Taking Abortion Rights Seriously

(*Whole Woman's Health* v *Hellerstedt*)

Kate Greasley*

In *Whole Woman's Health* v *Hellerstedt* the Supreme Court of the United States passed down its most important decision on abortion in just under a decade. By a majority of 5-3, the Court ruled that two provisions in a Texas law regulating abortion on grounds of women's health were constitutionally invalid, placing a 'substantial obstacle' in the way of women seeking to exercise their right to abortion. This comment delineates the key ways in which the Court's application of the standard of constitutional review under *Planned Parenthood* v *Casey* (1992) to the Texas provisions marks a landmark development for the protection of the constitutional right to abortion established in *Roe* v *Wade*, not the least by making clear that state abortion regulations which cite 'women's health' justifications should not pass constitutional review where those justifications lack a credible factual basis.

Keywords: abortion, reproductive rights, *Planned Parenthood* v *Casey*, *Roe* v *Wade*, TRAP laws.

'TRAP' LAWS AND HOUSE BILL 2

Whole Woman's Health v *Hellerstedt*[1] is without doubt the most important US Supreme Court decision on abortion in little under a decade, and arguably the most important since the Court's fundamental restatement of the abortion right in *Planned Parenthood* v *Casey* in 1992.[2] At the end of its term in June, the Court ruled by a majority of 5-3 to strike down as unconstitutional two provisions in a 2013 Texas law regulating abortion on the ground that they failed to meet the *Casey* standard of constitutional review by placing an 'undue burden' on Texan women seeking abortions. The provisions in question were an 'ambulatory surgical center requirement', which essentially required abortion clinics to meet the

*Lecturer in Law, University College London. With thanks to Susan Hays for helpful guidance.

[1] 579 US___ (2016). The judgment can be found at https://www.supremecourt.gov/opinions/15pdf/15-274_p8k0.pdf.

[2] *Planned Parenthood of Southeastern Pennsylvania* v *Casey*, 505 US 833 (1992).

design standards of medical centres intended for more complicated, hospital-level treatments, and an 'admitting privileges requirement', which demanded that doctors in abortion clinics have standing agreements with doctors in nearby hospitals that would allow them to have abortion patients admitted in the event of complications, rather than presenting at an emergency room and being admitted the usual way. Both of these requirements are extremely difficult for abortion clinics to meet. So much so, the petitioners argued, that the effect of their enforcement would be to close down a great many abortion clinics, obstructing abortion access for a large number of Texan women.

For those familiar with US abortion politics, these closures were of course transparently the purpose of Texas's 'House Bill 2' statute ('HB 2').[3] HB 2 is just one example of a US regulatory trend known to abortion rights advocates as 'Targeted Regulation of Abortion Providers', or 'TRAP' laws. TRAP laws, it is widely believed, aim to use putatively health-based regulations to force the closure of abortion clinics – in effect, regulating them to rubble. In the eyes of many, they amount to what Reva Siegel and Linda Greenhouse have called 'abortion exceptionalism': the hyper-regulation of abortion treatment within the medical profession with obvious political motivation.[4] TRAP law provisions are diverse and multitudinous, and can range from the specification of minimum hall widths, to additional medical suites, to the difficult-to-obtain admitting privileges.

The evidence suggests that TRAP laws can be extremely effective in their ostensible political purpose, and House Bill 2 was no exception. For one example, in 2014, the sole remaining abortion clinic in the state of Mississippi was left fighting to remain open after an admitting-privileges law threatened to close it down, as a result of which a Fifth Circuit court concluded that the law would impose an undue burden on women seeking abortion (*Jackson Women's Health Org.* v *Currier*, 760 F.3d 448, 457-58 (5th Cir. 2014)). Indeed, prior to the Supreme Court ruling in *Whole Woman's Health*, the Federal District Court in Texas issued an injunction to block the enforcement of the provisions, citing evidence that the number of abortion clinics in the state had reduced from more than forty to half of that after the admitting-privileges requirement took effect in 2013.[5] That injunction was subsequently stayed by the Fifth Circuit Court of Appeals, although the Supreme Court quickly blocked the stay pending its review.[6]

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[3] Act of July 12, 2013, 83rd Leg 2d CS, ch 1, §§ 1-12, 2013 Tex Gen Laws 5013.

[4] L. Greenhouse and R. B. Siegel, '*Casey* and the Clinic Closings: When "Protecting Health" Obstructs Choice' 125 Yale L J (2016) 1428. http://graphics8.nytimes.com/packages/pdf/opinion/greenhouse/CaseyClinic.pdf.

