

Liberty Finds No Refuge: The Doubt-Filled Future of *Casey*'s Undue Burden Standard

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ABSTRACT: Justice Anthony Kennedy's retirement from the United States Supreme Court raises serious questions about the continuing vitality of the Court's decisions in *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*. But a new justice on the Court is not the only reason that there is doubt surrounding a woman's ability to choose. Two years before Justice Kennedy retired, the Court introduced a great deal of uncertainty into its abortion jurisprudence in *Whole Woman's Health v. Hellerstedt*. In *Hellerstedt*, the Court interpreted *Casey*'s undue burden standard to require a court to balance an abortion regulation's benefits against its burdens in assessing the regulation's constitutionality, leading Justice Clarence Thomas to accuse the majority of "reimagining" *Casey*'s standard in a way that "will surely mystify lower courts for years to come." Whether the newly constituted Court will solve this mystery remains to be seen. In the meantime, lower courts must determine what *Casey*'s undue burden standard demands. And as states continue to experiment with new abortion-related measures and challenges are brought against regulations – both new and old – a coherent structure for applying the undue burden test is an urgent need.

This article offers that structure, providing guidance to lower courts as they apply the undue burden standard, pending the newly constituted Court's decision to revisit it – whenever that may be. When viewed in light of *Casey* itself, the undue burden test's foundations, and post-*Casey* decisions before *Hellerstedt*, one easily might conclude that *Hellerstedt* is aberrational. This article, however, proposes an interpretation that places *Hellerstedt*'s balancing test within the rest of the Court's undue burden standard jurisprudence, arguing that a court must balance benefits and burdens only in a very narrow circumstance – when a regulation seeking to advance the State's interest in protecting maternal health

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places a substantial obstacle in the path of a woman seeking an abortion. Nevertheless, the article concludes that, even when *Hellerstedt* is understood in this way, the undue burden standard leaves many questions unanswered, and thus neither the liberty of a woman to choose abortion nor that of the people to regulate the procedure enjoys the certitude *Casey* sought to secure.

Introduction

“Liberty finds no refuge in a jurisprudence of doubt,” the Supreme Court declared in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.¹ But if the *Casey* Court made any headway in quelling the doubt surrounding a woman’s ability to choose abortion and a state’s ability to regulate the practice, Justice Anthony Kennedy’s retirement from the high court has caused it to resurface with great intensity. Justice Kennedy was part of the *Casey* triumvirate that prevented the Court from overruling *Roe v. Wade*.² And with Justice Kennedy no longer on the Court, the pro-choice community now fears – and anti-abortion forces now hope – that the recognition of a woman’s constitutional right to choose abortion is in peril.³

The change in the Court’s composition, though, is not the only reason for uncertainty. More than two years before Justice Kennedy’s retirement, he and four other justices significantly undermined *Casey*’s ambitious goal of dispelling doubt. They did so in *Whole Woman’s Health v. Hellerstedt*, a case in which the Court found within *Casey* a test that requires a court to balance an abortion regulation’s benefits against its burdens.⁴ If one believes Justice

¹ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 844 (1992).

² *Ibid.* at 845-46 (“After considering the fundamental constitutional questions resolved by *Roe*, principles of institutional integrity, and the rule of *stare decisis*, we are led to conclude this: the essential holding of *Roe v. Wade* should be retained and once again reaffirmed.”).

³ Compare *Nation’s Leading Pro-Choice Advocacy Group Announces Reality of Roe SCOTUS Campaign*, NARAL PRO-CHOICE AM. (June 28, 2018), <https://www.prochoiceamerica.org/2018/06/28/naral-addresses-reality-of-ro-e-on-national-press-call/> [<https://perma.cc/LT2N-XV93>] (“Justice Kennedy’s retirement sounds the alarm over the future of civil rights in this country.”), with Emma Green, “The Coming Battle to Overturn *Roe v. Wade*,” *Atlantic* (June 28, 2018), <https://www.theatlantic.com/politics/archive/2018/06/the-coming-battle-to-overturn-ro-e-v-wade/563936/> [<https://perma.cc/2LV8-Y6MQ>] (“[N]ow that Kennedy has stepped aside, pro-life advocates see an opportunity to tilt the Court toward their cause....”).

⁴ See *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016) (citing

Clarence Thomas, the *Hellerstedt* majority's interpretation of *Casey* "will surely mystify lower courts for years to come."⁵

Of course, the newly constituted Court may cut short this mystery by overturning *Roe* and *Casey* altogether. That outcome, however, is not a foregone conclusion,⁶ and until the Court weighs in again, lower courts must decipher and apply *Casey*'s undue burden test in a manner consistent with *Hellerstedt*. Given that pro-choice advocates across the country have seen *Hellerstedt* as an opening to challenge both new and old abortion regulations,⁷

Casey analysis with respect to a Pennsylvania statute requiring spousal notification and parental consent, the court stated that "[t]he rule announced in *Casey*...requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer").

⁵ Ibid. at 2326 (Thomas, J., dissenting).

⁶ Compare Jacqueline Thomsen, *Jeffrey Toobin Predicts 'Abortion Will Be Illegal' in 20 States Soon after Kennedy Retires*, HILL (June 27, 2018), <https://thehill.com/regulation/court-battles/394450-jeffrey-toobin-predicts-abortion-will-be-illegal-in-20-states-soon> [<https://perma.cc/GG6Z-Y2DQ>] (quoting CNN legal analyst Jeffrey Toobin's prediction that "abortion will be illegal in a significant part of the United States in 18 months, and there is no doubt about that"), with Kathleen Parker, "Calm Down. *Roe v. Wade* Isn't Going Anywhere," *Wash. Post* (July 3, 2018), https://www.washingtonpost.com/opinions/calm-down-roe-v-wade-isnt-going-anywhere/2018/07/03/fd470196-7f05-11e8-bb6b-c1cb691f1402_story.html?utm_term=.5f2d4cdd55e3 [<https://perma.cc/E99L-Z3YE>] ("Susan Collins (R-Maine)...echoed the thoughts of close-to-the-court sources, who told me that neither Chief Justice John G. Roberts Jr. nor Neil M. Gorsuch would likely want to wade into that swamp and weigh in on a *Roe v. Wade* reversal.").

⁷ See, e.g., Complaint at 17-18, 21-24, 27-28, 31-33, *Whole Woman's Health All. v. Hill*, No. 1:18-cv-1904 (S.D. Ind. June 21, 2018) (challenging a bar against the performance of abortions by nonphysicians, facility licensure requirements, a requirement that a physician who performs abortions have admitting privileges at a local hospital or a written agreement with another physician who has admitting privileges at a local hospital, a requirement that late-term abortions be performed in a hospital or ambulatory surgery center, reporting requirements, restrictions on medication abortions, restrictions on the use of telemedicine in connection with abortions, informed consent requirements, a pre-abortion ultrasound requirement, an eighteen-hour waiting period, a parental consent requirement, and the imposition of criminal penalties with respect to abortion); Complaint at 15-19, *Falls Church Med. Cent., L.L.C. v. Oliver*, No. 3:18cv428 (E.D. Va. June 20, 2018) (challenging facility licensure requirements, a requirement that late-term abortions be performed in a licensed hospital, a bar against the performance of abortions by nonphysicians, a pre-abortion ultrasound requirement, a twenty-four-hour waiting period, informed consent measures,

understanding the relationship between *Casey* and *Hellerstedt* is a pressing concern.

In trying to grasp what *Hellerstedt* means for the undue burden standard, lower courts should not take the opinion too far. *Hellerstedt* must be understood in context, and importantly in that regard, *Hellerstedt* did not overrule any aspect of *Casey* or the cases that followed it.⁸ And in *Casey*, *Mazurek v. Armstrong*, and *Gonzales v. Carhart*, the Court broadly deferred to the legislature with respect to abortion regulations that did not place substantial obstacles in the path of a woman seeking an abortion prior to viability.⁹ Moreover, in cases preceding *Casey*, Justice Kennedy and *Casey* collaborator Justice Sandra Day O'Connor consistently interpreted the undue burden standard as a deferential one, and it seems unlikely that Justice Kennedy would have signed on to an opinion that radically deviated from his historical understanding of the test. Finally, the Court in *Casey*, and before *Hellerstedt*, upheld eight out of ten challenged abortion regulations,¹⁰ and prior to *Casey*, Justices O'Connor and Kennedy individually concluded that eighteen others

and the imposition of criminal penalties with respect to abortion); Complaint at 17, 19-20, 22, 24-25, 29-32, *Whole Woman's Health All. v. Paxton*, No. 16-CV-00500 (W.D. Tex. June 14, 2018) (challenging a bar against the performance of abortions by nonphysicians, facility licensure requirements, requirements that certain abortions be performed in a hospital or ambulatory surgery center, reporting requirements, restrictions on medication abortions, a prohibition against using telemedicine or telehealth with respect to abortion procedures, a pre-abortion ultrasound requirement, informed consent measures, waiting periods, parental consent and notification requirements, and the imposition of criminal penalties with respect to abortion).

⁸ See *Hellerstedt*, 136 S. Ct. at 2300.

⁹ See generally *Gonzales v. Carhart*, 550 U.S. 124 (2007); *Mazurek v. Armstrong*, 520 U.S. 969 (1997); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

¹⁰ See *Gonzales*, 550 U.S. at 133 (upholding the federal partial-birth abortion ban); *Stenberg v. Carhart*, 530 U.S. 914, 922 (2000) (striking down a Nebraska partial-birth abortion ban); *Mazurek*, 520 U.S. at 976 (concluding that a preliminary injunction should not issue against a measure prohibiting nonphysicians from performing abortions); *Casey*, 505 U.S. at 880, 884, 885, 887, 898, 899, 901 (upholding a definition of "medical emergency," an informed consent provision specifying particular information to be provided, a requirement that a physician provide information in connection with obtaining informed consent, a twenty-four-hour waiting period, a parental consent requirement, and recording and recordkeeping requirements (except that related to spousal notification), but striking down a spousal notification provision).

should have survived constitutional challenge¹¹ and disagreed about the constitutionality of only one.¹²

Bearing these things in mind, this article attempts to place *Hellerstedt*'s interpretation of *Casey*'s undue burden standard within the standard's corpus, offering courts a structured way in which to understand and apply the standard until such time as the Court revisits it. Part I of the article examines the undue burden standard's origins, with particular attention to opinions that Justices O'Connor and Kennedy authored in abortion-related cases prior to *Casey*. Part

¹¹ See *Hodgson v. Minnesota*, 497 U.S. 417, 461 (1990) (O'Connor, J., concurring) (concluding that a parental notification requirement with a judicial bypass should be upheld); *id.* at 497 (Kennedy, J., concurring in judgment in part and dissenting in part) (concluding that a parental notification requirement with a judicial bypass should be upheld); *Ohio v. Akron Ctr. for Reprod. Health (Akron II)*, 497 U.S. 502, 506-07 (1990) (opinion of Kennedy, J.) (concluding that a parental notification requirement with a judicial bypass is constitutional); *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 522, 523, 530 (1989) (O'Connor, J., concurring) (concluding that a declaration that life begins at conception, a ban on use of public employees and facilities to perform abortions, and a viability determination requirement are constitutional); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 771, 831, 832 (1986) (O'Connor, J., dissenting) (concluding that an informed consent requirement specifying that particular information must be provided, mandating certain recording and recordkeeping standards, requiring a particular standard of care and technique for post-viability abortions, and mandating a second physician's presence at post-viability abortions do not violate the Constitution); *Simopoulos v. Virginia*, 462 U.S. 506, 520 (1983) (O'Connor, J., concurring) (concluding that the State could require the performance of second trimester abortions in a licensed facility); *Planned Parenthood Ass'n of Kansas City, Mo., Inc. v. Ashcroft*, 462 U.S. 476, 504 (1983) (O'Connor, J., concurring in judgment in part and dissenting in part) (concluding that a requirement that the performance of second trimester abortions be in a hospital, a parental consent provision with a judicial bypass, a pathology report requirement for all abortions, and a mandate of a second physician's presence at post-viability abortions do not violate the Constitution); *Akron v. Akron Ctr. for Reprod. Health, Inc. (Akron I)*, 462 U.S. 416, 464 (1983) (O'Connor, J., dissenting) (concluding that a requirement that the performance of post-first trimester abortions be in a hospital, an informed consent requirement specifying that particular information must be provided, a mandate that a physician provide information in obtaining informed consent, and a twenty-four hour waiting period are constitutional).

¹² See *Hodgson*, 497 U.S. at 459-60 (O'Connor, J., concurring) (concluding that a parental notification requirement without a judicial bypass is unconstitutional); *ibid.* at 497 (Kennedy, J., concurring in judgment in part and dissenting in part) (concluding that a parental notification requirement without a judicial bypass should be upheld).

II describes the *Casey* Court's articulation of the undue burden standard and discusses how the Court applied the standard in *Casey* itself and in other cases preceding *Hellerstedt*. Part III then critically examines *Hellerstedt* and suggests an interpretation that is consistent with the undue burden standard's foundations and historical application. In particular, Part III contends that courts should apply the rigorous balancing test found in *Hellerstedt* only in the narrowest of circumstances – when a maternal health-related regulation places a substantial obstacle in the path of a woman seeking an abortion – and should grant states wide latitude in adopting regulations that create no such obstacles. To assist lower courts, Part III also fits the balancing test within a comprehensive structure for assessing the constitutionality of abortion regulations. Finally, Part III identifies questions that even this structure leaves unanswered, and thus the article concludes that, until the Court speaks with greater clarity, *Casey*'s objective of removing doubt and securing liberty will remain out of reach.

I. Origins of the Undue Burden Test

A. Early Cases

The undue burden standard, to which the *Casey* Court assigned the lofty goal of securing liberty, had very modest beginnings. In establishing the standard, the Court in *Casey* hearkened back as far as *Doe v. Bolton*, *Roe*'s companion case.¹³ Support for the standard as *Casey* conceived it, however, is not really there. While the Court in *Doe* stated that a Georgia law requiring permission of a hospital committee before a physician may perform an abortion was “*unduly restrictive* of the patient's rights and needs,” it employed a searching review in reaching that conclusion, and when it struck down a Georgia requirement that abortions be performed in an accredited hospital, the Court specifically employed *Roe*'s trimester framework, which *Casey*'s undue burden standard would replace.¹⁴

¹³ See *Casey*, 505 U.S. at 874-75 (citing *Doe v. Bolton*, 410 U.S. 179 (1973)); *Roe v. Wade*, 410 U.S. 113, 116 (1973) (describing *Doe* as “its Georgia companion”).

