the analytical framework for previability abortion regulations proceeding out of *Roe* and its progeny, which essentially subjected persuasion regulations and others designed to inform a woman's abortion decision to strict scrutiny—presumptively invalidating them.[32] As to maternal health regulations, *Roe* suggested these would be subjected to a form of rational basis review, but in practice the Court ended up heavily scrutinizing them in a balancing analysis which usually ended up striking them down.[33] It also describes how a plurality of Republican appointees in *Casey* (including Kennedy) struck a compromise by unexpectedly upholding *Roe*'s core holding that a woman had a right to abort her fetus prior to viability, but replaced the entire *Roe* framework with an undue burden analysis designed to give the states more leeway to regulate abortions—particularly with respect to influencing a woman's choice in a "pro-life" manner, but also as to the imposition of maternal health regulations.[34] It will then describe how Kennedy and his more conservative colleagues on the Court reinforced this deferential approach to abortion regulations in the post-*Casey* decisions of *Mazurek* and *Gonzalez* as noted above.[35]

Part III then describes how, when faced with a challenge to the Texas regulations in *Hellerstedt*, Kennedy assigned the task of writing the majority opinion to Breyer even though the two had been ideologically

29. *See infra* notes 146–159 and accompanying text.
30. *See infra* notes 153–154 and accompanying text.
31. *See infra* notes 151–153 and accompanying text.
32. *See infra* notes 43–48 and accompanying text.
33. *See infra* notes 49–51 and accompanying text.
34. *See infra* notes 56–57 and accompanying text.
35. *See infra* notes 76–93 and accompanying text.

opposed to each other in *Mazurek* and *Gonzalez*.[36] It also describes how Breyer took full advantage of that opportunity to unjustifiably criticize the Fifth Circuit's faithful application of *Casey* in *Hellerstedt*, and in the course of doing so reshaped the undue burden analysis from the deferential approach adopted in *Casey* to a more heightened scrutiny balancing analysis that resembles the *Roe* approach to maternal health regulations.[37]

Part IV then examines the key question of to what degree *Hellerstedt* portends a return to the displaced *Roe* trimester framework in the guise of a new undue burden balancing approach.[38] As noted, it contends that pending further guidance from the Court, *Hellerstedt* would be best read by lower courts as requiring the new balancing version of undue burden for regulations that purportedly enhance the safety of the abortion procedure, and *Casey*'s more deferential version for persuasion regulations given its greater solicitousness to state interests in the abortion process.[39]

Finally, Part V offers some reflections on how *Hellerstedt*'s new balancing approach fits within the Court's overall substantive due process jurisprudence, of which abortion analysis is one key part.[40] It concludes that whatever the merits or demerits of that approach may be, at least one virtue is that it aligns the Court's treatment of abortion rights more closely with its treatment of other substantive due process rights—and particularly those which the Court has treated as lying somewhere in a grey area between liberty interests designated as non-fundamental and those designated as fundamental rights.[41]

II. THE *CASEY* COMPROMISE AND ITS SUBSEQUENT IMPLEMENTATION

A. The Roe *Framework and Its Aftermath*

In its seminal 1973 decision in *Roe v. Wade*,[42] facing a challenge to a Texas ban on abortions except to save the mother's life, seven Justices of the Court for the first time determined a woman had a liberty right to abort

36. *See infra* notes 105–107 and accompanying text.

37. *See infra* notes 109–117 and accompanying text.

38. *See infra* notes 157–159 and accompanying text.

39. *See infra* note 57 and accompanying text. For a thoughtful and insightful article agreeing with much of the analysis in this article, yet arguing that Breyer's reading of *Casey* should be rejected by the Court in future cases, see Stephen G. Gilles, *Restoring Casey's Undue-Burden Standard after Whole Women's Health v Hellerstedt*, 35 QUINNIPIAC L. REV. (forthcoming 2018).

40. *See infra* notes 160–165 and accompanying text.

41. *See infra* notes 172–174 and accompanying text.

42. 410 U.S. 113 (1973).

her fetus under the Due Process Clause of the Constitution.[43] The majority decided that this substantive due process right was fundamental prior to fetal viability, and non-fundamental after viability.[44] The fetus, on the other hand, was not entitled to constitutional rights because it was not a "person" under the Constitution, yet the majority determined that states had a compelling interest in protecting fetal life after viability, and a compelling interest in protecting maternal health starting with the second trimester of a woman's pregnancy.[45] Thus was born the *Roe* trimester framework: in the first three months of pregnancy when the state had no compelling interest in protecting either fetal life or a woman's health, any burdens on the abortion right except general medical safeguards would be strictly scrutinized and typically invalidated;[46] in the second trimester, regulations designed to inform or influence a woman's decision whether to have an abortion would be strictly scrutinized and generally invalidated, while regulations designed to make the abortion procedure safer for the woman could stand so long as they were "reasonably related" to achieving that goal;[47] in the last three months (with viability then occurring around the end of the second trimester), the state's compelling interest in protecting fetal life could justify outright bans on abortions except where necessary to preserve the life or health of the mother.[48]

As this framework came to be applied in the 1970's and '80's, it produced a virtual "abortion on demand" for women prior to the end of the second trimester.[49] Previability regulations designed to protect fetal life were presumptively invalid,[50] and even though the Court asserted that

43. *See Roe*, 410 U.S. at 116–67.

44. *See id.* at 152–65.

45. *See id.*

46. *See id.* at 164; Planned Parenthood v. Casey, 505 U.S. 833, 872 ("*Roe* established a trimester framework to govern abortion regulations. Under this elaborate but rigid construct, almost no regulation at all is permitted during the first trimester of pregnancy . . . .").

47. *See Roe*, 410 U.S. at 164; *Casey*, 505 U.S. at 872 (asserting that "regulations designed to protect the woman's health, but not to further the State's interest in potential life, are permitted during the second trimester").

48. *See Roe*, 410 U.S. at 164–65; *Casey*, 505 U.S. at 872 (asserting that "during the third trimester, when the fetus is viable, prohibitions are permitted provided the life or health of the mother is not at stake").

49. *See, e.g.*, Gonzalez v. Carhart, 550 U.S. 124, 146 (2007) (asserting, "*Casey* rejected both *Roe*'s rigid trimester framework and the interpretation of *Roe* that considered all previability regulations of abortion unwarranted").

50. *See Casey*, 505 U.S. at 871 (explaining that post-*Roe* cases decided that "any regulation touching upon the abortion decision must survive strict scrutiny, to be sustained only if drawn in narrow terms to further a compelling state interest"); *see also id.* at 876 (observing that *Roe* used "the trimester framework to forbid any regulation of abortion designed to advance [the interest in fetal life] before viability. . . . Before viability, *Roe* and subsequent cases treat all governmental attempts to influence a woman's decision on behalf of the potential life within her as unwarranted"); Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52, 81–84 (1976) (striking down a standard of care provision which

procedural regulations in the second trimester would be subjected to a form of deferential rational basis review, in practice it subjected them to a form of heightened scrutiny. This heightened scrutiny balanced the purported health benefits of such a regulation against the burden it placed on a woman's access to abortion, and almost always invalidated them.[51] It presumably applied this "heightened scrutiny balancing" in order to smoke out procedural regulations that, in reality, were attempts to make abortion more difficult or costly in order to increase the chances that a woman would go through with having her baby.

Such ready access to previability abortions created great discontent among segments of American society, particularly with respect to so-called "late term abortions" where a fetus would be aborted at a fairly advanced developmental stage.[52] Indeed, in 1980 Ronald Reagan won the presidency in significant part on his pledge to appoint Supreme Court Justices who would overrule *Roe* or at least severely constrict the right it had established.[53] Reagan, and his ideological successor George H.W. Bush, thought that by the early 1990's they had made good on that pledge since they had effected a combined total of six appointments to the Court (counting Reagan's elevation of Justice William Rehnquist to be Chief

required any physician performing an abortion "to exercise the prescribed skill, care, and diligence to preserve the life and health of the [f]etus" because "it impermissibly require[ed] the physician to preserve the life and health of the fetus, whatever the stage of pregnancy," including previability); Colautti v. Franklin, 439 U.S. 379, 390–401 (1979) (invalidating a standard of care provision and a viability-determination requirement as vague and overbroad).

51. *See, e.g.*, Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52, 75–79 (1976) (holding a provision which prohibited a specific abortion technique "fail[ed] as a reasonable regulation for the protection of maternal health" because the burdens it placed on women outweighed the purported health benefits—particularly because the prohibition "force[d] a woman and her physician to terminate her pregnancy by methods more dangerous to her health than the method outlawed"); City of Akron v. Akron Ctr. for Reproductive Health, Inc., 462 U.S. 416, 433–39 (1983) (invalidating an abortion provision that required second trimester abortions be performed in hospitals because the regulation "place[d] a significant obstacle in the path of women seeking an abortion," and the existing medical knowledge weakened Akron's justification for implementing the regulation); Planned Parenthood Ass'n of Kansas City, Mo., Inc. v. Ashcroft, 462 U.S. 476, 481–82 (1983) (following the reasoning established in *City of Akron*, invalidated a regulation that required "all second-trimester abortions must be performed in general, acute-care facilities); Doe v. Bolton, 410 U.S. 179, 192–200 (1973) (invalidating various procedural requirements). *But cf.* Simopoulos v. Virginia, 462 U.S. 506, 510–19 (1983) (upholding outpatient hospital facility requirement after weighing evidence because a state's legitimate interest in maternal health "embraces the facilities and circumstances in which abortions are performed," and because the requirement "is not an unreasonable means of furthering [Virginia's] compelling interest").

52. *See, e.g.*, Lydia Saad, *Public Opinion About Abortion—An in-Depth Review*, GALLUP (Jan. 22, 2002), http://www.gallup.com/poll/9904/Public-Opinion-About-Abortion-InDepth-Review.aspx; see also Michael Gerson, *Abortion's Gray Areas*, WASH. POST (July 4, 2013), https://www.washingtonpost.com/opinions/michael-gerson-abortions-gray-areas/2013/07/04/5a788fa4-e412-11e2-a11e-c2ea876a8f30_story.html?utm_term=.32f7e25a1c00.