[5] *Whole Woman's Health* v *Lakey*, 46 F. Supp. 3d 673 (W.D. Tex. 2014).

[6] *Whole Woman's Health* v *Lakey*, 769 F. 3d 285 (5th Cir. 2014).

The provision's continuing effect, as the Supreme Court noted in its majority judgment, would reduce the number of functioning abortion clinics to seven or eight in the whole of Texas, left to service an approximate 60-72,000 Texas women who seek abortion each year.[7]

The effect of these closures on travel distances for women was also considerable, given the state's vastness, evidence for which was acknowledged by the District Court when granting the initial injunction. The District Court had found that the decrease in geographical distribution of abortion clinics since enforcement of the admitting privileges requirement doubled the number of women living more than 50 miles from an abortion clinic, and increased those living more than 100 miles from a clinic by 150%, those living more than 150 miles has increased by more than 350%, and those living more than 200 miles has increased by about 2,800%.[8] An Amicus Curiae Brief submitted to the Supreme Court by Jane's Due Process, a charity which helps Texan minors through the judicial proceedings needed to obtain an abortion without parental notification, summarized the effects as follows:

> From San Angelo, a city with a university and military base, the nearest open clinic is in excess of 200 miles and three-hour drive one way. From Lubbock, a city with a major public university of approximately 35,000 students, the nearest open clinic is in excess of 300 miles and a four-and-a-half hour drive one way…the nearest New Mexico clinic is even farther. There is no public transport service to connect many small towns to larger ones. Bus service from the larger towns to the remaining clinics is infrequent and even more time consuming.[9]

Some Texan legislators were brazen about the fact that the real purpose of HB 2, which was claimed to create health-protective abortion regulations, was in truth to obstruct abortion altogether by setting up abortion clinics for failure. Not long after the bill was sent to the state legislature, the Republican Lieutenant Governor David Dewhurst tweeted a photo of a map that showed all of the abortion clinics that would close as a result of the bill, accompanied by the caption: 'We fought to pass [HB 2] thru the Senate last night, & this is why!'.[10] The political background of HB 2 is

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[7] *Whole Woman's Health* v *Hellerstedt,* n 1 above, at 5, 32 and 39.

[8] *ibid*, 2.

[9] S. Hays, 'Amicus Curiae Brief of Jane's Due Process, inc. in Support of Petitioners', http://www.scotusblog.com/wp-content/uploads/2016/01/Jane's-Due-Process-Law-Office-of-Susan-Hays.pdf, 14.

[10] See J. Vertuno, 'Dewhurst Tweet Says Bill Attempt To Close Clinics', *Statesman* (June 19, 2013), http://www.statesman.com/news/news/state-regional-govt-politics/dewhurst-tweet-says-bill-attempt-close-clinics/nYPwR.

therefore that it was both widely intended to drastically reduce the number of abortion clinics in the state, and had proven success in that aim, and in significantly encumbering women seeking abortion.

WHOLE WOMAN'S HEALTH v *HELLERSTEDT*

The Supreme Court's decision on the constitutionality of HB 2 turned crucially on applying the standard of review for abortion legislation set down in *Planned Parenthood* v *Casey* (1992), which had modified the original standard of review set down in *Roe* v *Wade* (1973), the landmark case that initially recognised the protected status of the right to abortion.[11] *Casey* affirmed the central ruling in *Roe* that abortion, as an element of procreative liberty, was part of the fundamental right to "privacy" found in the 9th and 14th Amendments to the Constitution. Also like *Roe*, however, the *Casey* Court held the right to abortion to be a qualified right, and recognised that the state had legitimate interests in regulating abortion either for the protection of fetal life or the protection of women's health. *Casey* held that before the point of fetal viability, abortion legislation could therefore be enacted for these purposes, but only so long as the regulations did not constitute an 'undue burden' on the right to abortion by placing a 'substantial obstacle' in the way of women trying to obtain it. States could not further their legitimate aims in a way that was consistent with the abortion right where regulations entailed creating such an obstacle. Moreover, and extremely relevant to *Whole Woman's Health,* the Court stated that '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.' [12]

Applying the *Casey* standard of constitutional review to HB 2's ambulatory surgical centre and admitting privileges requirements therefore involved asking two key questions. First, were the requirements in pursuit of a legitimate aim, in the way of protecting women's health? And second, did they either in 'purpose or effect' impose an 'undue burden' on women seeking abortion, by placing a 'substantial obstacle' in their path?