¹⁴ *Doe*, 410 U.S. at 189, 198 (emphasis added) (“What is said [in *Roe*] is applicable here....”); *ibid.* at 195 (“We hold that the hospital requirement of the Georgia law, because it fails to exclude the first trimester of pregnancy, is also invalid.”); see also *Casey*, 505 U.S. at 873 (“We reject the trimester framework, which we do not consider to be part of the essential holding of *Roe*.”); *Roe*, 410 U.S. at 164-65 (describing the trimester framework).

The Court's 1976 decision in *Bellotti v. Baird* (*Bellotti I*), 1977 decision in *Mayer v. Roe*, and 1980 decision in *Harris v. McRae*, all of which *Casey* also cites, likewise offer meager support for the detailed undue burden standard the Court adopted in *Casey*.¹⁵ *Bellotti I* suggests that unduly burdensome regulations would be unconstitutional, but the opinion does not flesh out what that means because the Court decided to abstain from deciding any constitutional question.¹⁶ Like *Bellotti I*, *Maier* and *McRae* state that the right the Court articulated in *Roe* "protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy."¹⁷ Neither case, however, offers any instruction as to when a regulatory burden becomes undue because in each, the Court determined that a regulation barring the use of government funds to pay for certain abortions imposes *no* obstacle to abortion access and therefore does not burden a woman's choice at all.¹⁸ And finding no burden, the Court upheld each regulation under rational basis review with its requisite legislative deference.¹⁹

¹⁵ See *Casey*, 505 U.S. at 874-75 (citing *Harris v. McRae*, 448 U.S. 297, 314 (1980); *Maier v. Roe*, 432 U.S. 464, 473-74 (1977); *Bellotti v. Baird* (*Bellotti I*), 428 U.S. 132, 147 (1976)).

¹⁶ *Bellotti I*, 428 U.S. 146 ("In deciding this case, we need go no further than the claim that the District Court should have abstained pending construction of the statute by the Massachusetts courts."); *ibid.* at 147 ("In *Planned Parenthood of Central Missouri v. Danforth*, ...we held that a requirement of written consent on the part of a pregnant adult is not unconstitutional unless it unduly burdens the right to seek an abortion."); *ibid.* at 148 (indicating that the Court did not need to consider "at what point review of consent and good cause in the case of a minor becomes unduly burdensome").

¹⁷ *Maier*, 432 U.S. at 473-74; see also *McRae*, 448 U.S. at 314 (quoting *Maier*, 432 U.S. at 473-74).

¹⁸ *Maier*, 432 U.S. at 474 ("The Connecticut regulation places no obstacles – absolute or otherwise – in the pregnant woman's path to an abortion.... We conclude that the Connecticut regulation does not impinge upon the fundamental right recognized in *Roe*."); see also *McRae*, 448 U.S. at 315 ("The Hyde Amendment, like the Connecticut welfare regulation at issue in *Maier*, places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy...."); *ibid.* at 318 ("[W]e conclude that the Hyde Amendment does not impinge on the due process liberty recognized in *Wade*.").

¹⁹ *Maier*, 432 U.S. at 479 ("Our conclusion that the Connecticut regulation is constitutional is not based on a weighing of its wisdom.... Indeed, when an issue involves policy choices as sensitive as those implicated by public funding of non-therapeutic abortions, the appropriate forum for their resolution...is the legislature.");

B. Pre-Casey Opinions of Justices O'Connor and Kennedy

Despite *Casey*'s protestations otherwise, the genesis of the undue burden test is not the Court's early abortion cases. It is an invention of Justice O'Connor, who believed that the legislative deference found in *Maher* and *McRae* may apply when a regulation burdens a woman's ability to have an abortion in some respects.²⁰ The opinions of Justice O'Connor that *Casey* references²¹ thus offer more meaningful guidance than the early cases as to what *Casey*'s undue burden standard means.

Justice O'Connor began her assault on *Roe*'s trimester framework in *Akron v. Akron Center for Reproductive Health, Inc. (Akron I)*, *Planned Parenthood Association of Kansas City, Missouri, Inc. v. Ashcroft*, and *Simopoulos v. Virginia*, all of which were decided on the same day in 1983. In *Akron I*, the majority delivered a serious blow to abortion opponents, striking down a host of abortion regulations, including ones requiring an unmarried minor to obtain parental consent before having an abortion, a physician performing an abortion during any trimester to provide specified information to a woman in obtaining her informed consent, a physician performing a post-first trimester abortion to do so in a hospital, and a twenty-four-hour waiting period after a woman gives her consent.²² Antichoice activists enjoyed more

see also *McRae*, 448 U.S. at 326 ("In making an independent appraisal of the competing interests involved here, the District Court went beyond the judicial function. Such decisions are entrusted under the Constitution to Congress, not the courts.").

²⁰ See, e.g., *Akron v. Akron Ctr. for Reprod. Health, Inc. (Akron I)*, 462 U.S. 416, 464 (1983) (O'Connor, J., dissenting).

²¹ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874, 877, 878 (1992) (O'Connor, J., concurring) (plurality opinion) (citing *Hodgson v. Minnesota*, 497 U.S. 417, 458-59 (1990); *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 530 (1989) (O'Connor, J., concurring); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 828 (1986) (O'Connor, J., dissenting); *Simopoulos v. Virginia*, 462 U.S. 506, 520 (1983) (O'Connor, J., concurring); *Planned Parenthood Ass'n of Kansas City, Mo., Inc. v. Ashcroft*, 462 U.S. 476, 505 (1983) (O'Connor, J., concurring in part and dissenting in part); *Akron I*, 462 U.S. at 464 (O'Connor, J., dissenting)).

²² See *Akron I*, 462 U.S. at 438-39 (concluding that the hospitalization requirement "unreasonably infringes upon a woman's constitutional right to obtain an abortion"); *ibid.* at 441-42 (finding the parental consent requirement unconstitutional because the associated judicial bypass was inadequate); *ibid.* at 444 ("[W]e believe that [the Akron ordinance] attempts to extend the State's interest in ensuring 'informed consent' beyond permissible limits."); *ibid.* at 449 ("[W]e believe that it is

success in *Ashcroft* and *Simopoulous*, as the Court invalidated just one measure and upheld a variety of others.²³ Although the Court in *Ashcroft* concluded that a Missouri requirement that second trimester abortions be performed in a hospital was unconstitutional,²⁴ it rejected challenges to statutes mandating parental consent, a second physician's presence at a post-viability abortion, and a pathologist's examination of aborted fetal tissue.²⁵ And in *Simopoulos*, the Court determined that requiring physicians to perform second trimester abortions in a hospital or licensed clinic did not run afoul of constitutional demands.²⁶

In contrast, except for the parental consent requirement at issue in *Akron I*, with respect to which she believed that abstention was the proper course of action,²⁷ Justice O'Connor would have upheld all of the regulations at issue in *Akron I*, *Ashcroft*, and *Simopoulos* under an undue burden standard.²⁸ In *Akron*

unreasonable for a State to insist that only a physician is competent to provide the information and counseling relevant to informed consent. We affirm the judgment of the Court of Appeals that [the requirement] is invalid."); *ibid.* at 449-50 ("The Court of Appeals...[found] that the inflexible waiting period had 'no medical basis,' and that careful consideration of the abortion decision by the woman 'is beyond the state's power to require.' We affirm the Court of Appeals' judgment.").

²³ See *Simopoulous*, 462 U.S. at 519 (finding that requiring second trimester abortions be performed in licensed clinics was not unconstitutional); *Ashcroft*, 462 U.S. at 494 (confirming the unconstitutionality of a requirement that second trimester abortions be performed in a hospital, but finding that the other measures at issue did not violate the Constitution).

²⁴ *Ashcroft*, 462 U.S. at 494 ("The judgment of the Court of Appeals, insofar as it invalidated Missouri's second-trimester hospitalization requirement...is affirmed.").

²⁵ *Ibid.* ("The judgment of the Court of Appeals, insofar as it...upheld the State's parental- and judicial-consent provision, is affirmed. The judgment invalidating the requirement of a pathology report for all abortions and the requirement that a second physician attend the abortion of any viable fetus is reversed.").

²⁶ See *Simopoulos*, 462 U.S. at 519 (concluding that requiring that second trimester abortions be performed in licensed clinics does not contravene the Constitution).

²⁷ *Akron I*, 462 U.S. at 468 (O'Connor, J., dissenting) ("I believe that the Court should have abstained from declaring the [parental consent requirement] unconstitutional.").

²⁸ *Ibid.* at 466 ("I would apply the 'unduly burdensome' test and find that the hospitalization requirement does not impose an undue burden on that decision."); *ibid.* at 472 (concluding that requiring specific information as part of informed consent "impose[s] no undue burden or drastic limitation on the abortion decision"); *ibid.*

I, she explained:

If the particular regulation does not “unduly burde[n]” the fundamental right, then our evaluation of that regulation is limited to our determination that the regulation rationally relates to a legitimate state purpose. Irrespective of what we may believe is wise or prudent policy in this difficult area, “the Constitution does not...vest in this Court the authority to strike down laws because they do not meet our standards of desirable social policy, ‘wisdom,’ or ‘common sense.’”²⁹

Importantly, Justice O’Connor contemplated legislative deference only after a court first concludes that a regulation is not an undue burden.³⁰ And in the portion of her *Akron I* dissent that *Casey* cites,³¹ Justice O’Connor indicated that a court’s initial determination turns on whether the regulation imposes an absolute or severe obstacle on a woman’s ability to choose abortion.³² If a court

(concluding that requiring physician to provide information as part of informed consent “impose[s] no undue burden or drastic limitation on the abortion decision”); *ibid.* at 473 (“Although the waiting period may impose an additional cost on the abortion decision, this increased cost does not unduly burden the availability of abortions or impose an absolute obstacle to access to abortions.”); see also *Simopoulos*, 462 U.S. at 520 (O’Connor, J., concurring) (“I do not agree that the constitutional validity of the Virginia mandatory hospitalization requirement is contingent in any way on the trimester in which it is imposed. Rather, I believe that the requirement in this case is not an undue burden on the decision to undergo an abortion.”); *Ashcroft*, 462 U.S. at 505 (O’Connor, J., concurring in part and dissenting in part) (“I believe that the second-trimester hospitalization requirement . . . does not impose an undue burden on the limited right to undergo an abortion.”); *ibid.* (“I believe that the [parental consent] provision is valid because it imposes no undue burden on any right that a minor may have to undergo an abortion.”); *ibid.* (“I agree that the pathology-report requirement...is constitutional because it imposes no undue burden on the limited right to undergo an abortion.”).

²⁹ *Akron I*, 462 U.S. at 453 (O’Connor, J., dissenting) (alteration in original) (citations omitted).

³⁰ *Ibid.* at 465 (“This does not mean that in determining whether a regulation imposes an ‘undue burden’ on the *Roe* right we defer to the judgments made by state legislatures.”).

³¹ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 876 (1992) (plurality opinion).

³² *Akron I*, 462 U.S. at 464 (O’Connor, J., dissenting) (“[T]he *Roe* right is intended to protect against state action ‘drastically limiting the availability and safety of the desired service’ against the imposition of an ‘absolute obstacle’ on the abortion decision or against ‘official interference’ and ‘coercive restraint’ imposed on the

finds no such obstacle, it must apply rational basis review, deferring to the legislature.³³ Under Justice O'Connor's test, however, a court's inquiry does not end if it finds that a regulation imposes an absolute or severe obstacle.³⁴ Instead, she explains, a court nevertheless might sustain the regulation under strict scrutiny, for even the *Akron I* majority "recognize[d] that...a 'significant obstacle' can be justified by a 'reasonable' regulation."³⁵

Justice O'Connor's analysis of the ordinance at issue in *Akron I* confirms her approach. When evaluating Akron's hospitalization requirement, she first considered what the record reflected as to the requirement's effect on abortion access, and after finding no evidence of decreased availability and dismissing increased costs as a significant obstacle, she concluded that a searching review was not warranted.³⁶ Then, noting the breadth of factors that a state *might* consider in assessing health concerns, Justice O'Connor concluded that the hospitalization requirement bore a rational relationship to the State's interest in protecting maternal health.³⁷

Justice O'Connor referred to precedent and summarily concluded that Akron's informed consent requirements did not "impose [an] undue burden or drastic limitation on the abortion decision,"³⁸ but her evaluation of the twenty-four-hour waiting period at issue in *Akron I* reinforces how she understood the undue burden standard.³⁹ Just as with the hospitalization requirement, Justice O'Connor first considered the obstacles the waiting period might impose – increased costs and risks associated with a delay⁴⁰ – and then, deciding that they would not "unduly burden the availability of abortions or impose an absolute obstacle," she indicated that she did not need to go any further.⁴¹

abortion decision" and that "an 'undue burden' has been found for the most part in situations involving absolute obstacles or severe limitations on the abortion decision.").

³³ See *ibid.* at 454-55.

³⁴ See *ibid.* at 463.

³⁵ *Ibid.* at 463.

³⁶ See *ibid.* at 466 (concluding that further review was not necessary because the requirement's impact on availability and cost did not create an undue burden).

³⁷ *Ibid.* at 467 ("[T]he regulation has a 'rational relation' to a valid state objective of ensuring the health and welfare of its citizens.").

³⁸ *Ibid.* at 472.

³⁹ See *ibid.* at 473-74.

⁴⁰ See *ibid.* at 466-67.

⁴¹ *Ibid.* at 473 (finding no undue burden is posed and explaining that "the State is not required to 'fine-tune' its abortion statutes so as to minimize the costs of

Nevertheless, she did go further and concluded that, even if the waiting period constituted an undue burden, it would survive constitutional challenge because the government has compelling interests in protecting potential life and maternal health throughout pregnancy and because “[t]he waiting period is surely a small cost to impose to ensure that the woman’s decision is well considered in light of its certain and irreparable consequences on fetal life, and the possible effects on her own.”⁴² Thus, for Justice O’Connor, balancing benefits and burdens only is necessary when an abortion regulation imposes an absolute or significant obstacle on a woman’s ability to terminate her pregnancy.

In *Ashcroft* and *Simopoulos*, Justice O’Connor did not analyze the relevant abortion regulations in similar depth, but her concurring and dissenting opinions nevertheless are consistent with the approach she took in *Akron I*. With respect to the pathology report and parental consent requirements at issue in *Ashcroft*, Justice O’Connor quickly concluded that neither imposed an undue burden on a woman’s ability to choose abortion and gave no attention to whether the measures actually advanced any of the State’s interests.⁴³ Similarly, she decided that the hospitalization requirement in *Ashcroft* and the

abortions.”).