53. *See* Neal Devins, *Rethinking Judicial Minimalism: Abortion Politics, Party Polarization, and the Consequences of Returning the Constitution to Elected Government*, 69 VAND. L. REV. 935, 954–55 (2016).

Justice).[54] This was one Justice more than the five-justice majority necessary to cut back on *Roe*. Indeed, so emboldened was the Bush Administration that when *Casey* came to the Court in 1992 challenging a series of tighter abortion regulations adopted by Pennsylvania, Bush's Solicitor General, Kenneth W. Starr, took the unusual step of urging an outright abandonment of *Roe*—in effect asking the Court to allow individual states to decide where they stood on abortion without constitutional restriction (as they had prior to *Roe*).[55]

B. The Casey *Compromise*

The *Casey* decision proved to be a great disappointment to abortion opponents. A majority of the Court, consisting of Reagan–Bush appointees Sandra Day O'Connor, Anthony Kennedy and David Souter, together with Nixon-Ford appointees Harry Blackmun (the author of *Roe*) and John Paul Stevens, refused to flatly overrule *Roe* (four dissenting Justices would have done just that).[56] Reasoning principally that the Court's legitimacy as an institution of laws would be compromised if it caved into political pressure to overrule that decision in the absence of adequate legal reasons for doing so, the majority explicitly affirmed the basic principle that a woman has a right to terminate her pregnancy prior to fetal viability (which was occurring a few weeks earlier than it had in 1973 given advances in medical technology—thus giving states more room for post-viability abortion restrictions).[57]

Yet unlike Blackmun and Stevens, who basically thought the Court should continue to adhere to the *Roe* trimester framework,[58] the Reagan–Bush trilogy of O'Connor, Kennedy and Souter wrote a lead plurality opinion significantly curtailing the previability right.[59] In particular, the plurality was concerned the *Roe* framework made it too difficult for states to pass previability "persuasion regulations" designed to encourage women to have their babies rather than aborting them. As it explained,

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54. The majority in Roe comprised of Chief Justice Burger and Justices Douglas, Brennan, Stewart, Marshall, Blackmun, and Powell. Thereafter, President Reagan appointed Sandra Day O'Conner, Antonin Scalia, and Anthony Kennedy, and elevated William Rehnquist to be Chief Justice. President Bush then appointed David Souter and Clarence Thomas. *See* Michael J. Gerhardt, *The Pressure of Precedent: A Critique of the Conservative Approaches to Stare Decisis in Abortion Cases*, 10 CONST. COMMENT. 67, 86 n.3 (1993).

55. *See* Brief for the United States as Amicus Curiae Supporting Respondents at 8, Planned Parenthood v. Casey, 505 U.S. 833 (1992) (Nos. 91-744 and 91-902) (filed by Solicitor General Kenneth Starr).

56. *See* Planned Parenthood v. Casey, 505 U.S. 833, 869–71.

57. *See id.* at 854–69.

58. *See id.* at 911–22 (Stevens, J., concurring in part and dissenting in part); *id.* at 922–43 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

59. *See id.* at 869–79 (plurality opinion).

"[t]he trimester framework . . . does not fulfill *Roe*'s own promise that the State has an interest in protecting fetal life or potential life. *Roe* began the contradiction by using the trimester framework to forbid any regulation of abortion designed to advance that interest before viability."[60] Hence, the plurality abandoned that framework (i.e., strict scrutiny for "decisional" regulations, and non-deferential balancing for procedural health regulations) and instead adopted the undue burden test. Under this test, the previability abortion regulation would be sustained unless it could be shown to have a purpose or effect of placing "a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."[61] Moreover, "[u]nless it has that effect on her right of choice, a state measure designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal."[62]

This formulation suggested the state would no longer bear the burden of showing it had a constitutionally sufficient interest in protecting the potential life of a previability fetus. All it needed to show was that a measure was reasonably related to achieving that goal, suggesting an attitude of substantial deference to the state. In other words, at the heart of the *Casey* compromise was a wholesale shifting of the burden of proof for sustaining a previability persuasion regulation from the state to a plaintiff. Such an interest would be presumed to be constitutionally sufficient, and it would fall on a plaintiff to show a regulation had the purpose or effect of substantially hindering the obtaining of an abortion.

As noted earlier, this test was somewhat incoherent when it came to persuasion regulations since their entire purpose was to convince a woman to refrain from having an abortion. Moreover, if such a regulation was successful in achieving its goal, it arguably hindered her from having that procedure—albeit because of the woman's own decision-making process. Hence, the plurality's new formulation only made sense if it were read to mean that persuasion regulations would not amount to an undue burden so long as they did not overcome a woman's own informed and voluntary choice whether or not to have an abortion (effectively crossing the line from persuasion to psychological coercion), nor have incidental effects of substantially impeding a woman's access to an abortion. But the main point of adopting the undue burden test was to free the state from having to justify the desirability of persuasion regulations, and to put the burden on the plaintiff to show unjustifiable obstruction.

Yet the *Casey* plurality did not stop there. Even as to previability regulations of the abortion process, it asserted that those "designed to

60. *Id.* at 876 (plurality opinion).

61. *Casey*, 505 U.S. at 878 (plurality opinion).

62. *Id.*

foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden."[63] In other words, such regulations would also be subjected to the undue burden test. As the plurality explained, "[a]s with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion. Unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right."[64] This formulation also suggested substantial deference to the state in imposing procedural regulations. So long as a regulation appeared designed to foster a woman's health, the burden would be on the plaintiff to show it was both unnecessary and had the purpose or effect of hindering abortions.

It was not clear, however, why the *Casey* plurality extended this level of deference to such regulations when all of its concerns were about the fact that the *Roe* framework had made persuasion regulations impossible. Moreover, most of the key regulations challenged in *Casey* were of the latter type. One gets the sense the plurality included maternal health regulations in the undue burden mix simply because it wanted a uniform approach to displace the *Roe* trimester framework in its entirety. Yet such a deferential approach to maternal health regulations may not have been wise because of their susceptibility to being imposed as a pretext for hindering access to abortions and reducing the loss of fetal life. As will be discussed later, many claimed that this was the real purpose of the Texas regulations challenged in *Hellerstedt*.[65]

Nevertheless, this newly deferential posture towards state persuasion and maternal health regulations was apparent in the *Casey* plurality's scrutiny of Pennsylvania's abortion regulations. In upholding regulations requiring that a mother be informed of specific health risks of the procedure, as well as be provided with information about the fetus designed to increase the likelihood she might choose to have her child, the plurality (with the votes of the dissenting Justices) overruled prior decisions which had placed a heavy burden on the state to justify such regulations.[66] Similarly, the plurality overturned prior decisions invalidating requirements that the physician herself provide such information to the patient, regulations presumably designed to add gravity

63. *Id.* at 878 (plurality opinion).

64. *Id.*

65. *See infra* notes 151–155 and accompanying text for a greater discussion of these issues.

66. *See Casey*, 505 U.S. at 881–84 (plurality opinion) (overruling in part Thornburgh v. Am. College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) and City of Akron v. Akron Ctr. for Reproductive Health, Inc., 462 U.S. 416 (1983)). The Court also held initially that the Pennsylvania law being challenged met the *Roe* requirement that abortion restrictions contain an exception allowing that procedure as necessary to preserve the health or life of a woman. *See id.* at 879–80.

or credibility to the "pro-life" information being provided.[67] In both cases, the plurality accorded substantial deference to the asserted state interests for the regulations, either concluding without evidence that such regulations did not unduly burden the abortion right or noting the lack of it.[68]

The plurality employed a virtually identical analysis in overturning a prior decision invalidating a requirement that a woman wait twenty-four hours between being provided with the foregoing types of information and having an abortion. It noted that such requirements appeared to be rational measures to promote fetal life and made the judgment that they did not place a substantial obstacle on the abortion right even though the district court had determined they could be "particularly burdensome" for some groups of women.[69] The plurality also upheld a requirement that a minor obtain at least one parent's consent to obtain an abortion or otherwise demonstrate to a court that it was in her best interests, citing pre-*Casey* holdings to this effect.[70] Moreover, even though the state had placed onerous reporting requirements on abortion providers, the plurality deferred to the state's asserted interest in promoting health and research with the requirements, and noted the lack of a showing that any increased costs from them would impose a substantial obstacle to getting an abortion.[71]

The only regulation invalidated in *Casey* was a requirement that a married woman notify her spouse prior to obtaining an abortion, or provide good reasons for failing to do so. Here, the plurality did not question the state's presumed interest in promoting fetal life with the requirement, but took cognizance of much evidence in the record that it could substantially hinder the ability of women who experience spousal abuse to obtain abortions.[72]

In sum, *Casey* constituted a sea change from the *Roe* approach of placing a heavy burden on the state to sustain previability abortion regulations, essentially transferring it to plaintiffs who could prevail only by providing evidence that their ability to obtain abortions had been substantially impeded—as in the case of the spousal notification provision as applied to a given class of women. In this way, the Reagan–Bush appointees could in good conscience vote to uphold a woman's right

67. *See id.* at 884–85 (plurality opinion) (overruling in part City of Akron v. Akron Ctr. for Reproductive Health, Inc., 462 U.S. 416 (1983)).

68. *See id.* at 881–85 (plurality opinion).

69. *See id.* at 885–87 (plurality opinion) (overruling in part City of Akron v. Akron Ctr. for Reproductive Health, Inc., 462 U.S. 416 (1983).

70. *See id.* at 899–900 (plurality opinion).

71. *See Casey*, 505 U.S. at 900–01 (plurality opinion).

72. *See id.* at 887–98 (majority opinion).

to obtain a previability abortion, while at the same time permitting significant regulation of both the abortion decision and the procedure itself. This was the essence of the *Casey* compromise.