In a majority opinion that was surely as satisfying to defenders of abortion rights as it was alarming to their opponents, Justice Breyer systematically dismantled Texas's dubitable claims that the provisions really were in the service of protecting women's health, and demonstrated that that they did, beyond question, place a substantial obstacle on women seeking abortion. Beginning with the admitting privileges requirement,

[11] *Roe* v *Wade*, 410 US 113 (1973).

[12] *Casey,* n 2 above, 878. My emphasis.

the decision relayed the well of evidential support for the conclusion that it did not *in fact* bring about any meaningful health benefits for women. This largely owed to the fact that the admitting privileges were redundant in the case of almost all abortions, both because complications arising from abortion rarely require hospital admissions, and because in the unusual case where a patient *did* need to go to hospital, no added benefit resulted from admitting privileges.[13] Justice Breyer underscored that fact that Texas had even been forced to admit in oral argument that it could not adduce a single instance where an admitting privilege had made a difference to a health outcome.[14]

While there was no evidence of a health benefit attending the admitting privileges requirement—the purported legitimate state aim—there *was* significant evidence that the regulation imposed a substantial obstacle on women seeking abortion. For more than one reason, admitting privileges are extremely difficult for abortion doctors to obtain, meaning that the enforcement of the provision resulted in the closure of a large number of clinics. As Justice Breyer explained, one of the reasons that abortion clinics so struggled to obtain admitting privileges was that they are conditional on a certain number of admissions per year – women who needed to be transferred to hospitals. However, abortion being as safe as it is, doctors who perform only abortions were unable meet that quota. He writes: 'In a word, doctors would be unable to maintain admitting privileges or obtain those privileges for the future, because the fact that abortions are so safe meant that providers were unlikely to have any patients to admit'.[15]

The effects of the provision on abortion access could be seen from the evidence of the clinic closures to date, which, when viewed alongside the average number of abortions in Texas, the capacity of the remaining abortion clinics, the inevitable effects of longer waiting times, and farther travel distances for abortion, led the majority to conclude that the undue burden test was unquestionably met.[16]

Turning to the surgical centre requirement, the majority pointed to 'considerable evidence' that the requirement does not benefit patients and is medically unnecessary.[17] Referring again to the findings of the District Court, the majority argued that there was no good evidence to suggest

[13] *Whole Woman's Health* v *Hellerstedt*, above n 1, 27-29.

[14] *ibid*, 28.

[15] *ibid*, 30.

[16] *ibid*, 31-32.

[17] *ibid,* 34-35.

that women would obtain better health outcomes at ASCs than they do at ordinarily licensed abortion clinics. In the case of medically induced abortions (abortions procured using drugs), the ASC requirement would make no difference at all, since complications are only ever likely to arise once the patient has already left the facility.[18] More importantly though, the Court emphasised the fact that abortion procedures are far *safer* than numerous procedures taking place at facilities *not* subject to ASC requirements – including colonoscopy, liposuction and, not the least, childbirth.[19] (It was pointed out that colonoscopy a procedure which typically takes place out of an ASC environment, has a mortality rate 10 times higher than that of abortion, and liposuction a mortality rate 28 times higher.) The majority took these comparisons as strong evidence that the surgical centre provision is not grounded in differences between abortion and other surgical procedures that are 'reasonably related to preserving women's health'.[20] Furthermore, some ASC provisions, such as ones designed to safeguard heavily sedated patients during fire emergencies, simply had no application whatsoever to abortion facilities, which do not typically put patients under general anaesthetic.[21]

Again then, the record evidence supported the conclusion that the requirement was not in the interest of improving women's health. And again, it was held, the provision created a 'substantial obstacle' for women seeking abortion, the District Court findings being that the costs an ordinary abortion clinic would have to incur to meet the surgical center requirements were considerable, ranging from $1 million-$3 million;[22] that the requirement would reduce the total number of abortion facilities to seven or eight, and that the idea that these remaining facilities could cater for the 60-72,000 Texan women who seek abortion each year was implausible.[23] Texas had argued that there was no good evidence to suggest that the remaining abortion clinics could not increase their current capacity to meet the increased demand. The majority, however, dismissed that argument, regarding it to be pure 'common sense' that the existing facilities would not be able to meet many times their existing demand without expanding or incurring significant costs. By analogy, the majority argued, it may be 'conceivable' that a certain grocery store which we know serves 200 customers per week could easily provide for 1000 customers at no significant additional cost or delay, it is highly unlikely. Equally, it was

[18] *ibid*, 30.

[19] *ibid*, 35.

[20] *ibid*, 31.

[21] *ibid.*

[22] *ibid*, 36.