⁴² *Ibid.* at 473-74 (explaining that any undue burden caused by the waiting period can be overcome by the government’s compelling interest and the low-cost of requiring a waiting period).

⁴³ *Planned Parenthood Ass’n of Kansas City, Mo., Inc. v. Ashcroft*, 462 U.S. 476, 505 (1983) (O’Connor, J., concurring in part and dissenting in part) (“I believe that the [parental consent] provision is valid because it imposes no undue burden on any right that a minor may have to undergo an abortion.”); *ibid.* (“I agree that the pathology-report requirement...is constitutional because it imposes no undue burden on the limited right to undergo an abortion.”). With respect to the pathology report requirement, Justice O’Connor suggests that Justice Powell, the author of the principal opinion in *Ashcroft*, himself had applied the undue burden standard: “I agree that the pathology-report requirement...is constitutional because it imposes no undue burden on the limited right to undergo an abortion.” *Ibid.* at 505 (emphasis added). But it would seem to be a mistake to conclude that Justice Powell’s opinion reflects the undue burden test as Justice O’Connor envisioned it in *Akron I* because there is no doubt that Justice Powell was engaging in a balancing test even though the impediment at issue was insignificant: “In weighing the balance between protection of a woman’s health and the comparatively small additional cost of a pathologist’s examination, we cannot say that the Constitution requires that a State subordinate its interest in health to minimize to this extent the cost of abortions.” *Ibid.* at 489.

requirement in *Simopoulos* that second trimester abortions be performed in a licensed facility were not unduly burdensome.⁴⁴ Like she did in *Akron I* regarding the twenty-four hour waiting period, in *Ashcroft*, Justice O'Connor went on to state that, even if the hospitalization requirement were an undue burden, it would survive strict scrutiny.⁴⁵ In contrast, Justice O'Connor appears to have jumped straight to strict scrutiny in evaluating the second physician requirement in *Ashcroft*, finding that the requirement was "constitutional because the State possesse[d] a compelling interest in protecting and preserving fetal life ...[that] is extant throughout pregnancy."⁴⁶

To the extent that Justice O'Connor was not clear enough in *Akron I*, her opinion in *Thornburgh v. American College of Obstetricians and Gynecologists* remedies the deficiency and confirms her understanding of what the Constitution requires:

Under this Court's fundamental-rights jurisprudence, judicial scrutiny of state regulation of abortion should be limited to whether the state law bears a rational relationship to legitimate purposes...with heightened scrutiny reserved for instances in which the State has imposed an "undue burden" on the abortion decision. An undue burden will generally be found "in situations involving absolute obstacles or severe limitations on the abortion decision," not wherever a state regulation "may 'inhibit' abortions to some degree." And if a state law does interfere with the abortion decision to an extent that is unduly burdensome, so that it becomes "necessary to apply an exacting standard of review," the possibility remains that the statute will withstand the stricter scrutiny.⁴⁷

Under this standard, according to Justice O'Connor, all of the measures the

⁴⁴ Ibid. at 505 ("I believe that the second-trimester hospitalization requirement...does not impose an undue burden on the limited right to undergo an abortion."); *Simopoulos v. Virginia*, 462 U.S. 506, 520 (1983) ("I believe that [Virginia's mandatory hospitalization requirement] is not an undue burden on the decision to undergo an abortion.").

⁴⁵ *Ashcroft*, 462 U.S. at 505 (O'Connor, J., concurring in part and dissenting in part) ("I believe that the second-trimester hospitalization requirement...does not impose an undue burden on the limited right to undergo an abortion. Assuming, *arguendo*, that the requirement was an undue burden, it would nevertheless 'reasonably relat[e] to the preservation and protection of maternal health.'").

⁴⁶ Ibid.

⁴⁷ *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 828 (1986) (O'Connor, J., dissenting).

Thornburgh majority enjoined – informed consent and second physician requirements similar to those at issue in *Akron I*; a standard of care for postviability abortions, including a requirement that a physician use a technique that gives a fetus the best chance for survival; and reporting and recordkeeping requirements⁴⁸ – should have been upheld.⁴⁹ While Justice O'Connor conceded that commanding a physician to provide “sufficiently inflammatory and inaccurate” information to a woman might pose an undue burden, she decided that the information Pennsylvania specified with respect to fetal development was not of that character and was “rationally related to the State’s interests in ensuring informed consent and in protecting potential human life.”⁵⁰ Moreover, she emphasized that facts about available pregnancy-related medical assistance and a father’s legal obligations were “indisputably relevant in many cases and [providing those facts to a woman] would not appear to place a severe limitation on the abortion decision.”⁵¹ In addition, Justice O'Connor considered it unlikely that the standard of care and reporting and recordkeeping requirements at issue in *Thornburgh* presented impermissible burdens, and therefore, as one would expect, she did not evaluate whether the requirements would actually serve the State’s interests.⁵² Finally, she gave the second physician requirement almost no attention, doing little more than recalling the Court’s decision in *Ashcroft* to uphold a similar

⁴⁸ Ibid. at 764 (“Section 3205’s informational requirements...are facially unconstitutional.”); ibid. at 767-68 (“Pennsylvania’s reporting requirements...must be invalidated.”); ibid. at 768-69 (“The Court of Appeals ruled that § 3210(b) was unconstitutional because it required a ‘trade-off’ between the woman’s health and fetal survival, and failed to require that maternal health be the physician’s paramount consideration.... We agree...and therefore find the statute to be facially invalid.”); ibid. at 770 n.16 (finding the second physician requirement unconstitutional because it did not include a medical emergency exception).

⁴⁹ See ibid. at 832 (asserting that it was unlikely that those challenging the informational requirement could establish that they constitute an undue burden and concluding that the challenger was “unlikely to succeed in establishing an undue burden on the abortion decision” from the reporting and recordkeeping requirements); ibid. (stating that “there is little possibility” that the required abortion technique will unduly burden a woman’s decision to have an abortion); ibid. (indicating agreement that the second physician requirement was constitutional under *Ashcroft*).

⁵⁰ Ibid. at 831.

⁵¹ Ibid.

⁵² See ibid. (discussing the standard of care and reporting and recordkeeping requirements).

requirement that she believed could survive strict scrutiny.⁵³

Three years after *Thornburgh*, Justice O'Connor again wrote separately to lobby for her undue burden standard.⁵⁴ In *Webster v. Reproductive Health Services*, the Court upheld a Missouri statute that declared, in the preamble, the State's view that life begins at conception, barred the use of public employees and facilities for the performance of abortions, and required a determination of fetal viability for a pregnancy at twenty or more weeks gestation.⁵⁵ In portions of the principal opinion that Justice O'Connor joined, the Court decided that the preamble had no effect whatsoever on a woman's ability to choose abortion⁵⁶ and, relying on *Maher* and *McRae*, that the ban on using government facilities and employees did not represent an obstacle to a woman's choice.⁵⁷ The principal opinion in *Webster*, however, is unclear as to the constitutional standard used to evaluate the requirement that a physician test for fetal viability when a woman is twenty or more weeks into her pregnancy.⁵⁸ Justice O'Connor, in contrast, remained loyal to the standard she began espousing in *Akron I*: "It is clear to me that requiring the performance of examinations and tests useful to determining whether a fetus is viable, when viability is possible, and when it would not be medically imprudent to do so, does not impose an

⁵³ See *ibid.* at 832 (referring to the Court's decision in *Ashcroft*).

⁵⁴ See generally *Webster v. Reprod. Health Servs.*, 492 U.S. 507, 522-31 (O'Connor, J., concurring in part and concurring in the judgment).

⁵⁵ *Ibid.* at 507 ("We...need not pass on the constitutionality of the Act's preamble."); *ibid.* at 511 ("[W]e uphold the Act's restrictions on the use of public employees and facilities for the performance or assistance of nontherapeutic abortions."); *ibid.* at 519-20 ("[W]e are satisfied that the requirement of these [viability] tests permissibly furthers the State's interest in protecting potential human life, and we therefore believe [the statute] to be constitutional."); *ibid.* at 531 (O'Connor, J., concurring); *ibid.* at 537 (Scalia, J., concurring).

⁵⁶ *Ibid.* at 506-07 ("Certainly the preamble does not by its terms regulate abortion or any other aspect of appellees' medical practice.... We therefore need not pass on the constitutionality of the...preamble.").

⁵⁷ *Ibid.* at 509 ("As in [*Maher* and *McRae*], the State's decision here to use public facilities and staff to encourage childbirth over abortion 'places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy.'").

⁵⁸ See *ibid.* at 519-20 (criticizing *Roe*'s trimester framework, the principal opinion in *Webster* offers no alternative but instead summarily states: "[W]e are satisfied that the requirement of these tests permissibly furthers the State's interest in protecting potential human life, and we therefore believe [the statute] to be constitutional.").

undue burden on a woman's abortion decision."⁵⁹ According to Justice O'Connor, any increased costs associated with the requirement were insignificant from a constitutional perspective.⁶⁰

Justice Kennedy served on the Court when it decided *Webster*, but he neither wrote separately nor joined in Justice O'Connor's concurrence. Nevertheless, *Casey* suggests that Justice Kennedy began to embrace the undue burden standard starting just a year later in *Ohio v. Akron Center for Reproductive Health (Akron II)* and *Hodgson v. Minnesota*.⁶¹ In *Akron II*, the Court upheld an Ohio statute requiring parental notification before a physician could perform an abortion on certain minors.⁶² With Justice Kennedy writing for the majority, the Court concluded that the Ohio statute passed constitutional muster because it was like parental notice and consent provisions the Court had permitted in the past.⁶³ Only three justices, however, joined in the final section of Justice Kennedy's opinion in which he added: "The Ohio statute...does not impose an undue, or otherwise unconstitutional, burden on a minor seeking an abortion. We believe, in addition, that the legislature acted in a rational manner in enacting [the law]."⁶⁴ The State, Justice Kennedy insisted, was entitled to assume that, "in most cases, a young woman will receive guidance and understanding from a parent."⁶⁵

In his separate opinion in *Akron II*, Justice Kennedy thus seems to have applied a standard very much consistent with the undue burden standard that Justice O'Connor articulated and applied in *Akron I* and *Thornburgh*. Yet, Justice O'Connor did not sign on to Justice Kennedy's separate opinion in *Akron II*, nor did she herself write separately to explain her point or points of

⁵⁹ Ibid. at 530 (O'Connor, J., concurring).

⁶⁰ See *ibid.* (discussing the costs of the statutorily required tests).

⁶¹ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874 (1992) (citing *Ohio v. Akron Ctr. for Reprod. Health (Akron II)*, 497 U.S. 502, 519-20 (1990)); *ibid.* at 877 (citing *Akron II*, 497 U.S. at 519-20); *ibid.* at 878 (citing *Hodgson v. Minnesota*, 497 U.S. 417, 482-97 (1990) (Kennedy, J., concurring in part and dissenting in part)).

⁶² See *Akron II*, 497 U.S. at 506-07 (indicating that the Ohio statute did not violate the Constitution).

⁶³ Ibid. at 510 ("We have decided five cases addressing the constitutionality of parental notice or parental consent statutes in the abortion context.... [W]e conclude that [the law] is consistent with them.").

⁶⁴ Ibid. at 505, 519-20.

⁶⁵ Ibid. at 520.

departure.⁶⁶ In *Hodgson*, handed down on the same day as *Akron II*, however, the justices' differences became clear.⁶⁷

The Court in *Hodgson* evaluated two Minnesota statutory provisions that prohibited a physician from performing an abortion on a minor without notification of both of her parents.⁶⁸ The first, or principal, provision contained no judicial bypass procedure.⁶⁹ The second, or alternative, provision contained a judicial bypass and would apply if a court enjoined the principal provision.⁷⁰ With two separate five-justice majorities, the Court struck down the principal provision and upheld the alternative.⁷¹ Justice O'Connor was the swing vote, joining both majorities.⁷² Justice Kennedy, on the other hand, dissented from the decision to invalidate the principal measure.⁷³

Justice O'Connor wrote a concurrence in *Hodgson* explaining the undue burden standard as she had in the past: "It has been my understanding in this area that '[i]f the particular regulation does not "unduly burde[n]" the fundamental right, ...then our evaluation of that regulation is limited to our determination that the regulation rationally relates to a legitimate state purpose.'"⁷⁴ She added, however: "It is with that understanding that I agree with Justice Stevens' statement that the 'statute cannot be sustained if the obstacles it imposes are not reasonably related to legitimate state interests.'"⁷⁵ To be consistent with her opinions in *Akron I* (which she cites in her *Hodgson* concurrence), *Webster* (which she also cites), and *Thornburgh*, Justice

⁶⁶ See *ibid.* at 507 (indicating that Justice O'Connor did not join in Part V of Justice Kennedy's opinion in *Akron II*).

⁶⁷ See *ibid.* at 502; see also *Hodgson v. Minnesota*, 497 U.S. 417 (1990).

⁶⁸ See *Hodgson*, 497 U.S. at 422 (describing the principal parental notification requirement).

⁶⁹ See *ibid.* at 422-23 (describing the alternative parental notification requirement).

⁷⁰ See *ibid.* at 423.

⁷¹ *Ibid.* ("[W]e...conclude that the requirement of notice to both of the pregnant minor's parents is not reasonably related to legitimate state interests and that subdivision 2 is unconstitutional. A different majority of the Court, for reasons stated in separate opinions, concludes that subdivision 6 is constitutional.").

⁷² See *ibid.* at 422.

⁷³ See *ibid.* at 496-97 (Kennedy, J., concurring in judgment in part and dissenting in part) (concluding that the notification provision, without a judicial bypass, satisfied the Constitution).

⁷⁴ *Ibid.* at 459 (O'Connor, J., concurring) (alteration in original).

⁷⁵ *Ibid.*

O'Connor must have concluded that Minnesota's principal parental notification provision imposed an undue burden – a “severe limitation[] on the abortion decision”⁷⁶ – and, as a result, only could be sustained if it withstood a searching inquiry.