*C. Post-*Casey *Applications of the Compromise*

The Court's next application of *Casey*'s new undue burden approach reinforced its deferential attitude towards regulations of the abortion process in the interests of maternal health. In *Mazurek v. Armstrong*,[73] the Ninth Circuit held the plaintiffs had a "fair chance" of obtaining injunctive relief against the enforcement of a Montana statute that limited the performance of abortions to licensed physicians—effectively preventing the one licensed physician assistant in the State who performed abortions from doing so herself.[74] The appellate court agreed with the plaintiffs' argument that the State arguably had the purpose of substantially obstructing abortions, and hence imposing an undue burden, given evidence suggesting physician assistants performed the procedure as safely as physicians.[75]

Reversing in a short six–three per curiam opinion joined by *Casey* plurality member Justice Kennedy,[76] the Court held that this argument was "squarely foreclosed by *Casey* [where] . . . we emphasized that [o]ur cases reflect the fact that the Constitution gives the States broad latitude to decide that particular functions may be performed only by licensed professionals, *even if an objective assessment might suggest that those same tasks could be performed by others*."[77] In other words, it was error to read improper purpose into the Montana law based solely on arguments about its efficacy in improving health outcomes given the deference owed the State in making such determinations. Moreover, considering the lack of evidence the law had the effect of substantially hindering access to abortions, the Court ruled the Ninth Circuit had been wrong to cast doubt on its validity.[78] Thus, in the first post-*Casey* decision analyzing the undue burden test, the Court upped the ante even more on plaintiffs challenging a health regulation, effectively ruling that only direct evidence of an improper purpose would suffice to satisfy that branch of the test in light of the deference to be accorded the state's regulation.

The Court's next decision utilizing the undue burden approach,

73. Armstrong v. Mazurek, 94 F.3d 566 (9th Cir. 1996).

74. *See id.* at 567–68.

75. *See id.* at 567.

76. *See* Mazurek v. Armstrong, 520 U.S. 968 (1997) (per curiam).

77. *Id. at* 973 (emphasis in original).

78. *See id.* at 971–75.

Stenburg v. Carhart,[79] dealt with a Nebraska abortion regulation that fell somewhere between a persuasion regulation and a maternal health regulation. It concerned a ban on utilizing an abortion procedure where a fetus would be partially delivered from a woman's vagina before its life was terminated—hence the designation "partial birth" abortion ban.[80] Like a persuasion regulation, it was designed to promote what was perceived to be a moral outcome—just as the former was designed to persuade a woman to choose to have her child, the latter sought to bar the use of a procedure considered inhumane to the fetus and inimical to medical profession ethics.[81] And just as a health regulation typically regulated the medical procedure itself to promote safety for the mother, the partial birth ban also regulated that procedure but for a concededly moral end.[82]

The decision, however, did not shed much light on how to apply the undue burden standard. In a five–four decision, the liberal wing of the Court, joined by Justice O'Connor, held that the omission of a health exception from the partial birth ban violated the *Roe* holding that exceptions to abortion restrictions are required in cases where non-compliance is necessary to preserve the health or life of the mother.[83] Moreover, in a second part of the opinion, the majority held the ban was written so broadly that it included the most common abortion procedure in the second trimester, one distinct from the partial birth method.[84] Hence, the majority observed without elaboration, it constituted an undue burden on the abortion right—something the State of Nebraska itself had conceded if the law was to be read so broadly.[85] The majority obviously thought that banning the most common method of performing an abortion would result in a substantial obstacle to obtaining one.

Pertinent to this discussion, Justice Kennedy's dissent was the most notable part of *Stenberg*. He accused the majority, including his *Casey* plurality co-authors Justices O'Connor and Souter, of misreading that case.[86] In his view, *Casey* was all about giving the states more deference with respect to their interests in regulating abortion than had been accorded under the *Roe* framework.[87] As he asserted, "*Casey* is premised

79. Stenberg v. Carhart, 530 U.S. 914 (2000).

80. *See id.* at 920–30.

81. *See id.* at 930–31.

82. *See id.* at 920–30.

83. *See id.* at 930–38.

84. *See id.* at 938–46.

85. *See Stenberg*, 530 U.S. at 938–46.

86. *See id.* at 956–79 (Kennedy, J., dissenting).

87. *See id.* at 956–57 (asserting that "[w]hen the Court reaffirmed the essential holding of *Roe* [in *Casey*], a central premise was that the States retain a critical and legitimate role in legislating on the subject of abortion, as limited by the woman's right the Court restated and again guaranteed. . . . The

on the States having an important constitutional role in defining their interests in the abortion debate."[88] Moreover, in his view, those interests extended beyond just protecting fetal life to include state interests in promoting respect for fetal life and medical profession ethics,[89] as well as making judgments about the health necessity of abortion procedures when the medical community was divided on that question.[90]

Hence, it was not surprising when the Court was facing a challenge to a partial birth abortion ban enacted by the U.S. Congress in the wake of *Stenberg*, and the more conservative Justice Samuel Alito had replaced Justice O'Connor, that Justice Kennedy was giving the assignment of writing the majority opinion essentially overruling *Stenberg* seven years later.[91] In *Gonzalez v. Carhart*,[92] Kennedy wrote for himself and his four more conservative colleagues on the Court. Upholding the federal ban, which like its Nebraska counterpart omitted an exception to use the procedure in order to preserve the health of the mother, Kennedy reframed the question from how it had been couched in *Stenberg*. Instead of simply asking whether the *Roe* requirement that required a health or life exception to any abortion regulation was satisfied, Kennedy asked if the lack of a health exception constituted an undue burden on the abortion

State's constitutional authority is a vital means for citizens to address these grave and serious issues, as they must if we are to progress in knowledge and understanding and in the attainment of some degree of consensus").

88. *Id.* at 961; *see also id.* at 979 ("*Casey* . . . said we would be more solicitous of state attempts to vindicate interests related to abortion.").

89. *See Stenberg*, 530 U.S. at 957 ("The political processes of the State are not to be foreclosed from enacting laws to promote the life of the unborn and to ensure respect for all human life and its potential."); *id.* at 962 ("A State may take measures to ensure the medical profession and its members are viewed as healers, sustained by a compassionate and rigorous ethic and cognizant of the dignity and value of human life, even life which cannot survive without the assistance of others.").

90. *See id.* at 965 ("Nebraska, however, was entitled to conclude that its ban, while advancing important interests regarding the sanctity of life, deprived no woman of a safe abortion and therefore did not impose a substantial obstacle on the rights of any woman."); *id.* at 968 ("Courts are ill-equipped to evaluate the relative worth of particular surgical procedures. The legislatures of the several States have superior factfinding capabilities in this regard."); *id.* at 970 ("The Court fails to acknowledge substantial authority allowing the State to take sides in a medical debate, even when fundamental liberty interests are at stake and even when leading members of the profession disagree with the conclusions drawn by the legislature."); *id.* at 972 ("In light of divided medical opinion on the propriety of the partial birth abortion technique (both in terms of physical safety and ethical practice) and the vital interests asserted by Nebraska in its law, one is left to ask . . . [u]pon what sound principles as to the relations existing between the different departments of government can the court review this action of the legislature? . . . The answer is none.").

91. Although the Court never formally overruled *Stenberg* in *Gonzalez*, its brief treatment of that case asserting disagreement with its holding on the major issue before the Court—whether deference was owed to legislative judgments about health questions involving medical uncertainty—demonstrated that it was effectively overruling that case. *See* Gonzalez v. Carhart, 550 U.S. 124, 166–67 (2007).

92. Gonzalez v. Carhart, 550 U.S. 124 (2007).

right.[93]

Looking at the purpose of the ban, he simply asked whether Congress had a rational basis for the law other than to obstruct abortions, and whether the law furthered that objective.[94] This was classic rational basis review. Finding that the law promoted respect for fetal life and ethical conduct by the medical profession, and that it furthered these objectives, Kennedy concluded that the statute's purpose was not to obstruct abortions.[95] As to the effects of the ban, while he asserted that "uncritical deference" should not be given to Congress's determination that the lack of a health exception would not pose significant risks to women in light of medical uncertainty surrounding that question,[96] "[c]onsiderations of marginal safety, including the balance of risks, are within the legislative competence when the regulation is rational and in pursuit of legitimate ends."[97] Applying deferential rational basis review once again, Kennedy held that the lack of a health exception did not have the effect of substantially hindering abortions, especially considering that more common procedures remained available for doctors to use.[98]

The upshot of *Gonzalez* was that it appeared to transform the undue burden analysis of *Casey* and *Mazurek* from one where a plaintiff bore the complete onus of challenging an abortion regulation—showing that it constituted an undue burden—to one where the state would at least have to survive deferential rational basis review as to the regulation before the burden would shift to a plaintiff to prove an undue burden. Regardless, however, it appeared that the state's burden of proof would be relatively light in comparison to the plaintiff's heavy onus of showing an undue burden. In other words, beginning with the plurality opinion in *Casey*, Kennedy had succeeded in moving the Court to a position where, as he put it in his *Stenberg* dissent, it "would be more solicitous of state

93. *See id.* at 156–67. The Court also decided that the federal act was not unduly vague nor so broad that it could impose an undue burden by precluding more common methods of abortion. *See id.* at 146–56.

94. *See id.* at 158 ("Where it has a rational basis to act, and it does not impose an undue burden, the State 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. The Act's ban on abortions that involve partial delivery of a living fetus furthers the Government's objectives.").

95. *See id.* at 156–60.

96. *Id.* at 166.

97. *Gonzalez*, 550 U.S. at 166.