[23] *ibid*, 33-34.

intuitively reasonable to suppose that the existing clinics could not operate at many times their current demand without compromising the service.[24]

Justice Breyer argued further that the quality of care for women at the overstretched facilities was surely likely to decline as a result of the ASC requirement. In summation, he stated, 'in the face of no threat to women's health, Texas seeks to force women to travel long distances to get abortions in crammed-to-capacity super-facilities'.[25] The majority thus concluded that the ASC requirement, like the admitting privileges requirement, provided few if any health benefits to women, imposed a substantial obstacle on women seeking abortion, and thus constituted an 'undue burden' on the abortion right.[26] Filing an additional concurring judgment, Justice Ginsburg described it as being 'beyond rational belief' that HB 2 would actually enhance women's health, and practically certain that it would substantially impede abortion access.[27] Justice Ginsburg made the further important point, echoed in the majority opinion, that when safe provision is unavailable, women are more likely to jeopardise their health by resorting to rogue practitioners, making it even less credible that the effect of the requirements would be to enhance women's health.[28]

THE HEALTH JUSTIFICATION

Whole Woman's Health was a hugely significant development in the Supreme Court's abortion jurisprudence in more than one way. The Court's reasoning demonstrated a notably more hawkish application of the *Casey* test for constitutional abortion regulation than it had, as yet, clearly endorsed. The reasoning behind its invalidation of HB 2 appeared to intensify that standard of scrutiny in some key respects, although in ways which are arguably truer to the standard of review laid down in *Casey* than its less demanding iterations.

The most obviously salient feature of the Court's reasoning was its willingness to interrogate the factual basis of HB 2's health-based justification, and its reliance on detailed evidence to conclude that it would not *in fact* promote women's health. The first prong of the *Casey* test asks whether a pre-viability abortion regulation is for the furtherance

[24] *ibid,* 33.

[25] *ibid*, 35-36.

[26] *ibid*, 36.

[27] *ibid*, 47.

[28] *ibid.*

of a legitimate state aim, of which there are two: protection of fetal life and protection of women's health. The majority opinion made clear that the Court was unwilling to find that the legitimate aim test is met simply because a state attests that the measure was *intended* to be health-protective, when compelling evidence suggests that it will not in reality confer health benefits. The Court refused to simply take Texas's claim that the two provisions were in the interest of women's health at face value and move quickly on to ask whether they presented a substantial obstacle to abortion (the second limb of the test), when the purported justification was so highly improbable to begin with.

On the face of it, scrutinising the factual basis for the initial regulatory justification is an integral part of applying the first stage of the *Casey* standard of review. As *Casey* stated, 'unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle' on the abortion right would amount to an undue burden. The best way to probe whether a health regulation is 'unnecessary' is to determine whether it is *in fact* likely to promote health. Evidence for the health justification is also clearly material to the question of legislative 'purpose', since the weaker the factual basis for the health justification, the more warranted is the conclusion that the true purpose of the legislation was to obstruct abortion.

However, the appropriateness of the Court's investigation into the factual basis for HB 2's health-based justification was itself a contentious issue in the case, and one of the focal points for the dissenting justices. Departing from the majority, Justice Thomas argued that the Court had, up until now, given state and federal legislatures a wide discretion when legislating on matters of 'medical uncertainty'.[29] Justice Thomas relied on the last landmark abortion case, *Gonzales* v *Carhart*,[30] as authority for the proposition that wherever justifications for an abortion law are debatable, the Court ought to defer to the legislature. To do otherwise, he argued, would hold the legislature to too 'exacting a standard'.[31] In *Gonzales,* the Supreme Court had upheld the constitutionality of the federal 'Partial Birth Abortion Ban Act 2003', which placed a near-absolute prohibition on a particularly controversial method of late abortion. The factual dispute there was whether the partial-birth method could ever be medically necessary, in which case banning it could not be constitutional under *Casey,* even post-viability, for *Casey* required all post-viability abortion bans to contain exceptions where abortion was necessary to safeguard the health or life of the pregnant woman. Some medical opinion disagreed

[29] *ibid*, 55.

[30] 550 US 124 (2007). Opinion can be found at https://www.supremecourt.gov/opinions/06pdf/05-380.pdf.