And the Court in *Hodgson* determined the principal provision could not survive a rigorous review because it was not appropriately tailored.⁷⁷ According to the Court, requiring notification of both parents served *no purpose* in “the ideal family setting, [in which] notice to either parent would normally constitute notice to both,” and would cause harm in dysfunctional families, as evidenced by “testimony...that th[e] requirement...resulted in major trauma to the child, and often to a parent as well.”⁷⁸ Moreover, the Court described the requirement as an “oddity” given that the consent of only one parent was required for a minor to enlist in the military, travel abroad, or participate in medical research.⁷⁹ Additionally, in Justice O'Connor's concurrence, she emphasized: “Minnesota's two-parent notice requirement is all the more unreasonable when one considers that only half of the minors in the State of Minnesota reside with both biological parents.”⁸⁰

Yet, in the face of all of these infirmities, Justice O'Connor was willing to cast her lot with those who would uphold the alternative Minnesota provision, which contained a judicial bypass procedure.⁸¹ And in her concurrence, Justice O'Connor explains why: “In a series of cases, this Court has explicitly approved judicial bypass as a means of tailoring a parental consent provision so as to avoid unduly burdening the minor's limited right to

⁷⁶ *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 828 (1986) (O'Connor, J., dissenting) (discussing the heightened scrutiny applied to laws placing undue burdens on the ability to get an abortion). The district court in *Hodgson* determined that the notification requirement “place[d] a significant burden upon pregnant minors who do not live with both parents” and “a significant obstacle in the path of minors in two parent homes who voluntarily have consulted with one parent but not with the other out of fear of psychological, sexual, or physical abuse toward either the minor or the notified parent.” *Hodgson*, 497 U.S. at 443.

⁷⁷ See *Hodgson*, 497 U.S. at 423 (explaining that the Court found the statute unconstitutional).

⁷⁸ *Ibid.* at 450-51.

⁷⁹ See *ibid.* at 454.

⁸⁰ *Ibid.* at 460 (O'Connor, J., concurring).

⁸¹ See *ibid.*

obtain an abortion.”⁸² For Justice O’Connor, the judicial bypass stripped away the significant obstacles the notification requirement otherwise would impose.⁸³ As a result, the Court did not have the authority to “strike down [the requirement] because [it did] not meet [the Court’s] standards of desirable social policy, ‘wisdom,’ or ‘common sense.’”⁸⁴

Justice Kennedy’s approach to the undue burden standard in *Hodgson* suggests a higher threshold for finding an undue burden than Justice O’Connor employed, thus freeing more legislation from judicial interference.⁸⁵ In this regard, Justice Kennedy emphasized that Minnesota’s principal parental notification provision, unlike a parental consent requirement, imposed no “absolute obstacle” on a woman’s ability to choose abortion.⁸⁶ But it would be a mistake to conclude that Justice Kennedy only deemed an absolute obstacle to create an undue burden, for he also considered the record and the principal notice provision’s exceptions to evaluate if the provision would create “a serious threat to [a] minor’s health or safety.”⁸⁷ Still, Justice Kennedy’s dissent in *Hodgson* seems to indicate that a court should stay its hand when it appears that the legislature has made a reasoned judgment in addressing the risks attendant to abortion-related legislation:

“It cannot be doubted that as long as a state statute is within ‘the bounds of reason and [does not] assum[e] the character of a merely arbitrary fiat...[then] [t]he State . . . must decide upon measures that are needful for the protection of its people....’” Like all laws of general application, the Minnesota statute cannot produce perfect results in every situation to which it applies; but the State is under no obligation to enact perfect laws. The statute before us...represents a permissible, reasoned attempt to preserve the parents’ role in a minor’s decision to have an abortion without placing any absolute obstacles before a minor who is determined to elect an abortion for her own interest as she sees it.⁸⁸

⁸² Ibid. at 461.

⁸³ See *ibid.*

⁸⁴ *City of Akron v. Akron Ctr. for Reprod. Health, Inc. (Akron I)*, 462 U.S. 416, 453 (1983) (O’Connor, J., dissenting) (quoting *Plyler v. Doe*, 457 U.S. 202, 242 (1982) (Burger, J., dissenting)).

⁸⁵ See *Hodgson*, 497 U.S. at 496 (Kennedy, J., concurring in the judgment in part and dissenting in part).

⁸⁶ *Akron I*, 462 U.S. at 453.

⁸⁷ *Hodgson*, 497 U.S. at 492.

⁸⁸ Ibid. at 496 (alteration in original) (citing *Akron I*, 462 U.S. at 459 (O’Connor, J., dissenting)).

According to Justice Kennedy, in striking down Minnesota's principal parental notification requirement, the Court erred by substituting its own judgment for that of the State.⁸⁹

II. *Casey* and its Progeny

A. Adoption of the Undue Burden Standard

When the *Casey* Court adopted the undue burden standard to measure the constitutionality of abortion regulations that apply previability, it suggested that Justices O'Connor and Kennedy used the same standard in *Hodgson* but differed as to how it applied in that case.⁹⁰ And as one can see later in *Stenberg v. Carhart*, *Hodgson* was not the last time the two justices disagreed regarding the application of the undue burden test.⁹¹ In *Casey*, though, they spoke with one voice.⁹²

Resisting calls to overrule *Roe*, Justices O'Connor, Kennedy, and Souter led the Court in *Casey* to preserve what it described as *Roe*'s essential holding, a holding with three parts:

First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.⁹³

⁸⁹ Ibid. at 490 (“[W]e must defer to a reasonable judgment by the state legislature when it determines what is sound public policy.... The Court today departs from this rule. It now suggests that a general requirement that both parents be notified is unconstitutional because of *its own conclusion*....” (emphasis added)).

⁹⁰ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 878 (1992) (citing *Hodgson v. Minnesota*, 497 U.S. 417 (1990) (“Even when jurists reason from shared premises, some disagreement is inevitable.... That is to be expected in the application of any legal standard which must accommodate life's complexity. We do not expect it to be otherwise with respect to the undue burden standard.”)).

⁹¹ See *Stenberg v. Carhart*, 530 U.S. 914, 947, 956 (2000).

⁹² See *Casey*, 505 U.S. at 843.

⁹³ Ibid. at 846.

According to the Court, the trimester framework that the Court had used in *Roe* and the cases that followed it was not part of *Roe*'s essential holding⁹⁴ and, in fact, "misconceive[d] the nature of the pregnant woman's interest" and "undervalue[d] the State's interest in potential life."⁹⁵ Having identified these flaws, the Court abandoned the "elaborate but rigid" framework described in Appendix A of this Article in favor of an undue burden standard like that which Justice O'Connor had been advocating since *Akron I* and Justice Kennedy purportedly began to support in *Akron II*.⁹⁶

In adopting the undue burden standard, the *Casey* Court retained viability – which did not feature in the standard as Justices O'Connor and Kennedy previously articulated it⁹⁷ – as the critical dividing line with respect to the State's ability to regulate abortion.⁹⁸ Prior to fetal viability, the *Casey* Court explained, a State cannot (i) "prohibit any woman from making the ultimate decision to terminate her pregnancy"⁹⁹ or (ii) impose an "undue burden" on that decision by adopting an "unnecessary health" or other regulation whose "purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."¹⁰⁰ According to the

⁹⁴ Ibid. at 873 ("We reject the trimester framework, which we do not consider to be part of the essential holding of *Roe*.").

⁹⁵ Ibid.

⁹⁶ Ibid. at 872-73 ("We reject the trimester framework...."); see also *ibid.* at 876 ("In our view, the undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty.").

⁹⁷ E.g., *City of Akron v. Akron Ctr. for Reprod. Health, Inc. (Akron I)*, 462 U.S. 416, 453 (1983) (O'Connor, J., dissenting) ("In my view, this 'unduly burdensome' standard should be applied to the challenged regulations throughout the entire pregnancy without reference to the particular 'stage' of pregnancy involved.").

⁹⁸ *Casey*, 505 U.S. at 871 ("The woman's right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*. It is a rule of law and a component of liberty we cannot renounce.").

⁹⁹ Ibid. at 879; see also *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007) ("Before viability, a State 'may not prohibit any woman from making the ultimate decision to terminate her pregnancy.'"); *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000) ("[B]efore 'viability...the woman has a right to choose to terminate her pregnancy.'").

¹⁰⁰ *Casey*, 505 U.S. at 878; see also *Gonzales*, 550 U.S. at 146 ("[A State] also may not impose upon this right an undue burden, which exists if a regulation's 'purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.'"); *Stenberg*, 530 U.S. at 921 (stating that "a law designed to further the State's interest in fetal life which imposes an undue burden on

Court, however, so long as it does not impose an “undue burden” on a woman’s ability to choose to abort a fetus prior to viability, a state may regulate abortion previability to advance its interest in protecting potential life by making sure that “the woman’s choice” is informed and to advance its interest in maternal health through measures affecting performance of the abortion procedure.¹⁰¹ And after viability, a state’s ability to adopt abortion-related regulations becomes more robust, allowing restrictions, and even a prohibition, so long as exceptions are made to allow a woman to have an abortion when it is necessary to protect her life or health.¹⁰²

B. Application of the Undue Burden Standard Before *Hellerstedt*

Applying the principles it had set out, the *Casey* Court determined that most of the Pennsylvania statute at issue in *Casey* was constitutional.¹⁰³ Among the statutory provisions that the Court upheld were a definition of the term “medical emergency” as used in exceptions to various parts of the abortion law, informed consent provisions that mandated specific information and required a physician to provide information to a woman seeking an abortion, a twenty-four-hour waiting period, parental consent requirements, and reporting and recordkeeping obligations – all of which applied throughout pregnancy.¹⁰⁴ The only part of the statute that the Court struck down as an undue burden was a provision requiring spousal notification, which the Court determined was likely to deter a “significant number of women...from procuring an abortion as surely

the woman’s decision before fetal viability’ is unconstitutional” and that “[a]n ‘undue burden is...shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus’”).

¹⁰¹ *Casey*, 505 U.S. at 878 (describing a State’s ability to regulate abortion previability); see also *Gonzales*, 550 U.S. at 146 (quoting *Casey*’s proposition that “[r]egulations which do no more than create a structural mechanism by which the State...may express profound respect for the life of the unborn are permitted if they are not a substantial obstacle to the woman’s exercise of the right to choose”).

¹⁰² See *Casey*, 505 U.S. at 879 (describing a State’s ability to regulate abortion postviability); see also *Stenberg*, 530 U.S. at 921 (explaining the standard from *Casey* and *Roe* with respect to postviability abortion regulations).

¹⁰³ See *Casey*, 505 U.S. at 884, 887, 899, 901.

¹⁰⁴ See *ibid.* (concluding that various provisions of Pennsylvania’s abortion statute are constitutional).

as if [Pennsylvania] had outlawed abortion in all cases.”¹⁰⁵

Refusing to invalidate the informed consent provisions at issue in *Casey*, the Court overruled its prior decisions in *Akron I* and *Thornburgh* to the extent that they barred the State from requiring that a woman be given “truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the ‘probable gestational age’ of the fetus.”¹⁰⁶ In so doing, the Court emphasized that the State may encourage childbirth over abortion and require information – even information that has “no direct relation to [a woman’s] health” – in an attempt to make sure that a woman understands “the full consequences of her decision.”¹⁰⁷ And, contrary to the Court’s decision in *Akron I* but consistent with Justice O’Connor’s approach in that case, the *Casey* Court decided that Pennsylvania had the freedom to require a physician to provide information in connection with obtaining informed consent even if it would be reasonable to conclude that another person could perform that task.¹⁰⁸

The Court’s invalidation of Pennsylvania’s spousal notification requirement is reminiscent of Justice O’Connor views in *Hodgson* with respect to the Minnesota parental consent provision that provided for no judicial bypass procedure.¹⁰⁹ In *Casey*, the Court emphasized that the spousal notification requirement could endanger the physical and psychological wellbeing of a constitutionally significant number of pregnant women and their children.¹¹⁰ As a result, according to the Court: “[The requirement] will operate as a substantial obstacle to a woman’s choice to undergo an abortion. It is an undue burden, and therefore invalid.”¹¹¹ Despite what appeared to be a definitive conclusion, the Court continued its analysis – perhaps considering whether the requirement might survive more exacting scrutiny – and weighed the interests of a pregnant woman against that of her spouse.¹¹² Like it had in

¹⁰⁵ Ibid. at 894.

¹⁰⁶ Ibid. at 882.

¹⁰⁷ Ibid.

¹⁰⁸ See *ibid.* at 884-85 (evaluating the informed consent requirement).

¹⁰⁹ See *Hodgson v. Minnesota*, 497 U.S. 417, 461 (1990).

¹¹⁰ See *Casey*, 505 U.S. at 887-895 (discussing the risks associated with the spousal notification requirement); cf. *Hodgson*, 497 U.S. at 443-44 (describing the potential for abuse as a result of Minnesota’s parental consent requirement).

¹¹¹ *Casey*, 505 U.S. at 895.

¹¹² See *ibid.* at 895-98 (discussing the father’s interest).

Hodgson when comparing the interests of a pregnant minor and one of her parents with the interest of her other parent, the *Casey* Court determined that the balance tipped in favor of the pregnant woman.¹¹³

After *Casey*, the Court waited nearly five years before applying the undue burden standard again.¹¹⁴ It did so in *Mazurek v. Armstrong*, a case involving a Montana statute that provided that only licensed physicians could perform abortions in the State.¹¹⁵ The law's only effect at the time was to bar a single physician assistant from performing abortions in Montana, and the court of appeals did not disturb the district court's conclusion that there was not enough evidence to find that this effect created "a 'substantial obstacle to a woman seeking an abortion.'" ¹¹⁶ The appellate court determined, however, that the plaintiffs made a sufficient showing, for purposes of a preliminary injunction, that the law was enacted with that purpose.¹¹⁷ The Supreme Court disagreed, finding that this conclusion was "squarely foreclosed by *Casey*."¹¹⁸ Relying on the *Casey* Court's decision with respect to Pennsylvania's requirement that a physician (rather than another qualified person) provide information in connection with obtaining a woman's consent to having an abortion, the Court in *Mazurek* stressed 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*."¹¹⁹ Thus, according to the Court, it did not matter that the evidence indicated that Montana's physician only requirement furthered no health-related objective.¹²⁰

Three years later in *Stenberg*, however, the Court struck down a Nebraska

¹¹³ Ibid. at 896 ("Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor." (internal quotations omitted)); *Hodgson*, 497 U.S. at 453 ("[T]he combined force of the separate interest of one parent and the minor's privacy interest must outweigh the separate interest of the second parent.").

¹¹⁴ See generally *Mazurek v. Armstrong*, 520 U.S. 968 (1997).

¹¹⁵ See id. at 969 (describing the Montana statute).

¹¹⁶ Ibid. at 972.

¹¹⁷ See ibid. at 972 (discussing the decision of the court of appeals).

¹¹⁸ Ibid. at 973.

¹¹⁹ Ibid. (quoting *Casey*, 505 U.S. at 885 (emphasis added)).