98. *See id.* at 161–67. It was particularly notable that Kennedy concluded deference to legislative judgments on the medical safety issues surrounding the partial birth ban was required in light of his observations that Congress had made some erroneous factual findings about those issues—hence prompting his assertion that the Court's deference should not be "uncritical." *See id.* at 165–66. This illustrates how determined Kennedy and his more conservative colleagues were to require deference to legislative judgments in this area.

attempts to vindicate interests related to abortion."[99]

III. REWRITING THE *CASEY* COMPROMISE IN *HELLERSTEDT*

This was the state of the law heading into the *Hellerstedt* case and its challenge to new maternal health regulations imposed by Texas—those requiring abortion clinic doctors to have admitting privileges at a local hospital, and those requiring clinics themselves to meet more onerous safety requirements applicable to surgical facilities.[100] Had the Court faithfully applied the foregoing *Casey*-to-*Gonzalez* precedent in the case, it would have asked whether Texas had a rational health basis for imposing the new requirements, and then put the burden on the plaintiffs to show they had the purpose or effect of unduly burdening the abortion right.[101] Moreover, under the *Mazurek* holding,[102] claims that the new regulations were unnecessary from a health or safety perspective would have been inadmissible to show Texas had an impermissible purpose for adopting them.[103] Only direct evidence of such purpose would have sufficed.[104]

Yet Justice Kennedy obviously had a change of thinking concerning the *Casey* compromise and what it meant. As the senior Justice in the *Hellerstedt* majority, he could have chosen to write the opinion himself—perhaps crafting a middle-of-the-road, if somewhat idiosyncratic, decision as he is known to do in ideologically charged cases. Alternatively, he could have assigned it to a member of the more liberal wing of the Court he was joining.[105] He chose the latter course, assigning

99. *See* Stenberg v. Carhart, 530 U.S. 914, 979 (2000).

100. *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016). The "admitting privileges requirement" stated that "[a] physician performing or inducing an abortion . . . must, on the date the abortion is performed or induced, have active admitting privileges at a hospital that . . . is located not further than 30 miles from the location at which the abortion is performed or induced." *Id.* (citing TEX. HEALTH & SAFETY CODE ANN. § 171.0031(a)). The "surgical-center requirement" stated that "the minimum standards for an abortion facility must be equivalent to the minimum standards adopted under [the Texas Health and Safety Code section] for ambulatory surgical centers." *Id.* (citing TEX. HEALTH & SAFETY CODE ANN. § 245.010(a)).

101. *See supra* notes 61–62 and accompanying text.

102. *See* Mazurek v. Armstrong, 520 U.S. 968 (1997) (per curiam).

103. *See supra* note 78 and accompanying text.

104. *See id.*

105. See *supra* note 19 for a description of the Court's opinion-assigning procedures. For an example of such a middle of the road opinion by Kennedy, see *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 781–98 (2007) (Kennedy, J., concurring in part and concurring in the judgment), where he agreed with a plurality of the more conservative members of the Court that a racial school assignment plan was not narrowly tailored, but agreed with the more liberal members in dissent that the plan furthered compelling state interests—a proposition the conservative plurality declined to agree with. See also, e.g., Lawrence v. Texas, 539 U.S. 538 (2003), where Kennedy sided with the liberal wing of the Court to write a majority opinion striking down a Texas gay sodomy law on substantive due process grounds, but declined to follow standard substantive due process analysis

it to Justice Breyer who had authored the majority opinion in *Stenberg* (the decision Kennedy effectively overruled in *Gonzalez*)[106] and who had taken contrary positions to Kennedy in every case implementing the *Casey* compromise: *Mazurek*, *Stenberg* and *Gonzalez*.[107] Breyer took ample advantage of the opportunity to reshape the Court's understanding of that compromise.

He initially took issue with the Fifth Circuit's articulation of the applicable legal standard from *Casey* and its progeny: to wit, that "a state law is constitutional if: (1) it does not have the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus; and (2) it is reasonably related to (or designed to further) a legitimate state interest."[108] While one could quibble with the order in which the appellate court had placed these requirements—it made more sense to first ask about the rationality of the legislation, and then inquire whether it imposed an undue burden—they were certainly taken right out of the *Casey–Mazurek–Gonzalez* playbook as described above.[109]

Yet Breyer described this formulation as being "incorrect" for two reasons: first, "[t]he first part of the Court of Appeals' test may be read to imply that a district court should not consider the existence or nonexistence of medical benefits when considering whether a regulation of abortion constitutes an undue burden. The rule announced in *Casey*, however, requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer."[110] To support this position he cited *Casey*'s treatment of the spousal notification and parental consent (Breyer erroneously called it "parental notification") regulations, claiming the Court performed a "balancing" of their benefits and burdens in assessing whether they had the effect of imposing an

by ranking the asserted liberty interest in having private consensual sex and applying the given level of scrutiny—instead applying an amorphous balancing analysis that applied heightened scrutiny as desired by the liberal wing, but also declining to identify the asserted right as fundamental as that camp likely desired. As another example, see *Casey* itself where, as discussed, Kennedy and his two plurality co-authors split the difference between the more liberal and conservative members of the Court by retaining the core *Roe* viability holding but allowing greater state restrictions on abortion. *See supra* note 20 and accompanying text.

106. *See supra* note 79–93 and accompanying text.

107. In *Mazurek*, Kennedy joined the majority opinion while Breyer was in dissent. *See Mazurek*, 520 U.S. 968 (1997) (per curiam); *id.* at 977–78 (Stevens, J., dissenting joined by Ginsburg and Breyer, JJ.). In *Stenberg*, Breyer authored the majority opinion while Kennedy issued a vigorous dissent. *See supra* notes 81–91 and accompanying text. And in *Gonzalez*, Kennedy wrote the majority opinion while Breyer joined Ginsburg's dissent. *See supra* notes 91–98 and accompanying text; *see also* Gonzalez v. Carhart, 550 U.S. 124, 169 (2007) (Ginsburg, J., dissenting joined by Breyer, J.).

108. *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2309 (2016) (citing Whole Women's Health v. Cole, 790 F.3d 563, 572 (5th Cir. 2015) (per curiam), *rev'd sub nom.,* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016)).

109. *See supra* notes 100–108 and accompanying text.

110. *Hellerstedt*, 136 S. Ct. at 2309.

undue burden.[111]

Next, according to Breyer, "the second part of the test is wrong to equate the judicial review applicable to the regulation of a constitutionally protected personal liberty with the less strict review applicable where, for example, economic legislation is at issue."[112] Here, Breyer cited to a decision applying deferential rational basis review to scrutinize an alleged infringement of an economic substantive due process right to engage in one's profession without undue interference by the state.[113] In other words, Breyer was asserting that *Casey* called for some form of heightened scrutiny balancing of the costs and benefits of Texas's regulation. As he concluded, "[t]he Court of Appeals' approach simply does not match the standard that this Court laid out in *Casey*, which asks courts to consider whether any burden imposed on abortion access is 'undue.'"[114]

With this critique of the Fifth Circuit's reasoning, Breyer transformed the *Casey* compromise in three important ways. His first characterization of *Casey* as balancing benefits and burdens to assess the "undueness" of an abortion regulation was simply incorrect. This assertion suggested the state bore the burden of proving the benefits of a given regulation—for what abortion plaintiff would be attempting to prove them? As described above, however, with persuasion regulations, any "benefits" of saving fetal life were assumed to be a given.[115] With respect to maternal health regulations, both *Casey* and *Mazurek* ruled the state was entitled to substantial deference provided the regulations appeared designed to further that health.[116] And even as to the "morality promoting" partial birth ban in *Stenberg* and *Gonzalez*, the controlling latter decision assessed the state's interests in promoting respect for the fetus and medical ethics under a typical (and deferential) rational basis review approach.[117]

So what balancing was Breyer referring to? If one reviews the Court's analysis of the spousal notification provision in *Casey* he relied on, there is not one mention of any benefits flowing from it prior to the Court concluding "[i]t is an undue burden, and therefore invalid."[118] Its reasoning focused exclusively on how those married women with abusive husbands would be deterred from signing the requisite declaration

111. *See id.*

112. *Id.*

113. *See id.* at 2309–10 (citing Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 491 (1955)).

114. *Id.* at 2310.

115. *See supra* notes 59–60 and accompanying text.

116. *See supra* notes 73–78 and accompanying text.

117. *See supra* note 94 and accompanying text.

118. *See* Planned Parenthood v. Casey, 505 U.S. 833, 887–95 (1992).

necessary to get an abortion—in other words, the effects of the regulation on a woman's ability to get the procedure.[119]

It was only after reaching this conclusion the Court quite predictably addressed the husband's interest in the spousal notification requirement because protecting that interest was its entire purpose (along with, presumably, encouraging a joint decision that would be more "pro-life").[120] It would have been an odd analysis had the Court not at least mentioned this point. Yet even here the Court expended one sentence citing a statement from a prior decision that "a husband has a 'deep and proper concern and interest . . . in his wife's pregnancy and in the growth and development of the fetus she is carrying.'"[121] But the rest of the Court's discussion was devoted exclusively to explaining why that interest should be subordinated to the wife's interest in making decisions about her own body.[122] To say the Court's treatment of the notification requirement balanced its benefits against its burdens in assessing whether it had the effect of an undue burden was simply inaccurate. Breyer was conflating a mere acknowledgment of the state's interest for passing the regulation with an evaluation of any benefits it might have had.

Moreover, Breyer's assertion that *Casey* balanced the benefits and burdens of the parental consent requirement in concluding it was not an undue burden was just as flawed. The plurality's entire analysis consisted of two short paragraphs.[123] In the first, it simply reaffirmed pre-*Casey* rulings upholding parental consent requirements—cases not even decided under the undue burden standard.[124] In the second, the plurality addressed briefly an additional complaint made by the plaintiff that the parental consent requirement at issue was more burdensome than those involved in the prior rulings because it mandated that both the minor's and a parent's consent be informed.[125] The plurality summarily rejected this contention: "petitioners' argument is a reprise of their argument with respect to the informed consent requirement in general, and we reject it for the reasons given above."[126] It then added a sentence to note that "some of the provisions regarding informed consent have particular force

119. *See id.*

120. *See id.* at 895–96.