[31] n 30 above.

with Congress on this question, testifying, contrary to the 'congressional findings' cited in the Act, that the partial-birth procedure would in some cases be the safest method of performing an abortion.[32] The majority of the Court ruled that it was, however, required to defer to Congress's determination on a question that was 'medically uncertain'—the debatable health benefits of partial-birth abortion—and assume that no such benefits obtained.[33]

In *Whole Woman's Health,* the Fifth Circuit, which had earlier ruled to stay the injunction on the enforcement of the two provisions, had also invoked *Gonzales* to argue for a deferential 'rational basis' standard of review, which takes it to be improper for the judiciary to examine the factual basis of a state's claim that its abortion regulations promote women's health.[34] According to Justice Thomas, the majority opinion of the Supreme Court 'ratcheted up' the standard of review of abortion legislation by requiring *more* than just a rational basis for a health-protective abortion regulation, a test which presumably would only ask if the legislature was aiming at health-protection with its measures, not whether it was succeeding.[35] Rather, he argued, by examining the factual basis for the health justification, the Court intensified the level of review beyond that which *Casey* endorsed.

However, while the Court's scrutiny of the factual basis for Texas's health-protective provisions was perhaps more rigorous than had been seen before, it can be argued that it constituted no departure from precedent, or any additional gloss on the *Casey* standard. As Greenhouse and Siegel detail, numerous lower court rulings reviewing abortion legislation had taken it as read that '*Casey* requires inquiry into the facts that justify laws targeting abortion for onerous health restrictions', with only the Fifth Circuit departing from this norm.[36] Justice Thomas's conclusion that such fact-finding 'ratchets up' the standard of review is therefore dubitable, especially when one considers the obvious relation of the evidential basis for a health-protective measure to the legislature's rational basis for enacting that measure. Indeed, one might well question whether a Court can properly impute to a legislature a rational basis for

[32] Although the majority considered there to be a division of medical opinion on the matter (see n 34 above, 54), see Justice Ginsburg's dissenting judgment (at 49-73) in which she explains that the medical consensus was in fact in favour of the banned procedure and supportive of its health benefits (at 55-57), and that the 'facts' supported in the 'congressional findings' did not 'withstand inspection', including by the testimony of the government's own witnesses (at 55).

[33] *ibid,* 33.

[34] 748 F.3d 583 (5th Cir. 2014), at 590, 594-99.

[35] *Whole Woman's Health,* n 1 above, 56.

[36] Greenhouse and Siegel, n 4 above, 1433.

an abortion restriction, grounded in either the aim of protecting fetal life or of protecting women's health, whilst deferring entirely to the legislature on the matter of facts and evidence.

Even the rational basis question cannot be wholly severed from the relevant facts whilst still retaining any bite, since whether or not a measure is rationally connected to a particular end is always, ultimately, fact-dependent. This can be brought out simply by thinking about what it would take to *fail* a pure 'rational basis' test for a regulatory justification. To use a silly example, we might imagine that Texas had enacted a provision to demand that elephants must be brought into abortion clinics for the protection of women's health. The suggestion that the presence of elephants at abortion clinics could in any way enhance women's health is an obvious absurdity. But how would one argue as much, in the face of a legislature's insistence to the contrary? The only way would be to draw attention to the fact that no evidence supports the connection between elephants and better health outcomes in abortion, and that no intuitive reason can be given for believing that it does.

This was essentially what the Supreme Court majority argued about the admitting privileges and ASC requirements. Justice Breyer's main point was that the evidence made it highly implausible that the two provisions would operate in effect to promote women's health. And how else, it might be asked, was the Court supposed to show that that first limb of the *Casey* test was not met, since it will always be open to states to *claim* that a measure is in pursuit of a health-protective aim, even if the notion that it will do so is preposterous. Denying the Court the ability to scrutinise the factual basis of the health-justification would in effect be to make the legitimate aim limb of the test entirely perfunctory, a result which *Casey* cannot have intended.

As an objection to this point, it may be pointed out that it was only medically debatable or uncertain questions of fact on which Justice Thomas argued the Court was bound to defer to the legislature, relying on the authority on *Gonzales*. The Court in *Gonzales*, we saw, had considered itself barred from passing judgment on 'medically uncertain' questions about which the legislature has made a determination – the 'uncertain' issue there being whether the partial-birth abortion procedure in particular could ever be necessary to protect women's health. However, *Whole Woman's Health* can be distinguished from *Gonzales* on this point. Here, the majority did not regard the putative health benefits of the two provisions as medically debatable, but as *wholly implausible*, given the evidence. It was not the case that the Court first recognised conflicting medical opinion on the question of the health justification and *then* decided to prefer one body of opinion, against the preference of the legislature. Rather, the culmination of the argument was that *there was no medical uncertainty*. It was beyond reason—indeed, beyond 'common sense'—to imagine that HB 2's provisions would do anything other than

further compromise the health of women undergoing abortions. In *Carhart*, it was only *once* the Court had accepted that medical opinion was indeed divided on the health benefits of partial-birth abortion that deference to the legislature was considered appropriate, on the premise that '[t]he Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty.'[37] This trigger for judicial deference did not occur in *Whole Woman's Health*, where no medical and scientific uncertainty was acknowledged. To defer to the legislature in the face of the complete lack of evidence for the health justification would have been to give it unbridled scope to pass any abortion regulation which does not substantially impede abortion access just by claiming that it is for the protection of women's health, practically eliminating the first stage of constitutional review under *Casey*.