¹²⁰ See ibid. (giving no weight to a study indicating that the Montana law would not improve health outcomes).

ban on partial-birth abortion under *Casey*'s undue burden standard.¹²¹ It did so for two reasons.¹²² First, according to the Court, the law impermissibly barred the use of "dilation and evacuation" (D&E), the most common method for performing second-trimester abortions.¹²³ Second, the Court decided, the ban was unconstitutional because it failed to include an exception for cases in which a partial-birth abortion is necessary to protect the health of the mother.¹²⁴ Although Nebraska's partial-birth abortion ban applied previability and therefore was subject to *Casey*'s undue burden test, the *Stenberg* Court did not evaluate the contours of the test's purpose prong or its effect prong in any depth.¹²⁵ And it did not need to do so. The State had agreed that its partial-birth abortion ban would constitute an undue burden if it barred the performance of a D&E.¹²⁶ As a result, once the Court determined that the ban prohibited a D&E, the Court did not need to – and did not – go any further.¹²⁷ Moreover, the Court indicated that, because a State must include exceptions to postviability abortion restrictions when necessary to protect a woman's life or health, the State's failure to include a necessary exception to a regulation that applies previability – when the State's regulatory authority is more limited – per se is an undue burden and invalid.¹²⁸

¹²¹ See *Stenberg v. Carhart*, 530 U.S. 914, 922 (2000) (concluding that Nebraska's partial-birth abortion ban is unconstitutional).

¹²² See *ibid.* at 924, 934.

¹²³ *Ibid.* at 924 (indicating that the D&E is the most common abortion procedure in the second trimester); see also *ibid.* at 945-46 ("All those who perform abortion procedures using [the D&E] method must fear prosecution, conviction, and imprisonment. The result is an undue burden upon a woman's right to make an abortion decision. We must consequently find the statute unconstitutional.").

¹²⁴ *Ibid.* at 934 ("We find the...arguments insufficient to demonstrate that Nebraska's law needs no health exception.").

¹²⁵ See *ibid.* at 938.

¹²⁶ *Ibid.* ("Nebraska does not deny that the statute imposes an 'undue burden' if it applies to the more commonly used D & E procedure as well as to D & X.").

¹²⁷ See *ibid.* at 930.

¹²⁸ *Ibid.* ("Since the law requires a health exception in order to validate even a postviability abortion regulation, it at a minimum requires the same in respect to previability regulation."); see also *Gonzales v. Carhart*, 550 U.S. 124, 156 ("The abortions affected by the Act's regulations take place both previability and postviability; so the...undue burden analysis...[is] applicable. The question is whether the Act, measured by its text in this facial attack, imposes a substantial obstacle to late-term, but previability, abortions.").

In reaching its decision that the absence of a health exception was fatal to Nebraska's ban, the Court gave studied attention to the record, weighing differences in medical opinion as to whether the partial-birth abortion method ever is necessary to protect a woman's health.¹²⁹ Ultimately, the Court concluded that a health exception was required because "substantial medical authority support[ed] the proposition that banning [partial-birth abortion] could endanger women's health."¹³⁰ Justice O'Connor concurred, thus indicating her belief that the Court is the proper forum for resolving cases of medical uncertainty.¹³¹

Justice Kennedy disagreed.¹³² With the Chief Justice joining him, Justice Kennedy insisted that the Court must defer to the State when it comes to resolving matters in which there is disagreement within the medical community.¹³³ This is not to say that Justice Kennedy believed the Court had no role.¹³⁴ But, Justice Kennedy suggested, the Court's role is limited to determining if there is significant support in the record for the State's position.¹³⁵ If there is, he stressed, the Court must defer to the legislative determination of its weight relative to any contrary evidence.¹³⁶ According to Justice Kennedy: "Nebraska...was entitled to conclude that its ban...deprived no woman of a safe abortion and therefore did not impose a substantial obstacle on the rights of any woman."¹³⁷

¹²⁹ See *Stenberg*, 530 U.S. at 930-38 (considering evidence regarding the need for a health exception).

¹³⁰ *Ibid.* at 938; see also *ibid.* at 936-37 (noting "a division of opinion among some medical experts over whether D & X is generally safer[] and an absence of controlled medical studies.").

¹³¹ See *ibid.* at 948 (O'Connor, J., concurring) (indicating agreement with the majority as to the need for a health exception to Nebraska's partial-birth abortion ban).

¹³² See *ibid.* at 961-62, 968.

¹³³ *Ibid.* at 969-70 (Kennedy, J., dissenting) ("[T]he State is entitled to make judgments where high medical authority is in disagreement.").

¹³⁴ See *ibid.* at 970-71 (noting that courts must be cautious "when medical uncertainty is present").

¹³⁵ *Ibid.* at 967 ("Substantial evidence supports Nebraska's conclusion that its law denies no woman a safe abortion.").

¹³⁶ *Ibid.* at 969-70 ("The question here is whether there was substantial and objective medical evidence to demonstrate the State had considerable support for its conclusion that the ban created a substantial risk to no woman's health.... [T]he State is entitled to make judgments where high medical authority is in disagreement.").

¹³⁷ *Ibid.* at 965.

Justice Kennedy likewise disagreed with the Court's taking for itself the role of deciding whether Nebraska's ban would further the State's interest in protecting potential life.¹³⁸ The Court's assertion that "[t]he Nebraska law...does not directly further an interest 'in the potentiality of human life'...[because] it regulates only a *method* of performing abortion"¹³⁹ brought a strong rebuke: "The issue is not whether members of the judiciary can see a difference between [partial-birth abortion and a D&E]. It is whether Nebraska can.... Nebraska was entitled to find the existence of a consequential moral difference between the procedures."¹⁴⁰

With Justice O'Connor's retirement, the views Justice Kennedy expressed in *Stenberg* would prevail in *Gonzales*, a case in which the Court upheld a federal partial-birth abortion ban.¹⁴¹ Nevertheless, writing for the majority, Justice Kennedy chose to distinguish *Stenberg* rather than overrule it.¹⁴² According to the *Gonzales* Court, two key distinctions existed between the Nebraska partial-birth abortion ban and the federal ban: "First, Congress made factual findings.... Second, ...the Act's language differs from that of the Nebraska statute. . . ."¹⁴³

In contrast to what it determined about the Nebraska ban, the Court in *Gonzales* concluded that the federal partial-birth abortion ban was not so broad as to bar a D&E.¹⁴⁴ This meant that the Court had to dive more deeply into to the undue burden test's purpose and effect prongs, and it did so deliberately and methodically, first considering whether the federal partial-birth abortion ban's purpose was to place a substantial obstacle to a woman's ability to choose abortion and then evaluating whether the ban had that effect.¹⁴⁵

¹³⁸ Ibid. at 962 ("The issue is not whether members of the judiciary can see a difference between [abortion] procedures. It is whether Nebraska can.").

¹³⁹ Ibid. at 930 (majority opinion).

¹⁴⁰ See *ibid.* at 962 (Kennedy, J., dissenting).

¹⁴¹ *Gonzales v. Carhart*, 550 U.S. 124, 133 (2007) ("We conclude the Act should be sustained....").

¹⁴² Ibid. ("Compared to the state statute...in *Stenberg*, the Act [in this case] is more specific...and...more precise in its coverage.").

¹⁴³ Ibid. at 141.

¹⁴⁴ Ibid. at 154 ("[I]nterpreting the Act so that it does not prohibit standard D & E is the most reasonable reading and understanding of its terms.").

¹⁴⁵ See *ibid.* at 147 (concluding that the Act in question "[did] not impose an undue burden" on women seeking an abortion).

As to purpose, the Court clearly and unmistakably applied the deferential rational basis standard:

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.¹⁴⁶

And the Court's application of the standard confirms the extreme deference that courts must give to state regulation.¹⁴⁷ Echoing Justice Kennedy's dissent in *Stenberg*, the *Gonzales* Court emphasized that Congress was entitled to make a moral distinction between partial-birth abortion and a D&E,¹⁴⁸ and a mere inference was enough to sustain the ban as a measure advancing the interest in protecting potential life:

It is a reasonable inference that a necessary effect of the regulation and the knowledge it conveys will be to encourage some women to carry the infant to full term, thus reducing the absolute number of late-term abortions. The medical profession, furthermore, may find different and less shocking methods to abort the fetus in the second trimester, thereby accommodating legislative demand. The State's interest in respect for life is advanced by the dialogue that better informs the political and legal systems, the medical profession, expectant mothers, and society as a whole of the consequences that follow from a decision to elect a late-term abortion.¹⁴⁹

Notably, the *Gonzales* Court's application of the rational basis standard conflicted only with dicta in *Stenberg* because the Court in that case indicated that the interest advanced was irrelevant to whether a health exception to

¹⁴⁶ *Ibid.* at 158.

¹⁴⁷ *Ibid.* ("The Act's ban on abortions that involve partial delivery of a living fetus furthers the Government's objectives.").

¹⁴⁸ *Ibid.* ("Congress could...conclude that the type of abortion proscribed by the Act requires specific regulation because it implicates additional ethical and moral concerns that justify a special prohibition."); cf. *Stenberg v. Carhart*, 530 U.S. 914, 963 (2000) (Kennedy, J., dissenting). ("[Partial-birth abortion]'s stronger resemblance to infanticide means Nebraska could conclude the procedure presents a greater risk of disrespect for life and a consequent greater risk to the profession and society.... The Court is without authority to second-guess this conclusion.").

¹⁴⁹ *Gonzales*, 550 U.S. at 160; *ibid.* at 157 ("The Act expresses respect for the dignity of human life.... The government may use its voice and its regulatory authority to show its profound respect for the life within the woman.").

Nebraska's partial-birth abortion ban was required.¹⁵⁰

Like the Nebraska ban, the federal ban at issue in *Gonzales* failed to include a health exception, and this omission drew the *Gonzales* Court's attention in relation to the undue burden standard's "effect" prong.¹⁵¹ While eventually deciding that the Constitution did not require a health exception, the *Gonzales* Court was careful not to contradict *Stenberg*.¹⁵² Instead, the Court stressed that *Stenberg* had been misunderstood:

Stenberg has been interpreted to leave no margin of error for legislatures to act in the face of medical uncertainty.... A zero tolerance policy would strike down legitimate abortion regulations, like the present one, if some part of the medical community were disinclined to follow the proscription. This is too exacting a standard to impose on the legislative power, exercised in this instance under the Commerce Clause, to regulate the medical profession. Considerations of marginal safety, including the balance of risks, are within the legislative competence when the regulation is rational and in pursuit of legitimate ends.¹⁵³

Consistent with what Justice Kennedy stated in *Stenberg*, the latitude that legislatures enjoy in resolving matters of medical uncertainty does not mean that courts have no role to play: "Although we review congressional factfinding under a deferential standard, we do not in the circumstances here place dispositive weight on Congress's findings. The Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake."¹⁵⁴ Consequently, the *Gonzales* Court reviewed the record and discredited certain congressional factfinding that did not have a legitimate basis.¹⁵⁵ But even without these findings, the evidence as to the existence of

¹⁵⁰ *Stenberg*, 530 U.S. at 931 ("But we cannot see how the interest-related differences could make any difference to the question at hand, namely, the application of the 'health' requirement.").

¹⁵¹ See *Gonzales*, 550 U.S. at 160 (discussing the absence of a health exception in relation to the federal ban's effect).

¹⁵² See *ibid.* at 166-67 (declining to facially invalidate laws that fail to create a health exception "where there is uncertainty over whether [a specific abortion] procedure is...necessary to preserve a woman's health").

¹⁵³ *Ibid.* at 166.

¹⁵⁴ *Ibid.* at 165.

¹⁵⁵ *Ibid.* at 165-66 ("Whether or not accurate at the time, some of the important findings have been superseded.... Uncritical deference to Congress' factual findings in these cases is inappropriate.").

safe alternatives to partial-birth abortion was sufficient.¹⁵⁶

III. Understanding *Hellerstedt*

Significant legislative deference marks the undue burden standard's history, beginning with Justice O'Connor's articulation and application of the standard in *Akron I*.¹⁵⁷ And while *Stenberg* and *Gonzales* present a somewhat unclear picture about when and how much courts must yield to a State's determination that a regulation does not place a substantial obstacle in the path of a woman seeking an abortion previability,¹⁵⁸ up through *Gonzales*, the Court – and individually Justices O'Connor and Kennedy – consistently determined that, in absence of a substantial obstacle, the Constitution requires only that an abortion regulation have a rational basis.¹⁵⁹ As a result, when the *Hellerstedt* Court reprimanded the United States Court of Appeals for the Fifth Circuit for granting significant latitude to Texas, Justice Thomas's accusation that the Court had "reimagine[d] the undue-burden standard" seems to ring true.¹⁶⁰

A. An Aberrational Decision or Consistent with the Undue Burden Standard's Heritage?

Lending support to Justice Thomas's claim is the sharp contrast between the Court's approach in *Gonzales* and that in *Hellerstedt*. Hewing closely to *Casey*'s text, the Court in *Gonzales* considered, first, whether the federal partial-birth abortion ban had the *purpose* of placing a substantial obstacle in the path of a woman seeking an abortion and, second, whether the ban had that

¹⁵⁶ *Ibid.* at 164 ("Medical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts. The medical uncertainty over whether the Act's prohibition creates significant health risks provides a sufficient basis to conclude in this facial attack that the Act does not impose an undue burden." (citation omitted)).

¹⁵⁷ See *City of Akron v. Akron Ctr. for Reprod. Health, Inc. (Akron I)*, 462 U.S. 416, 453 (1983) (O'Connor, J., dissenting) (describing an "unduly burdensome" standard).

¹⁵⁸ See *Stenberg v. Carhart*, 530 U.S. 914, 931 (2000); *Gonzales*, 550 U.S. at 160.

¹⁵⁹ See, e.g., *Gonzales*, 550 U.S. at 164-66 (concluding that a rational basis standard applies when a court does not determine that the statute in question imposes on undue burden on a woman's ability to seek an abortion).