121. *Id.* (citing Planned Parenthood of Central Mo. V. Danforth, 428 U.S. 52, 69 (1976)).

122. *See id.* at 895–98.

123. *See Casey*, 505 U.S. at 899–900.

124. *See id.* at 899 (citing Ohio v. Akron Ctr. for Reproductive Health, 497 U.S. 502, 510–19 (1990); Hodgson v. Minnesota, 497 U.S. 417, 461 (1990) (O'Connor, J., concurring in part and concurring in judgment in part); *id.* at 497–501 (Kennedy, J., concurring in judgment in part and dissenting in part); Akron v. Akron Ctr. for Reproductive Health, Inc., 462 U.S. 416, 440 (1983); Bellotti v. Baird, 443 U.S. 622, 643–44 (1979) (plurality opinion)).

125. *See Casey*, 505 U.S. at 899–900.

126. *Id.* at 899.

with respect to minors," referring to the twenty-four hour waiting period requirement that could encourage more family deliberations about whether to seek an abortion.[127]

While the plurality did note this one potential benefit of Pennsylvania's parental consent provision, it hardly balanced the burdens and benefits of that provision as part of an undue burden analysis. Indeed, the main weight of the plurality's reasoning, as noted, hinged on a reference to prior rulings utilizing the very *Roe* trimester framework *Casey* was rejecting.

But perhaps even more problematic was Breyer's reference to *Casey*'s treatment of these provisions at all to support his balancing thesis. His main complaint was that the Fifth Circuit's formulation suggested that "the existence or nonexistence of *medical benefits*" should not be considered in evaluating whether an abortion regulation was an undue burden.[128] But medical benefits are only pertinent to maternal health regulations, and not persuasion or other regulations designed to achieve moral goals such as protecting or respecting fetal life. And the spousal notification and parental consent requirements cited by Breyer to support his notion that such benefits should be balanced against burdens were of the latter ilk—designed presumably to encourage more thoughtful decisions about whether to carry a fetus to term. Hence, Breyer was mixing apples and oranges to support his balancing thesis, even if *Casey* had actually performed such a balancing in evaluating those requirements.

Breyer's second main criticism of the Fifth Circuit's undue burden formulation was that it utilized rational basis review to scrutinize the asserted state interests rather than the heightened scrutiny normally applied to substantive due process liberty interests of a personal versus economic nature.[129] But, as described above, the rational basis review adopted by the Fifth Circuit could have been lifted verbatim from Kennedy's undue burden analysis in *Gonzalez*—the controlling decision on the matter because it was the last opinion to garner a majority of the Court.[130] And even if Breyer had wanted to distinguish *Gonzalez* as involving morality and ethical regulations rather than the maternal health regulations at issue in *Hellerstedt*, the treatment in *Casey* and *Mazurek* of maternal health regulations was even more deferential—not even calling for traditional rational basis review, but rather putting the onus on the abortion plaintiff to prove an undue burden if the regulation seemed designed to further maternal health.[131]

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127. *See id.* at 899–900.

128. *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2309 (2016) (emphasis supplied).

129. *See supra* notes 112–114 and accompanying text.

130. *See supra* notes 92–99 and accompanying text.

131. *See supra* notes 63–78 and accompanying text.

Breyer was no doubt correct that the Court normally does not apply deferential rational basis review to scrutinize alleged infringements on "non-fundamental" liberty interests[132]—and no one could rationally contend that even after *Casey* a woman's right to a previability abortion could be characterized as *that*[133]—but the Court also does not apply an undue burden test in such cases that shifts the burden of proof from the state to a plaintiff.[134] Such burden shifting, however, was the whole point of the *Casey* compromise—to adopt a "one-off" approach from its ordinary substantive due process jurisprudence that would allow greater restrictions on the previability abortion right.[135] Moreover, the Court is always free to change its standard approach to a given area of rights regardless of whether a later Court deems it inconvenient to its current analysis.[136] And of course a majority of an even later Court is free to return to its traditional approach, but it must explain why that is justified in light of stare decisis constraints that should operate to prevent results-oriented swings in the fundamental law of the land.[137]

Finally, as noted, Breyer summed up his critique of the Fifth Circuit's approach by asserting it "simply does not match the standard that this Court laid out in *Casey*, which asks courts to consider whether any burden imposed on abortion access is 'undue.'"[138] But this is exactly what the Fifth Circuit had done. So where was Breyer going with this? He seemed to be suggesting that the "undueness" in undue burden should be read synonymously with "unwarranted" or "unnecessary" (thus justifying a look at the benefits of a regulation in addition to its burden), rather than merely assessing the "excessiveness" or "severity" of the burden on the plaintiff as the Court had previously done. In other words, Breyer was subtly shifting the calculus from a more quantitative measure of "undueness" that focused on the degree of right obstruction experienced by a plaintiff, to a more qualitative measure of whether a restriction was inappropriate or unjustified in the first place (thus shifting much of the burden of proof to the state). This all seemed designed to justify Breyer's

132. *See infra* notes 171–174 and accompanying text.

133. As will be discussed later, even though the Court applied deferential rational basis review to the state's asserted interests in regulating abortion, it did give a plaintiff the right to prove an undue burden despite the fact that the state might have had legitimate interests in the regulation. In effect, this elevated the Court's treatment of the previability right to something a bit more substantial than a non-fundamental right. *See infra* notes 180–182 and accompanying text.

134. *See infra* notes 172–179 and accompanying text.

135. *See* Gonzales v. Carhart, 550 U.S. 124,145–46 (2007); *see also* Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 341–42 (2007); David D. Meyer, *Gonzales v. Carhart and the Hazards of Muddled Scrutiny*, 17 J.L. & POL'Y 57, 63–65 (2008).

136. *See generally* Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68 (1991).

137. *See id.*

138. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2310 (2016).

shift from a deferential approach to the asserted state interests in regulating abortion to one demanding a heightened scrutiny balancing of a regulation's benefits against its costs.

In addition to rejecting the Fifth Circuit's formulation of the undue burden standard, Breyer also criticized that court for holding that the federal district court had improperly substituted its judgment for that of the Texas Legislature about the medical necessity of the challenged regulations.[139] In other words, he was asserting the district court was correct in not deferring to the Legislature's judgment about that necessity. To support this position, Breyer pointed to places in *Casey* and *Gonzalez* where the Court itself had looked at "evidence and arguments" in the record.[140] He also distinguished *Gonzalez*'s heavy deference to Congress's judgment that a partial-birth-procedure health exception was not medically necessary by noting that while Congress had held hearings and made factual findings on that issue, "the relevant statute here does not set forth any legislative findings. Rather, one is left to infer that the legislature sought to further a constitutionally acceptable objective (namely, protecting women's health)."[141] Breyer then concluded the district court properly gave "significant weight to evidence in the judicial record" in balancing "the asserted benefits against the burdens" of the Texas regulations.[142]

But wait, one might ask, isn't the issue of whether the district court should have done an independent examination of evidence regarding medical necessity only relevant if it was supposed to balance the benefits and burdens of the Texas regulations? Breyer, however, was making the issue relevant by transforming the *Casey* compromise from one where the Court had indeed inferred constitutionally acceptable objectives if the design of a regulation seemed to warrant that, to his new undue burden balancing approach that put much of the onus on the state to justify it. Moreover, Breyer's reliance on *Casey* to support his new "independent judicial review in performing balancing" thesis was ironic because the former case, as noted, was the one that demanded deference to health regulations where they appeared "designed to foster the health of a woman seeking an abortion . . . ."[143] And while the *Gonzalez* Court did discuss the weight to be placed on legislative findings with respect to the different issue of whether the lack of a health exception in a morality regulation would endanger women (not the medical necessity of a

139. *See id.* at 2309–10.

140. *See id.* at 2310.

141. *Id.*

142. *Id.*

143. Planned Parenthood v. Casey, 505 U.S. 833, 878 (1992); *see also supra* notes 60–65 and accompanying text.

maternal health regulation itself—the issue in *Hellerstedt*), it ended up requiring deferential rational basis review of those findings with the qualifier that it should not be "uncritical deference."[144]

In sum, Breyer used misplaced criticism of what the Fifth Circuit had properly done pursuant to *Casey* and its progeny, to accomplish a substantial rewriting of the compromise called for by that decision. In five key paragraphs of the *Hellerstedt* opinion,[145] he moved the Court from a place where it substantially deferred to regulations of the previability abortion right, placing the burden of proof squarely on a plaintiff to show a regulation had the purpose or effect of substantially obstructing abortion access, to a position of heightened scrutiny balancing of the benefits and burdens of a regulation, one that naturally shifts much of the burden of proof to the state. This is the same place the Court had been during the reign of the *Roe* trimester framework, at least for maternal health regulations—the type of regulations being challenged in *Hellerstedt*.[146] And once Breyer had secured this reversion to the *Roe* approach, it was little surprise that after a detailed balancing of the asserted benefits of Texas's new hospital admission and surgical center requirements against their alleged burdens, the majority struck them down as an undue burden on the abortion right.[147]

IV. TO WHAT EXTENT THERE AND BACK AGAIN?

The difficult question lower courts will now have to struggle with is to what degree the Court has returned to the *Roe* framework for previability abortions, even though couched in the *Casey* undue burden standard. It is no surprise that Breyer and his more liberal colleagues would like to ditch the *Casey* compromise, since their dissents in *Mazurek* and *Gonzalez* indicate they likely never considered themselves to be part of it.[148] So the critical question is to what extent swing Justice Anthony Kennedy signed on to that proposition through his unqualified joinder of Breyer's majority opinion in *Hellerstedt*. Is Kennedy really prepared to jettison the *Casey* compromise after playing a critical role in adopting it and reinforcing it in both *Mazurek* and *Gonzalez*?

Not believing that Kennedy's passive joinder of Breyer's opinion can be taken to that length, I submit he would make a distinction between

144. *See* Gonzales v. Carhart, 550 U.S. 124, 165 (2007); *see also supra* notes 93–96 and accompanying text.