As Siegel and Greenhouse helpfully point out, it is also possible to draw guidance from the *Casey* decision itself about how to apply its standard of review to putatively health-protective abortion regulations.[38] Only one of the provisions at issue in *Casey* had the purported aim of protecting women's health (all the others being justified by the alternative legitimate aim of 'protecting fetal life'). This was a reporting requirement that Pennsylvania had imposed on all doctors performing abortions. In determining that the reporting requirement was indeed a necessary health restriction, the Court was particularly influenced by the fact that the requirement conforms to the general standards of medical regulation outside of the abortion context. In other words, the fact that *exactly the same* medical regulation applied to other medical procedures of equal complexity was the best evidence there was that the provision was medically necessary, and not merely intended to obstruct abortion. As Justice Breyer's comparisons with other procedures elucidated, the same was evidently not true of Texas's admitting privileges and ASC requirements,

THE SUBSTANTIAL OBSTACLE TEST

As we saw, the standard of constitutional review under *Casey* looks to both the justification for abortion regulation *and* its effects. As well as questioning the veracity of the health-based justification, the Supreme Court found that the two provisions had the prohibited effect of imposing a substantial obstacle on women seeking abortion. A notable aspect of this part of the ruling was the majority's attentiveness to the compound effect

[37] *Gonzales,* n 34 above, 40. As Justice Kennedy also declared in *Carhart*, 'uncritical deference to Congress' factual findings in these cases is inappropriate' (*ibid*, 43).

[38] Greenhouse and Siegel, n 4 above, 1438-1444.

of the two provisions on access to abortion. As Justice Breyer opined, increased driving distances may not in and of themselves constitute an undue burden (something for which *Casey* was an authority[39]); however, they might nevertheless constitute one additional burden which, when taken together with all of the other effects of the clinic closures, add up to a substantial obstacle.[40] Considering the compound effect of the provisions demonstrated the Court's intention to take the substantial obstacle test under *Casey* seriously by considering the overall effects of the provisions on women seeking abortions. This was an important clarification of the second stage of constitutional review. Any obstructive effect, when taken in isolation, might not appear substantial. But a true test of whether or not the provisions unduly burdened the abortion right could only proceed by taking all of the effects together: the clinic closures, the increased travelling distances, the higher costs, and so on.

In fact, the argument could be made that the second stage of constitutional review warrants an even broader appraisal than that which the Supreme Court conducted. Whether or not the provisions impose a substantial obstacle on exercising the abortion right in truth depends not only on their combined effects, but on their combined effects when taken together with other limitations on abortion access *not* related to the provisions. When assessing its impact on the abortion right, HB 2's disputed provisions cannot be viewed in isolation from the various other abortion-restrictive legislation enacted in Texas over the past few years. These include: cuts to family planning services, a ban on state funding for anyone or any institution 'affiliated' with an abortion provider;[41] so-called 'informed consent' requirements, such as mandatory ultrasound 24 hours ahead of the abortion procedure, and the required viewing of a state-printed pamphlet describing gestational development and the risks of abortion.[42] It could be argued that any serious consideration of the impact of the admitting privileges and ASC requirements must consider them in the context of these multitudinous regulations and account for the exacerbating effects of some burdens upon others. For example, even if driving 150 miles is not, in isolation, a substantial obstacle (itself a doubtful conclusion), the need to drive 150 miles and stay overnight, or to make two separate trips, so as to satisfy the waiting period requirement, might well be.

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[39] *Casey,* n 2 above, 885-887.

[40] *ibid*, 31.

[41] See, Tex. Hum. Res. Code ss 32.02(c-1) and 25 Tex. Admin. Code ss 39.31, 39.38.

[42] See the Women's Right to Know Act 2011, Tex. Gen. Laws 342 (codified at Tex. Health & Safety Code ch. 171).

