IRRECONCILABLE DIFFERENCES? *WHOLE WOMAN'S HEALTH*, *GONZALES*, AND JUSTICE KENNEDY'S VISION OF AMERICAN ABORTION JURISPRUDENCE

LAURA WOLK* & O. CARTER SNEAD**

INTRODUCTION

A law is unconstitutional if it "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[1] Twenty-five years have elapsed since a plurality of the Supreme Court articulated this undue burden standard in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[2] yet its contours remain elusive. Notably, two current members of the Court—Justice Breyer and Justice Kennedy—seem to fundamentally differ in their understanding of what *Casey* requires and permits. In *Gonzales v. Carhart*,[3] Justice Kennedy emphasized a wide range of permissible state interests implicated by abortion[4] and indicated that courts should defer to States when they regulate in areas of medical uncertainty.[5] According to Justice Kennedy, "[w]here [the State] has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power" to impose regulations "in furtherance of its legitimate interests."[6] More recently, Justice Breyer wrote in *Whole Woman's Health v. Hellerstedt*[7] that

* J.D., Notre Dame Law School, 2016.

** William P. and Hazel B. White Director, Notre Dame Center for Ethics and Culture; Professor of Law and Concurrent Professor of Political Science, University of Notre Dame.

1. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992) (plurality opinion).

2. *Id.* at 877–79.

3. 550 U.S. 124 (2007).

4. *See id.* at 163.

5. *See id.*

6. *Id.* at 158.

7. 136 S. Ct. 2292 (2016).

Casey requires courts to "consider the burdens a law imposes on abortion access together with the benefits those laws confer" on pregnant women.[8] Justice Breyer also opined that courts retain an active role in resolving questions of medical uncertainty[9] and took a narrow view of permissible State interests.[10] This decision maps onto the approach he took in authoring *Stenberg v. Carhart*,[11] another of the Supreme Court's seminal abortion decisions.

As a purely academic matter, these fundamentally conflicting interpretations of *Casey* are notable because of Justice Kennedy's co-authorship of that decision's joint opinion. Yet, the Court's alternative approaches have wide-ranging practical ramifications as well because they send radically different signals to state legislatures regarding the field of legitimate interests and the appropriate role of the courts in assessing legislation. Texas has recently brought this issue to the fore through its efforts to prohibit a particular type of second-trimester abortion procedure, which it calls a "live dismemberment abortion."[12] Under *Gonzales*, the Texas law should easily pass constitutional muster: It invokes the same interests as those *Gonzales* held to be legitimate, leaves alternative abortion methods untouched, and regulates in an area of medical uncertainty. Yet, looking largely to *Whole Woman's Health* for guidance, the United States District Court for the Western District of Texas struck down the law as facially unconstitutional.[13]

---

8. *Id.* at 2309.

9. *See id.* at 2310.

10. *See id.* at 2311, 2315–16.

11. 530 U.S. 914 (2000).

12. *See* Act of May 26, 2017, 85th Leg., R.S., ch. 441, § 6, 2017 Tex. Sess. Law Serv. 1167–68 (codified at TEX. HEALTH & SAFETY CODE §§ 171.151–.154).

13. Whole Woman's Health v. Paxton, 280 F. Supp. 3d 938, 952–53 (W.D. Tex. 2017). Professor Snead testified as one of Texas's expert witnesses in this litigation. Of course, the challenge to Texas's legislation is still in its early stages, and there is never any guarantee that the Supreme Court will grant certiorari. However, at least seven other states have enacted similar laws, including Alabama, Arkansas, Kansas, and Oklahoma. *See id.* at 945–46 (listing and citing cases). It accordingly seems plausible that these issues will continue percolating in the district courts and eventually warrant Supreme Court review. Rather than addressing the idiosyncrasies of each state's legislation, this essay uses Texas's attempt as a general exemplar.