145. *See Hellerstedt*, 136 S. Ct. at 2309–10.

146. *See supra* notes 49–51 and accompanying text.

147. *See Hellerstedt*, 136 S. Ct. at 2310–18.

148. *See* Mazurek v. Armstrong, 520 U.S. 968, 977–81 (1997) (Stevens, J., dissenting); *Gonzales*, 550 U.S. at 169–91 (Ginsburg, J., dissenting).

maternal health regulations and those designed to promote a moral outcome (such as influencing the woman's decision in a pro-life way or promoting respect for the fetus in the way it is aborted). On the one hand, it is difficult to believe Kennedy would be willing in future cases to allow courts to balance the benefits and burdens of a regulation designed to persuade a woman to carry a child to term. As discussed, giving deference to the judgment of a state that such an objective is constitutionally permissible was at the heart of the *Casey* compromise.[149] It made sense under this framework to put the onus on the plaintiff to show that this was not the true purpose of a regulation, or that it was unduly coercive or imposed undue incidental burdens. To infer a wholesale abandonment of this position would seem to be unwarranted.

On the other hand, as noted, the need for or desirability of maternal health regulations would not always be so obvious, even to a person like Kennedy.[150] Given the indeterminate risks often associated with medical procedures like abortion, and uncertainties at the margins regarding how much a safety measure reduces such risks, it is much easier for a legislature to use health regulations as a pretext for making it more difficult for women to get abortions.[151] Indeed, the hospital admitting and surgical center regulations challenged in *Hellerstedt* itself had been widely adopted by many conservative states after *Casey*, *Mazurek*, and *Gonzalez* had legislators believing the Court would be more receptive to abortion regulation.[152] Those regulations were viewed by many as thinly veiled attempts to make it more difficult for women to obtain abortions, and not to improve the procedure's safety.[153]

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149. *See supra* notes 60–64 and accompanying text.

150. Indeed, during the oral arguments in *Hellerstedt*, Justice Kennedy voiced concern regarding Texas's so-called maternal health regulations because the "law has really increased the number of surgical procedures as opposed to medical procedures, and that this may not be medically wise." Transcript of Oral Argument at 44, Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016) (No. 15-274).

151. *See, e.g.*, Planned Parenthood of Wisconsin, Inc. v. Schimel, 806 F.3d 908, 920–21 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 2545 (2016) (explaining that abortion opponents who understand the law, such as legislators and governors, recognize that it is a difficult task to overturn Supreme Court precedent; therefore, "some of them proceed indirectly, seeking to discourage abortions by making it more difficult for women to obtain them. They may do this in the name of protecting the health of women who have abortions, yet . . . the specific measures they support may do little or nothing for health, but rather strew impediments to abortion.").

152. Between 2000 and 2014, the number of states that adopted abortion regulations increased from eleven to twenty-six. This increase is likely the result of, among other things, federal court decisions upholding similar regulations in other states. *See* Rachel Benson Gold & Elizabeth Nash, *States Continue to Enact Abortion Restrictions in First Half of 2014*, REWIRE (July 8, 2014), https://rewire.news/article/2014/07/08/states-continue-enact-abortion-restrictions-first-half-2014-lower-level-previous-three-years/; *see also supra* note 99.

153. *See, e.g.*, Bridgit Burns et al., *Evaluating Priorities: Measuring Women and Children's Health and Well-Being Against Abortion Restrictions in the States*, IBIS REPRODUCTIVE HEALTH (Sept. 30, 2014),
http://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/Priorities_Project.pdf; *see*

Hence, it is easy to see why Kennedy may have been inclined to join his more liberal colleagues in striking down the regulations. In his likely view, while the state has a legitimate and important role to play in presenting pro-life options for a woman to consider in making the ultimate abortion decision, once that decision is made the state has no business making it more difficult to carry out on the rationale of health regulations whose efficacy is doubtful. Indeed, the regulations at issue in *Hellerstedt* made access to abortions so much more difficult for so many Texan women—according to Breyer, they forced the closure of some thirty-three of forty abortion clinics, making it necessary for some women to drive over 200 miles to get the procedure[154]—that one wonders why Kennedy did not simply choose to write an opinion asserting that the effect of the regulations was to impose an undue burden while deferring to the asserted state interests in making abortion safer for women.

The answer to that question may lie in a subtle defect in the initial *Casey* reasoning. As noted, the plurality in the case concluded that "[u]necessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right."[155] In other words, if it were shown that a health regulation was *necessary* to a woman's safety, it would be quite absurd to invalidate it as hindering access to abortions. Logically, then, a regulation would have to be shown to be *both* unnecessary and an undue burden before it could be invalidated. But *Mazurek* and *Gonzalez* had counseled substantial (though not uncritical) deference to the state in making health determinations.[156] However, if substantial deference was to be accorded determinations by state officials that a health regulation was necessary, it would be very difficult for plaintiffs like those in *Hellerstedt* to show regulations that plainly had an effect of substantially hindering abortion access should ever be invalidated. Thus, the stark facts of *Hellerstedt* likely revealed this problem in the *Casey* compromise approach for health regulations, and may have caused Kennedy to rethink it and join Breyer in reshaping it.

If this is correct, however, a critical problem for Kennedy is that Breyer did not limit his new balancing approach to maternal health regulations.[157] Even though, as noted, he referred to weighing the "medical benefits" and burdens of a regulation, suggesting that his discussion was addressing

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also Targeted Regulation of Abortion Providers (TRAP), CTR. FOR REPRODUCTIVE RIGHTS (Aug. 28, 2015), http://www.reproductiverights.org/project/targeted-regulation-of-abortion-providers-trap.

154. *See Hellerstedt*, 136 S. Ct. at 2312–13.

155. Planned Parenthood v. Casey, 505 U.S. 833, 878 (1992) (plurality opinion); *see also supra* notes 61–62 and accompanying text.

156. *See supra* notes 73–99 and accompanying text.

157. *See Hellerstedt*, 136 S. Ct. at 2309–10.

health regulations, he cited *Casey*'s treatment of persuasion regulations to support this proposition.[158] Hence, it is very possible that in future challenges to regulations designed to influence a woman's decision process in ways to encourage her to have the child, the more liberal wing of the Court may use the new balancing approach to return to the *Roe* framework for these regulations as well—which invariably ended up invalidating them as an undue encroachment on the woman's decisional autonomy.[159] If this were to happen, however, Kennedy would be likely to get off the balancing band wagon since this would gut the core component of the *Casey* compromise.

Of course, if Kennedy meant to draw a line between health and persuasion regulations even though he joined Breyer's *Hellerstedt* opinion without reservation, it is lower courts that will pay the price as they often do when the Justices are not clear about what they are doing. Plaintiffs will argue that *Hellerstedt* requires them to balance the purported benefits and burdens of both persuasion and health regulations, even though to conduct such balancing on the former risks upsetting over two decades of case law built around the notion that states have a constitutionally legitimate role in advocating for fetal life. Lower courts will see that tension, and likely be at a loss about what to do about it. I believe it makes more sense to apply *Hellerstedt* balancing solely to maternal health regulations until the Court more explicitly abandons the core of the *Casey* compromise as to persuasion regulations.

V. REFLECTIONS ON FITTING *HELLERSTEDT*'S NEW BALANCING APPROACH INTO THE COURT'S OVERALL SUBSTANTIVE DUE PROCESS JURISPRUDENCE

With all of the focus on the undue burden standard, it is easy to forget how far the Court's abortion-rights jurisprudence has drifted from that tribunal's general approach to substantive due process rights. Yet with Breyer's move to revamp that standard in the form of a balancing analysis (at least with respect to maternal health regulations), it does move the Court's abortion jurisprudence back in the direction of its overall approach to substantive due process rights.

The notion of such a right rests in the Due Process Clause of the Fifth and Fourteenth Amendments, which command that the government shall not deprive any person of "life, liberty or property, without due process

158. *See id.; see also supra* notes 110–114 and accompanying text.

159. *See supra* notes 125–147 and accompanying text*; see also* Erwin Chemerinsky, *A New Era for Abortion Rights?*, CNN (June 27, 2016, 6:52 PM), http://www.cnn.com/2016/06/27/opinions/scotus-abortion-ruling-chemerinsky/index.html.

of law."[160] Even though the text and history of these Clauses support the idea that it primarily protects people from being deprived of the specified things without fair *process* by the government,[161] such as notice of the law justifying the deprivation and an opportunity to contest its application in a particular case,[162] in the late nineteenth century the Court started holding that it also protects against undue interferences by the government with certain "liberty" interests, regardless of how fairly it dealt with a person.[163] Thus, the Court recognized the notion that the Due Process Clauses have a "substantive" component to them—one that guards against unreasonable interferences regardless of process—in addition to their procedural components. Although many critics of such an implied substantive aspect of the Due *Process* Clauses have labeled it an "oxymoron" and other things,[164] at least some support for this approach can arguably be found in the Ninth Amendment to the Constitution which provides that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[165]

Obviously the Court did not want to invite constitutional litigation on every complaint of an undue interference by the government with a person's "liberty," and so it gradually determined to only take seriously those liberty interests that could be deemed "fundamental" in our legal

160. U.S. CONST., amend V, XIV, § 1.

161. *See, e.g.*, 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES: WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES BEFORE THE ADOPTION OF THE CONSTITUTION § 1783 (The Law Book Exchange Ltd., 2d ed. 2005) (explaining that the Due Process Clause "is but an enlargement of the language of magna charta, '*nec super eum ibimus, nec super eum mittimus, nisi per legale judicium parium suorum, vet per legem terrae*,' neither will we pass upon him, or condemn him, but by the lawful judgment of his peers, or by the law of the land. Lord Coke says, that these latter words, *per legem terrae* (by the law of the land,) mean by due process of law, that is, without due presentment or indictment, and being brought in to answer thereto by due process of the common law."). Noted jurists and scholars have argued, however, that at least by the time of the Fourteenth Amendment's adoption, if not earlier, that the notion of due process was widely understood to contain some substantive protections against unreasonable or arbitrary government actions. *See, e.g.*, McDonald v. City of Chi., 561 U.S. 742, 862–63, n.5 (2010) (Stevens, J., dissenting).