Texas had also claimed that the two disputed provisions did not impose a substantial obstacle on the abortion right because they did not burden a 'large fraction' of Texan women, a condition which formed part of *Casey*'s undue burden test.[43] Justice Breyer rebutted this argument by claiming that on the right reading of *Casey*, the imposition did not have to effect a 'large fraction' of *all* Texan women of reproductive age, but only a large fraction of women for whom the provisions are *relevant.*[44] It would be enough to meet this test that a large fraction of all of the women for whom the restrictions were indeed relevant were substantially impeded by them. This reading is clearly the more consistent with *Casey's* aim to invalidate abortion regulations which create an undue burden for those exercising the abortion right. A standard of review which invalidates only those regulations that impede the abortion right for a large fraction of all women (or all women of reproductive age), many of whom would find the regulations personally negligible, cannot ensure adequate protection for those who truly need it – the rights-bearers that count. The only way to determine whether or not the rights infringement was 'substantial' was to ask whether it is substantial *for those whom it affects*.

THE 'WEIGHTED BALANCING' TEST

Finally, and perhaps most importantly, the majority opinion looked not only to whether each stage of constitutional review was passed independently, but applied *Casey* in a way which weighed the strength of the regulatory justification *against* the imposition on the abortion right, asking whether, when *taken together*, the regulation amounted to an undue burden. For instance, regarding the increased travelling distances, the majority held that they not only constituted one additional burden along with the other burdens created by the clinic closures, but that furthermore, '*when viewed in light of the virtual absence of any health benefit'*, led to the conclusion that the requirement was an undue burden.[45] Critically, the undue burden test is not here carried out in isolation from the strength of the justification. Rather, what amounts to an undue imposition is treated as a relative determination about whether the extent of the burden on women is warranted by the strength of the regulatory justification. The weaker the health justification, the more ready the Court was to find that the burdens it entailed were undue.

[43] *Casey,* n 2 above, 894-895.

[44] *Whole Woman's Health,* n 1 above, 39.

[45] *Whole Woman's Health*, n 1 above, 4.

In his dissenting opinion, Justice Thomas described this application of the undue burden test, which considered the burdens an abortion law imposes along with its benefits, as one of the ways in which the majority 'radically rewrites' the *Casey* standard. In his opinion, *Casey* did not endorse the balancing of benefits and burdens, but merely asked firstly whether a legitimate state interest was in play, and secondly, whether the regulation imposed a substantial obstacle on rights-bearers.[46]

Much clearly hangs on the Court's willingness to employ what Greenhouse and Siegel have termed the 'weighted balancing test',[47] or what in European human rights jurisprudence is known as 'proportionality': the demand that infringements of fundamental rights are *proportionate* to the legitimate aims those restrictions seek to effect. Clearly, a test which treats the undue burden question as a proportionality issue is a more demanding standard of scrutiny than one which takes the legitimate aim and substantial obstacle questions independently. On a standard which treats 'undue' as synonymous with 'disproportionate', the obstructing impact of an abortion measure need not even be substantial to be constitutionally invalid, but only not worth the trade-off if the benefits of the law are weak or dubious enough.

However, it can be argued that a necessary part of considering whether an abortion burden is 'undue' is to ask whether its benefits are worth its costs in terms of rights infringement, and that the Court's formulation of *Casey* on this point is a better fit for protection of fundamental constitutional rights. Burdens on rights can be 'undue' in more than one way, either by passing a threshold of excessiveness or by being unwarranted because they are pointless or not adequately counterbalanced. By deploying the weighted balancing test, the Supreme Court's approach to abortion rights protection reflect some of the proportionality-based reasoning recently engaged in the European Court of Human Right's abortion jurisprudence.[48] While the European Court of Human Rights declined, in *A, B, and C* v *Ireland* (2011) 53 EHRR 13 to recognise any general right to abortion under the European Convention of Human Rights, it has recognised in this case and in others that abortion restrictions by member states engage the Article 8 right to freedom of private and family life, and thus must be justified as necessary and proportionate under Article 8(2). In some recent decisions, the Court

[46] *ibid*, 54.

[47] Greenhouse and Siegel, n 4 above, 1460.

[48] See V. Undurraga, 'Proportionality in the Constitutional Review of Abortion Law', in R. Cook, B. Dickens and J. Erdman (eds), *Abortion Law in Transnational Perspective: Cases and Controverises* (University of Pennsylvania Press 2014), and R. Scott, 'Risk, Reasons and Rights: The European Convention on Human Rights and English Abortion Law' (2016) 4 Med Law Rev, 1-33.

employed what Veronica Undurraga terms the 'strict proportionality' test when addressing justifications for abortion restrictions.[49] That test involves asking questions such as whether criminalization is in fact effective in protecting unborn human life, whether there are alternative means of protection less onerous for women than criminalization, and whether the costs of abortion restrictions for women are worth their net gain.