¹⁶⁰ *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2323 (2016) (Thomas, J., dissenting).

effect.¹⁶¹ The *Hellerstedt* Court, on the other hand, made only a passing reference to the purpose and effect prongs of the undue burden test and then focused on the benefits and burdens of the Texas statute at issue in the case.¹⁶² It is tempting simply to equate *Hellerstedt*'s consideration of benefits with *Gonzales*'s consideration of purposes and *Hellerstedt*'s consideration of burdens with *Gonzales*'s consideration of effects, but reconciling the two cases is not that easy. While one might connect *Gonzales*'s evaluation of the federal partial-birth abortion ban's effect to *Hellerstedt*'s assessment of the Texas law's burdens, concluding that *Hellerstedt*'s consideration of the Texas law's benefits is the rough equivalent of *Gonzales*'s evaluation of the partial-birth abortion ban's purposes misses the critical point as to how the Court approached benefits in *Hellerstedt* and purposes in *Gonzales*. And the approaches were very different. The Court in *Gonzales* utilized a rational-basis-like test for determining purposes¹⁶³ and, in *Hellerstedt*, it engaged in a more searching review, looking specifically for evidence that the Texas statute advanced the interest that Texas purported to seek.¹⁶⁴ In fact, when measured against *Gonzales* and the undue burden standard's long history, *Hellerstedt* appears to be aberrational, a stark departure from all previous descriptions and applications of the standard.

According to the Court in *Hellerstedt*, the Fifth Circuit was 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," to find "that legislatures, and not courts, must resolve questions of medical uncertainty," and "to imply that a

¹⁶¹ See *Gonzales*, 550 U.S. at 156-67 (considering the federal partial-birth abortion ban's purpose and effect).

¹⁶² See *Hellerstedt*, 136 S. Ct. at 2300, 2309-20 (describing *Casey*'s purpose and effect prongs but evaluating the constitutionality of the Texas statutes based on its burdens and benefits).

¹⁶³ E.g., *Gonzales*, 550 U.S. at 159 ("While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained."); *ibid.* at 160 ("It is a reasonable inference that a necessary effect of the regulation and the knowledge it conveys will be to encourage some women to carry the infant to full term, thus reducing the absolute number of late-term abortions.").

¹⁶⁴ See *Hellerstedt*, 136 S. Ct. at 2311-12, 2315-16 (considering what evidence existed as to whether the Texas statute would achieve a benefit with respect to women's health).

district court should not consider the existence or nonexistence of medical benefits when considering whether a regulation of abortion constitutes an undue burden.”¹⁶⁵ *Casey*’s undue burden standard, the Court contended, represents a balancing test, “requir[ing] that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer.”¹⁶⁶ And, the Court decided, the balance tipped against a Texas statute that required two things – that a physician performing an abortion have admitting privileges at a nearby hospital and that an abortion facility meet the standards applicable to an ambulatory surgery center¹⁶⁷ – because the requirements offered little (if any) benefit while placing substantial obstacles in the path of a woman seeking to terminate her pregnancy previability.¹⁶⁸

A superficial reading of *Hellerstedt* might suggest that the undue burden standard is a free-flowing balancing test that applies in the manner depicted in Appendix B. *Hellerstedt*, though, purports to apply *Casey* and *Gonzales*,¹⁶⁹ and it seems extremely unlikely that Justice Kennedy would have been the swing vote in a decision that he believed would overrule sub silentio cases that are an important part of his legacy. Thus, one should interpret *Hellerstedt* in the context of the undue burden standard’s history and with particular attention to how Justice Kennedy understood the test. When interpreted in this way, *Hellerstedt*’s limitations become manifest.

To be faithful to *Casey* and *Gonzales*, *Hellerstedt* cannot mean that a court never is to apply rational basis review to an abortion regulation that presents an obstacle to a woman’s ability to have an abortion. Granted, this is what the *Hellerstedt* Court suggested when it cited *Williamson v. Lee Optical of Oklahoma, Inc.*, a case in which the Court upheld an economic regulation under rational basis review, as an example of precedent applying a standard that is inapplicable in the abortion context.¹⁷⁰ The Court in *Casey*, however,

¹⁶⁵ Ibid. at 2309-10.

¹⁶⁶ Ibid. at 2309.

¹⁶⁷ See *ibid.* at 2300 (concluding that the admitting privileges and ambulatory surgery center requirements were unconstitutional).

¹⁶⁸ See *ibid.* at 2311-18 (conducting a balancing test with respect to the admitting privileges and ambulatory surgery center requirements).

¹⁶⁹ See *ibid.* at 2309-10 (referring to *Casey* and *Gonzales*).

¹⁷⁰ See *ibid.* at 2309-10 (citing *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 491 (1955)); see also *Williamson*, 348 U.S. at 491 (“We cannot say that the regulation has no rational relation to that objective and therefore is beyond

specifically referenced *Williamson* in support of its decision to uphold Pennsylvania's requirement that a physician be directly involved in obtaining a woman's informed consent:

Since there is no evidence on this record that requiring a doctor to give the information as provided by the statute would amount in practical terms to a substantial obstacle to a woman seeking an abortion, we conclude that it is not an undue burden. Our 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. Thus, we uphold the provision as a reasonable means to ensure that the woman's consent is informed.¹⁷¹

And the *Casey* Court's treatment of this provision reflects continuity with the undue burden standard's past, stretching back to Justice O'Connor's description and application of the standard in *Akron I* and *Thornburgh* – one considers first whether an abortion regulation places a substantial obstacle in the path of a woman seeking an abortion, and if it does not, the regulation need only have a rational basis to satisfy constitutional scrutiny.¹⁷²

Moreover, in *Mazurek*, the Court seized on this part of *Casey* in rejecting a preliminary injunction against the Montana law that mandated that only physicians could perform abortions.¹⁷³ Dismissing the plaintiffs' argument that the State must have adopted the regulation for the purpose of placing a substantial obstacle in the path of a woman seeking an abortion because the evidence indicated that the regulation offered no medical benefit,¹⁷⁴ the Court stressed that "this line of argument [was] squarely foreclosed by *Casey* itself."¹⁷⁵ And consistent with *Mazurek*, the Court in *Gonzales*, with Justice

constitutional bounds.").

¹⁷¹ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884-85 (1992) (citing *Williamson*, 348 U.S. at 483).

¹⁷² See generally *Akron v. Akron Ctr. for Reprod. Health, Inc. (Akron I)*, 462 U.S. 416, 453 (1983) (O'Connor, J., dissenting); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 828 (1986) (O'Connor, J., dissenting).

¹⁷³ See generally *Mazurek v. Armstrong*, 520 U.S. 969 (1997).

¹⁷⁴ See *ibid.* at 973 (noting the plaintiffs' argument regarding the purpose of the Montana law).

¹⁷⁵ *Ibid.* ("In the course of upholding the physician-only requirement at issue in [*Casey*], 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

Kennedy writing for the majority, plainly applied a rational basis standard of review to determine whether the federal partial-birth abortion ban had the purpose of placing a substantial obstacle in the path of a woman seeking an abortion:

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.¹⁷⁶

Finally, the lack of rigorous analysis that the Court in both *Casey* and *Gonzales* utilized in assessing potential benefits from the regulations it upheld belie a claim that deferential rational basis review never applies under the undue burden test.¹⁷⁷ With respect to the information Pennsylvania sought to require as a part of obtaining informed consent, the *Casey* Court stated: “We...*see no reason* why the State may not require doctors to inform a woman seeking an abortion of the availability of materials relating to the consequences to the fetus....”¹⁷⁸ As to Pennsylvania’s twenty-four-hour waiting period, the Court added:

The *idea* that important decisions will be more informed and deliberate if they follow some period of reflection *does not strike* us as unreasonable.... In *theory*, at least, the waiting period is a reasonable measure to implement the State’s interest in protecting the life of the unborn, a measure that does not amount to an undue burden.¹⁷⁹

The Court in *Gonzales* went a step further when it upheld the federal partial-birth abortion ban:

While we find *no reliable data* to measure the phenomenon, it seems *unexceptionable* to conclude some women come to regret their choice to abort the infant life they once created and sustained.... It is a *reasonable inference* that a necessary effect of the regulation and the knowledge it conveys will be to encourage some women to carry the

licensed professionals, *even if an objective assessment might suggest that those same tasks could be performed by others.*” (quoting *Casey*, 505 U.S. at 885)).

¹⁷⁶ *Gonzales v. Carhart*, 550 U.S. 124, 158 (2007).

¹⁷⁷ See generally *Casey*, 505 U.S. 833; *Gonzales*, 550 U.S. 124.

¹⁷⁸ *Casey*, 505 U.S. at 882 (emphasis added).

¹⁷⁹ *Ibid.* at 885 (emphasis added).

infant to full term, thus reducing the absolute number of late-term abortions.¹⁸⁰

Furthermore, the majority in *Gonzales* upheld the ban even over Justice Ginsberg's claim that it achieved nothing because it barred only a single type of procedure, leaving others for a physician to use.¹⁸¹

When the Court indicates that it *sees no reason* why a regulation might be problematic, when it observes that a regulation *does not strike* the justices as unreasonable, when it sustains a regulation based on an *idea*, a *theory*, or a *reasonable inference*, and when it deems a proposition to be *unexceptional* even in the absence of *reliable evidence*, the Court abandons any pretense of a rigorous review.¹⁸² Simply put, under *Casey* and *Gonzales*, with respect to a regulation aimed at advancing the State's interest in protecting potential life, it need only be conceivable that the regulation could cause a woman to choose childbirth over abortion.¹⁸³ This is a rational basis standard of review. Thus, given the fact that *Hellerstedt* does not overrule *Casey*, *Mazurek*, or *Gonzales* expressly, and that it seems very unlikely that Justice Kennedy would have signed on to an opinion that does so implicitly, it is unreasonable to read *Hellerstedt* to mean that rational basis review never is appropriate under *Casey*'s undue burden test.

But then, how does one understand *Hellerstedt*'s insistence that the standard of review under the undue burden test is not deferential rational basis review? And why, when *Casey* teaches that a statute cannot survive constitutional scrutiny under the undue burden standard if "its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability,"¹⁸⁴ would the *Hellerstedt* Court have bothered to consider what benefits Texas's admitting privileges and ambulatory surgery center requirements might offer when it was concluding that the requirements resulted in substantial obstacles to a woman's ability to have an abortion before fetal viability?

A cynical reading of *Hellerstedt* might lead one to believe that the Court insisted on a balancing test to give it and lower courts freer rein to strike down

¹⁸⁰ *Gonzales*, 505 U.S. at 159-60 (emphasis added).

¹⁸¹ *Ibid.* at 181 (Ginsberg, J., dissenting) ("The law saves not a single fetus from destruction, for it targets only a *method* of performing abortion.").

¹⁸² See *Casey*, 505 U.S. at 182; *Gonzales*, 505 U.S. at 159-60.

¹⁸³ See generally *Casey*, 505 U.S. 833; *Gonzales*, 505 U.S. 124.

¹⁸⁴ *Casey*, 505 U.S. at 878.

abortion regulations in the future. *Casey*, though, offers an alternative interpretation, one that is much more likely to appeal to a right-leaning Court that does not wish to make significant waves in the Court's abortion jurisprudence.

Casey is relatively clear that, when a state regulation designed to advance its interest in protecting potential life presents a substantial obstacle in the path of a woman seeking an abortion, the regulation is invalid per se.¹⁸⁵ The decision, though, seems to leave a door open for measures aimed at the state's interest in protecting maternal health: "*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."¹⁸⁶ A plausible converse, then, is that *necessary* health regulations – presumably those that can survive strict scrutiny (i.e., being narrowly tailored to serve the interest in protecting maternal health) – are not an undue burden and therefore can survive constitutional challenge.

The Court in *Mazurek*, *Stenberg*, and *Gonzales* made no mention of what *Casey* stated with respect to "[u]nnecessary health regulations."¹⁸⁷ But the Court in *Hellerstedt* did so twice.¹⁸⁸ One, therefore, reasonably might interpret *Hellerstedt* to mean that, in the case of a health-related regulation, a court must give rigorous scrutiny to its benefits to determine whether the regulation is necessary. If the regulation's benefits rise to the level of necessity, they naturally outweigh any obstacles the regulation might impose, thereby satisfying constitutional requirements. And if the regulation's benefits do not rise to that level, a substantial obstacle always tips the scale in the other

¹⁸⁵ Ibid. at 877 ("[A] statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends.").

¹⁸⁶ Ibid. at 878 (emphasis added); cf. *ibid.* ("To promote the State's profound interest in potential life, throughout pregnancy the State may take measures to ensure that the woman's choice is informed.... These measures must not be an undue burden on the right.").

¹⁸⁷ Ibid.; see generally *Gonzales v. Carhart*, 550 U.S. 124 (2007); *Stenberg v. Carhart*, 530 U.S. 914, 963 (2000); *Mazurek v. Armstrong*, 520 U.S. 969 (1997).

¹⁸⁸ See *Hellerstedt*, 136 S. Ct. at 2300 (indicating that "[u]nnecessary 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" (quoting *Casey*, 505 U.S. at 878)).

direction. On the other hand, when a regulation does not place a substantial obstacle in the path of a woman seeking an abortion before viability, the regulation need only be rationally related to a legitimate government interest to measure up to constitutional standards.

One finds support for this interpretation in the structure of the *Hellerstedt* Court's analysis, which tracks *Casey*'s statement about "[u]nnecessary health regulations."¹⁸⁹ In evaluating the Texas admitting privileges and ambulatory surgery center requirements, the Court first assessed the benefits of the regulations and, in the case of the ambulatory surgery center requirement, explicitly stated that the evidence supported the lower court's finding that the requirement was "not necessary."¹⁹⁰ In addition, after finding that neither measure offered any appreciable benefit, the Court emphasized that, "[a]t the same time," the measure constituted a substantial obstacle.¹⁹¹ As a result, the Court held the regulations unconstitutional under *Casey*: "*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.*"¹⁹²

Moreover, the *Hellerstedt* Court cited only *Casey*'s treatment of Pennsylvania's parental consent and spousal notification provisions as examples supporting a balancing test.¹⁹³ And one searches in vain within *Casey*'s analysis of these two provisions for a sweeping balancing test like that

¹⁸⁹ *Casey*, 505 U.S. at 878.

¹⁹⁰ *Hellerstedt*, 136 S. Ct. at 2315.

¹⁹¹ *Ibid.* at 2312 ("At the same time, the record evidence indicates that the admitting-privileges requirement places a 'substantial obstacle in the path of a woman's choice.'" (quoting *Casey*, 505 U.S. at 877)); see also *ibid.* at 2316 ("At the same time, the record provides adequate evidentiary support for the District Court's conclusion that the surgical-center requirement places a substantial obstacle in the path of women seeking an abortion.").

¹⁹² *Casey*, 505 U.S. at 878 (emphasis added).