162. *See, e.g.*, Bd. of Regents v. Roth, 408 U.S. 564 (1972) (asserting that "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential") (citations and quotes omitted).

163. Of course this early trend reached its putative apex in the Court's (now) repudiated decision in *Lochner v. New York*, 198 U.S. 45 (1905) (holding the substantive due process right of liberty of contract was violated by a New York maximum hour law for bakery employees).

164. *See, e.g.*, U.S. v. Carlton, 512 U.S. 26, 39 (1994) (Scalia, J., concurring in the judgment) (asserting "[i]f I thought that 'substantive due process' were a constitutional right rather than an oxymoron, I would think it violated by bait-and-switch taxation"). *But see supra* note 161 discussing commentators who think the notion of due process was understood historically to have possessed a substantive component.

165. U.S. CONST. amend. IX; *see, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 486–99 (1965) (Goldberg, J., concurring) (finding a fundamental right of marital privacy based on the Ninth Amendment).

order.[166] Although the Court has long struggled with how to identify and define such fundamental liberty interests, and continues to struggle with that question today,[167] it did appear to settle on an approach to analyzing alleged infringements of such interests once they were identified. Generally, it would subject the infringing law or other government action to strict scrutiny, meaning that the government would need to prove a compelling interest or need for the law, and that the law was necessary or narrowly tailored to achieve that interest.[168] Under this approach, once a plaintiff had shown an infringement, the government would bear the entire burden of proving the importance of the purpose it was attempting to achieve, and that the law was narrowly tailored to achieve it.[169] In practice, this has become a virtually insurmountable hurdle to government regulation, with strict scrutiny typically labeled as "strict in theory, but fatal in fact"—that is, fatal to the existence of the regulation.[170] On the other hand, if the Court determined that an asserted liberty interest was

166. *See, e.g.*, *Griswold*, 381 U.S. at 479–86; *id.* at 486–99 (Goldberg, J., concurring); *id.* at 499–502 (Harlan, J., concurring). The trend of recognizing fundamental *implied* substantive due process rights through the Due Process Clause actually had its genesis in the Court's incorporation doctrine—i.e., incorporating only those *express* provisions of the Bill of Rights to the states through the Fourteenth Amendment Due Process Clause that it deems to be fundamental. *See, e.g.*, McDonald v. City of Chicago, 561 U.S. 742, 759–68 (2010) (describing the evolution of the Court's incorporation doctrine).

167. Perhaps not surprisingly, the modern struggle regarding how to identify a fundamental right for implied substantive due process rights has been between the conservative and liberal wings of the Court—a battle that is often won by wooing Kennedy to one's side. For instance, in *Washington v. Glucksberg*, 521 U.S. 702 (1997), the conservative majority joined by Kennedy defined fundamental liberty interests as those "deeply rooted in this Nation's history and tradition . . . and implicit in the concept of ordered liberty such that neither liberty nor justice would exist if they were sacrificed." *Id.* at 720–21 (citations and quotations omitted). Applying this strict standard, the Court found that an asserted liberty interest in committing suicide with the assistance of a physician was a decidedly non-fundamental right. *See id.* at 728. Yet in the Court's recent decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), Kennedy led the liberal wing of the Court in finding a fundamental liberty interest in same-sex marriage through a process of "reasoned judgment," where "[h]istory and tradition guide and discipline this inquiry but do not set its outer boundaries" and . . . "new insight reveals discord between the Constitution's central protections and a received legal stricture." *Id.* at 2598.

168. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 155 (1973) ("Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a compelling state interest . . . and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.").

169. *See, e.g.*, Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2014) ("Strict scrutiny is a searching examination, and it is the government that bears the burden to prove that the reasons for any [racial] classification [are] clearly identified and unquestionably legitimate.") (citations and quotations omitted). Of course, *Fisher* applied strict scrutiny in an equal protection case rather than one involving substantive due process rights. But that form of scrutiny is used as an analytical tool in various areas of constitutional law utilizing the same overall approach.

170. *See, e.g.*, Bernal v. Fainter, 467 U.S. 216, 219 n.6 (1984) ("Only rarely are statutes sustained in the face of strict scrutiny. As one commentator observed, strict-scrutiny review is 'strict' in theory but usually 'fatal' in fact.") (citation omitted). It should be noted, however, that particularly in the area of affirmative action plans, for several years certain members of the Court have been retreating from this notion in an attempt to uphold such plans against equal protection challenges. *See, e.g.*, *Fisher*, 133 S. Ct. at 2421.

non-fundamental, it would subject the law to deferential rational basis review and typically uphold it.[171]

In more recent decades, however, the Court has faced some cases where it appeared reluctant to characterize an asserted liberty interest as fundamental or non-fundamental, presumably because the former designation would essentially insulate the activity from any form of government regulation while the latter characterization would not sufficiently capture the importance of the claimed right. Examples of these include an asserted liberty interest in refusing lifesaving medical treatment,[172] and an asserted right of adults to engage in private, consensual sex.[173] In these cases, the Court does not give a formal designation to the asserted right but seems to treat it as an important or significant one (call it perhaps a "grey zone" right). To analyze alleged infringements of them, it appears to use a form of ad hoc balancing of the individual versus state interests at stake—at times being explicit about that, at other times not.[174]

Today's substantive due process methodology, then, seems to recognize three levels of liberty rights (non-fundamental, "important," and fundamental), and then applies the pertinent level of scrutiny to analyze alleged infringements (deferential rational basis review, ad hoc balancing, and strict scrutiny). With non-fundamental rights, the burden of proof to show an infringement, that the state lacked a legitimate government interest to justify it and that the law or action being challenged was not rationally related to achieving the interest, all fall on the plaintiff.[175] In other words, the law or action is presumed to be constitutional and the plaintiff bears the burden of overcoming that presumption.[176] With fundamental rights, once a plaintiff proves an infringement, the burden of proof shifts to the state to prove the requisite

171. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 728–36 (1997).

172. *See, e.g.*, Cruzan v. Director, Mo. Dept. of Health, 497 U.S. 261 (1990).

173. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003).

174. *Compare Cruzan*, 497 U.S. at 279 ("[D]etermining that a person has a 'liberty interest' under the Due Process Clause does not end the inquiry; whether respondent's constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests.") (citations and quotations omitted), *with Lawrence*, 539 U.S. at 564–79 (declining to designate the asserted sexual privacy right as fundamental, yet clearly applying some form of heightened scrutiny to the alleged infringement of that right).

175. *See, e.g.*, Armour v. City of Indianapolis, Ind., 132 S. Ct. 2073, 2080–81 (2012) (treating rational basis review under substantive due process and equal protection analysis as similar and noting "analogous precedent warns us that we are not to pronounc[e] this classification 'unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.' *Carolene Products Co.*, . . . 58 S.Ct. 778 (due process claim). Further, because the classification is presumed constitutional, the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it").

176. *See id.*

compelling interest and narrow tailoring.[177] In these cases, the law is presumed to be unconstitutional unless the state can overcome the presumption.[178] But in the nebulous area of important liberty rights, while the ad hoc balancing performed by the Court appears to be a form of heightened scrutiny where it reviews carefully the arguments made and evidence presented by the parties, once a plaintiff shows the infringement it seems the burden of proof is distributed roughly evenly to the plaintiff and the state to show whose interests should win.[179]

Now as to a woman's liberty interest in obtaining an abortion previability, *Roe* started out by declaring that interest to be a fundamental right.[180] But right away it began deviating from ordinary substantive due process methodology because alleged infringements on that right would have ordinarily been subjected to standard strict scrutiny.[181] For persuasion regulations designed to influence a woman's decision in favor of having the fetus, and for maternal health regulations designed to affect that decision such as informed consent on health risks, the standard methodology was basically followed.[182] The Court declared there was no compelling interest that could support such regulations until after the fetus achieved viability, and that after that point bans on abortion met strict scrutiny so long as they contained an exception to preserve the health or life of the mother.[183]

It was in the area of procedural health regulations where the Court most deviated from standard analysis. Such a regulation, it said, met a compelling interest of protecting the mother from abortion-specific health risks starting with the second trimester, and that it could stand if it was "reasonably related to maternal health."[184] Ordinarily, where a fundamental right was at issue, the Court would not declare that a generalized interest in furthering health would be compelling starting at a designated period of time (here the start of the second trimester) without reviewing the application of a specific regulation in the context it was being applied.[185] But where the Court did apply heightened scrutiny to

177. *See supra* note 169 and accompanying text.

178. *See, e.g.*, Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015) (in free speech context, asserting "[c]ontent-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests"). In other words, laws or state actions subject to strict scrutiny are generally presumed to be unconstitutional.

179. *See supra* note 174 and accompanying text.

180. *See* Roe v. Wade, 410 U.S. 113, 152–55 (1973); *supra* note 44 and accompanying text.

181. *See supra* note 45 and accompanying text.

182. *See supra* note 46 and accompanying text.

183. *See supra* note 48 and accompanying text.

184. *See Roe*, 410 U.S. at 164; *supra* note 47 and accompanying text.