As Greenhouse and Siegel also argue, a weighted balancing test can be a useful tool for 'smoking out unconstitutional motivation' in legislating—a key concern in *Casey*—without having to allege bad faith on the part lawmakers.[50] The imposition of meaningful obstacles to abortion for meagre or questionable health gains surely counts as good evidence for illicit constitutional purpose. But on the weighted balancing test, such regulations will fail constitutional review without any reference to legislative purpose. And it is clear that any number of measures that might pass the straightforward two-limb test would fail when their benefits are weighed against their burdens. Consequently, the Court's application of the weighted balancing test, if carried forward, marks a crucial turning point for abortion rights protection in the US.

REPRODUCTIVE RIGHTS PROTECTION

In *Planned Parenthood* v *Casey* the Supreme Court declared that a restriction on abortion which claims to be health-protective is unconstitutional if it 'serve[s] no purpose other than to make abortions more difficult'.[51] The provisions at issue in *Whole Woman's Health* were paradigm examples of such regulations. The majority judgment demonstrated an intention to take the 'undue burden' standard of review in *Casey* seriously, and to engage in rigorous assessment of fact and evidence in order to strike down unconstitutional abortion measures. The Court's decision made clear that states can no longer attempt to obstruct abortion under the pretence of protecting women's health and expect an easy pass through constitutional review.

The Court's particular interpretation of the *Casey* standard in this case heralds more rigorous scrutiny of abortion regulations than we have seen in the Supreme Court in the recent past, including in *Gonzales* v *Carhart*. In particular, it is interesting to imagine what the Court's interpretation of *Casey* in *Whole Woman's Health* would entail when applied to legislative measures that purport to serve the other recognised

[49] V. Undurraga, *ibid.*

[50] Greenhouse and Siegel, n 4 above, 1475.

[51] *Casey*, n 2 above, 901.

legitimate state aim of protecting fetal life. Examples of such fetal-protective measures include the numerous 'informed consent' and mandatory ultrasound provisions enacted by many states in an attempt to dissuade women from going through with abortion,[52] as well as the federal Partial-Birth Abortion Ban Act 2003, upheld in *Gonzales*, which purportedly aimed at protecting late fetal life. It seems that *Whole Woman's Health* has two main ramifications for the constitutionality of 'fetal-protective' abortion measures the next time they face challenge. First, states might have to demonstrate that a fetal-protective measure is *in fact* in the service of meeting its stated aim, meaning that it does, or in all likelihood will, save at least *some* fetal lives, and not only make abortion more cumbersome or distressing for women. As an example, the Partial-Birth Abortion Ban Act 2003 might well fail such a test if it were clearly established that the law does not *prevent* late abortions, but only, in the main, directs doctors to use a different method for late abortion. Second, applying the weighted balancing test, states may need to show that fetal-protective measures protect *enough* fetal lives as not to be 'undue' when weighed against the effects of the restriction. On a test like this, a mandatory ultrasound provision could be invalidated if its dissuasive success rate is not worth the additional burdens it imposes on women, even if mild, and especially if significant.

These potential implications are even more important when considered in the context of abortion rights protection in the US. Despite the Supreme Court's declaration of a constitutional right to abortion in *Roe v Wade*, abortion access is far more obstructed in many US states than it is in Britain, where abortion is, by default, a criminal offence.[53] Along with blocks on government abortion funding, one main reason for this is the application of the *Casey* standard of constitutional review, which has not traditionally probed the factual basis of regulatory justifications, or weighed them against their burdens. (In *Casey* itself, the Court upheld all of the disputed provisions, including an abortion-dissuasive counselling requirement, 24 hour mandatory waiting period and parental consent requirement for minors, with the single exception of a spousal notification requirement.)[54] It has been relatively easy for state legislatures to hinder the abortion right, so long as they do not do so substantially, just by alleging their intention to promote women's health or fetal life through its measures. The standard of scrutiny conducted in *Whole Woman's Health* may mark a sea change in this respect. The majority made clear that it is not incumbent on reviewing courts to take the legislature's regulatory justifications at face value, or to agree with the

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[52] See C. Sanger, 'Seeing and Believing: Mandatory Ultrasound and the Path to a Protected Choice ' (2008) 56 UCLA L Rev 351.

[53] See the Abortion Act 1967, s1, along with the Offences Against the Person Act 1861, ss 58-60, and the Infant Life Preservation Act 1929, s 1.

legislature's balancing of the benefits and burdens of its abortion restrictions. Most crucially, no longer can pro-life politicians attempt to impede or obstruct abortion access on counterfeit health-based grounds and expect the~~ir~~ legislation to survive constitutional review.