¹⁹³ See *Hellerstedt*, 136 S. Ct. at 2309 (referencing *Casey*'s use of a balancing test in assessing spousal notification and parental consent provisions). Curiously, the Court did not reference *Casey*'s consideration of Pennsylvania's reporting and recordkeeping requirements, which were founded on the same interest as the Texas statute at issue in *Hellerstedt* – the State's interest in safeguarding maternal health. See *id.* at 2310 ("[O]ne is left to infer that the legislature sought to further a constitutionally acceptable objective (namely, protecting women's health)."); *Casey*, 505 U.S. at 900 ("Although [the recordkeeping and reporting requirements] do not relate to the State's interest in informing the woman's choice, they do relate to health.").

shown in Appendix B.¹⁹⁴ The *Hellerstedt* Court's reference to *Casey*'s treatment of Pennsylvania's parental consent provision is more than puzzling. The Court in *Casey* paid almost no attention to that provision, instead referring back to previous opinions and explaining: "Our cases establish, and we reaffirm today, that a State may require a minor seeking an abortion to obtain the consent of a parent or guardian, provided that there is an adequate judicial bypass procedure."¹⁹⁵ The only new argument the Court considered was whether the requirement of "informed" parental consent would invalidate the statute.¹⁹⁶ But even as to that, the Court largely pointed to its earlier evaluation of Pennsylvania's general informed consent provision,¹⁹⁷ which the *Hellerstedt* Court did not cite in support of a balancing test.¹⁹⁸

To be sure, when addressing the spousal notification requirement, the *Casey* Court devoted significant attention to the burdens on abortion access that the requirement imposed.¹⁹⁹ It did so, however, to determine whether the requirement placed a substantial obstacle in the path of a woman seeking an abortion, and once it determined that it did, the Court declared the requirement to be "an undue burden, and therefore invalid."²⁰⁰ Admittedly, the Court did not stop there.²⁰¹ But its further discussion does not at all resemble the methodical evaluation of benefits and burdens that one sees in *Hellerstedt*.²⁰² Instead, the Court in *Casey* proceeded to reinforce its decision by distinguishing the spousal notification provision from parental notification and consent requirements and by deciding that a pregnant woman's liberty interest outweighs the interest her

¹⁹⁴ See *infra* App. B.

¹⁹⁵ *Casey*, 505 U.S. at 899.

¹⁹⁶ See *ibid.* (discussing the informed consent requirement).

¹⁹⁷ *Ibid.* ("For the most part, 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.").

¹⁹⁸ See generally *Hellerstedt*, 136 S. Ct. 2292.

¹⁹⁹ See *Casey*, 505 U.S. at 893 (indicating that the spousal notification provision could cause a woman to fear being physically or psychologically abused herself and fear the abuse of her children).

²⁰⁰ See *ibid.* at 895.

²⁰¹ See *ibid.*

²⁰² See *Hellerstedt*, 136 S. Ct. at 2311-18 (first considering the benefits associated with the Texas statute and then assessing whether the statute placed a substantial obstacle in the path of a woman seeking an abortion).

husband has in her pregnancy.²⁰³ If the *Casey* Court engaged in any type of balancing, it was this balancing of interests – balancing that hearkens back to Justice O'Connor's original conception of the undue burden standard, which allowed for the possibility that an abortion regulation that poses a substantial obstacle nevertheless might be upheld under exacting scrutiny.²⁰⁴

Indeed, the only times when Justice O'Connor approved of the Court's balancing of burdens and benefits or balanced benefits and burdens herself was when she had determined or assumed that an abortion regulation imposed a substantial obstacle.²⁰⁵ Her concurrence in *Hodgson* is a case in point.²⁰⁶ In her separate opinion agreeing with the decision to strike down Minnesota's two-parent consent requirement that did not include a judicial bypass, Justice O'Connor assessed the requirement's reasonableness and found it wanting.²⁰⁷ In particular, she stated that "Minnesota ha[d] offered no sufficient justification for its interference with the family's decisionmaking processes" and that, "[g]iven its broad sweep and its failure to serve the purposes asserted by the State in too many cases," she believed that the requirement was unconstitutional.²⁰⁸ Moreover, she concurred in the opinion of the Court, which determined that the parental consent requirement without a judicial bypass was both overinclusive and underinclusive:

In the ideal family setting, of course, notice to either parent would normally constitute notice to both. A statute requiring two-parent notification would not further any state interest in those instances.... Not only does two-parent notification fail to serve any state interest with respect to functioning families, it disserves the state interest in protecting and assisting the minor with respect to dysfunctional families.²⁰⁹

²⁰³ See *Casey*, 505 U.S. at 896-98 (distinguishing parental notification and consent provisions and evaluating a man's interest in his wife's pregnancy).

²⁰⁴ See *supra* Section I.B (discussing Justice O'Connor's early articulation of the undue burden test).

²⁰⁵ See, e.g., *Hodgson v. Minnesota*, 497 U.S. 417, 461 (1990) (O'Connor, J., concurring).

²⁰⁶ See *id.* at 459-61; see also *supra* Section I.B (discussing Justice O'Connor's view in *Akron I* that a waiting period could survive strict scrutiny because it was a small cost relative to its benefits).

²⁰⁷ See *Hodgson*, 497 U.S. at 460-61 (O'Connor, J., concurring).

²⁰⁸ *Ibid.* at 459-60.

²⁰⁹ *Ibid.* at 450.

But Justice O'Connor approved of this balancing only because the parental consent provisions placed obstacles – ones the district court described as significant ones – in the path of a woman seeking an abortion.²¹⁰ In this regard, she notes specifically: “It has been my understanding in this area that ‘[i]f the particular regulation does not “unduly burde[n]” the fundamental right, ...then our evaluation of that regulation is limited to our determination that the regulation rationally relates to a legitimate state purpose.’”²¹¹ Importantly, when Justice O'Connor considered Minnesota's two-parent notification requirement *with* a judicial bypass, she indicated that the burdens associated with the requirement drop away, and she concluded that the requirement is constitutional notwithstanding her earlier agreement that it was both overinclusive and underinclusive: “[T]he interference with the internal operation of the family...simply does not exist where the minor can avoid notifying one or both parents by use of the bypass procedure.”²¹² For Justice O'Connor, then, when no substantial obstacle is present, there is no need for judicial review.²¹³ In such a case, a court must defer to the legislature.

Just as with the *Hellerstedt* Court's refusal to defer to legislative judgment under a rational basis standard, one must not take too far what the Court stated about the role of the judiciary in resolving cases of medical uncertainty. The Court in *Hellerstedt* observed that *Gonzales* explains that courts have an independent role in reviewing legislative findings, although under a

²¹⁰ *Ibid.* at 459. (“I agree with Justice Stevens’ statement that the ‘statute cannot be sustained if the obstacles it imposes are not reasonably related to legitimate state interests.’”); *ibid.* at 443 (noting the lower court’s findings that the parental consent requirement imposes “a significant burden upon pregnant minors who do not live with both parents” and “a significant obstacle in the path of minors in two parent homes” who do not wish to consult both parents because of fear of abuse).

²¹¹ *Hodgson*, 497 U.S. at 459 (O'Connor, J., concurring).

²¹² *Ibid.* at 461. Notably, the justices dissenting from the decision to uphold the requirement with the judicial bypass do so by continuing to evaluate the requirement under an exacting standard, rather than rational basis review. See *ibid.* at 457 (opinion of Stevens, J.) (addressing the notification provision with a judicial bypass, Justice Stevens remarked that “for reasons already set forth at length, a rule requiring consent or notification of both parents is not reasonably related to the state interest in giving the pregnant minor the benefit of parental advice”); *ibid.* at 462 (Marshall, J., dissenting) (“The bypass procedure cannot save [the parental notification requirement] because the bypass itself is unconstitutional.... At the very least, this scheme substantially burdens a woman’s right to privacy without advancing a compelling state interest.”).

²¹³ See *ibid.* at 461 (O'Connor, J., concurring).

“deferential standard.”²¹⁴ The *Hellerstedt* Court was careful, though, to distinguish *Gonzales*, indicating that the deferential standard would not apply because of the absence of legislative findings in the Texas statute: “Unlike in *Gonzales*, the relevant statute here does not set forth any legislative findings.... For a district court to give significant weight to evidence in the judicial record in these circumstances is consistent with this Court’s case law.”²¹⁵ And it is.

With specific congressional findings accompanying the federal partial-birth abortion ban, the *Gonzales* Court deferred to legislative judgment as to whether the ban’s failure to include a health exception represented a substantial obstacle to a woman’s choosing abortion before viability.²¹⁶ One finds no such legislative deference in *Stenberg*, however, and despite Justice Kennedy’s disagreement with how the Court decided *Stenberg*, his opinion in *Gonzales* did not reject *Stenberg* but distinguished it, noting the absence of legislative findings in support of Nebraska’s partial-birth abortion ban.²¹⁷

Justice Kennedy sharply criticized the *Stenberg* Court, stating that, with a legitimate dispute as to whether a health exception to Nebraska’s ban ever would be necessary, it should have deferred to the legislature:

The question here is whether there was substantial and objective medical evidence to demonstrate the State had considerable support for its conclusion that the ban created a substantial risk to no woman’s health.... [T]he State is entitled to make judgments where high medical authority is in disagreement.²¹⁸

Justice Kennedy’s view, though, did not prevail in *Stenberg*, and given what appears to be strong adherence to the principle of stare decisis in the abortion context, he may have acquiesced to *Hellerstedt*’s less deferential approach with respect to a measure that was unsupported by legislative findings.²¹⁹

²¹⁴ See *Hellerstedt*, 136 S. Ct. at 2310 (quoting *Gonzales v. Carhart*, 550 U.S. 124, 165 (2007)).

²¹⁵ *Ibid.*

²¹⁶ See *Gonzales*, 550 U.S. at 163.

²¹⁷ See *ibid.* at 160 (displaying the *Gonzales* Court’s distinction of *Stenberg*).

²¹⁸ See *Stenberg v. Carhart*, 530 U.S. 914, 969-70 (2000) (Kennedy, J., dissenting).

²¹⁹ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 871 (1992) (“[C]oming as it does after nearly 20 years of litigation in *Roe*’s wake we are satisfied that the immediate question is not the soundness of *Roe*’s resolution of the issue, but the

Moreover, neither in *Stenberg* nor in *Gonzales* did Justice Kennedy suggest that a court should ignore the judicial record entirely. In *Stenberg*, he noted that the judicial record contained evidence supporting the State's conclusion regarding the necessity of a health exception.²²⁰ Similarly, the *Gonzales* Court stated that "[t]he evidence presented in the trial courts and before Congress demonstrates both sides have medical support for their position,"²²¹ and while the Court found the body of evidence sufficient for deference, it did so after discounting legislative findings that the judicial record indicated were incorrect.²²²

Finally, in light of the Court's precedent, it would be wrong to interpret *Hellerstedt* to mean that an abortion regulation must yield some medical benefit to be valid. Importantly, the *Hellerstedt* Court only indicated that the existence or nonexistence of medical benefits associated with an abortion regulation is *relevant* to the undue burden standard.²²³ It did not hold that the absence of medical benefits is fatal. And this is as it should be given the Court's decisions in both *Casey* and *Mazurek*.²²⁴ The *Casey* Court spoke with great clarity regarding the fact that an abortion regulation need not offer medical benefits to be constitutional: "[U]nder the undue burden standard a State is permitted to enact persuasive measures which favor childbirth over abortion, even if those measures do not further a health interest."²²⁵ Furthermore, relying on

precedential force that must be accorded to its holding.""). In the case of LGBT rights, however, Justice Kennedy was willing to depart from the principle. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2591 (2015), overruling *Baker v. Nelson*, 409 U.S. 810 (1972); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003), overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986).

²²⁰ *Stenberg*, 530 U.S. at 967 (Kennedy, J., dissenting) ("Substantial evidence supports Nebraska's conclusion that its law denies no woman a safe abortion.").

²²¹ *Gonzales*, 550 U.S. at 161.

²²² *Ibid.* at 165-66 ("Congress also found there existed a medical consensus that the prohibited procedure is never medically necessary. The evidence presented in the District Courts contradicts that conclusion. Uncritical deference to Congress' factual findings in these cases is inappropriate." (citations omitted)).

²²³ See *Hellerstedt*, 136 S. Ct. at 2309 (indicating that the Fifth Circuit was wrong to the extent that it "impl[ie]d that a district court *should not consider* the existence or non-existence of medical benefits").

²²⁴ See generally *Casey*, 505 U.S. 833; *Mazurek v. Armstrong*, 520 U.S. 968 (1997).

²²⁵ *Casey*, 505 U.S. at 886; see also *ibid.* at 822 ("We also see no reason why the State may not require doctors to inform a woman seeking an abortion of the availability

Casey, the Court in *Mazurek* upheld a statute ostensibly aimed at maternal health even though evidence indicated that it would not improve health outcomes.²²⁶ Thus, in light of *Casey* and *Mazurek*, one should interpret *Hellerstedt*'s assertion regarding medical benefits to mean no more than that a court should consider whether a measure purporting to serve the state's interest in maternal health reasonably might be thought to offer medical benefits and, if the measure would place a substantial obstacle in the path of a woman seeking an abortion, whether the benefits are commensurate with the obstacles it imposes.

B. A Framework for Lower Courts

The interpretation of *Hellerstedt* in Section III.A certainly is not the only one, but legislatures and courts across the country can't afford to be "mystif[ied]" until the Supreme Court ultimately has a chance to clarify what *Hellerstedt* means or to change the landscape of abortion regulation dramatically.²²⁷ Thus, incorporating the interpretation described above, Appendices C and C-1 offer a framework to help legislatures and courts alike to navigate the muddy waters the *Hellerstedt* Court stirred.²²⁸

Despite the substantial uncertainty in many areas, three principles are relatively clear. First, a regulation is unconstitutional under *Casey* if it "prohibit[s] any woman from making the ultimate decision to terminate her pregnancy before [fetal] viability."²²⁹ Second, under *Maher* and *McRae*, to survive constitutional challenge, an abortion-related regulation that does not place any obstacles in the path of a woman seeking an abortion need only be rationally related to a legitimate government purpose.²³⁰ And third, in adopting

of materials relating to the consequences to the fetus, even when those consequences have no direct relation to her health.").

²²⁶ See *Mazurek*, 520 U.S. at 973.

²²⁷ See *Hellerstedt*, 136 S. Ct. at 2326 (Thomas, J., dissenting).

²²⁸ See *infra* Apps. C and C-1.

²²⁹ *Casey*, 505 U.S. at 879. See also *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007) ("Before viability, a State 'may not prohibit any woman from making the ultimate decision to terminate her pregnancy.'"); *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000) ("[B]efore 'viability...the woman has a right to choose to terminate her pregnancy.'"). But see Thomas J. Molony, "Roe, Casey, and Sex-Selection Abortion Bans," 71 *Wash. & Lee L. Rev.* 1089, 1109-29 (2014) (proposing a possible basis for concluding that a narrow sex selection is constitutional).