185. Generally, an assessment of the "compellingness" of the state's interest in enforcing a law or taking an action alleged to infringe a fundamental right would focus on that particular law or action.

such a regulation was in the tailoring prong.[186] While the words "reasonably related" suggested a deferential rational basis review, as noted earlier, in practice the Court applied a heightened form of balancing to determine whether a health regulation could stand.[187] Yet that heightened balancing was still a less stringent form of review than the narrow tailoring that would ordinarily be called for when reviewing the infringement of a fundamental right.[188] In practice, balancing meant that a plaintiff and the state would share the burden of proof regarding the constitutionality of a given health regulation, as opposed to the state solely bearing that burden as it normally would under strict scrutiny.[189]

In sum, under *Roe*, persuasion and other regulations affecting the mother's decision process received the stringent review normally reserved for an alleged infringement of a fundamental right (here the previability abortion right),[190] yet regulations attempting to further maternal health during the second trimester received a sort-of intermediate balancing scrutiny that is modernly reserved for "important" rather than fundamental liberty interests.[191]

When *Casey* ushered in its compromise, however, both persuasion and other maternal health regulations were subjected to a deferential form of rational basis review that shifted the burden of demonstrating their unconstitutionality to a plaintiff.[192] This moved the proverbial abortion ball even further away from general substantive due process analysis. No longer could previability abortion be considered a fundamental right since it was receiving a form of deferential scrutiny normally accorded a right deemed to be non-fundamental—even though neither *Casey* nor any of its progeny ever explicitly acknowledged the right had been busted in rank.[193] So was the Court truly regarding a right it had declared to be fundamental as non-fundamental only two decades later?

The reality is more complicated. If the right were truly being regarded

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Instead, the *Roe* Court essentially declared that any challenged health regulation would meet the compelling interest test starting with the second trimester, and trained all of its scrutiny on whether it seemed "reasonably related" to achieving the generalized goal of maternal health.

186. *See supra* notes 46–47 and accompanying text.

187. *See id.*

188. *See Roe*, 410 U.S. at 155; *supra* note 177 and accompanying text.

189. *See supra* note 46 and accompanying text.

190. *See supra* notes 49–50 and accompanying text.

191. *See supra* notes 50–51 and accompanying text.

192. *See supra* notes 60–62 and accompanying text.

193. Although the *Casey* plurality never said it was no longer going to treat the previability right as being fundamental, by adopting the more deferential undue burden approach it was clear that this was precisely what it was doing. *See* Planned Parenthood v. Casey, 410 U.S. 833, 954 (1992). (Rehnquist, C.J., dissenting) ("*Roe* decided that a woman had a fundamental right to an abortion. The joint opinion rejects that view. *Roe* decided that abortion regulations were to be subjected to 'strict scrutiny' and could be justified only in the light of 'compelling state interests.' The joint opinion rejects that view.").

as non-fundamental, a plaintiff would have a very heavy burden of showing the state had no legitimate interest for an abortion regulation, and, even if it did, that the regulation was not rationally related to its achievement.[194] This is a difficult showing to make, which is why laws alleged to infringe upon non-fundamental rights carry a heavy presumption of constitutionality.[195] Yet even after *Casey*, an abortion plaintiff could still succeed on her claim by showing that even if the regulation passed rational basis review, it still had the effect of substantially obstructing access to abortions even though the plaintiff continued to bear the burden of proof on that issue.[196] In this sense, then, the Court appeared to be treating the previability abortion right as one lying somewhere between a non-fundamental liberty interest and an "important" one of the sort described above.

After *Hellerstedt*, however, at least as to regulations of the abortion procedure for the purpose of furthering maternal health, the Court seems to have elevated the rank of the previability abortion right squarely to the grey-zone category of important liberty interests—akin to the right to refuse unwanted medical treatment or to have private consensual sex.[197] This is because Breyer's new balancing approach tracks that used in the latter type of cases where the Court essentially engages in ad hoc balancing of the individual and state interests involved, seemingly distributing the burden of proof roughly evenly between the plaintiff and state in a given case.[198]

One might question, however, if this is a welcome development. Certainly for pro-choice individuals who believe in a strong abortion right, *Hellerstedt* will be welcome news even if they do not fully appreciate the doctrinal shift it represents. Moreover, at least for health regulations, this move to a balancing approach helps to align formerly *sui generis* abortion doctrine better with the Court's overall substantive due process jurisprudence.[199] This at least mitigates the anomaly where a liberty interest last formally classified as a fundamental right was receiving weak judicial scrutiny of alleged infringements. Yet adding more liberty interests to the amorphous "middle-tier" of substantive due process rights the Court does not even formally recognize, has its jurisprudential downsides. For one thing, lower courts are left to struggle with whether that category even exists and identifying, much less applying, its formal doctrinal parameters. For another, as with all general

194. *See supra* notes 175–176 and accompanying text.

195. *See id.*

196. *See supra* notes 83–90 and accompanying text.

197. *See supra* notes 172–174 and accompanying text.

198. *See supra* notes 174–179 and accompanying text.

199. *See supra* notes 166–179 and accompanying text.

balancing approaches, lower court judges are given more discretion to reach results that align with their particular ideological or policy preferences.[200]

Lastly, what about persuasion regulations or others designed to inform or influence a woman's decision? Time will tell whether we will have a schizophrenic abortion right whose strength fluctuates with the nature of the regulation impinging on it—a form of deferential rational basis review for persuasion regulations and more intermediate balancing scrutiny for health regulations. For unless the Court is willing to cut back on the core of the *Casey* compromise in favor of allowing courts to balance the benefits and burdens of having the state involved in a woman's decision-making process, that is where the law in this area seems to be headed.

VI. CONCLUSION

A little over forty years ago, *Roe v. Wade* declared that a woman enjoyed a fundamental right to an abortion, at least before her fetus attained the developmental ability to survive outside of her womb.[201] For the next twenty years, a divided Court heavily shielded this right from attempts by states to influence a woman's abortion decision in favor of fetal life.[202] When states also attempted to regulate abortion in the name of maternal health, the Court declared that this was appropriate starting with the second trimester of pregnancy yet it remained skeptical of the state's true motives—subjecting purported health regulations to a rigorous dose of judicial scrutiny.[203] This scrutiny ordinarily resulted in the Court striking down such regulations after determining their benefits did not justify their costs in terms of the burden they placed on the abortion right.[204]

Drawing the line at viability had stark real-world consequences. While many Americans likely shared differing views as to the moral and ethical propriety of aborting a fetus in its early developmental stages, those views coalesced into a strong political backlash when images circulated of fetuses being aborted in relatively advanced stages close to viability.[205] That backlash had a lot to do with the Court's membership becoming more conservative during the 1980's and early '90's—creating a wide

200. *See, e.g.*, Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2328 (2016) (Thomas, J., dissenting) (asserting, in reference to the balancing approach adopted by the *Hellerstedt* majority, that "[t]he Court should abandon the pretense that anything other than policy preferences underlies its balancing of constitutional rights and interests in any given case").

201. *See supra* notes 43–45 and accompanying text.

202. *See supra* notes 49–52 and accompanying text.

203. *See supra* notes 45–47 and accompanying text.

204. *See supra* notes 49–51 and accompanying text.

205. *See supra* notes 52–53 and accompanying text.

expectation that the Court would rethink its fundamental approach to abortion.[206]

Yet in *Casey*, a deeply divided Court reaffirmed *Roe*'s basic framework of recognizing a right of abortion up to viability despite its rhetoric of dispensing with the *Roe* trimester structure.[207] However, three Justices who straddled the divide between reaffirming *Roe in toto* and dispensing with that decision altogether, including Anthony Kennedy, announced that thereafter the Court would assume a more deferential posture towards a state's regulation of the abortion process.[208] They emphasized this was particularly important for regulations designed to influence a woman's choice in favor of carrying her fetus to term, but such deference would also be given to state regulations that purported to make the procedure safer for women.[209]

Thus, *Casey* ushered in a new twenty-year era where the Court remained relatively quiet on abortion. Yet in the few decisions where it spoke, with Justice Kennedy's leadership it continued to stress deference towards the state for both persuasion regulations and others impacting maternal health issues where the medical science was uncertain.[210] And states inclined to restrict the abortion process responded to this deferential posture by enacting more regulations of both varieties.[211]

The problem was that unlike persuasion regulations that have as a fairly transparent goal the reduction of previability abortions, maternal health regulations can be designed to achieve the same purpose yet be clothed in the garb of safety. And so, when *Hellerstedt* came to the Court it was time for that tribunal to pay the piper and face the latter reality. It responded, with Kennedy's key assistance, by effectively announcing it would subject maternal health regulations to greater judicial scrutiny to ensure their faithfulness of stated purpose—effectively returning to the *Roe* approach towards such regulations.[212]

Hence, the Court appears to be embarking on a third major phase of its abortion jurisprudence, except that the fate of persuasion regulations remains uncertain. Justice Breyer's majority opinion in *Hellerstedt*, and Kennedy's unqualified joinder of it, keeps this fate wrapped in mystery for now. Will the Court fully return to its protective *Roe* stance of the previability abortion right, or will a more variegated right emerge that, while guarding against unnecessary health regulations, remains

206. *See supra* notes 53–55 and accompanying text.
207. *See supra* notes 56–59 and accompanying text.
208. *See supra* notes 59–60 and accompanying text.
209. *See supra* notes 60–72 and accompanying text.
210. *See supra* notes 76–99 and accompanying text.
211. *See supra* notes 151–153 and accompanying text.
212. *See supra* notes 145–147 and accompanying text.

deferential towards states' attempts to have their voices heard during a woman's decision-making process?

Only time will tell, but perhaps what this back and forth suggests is a need for the Court to rethink the basic *Roe–Casey* framework of treating the abortion of fetuses in early stages of development the same as those in advanced stages—from conception all the way to viability. In other words, the liberal and conservative wings of the Court seemed locked in a seesaw battle as to whether to adhere to the *Roe* framework of subjecting all previability regulations to a skeptical judicial eye or the *Casey* approach of being more deferential to the state with respect to such regulations. But maybe the answer is not an all-or-nothing approach to previability abortion regulation. Perhaps the answer should be more nuanced, as it is in some countries that make it difficult for the state to regulate abortions in the early stages of a fetus's development and easier after the fetus reaches certain previability developmental markers. In short, like Tolkien's hobbit who needed much prodding to take the road in search of an adventure, maybe it is time for the one-size-fits-all conception to viability approach to be brought out of its comfortable hole in the side of the hill, and set on the road to a thoughtful reexamination.