²³⁰ See, e.g., *Harris v. McRae*, 448 U.S. 297, 315, 318 (1980); *Maher v. Roe*, 432

abortion-related regulations, a state may favor childbirth over abortion.²³¹

Beyond those three points, the landscape is much more complicated. Nevertheless, the principles that apply postviability have become relatively stable. Neither *Casey* nor *Hellerstedt* changed the rule that has been effective since *Roe* – that “subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.”²³² And *Gonzales* and *Stenberg* offer important direction as to whether a State must include a health exception.²³³ *Gonzales* is clear that a court must defer to the judgment of the legislature if the legislature has made findings that a barred procedure never is necessary to protect a woman’s health and the judicial record corroborates those findings.²³⁴ In addition, bearing in mind the distinctions that the Court in both *Gonzales* and *Hellerstedt* drew between the partial-birth abortion ban at issue in *Gonzales* and the measures at issue in *Stenberg* and *Hellerstedt*,²³⁵ one would expect that, consistent with *Stenberg*, a regulation would be invalid without a health exception if there is no legislative record and there is substantial evidence in the judicial record that the procedure might be

U.S. 464, 474 (1977).

²³¹ *Casey*, 505 U.S. at 872 (“[T]he Constitution does not forbid a State or city, pursuant to democratic processes, from expressing a preference for normal childbirth.” (quoting *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 511 (1989))); *Webster*, 492 U.S. at 506 (“The Court has emphasized that *Roe v. Wade* ‘implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion.’”); *Maher*, 432 U.S. at 473-74 (“[T]he right [to an abortion]...implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion....”); *McRae*, 448 U.S. at 314 (“But the constitutional freedom recognized in *Wade* and its progeny, the *Maher* Court explained, did not prevent Connecticut from making ‘a value judgment favoring childbirth over abortion....’”).

²³² *Casey*, 505 U.S. at 879 (quoting *Roe v. Wade*, 410 U.S. 113, 164-65 (1973)); see *Hellerstedt*, 136 S. Ct. at 2300 (ruling that each of Texas’s admitting privileges and ambulatory surgery center requirements “place[d] a substantial obstacle in the path of women seeking a previability abortion”).

²³³ See generally *Stenberg*, 530 U.S. at 938; *Gonzales*, 550 U.S. at 141.

²³⁴ See generally *Gonzales*, 550 U.S. 124.

²³⁵ *Gonzales*, 550 U.S. at 141 (“The Act responded to *Stenberg* in two ways. First, Congress made factual findings.”); *Hellerstedt*, 136 S. Ct. at 2310 (“Unlike in *Gonzales*, the relevant statute here does not set forth any legislative findings.”).

necessary to protect a woman's health in some circumstances.²³⁶

As described in Section II.A, *Hellerstedt* leaves the terrain for regulating abortion previability extremely uncertain.²³⁷ Even if a court employs the undue burden standard as reflected in Appendix C-1, which attempts to fit *Hellerstedt* within the remainder of the standard's corpus, questions remain.²³⁸ For example, while *Gonzales* addresses cases of medical uncertainty when the legislature has made specific findings, one questions whether the principles in *Gonzales* would result in similar deference when the legislature has evaluated any type of uncertainty related to obstacles an abortion regulation might impose.²³⁹

Indeed, Section II.A indicates that whether an abortion regulation enjoys rational basis review depends on the substantiality of the burden that the regulation imposes.²⁴⁰ Under the standard set forth in *Casey*, the crucial question for purposes of a facial challenge is whether the regulation, "in a large fraction of cases in which [it] is relevant," has the effect of placing a substantial obstacle in the path of a woman seeking an abortion.²⁴¹ Neither *Casey* nor

²³⁶ *Stenberg*, 530 U.S. at 938 ("[W]here substantial medical authority supports the proposition that banning a particular abortion procedure could endanger women's health, *Casey* requires the statute to include a health exception."); cf. *ibid.* at 948 (O'Connor, J., concurring) ("[W]here, as here, 'a significant body of medical opinion believes a procedure may bring with it greater safety for some patients and explains the medical reasons supporting that view,' ...our precedent requires that the statute include a health exception.").

²³⁷ See *supra* Section II.A.

²³⁸ See *infra* App. C-1 (describing the undue burden standard in *Hellerstedt*).

²³⁹ Given Justice Kennedy's approach in *Hodgson* and his authoring the majority opinion in *Gonzales*, Appendix C-1 assumes that those principles regarding uncertainty apply more generally. *Hodgson v. Minnesota*, 497 U.S. 417, 496 (1990) (Kennedy, J., concurring in part and dissenting in part) ("The law before us does not place an absolute obstacle before any minor seeking...an abortion, and it represents a considered weighing of the competing interests of minors and their parents."); *Stenberg*, 530 U.S. at 965 (Kennedy, J., dissenting) ("Nebraska...was entitled to conclude that its ban...deprived no woman of a safe abortion and therefore did not impose a substantial obstacle on the rights of any woman."). If the legislature is entitled to resolve cases of medical uncertainty, it should enjoy the same latitude with respect to matters that do not involve particular expertise.

²⁴⁰ See *supra* Section II.A (discussing when an abortion enjoys rational basis review).

²⁴¹ *Casey*, 505 U.S. at 895.

Hellerstedt, however, explains what constitutes a “large fraction,” and what constitutes a “substantial obstacle” may be in the eye of the beholder.²⁴² Importantly, though, the obstacles that led the Court to strike down abortion regulations in *Casey*, *Stenberg*, and *Hellerstedt* were of significant magnitude – measures that would operate as an effective veto on a married woman’s ability to choose abortion, bar the most common second trimester abortion procedure, and result in the closure of approximately 75% of the abortion clinics operating in a state²⁴³ – suggesting that lower courts should stay their hands in all but the most extreme circumstances.

Conclusion

The Court in *Casey* described *Roe*’s trimester framework as an “elaborate but rigid” construct.²⁴⁴ As Appendices C and C-1 display, however, a consistent interpretation of *Casey*’s undue burden standard results in a tangled web of legal rules²⁴⁵ that is no less elaborate.²⁴⁶ Moreover, *Casey*’s rule that a regulation may not prohibit any woman from having an abortion prior to viability is even more rigid than the trimester framework – not allowing a prohibition (such as a sex-selection abortion ban) that might satisfy strict scrutiny.²⁴⁷

And by replacing *Roe*’s trimester framework, the *Casey* Court sought to rescue liberty from “a jurisprudence of doubt.”²⁴⁸ But what *Casey* and its

²⁴² See *Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2343 n.11 (2016) (Alito, J., dissenting) (identifying as an open question whether the “large fraction” standard is the proper standard for facial challenges to abortion regulations).

²⁴³ See *ibid.* at 2312, 2316 (majority opinion) (indicating that the number of abortion facilities dropped from approximately forty to approximately twenty when Texas’s admitting privileges requirement went into effect and that the parties stipulated that only seven or eight would remain if Texas’s ambulatory surgery center requirement were enforced).

²⁴⁴ *Casey*, 505 U.S. at 872.

²⁴⁵ *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 518 (1989) (“Since the bounds of the inquiry [under *Roe*’s trimester framework] are essentially indeterminate, the result has been a web of legal rules that have become increasingly intricate, resembling a code of regulations rather than a body of constitutional doctrine.”).

²⁴⁶ See *infra* Apps. C and C-1.

²⁴⁷ See Molony, *supra* n230, at 1123 (suggesting that a state’s “compelling interest in eradicating sex discrimination” might justify a narrow sex-selection abortion ban).

²⁴⁸ *Casey*, 505 U.S. at 844.

progeny have wrought is just such a jurisprudence, and the Court's decision in *Hellerstedt* exacerbates the doubt surrounding a woman's ability to choose abortion and a State's ability to adopt regulations with respect to the procedure.

This is a surprising legacy for Justice Kennedy. He recognized that liberty extends both to the individual and to citizens collectively so that they may direct "the course of a nation that must strive always to make freedom ever greater and more secure."²⁴⁹ Ceding to judicial determination what represents a substantial obstacle and what is a large fraction is destabilizing enough, but a free-flowing balancing test like that which a superficial reading of *Hellerstedt* suggests is simply at odds with the liberty that the *Casey* Court claimed to secure. Unfortunately, following *Hellerstedt*, questions abound. The cloud surrounding *Hellerstedt* itself is an undue burden, and until the Court clarifies what the decision means or changes course entirely, liberty will continue to find no refuge.

²⁴⁹ *Schuette v. Coal. to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equal. by any Means Necessary (BAMN)*, 134 S. Ct. 1623, 1637 (2014). See also *Stenberg*, 530 U.S. at 957 (Kennedy, J., dissenting) ("The political processes of the State are not to be foreclosed from enacting laws to promote the life of the unborn.... The State's constitutional authority is a vital means for citizens to address these grave and serious issues....").

Appendix A

Roe's Trimester Framework

<i>Trimester</i>	<i>Permitted Regulations</i>
First	Almost none
Second	Advancing interest in protecting maternal health
Third (Post-Viability)	Advancing interest in protecting maternal health Advancing interest in protecting potential life

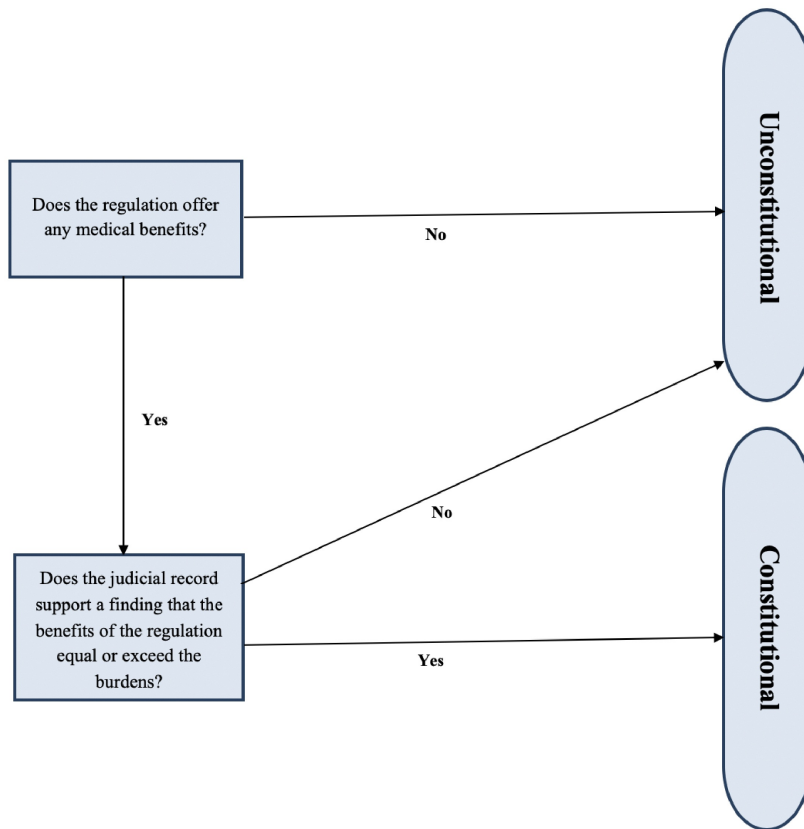
250 251 252
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²⁵⁰ *Roe v. Wade*, 410 U.S. 113, 164 (“For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman’s attending physician.”); see also *Casey*, 505 U.S. at 872 (“Under this elaborate but rigid construct almost no regulation at all is permitted during the first trimester of pregnancy.”).

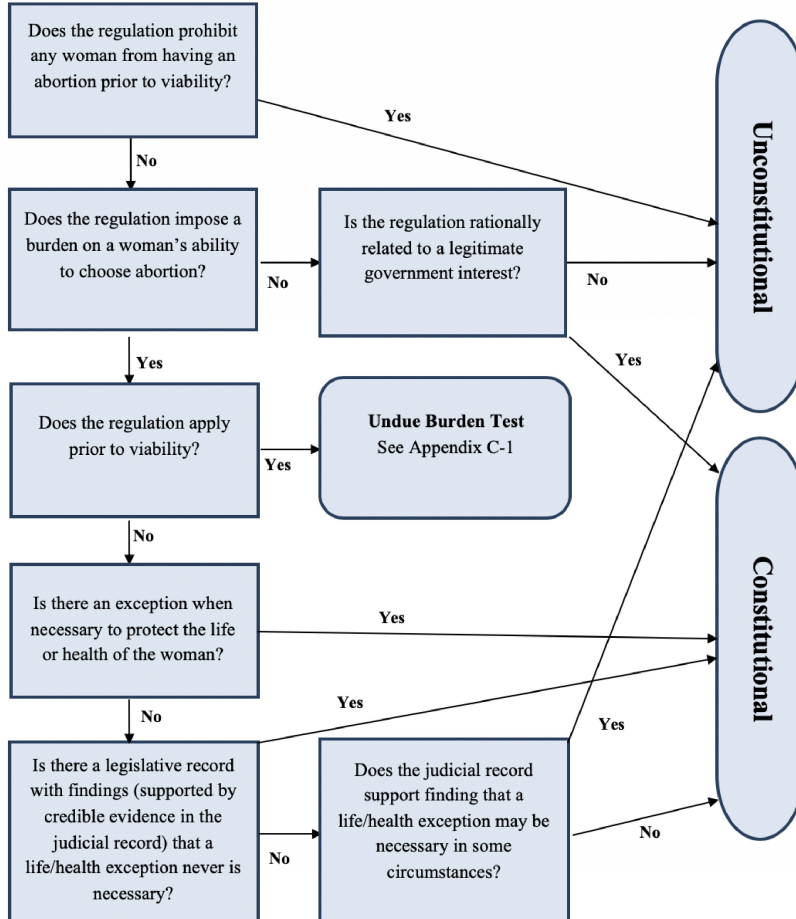
²⁵¹ *Roe*, 410 U.S. at 164 (“For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.”); see also *Casey*, 505 U.S. at 872 (“Under this elaborate but rigid construct...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....”).

²⁵² *Roe*, 410 U.S. at 164-65 (“For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.”); see also *Casey*, 505 U.S. at 872 (“Under this elaborate but rigid construct...prohibitions are permitted provided the life or health of the mother is not at stake.”).

Appendix B

Undue Burden Test—Superficial Reading of *Hellerstedt*

Appendix C

Post-*Casey* Constitutional Standards

APPENDIX C-1

Undue Burden Test