This Article uses Texas's latest legislative attempt to explore the tension arising out of the Court's inconsistent treatment of state interests and the role of the courts in assessing legislative factfinding. Part I re-examines the principles laid out in the Supreme Court's four canonical abortion decisions since *Roe v. Wade*.[14] It emphasizes the difference between Justice Breyer's and Justice Kennedy's approaches to applying *Casey*, culminating in Justice Kennedy's curious decision to join Justice Breyer's opinion (without comment) in *Whole Woman's Health*. Part II then describes the aforementioned Texas statute, Texas Senate Bill 8, and the district court's assessment of its constitutionality. It explains how this case demonstrates the inherent conflict between *Gonzales* and *Whole Woman's Health* and argues that the Texas law affords Justice Kennedy an apt vehicle to decide which interpretation of *Casey* should prevail. Specifically, it contends that challenges to laws such as Texas Senate Bill 8 would present the Court—and in particular Justice Kennedy—with the opportunity to reaffirm *Gonzales* and, in so doing, clarify the meaning and scope of *Whole Woman's Health*.

I. REVIEW OF THE CASE LAW

This Part provides an overview of *Roe v. Wade*'s four most important progeny: *Planned Parenthood v. Casey*, *Stenberg v. Carhart*, *Gonzales v. Carhart*, and *Whole Woman's Health v. Hellerstedt*. Many are no doubt already familiar with the terrain that these decisions cover. This summary focuses on the Court's inconsistent pronouncements regarding what interests may support a state's pre-viability abortion regulations, as well as the courts' role in evaluating a law's effects. More specifically, it identifies the differences in Justice Breyer's and Justice Kennedy's approaches to answering these questions, and it concludes by presenting the question of whether *Gonzales* and *Whole Woman's Health* may coexist.

14. 410 U.S. 113 (1973).

A. Planned Parenthood v. Casey

In 1992, plaintiffs in *Casey* brought facial challenges to five provisions of the Pennsylvania Abortion Control Act.[15] In assessing the provisions' constitutionality, a plurality of the Court replaced the "elaborate but rigid"[16] trimester framework articulated in *Roe* with the now-familiar undue burden standard.[17]

The decision's joint opinion—co-authored by Justices Kennedy, Souter, and O'Connor—reaffirmed:

> [T]he 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.[18]

Even so, it also explained 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."[19] Though the *Roe* Court had also recognized this "important and legitimate interest in protecting the potentiality of human life,"[20] the *Casey* joint opinion observed that subsequent Supreme Court decisions had "undervalue[d]" this "substantial interest,"[21] giving it "too little acknowledgment and implementation."[22] Accordingly, the undue burden standard, which prohibits laws that have the "purpose or effect" of erecting "substantial obstacle[s] in the path of a woman seeking an abortion of a nonviable fetus,"[23] seeks "[t]o protect the central right recognized by *Roe v. Wade* while at the same time accommodating the State's profound interest in potential life."[24] Thus, as the plurality explained, the standard permits "[r]egulations which do no more than create a structural mechanism by which the

---

15. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 844 (1992).
16. *Id.* at 872 (plurality opinion).
17. *See id.* at 846 (majority opinion).
18. *Id.*
19. *Id.* (emphasis added).
20. *Id.* at 871 (plurality opinion) (quoting Roe v. Wade, 410 U.S. 113, 162 (1973)).
21. *Id.* at 875–76.
22. *Id.* at 871.
23. *Id.* at 877.
24. *Id.* at 878.

State . . . may express profound respect for the life of the unborn . . . if they are not a substantial obstacle" to a woman's right to obtain an abortion.[25]

The *Casey* plurality also made it clear that the state may invoke other interests to support pre-viability regulations, including to "further the health or safety of a woman seeking an abortion."[26] Though "[u]nnecessary *health* regulations that have the purpose or effect of presenting a substantial obstacle . . . impose an undue burden,"[27] the state may legitimately regulate to protect a pregnant woman's physical and psychological health.[28] Assessing one of the Act's informed consent provisions, a plurality of the Court stated that providing "truthful, nonmisleading information"—even information concerning what happens to the fetus during an abortion procedure—"furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed."[29] In addition to fetal life and maternal health, the plurality also recognized the existence of "other valid state interest[s]" that may justify State regulations.[30]

But *Casey*'s overall tone is in some ways even more important than the rules it lays out. Throughout, the plurality opinion seemed to self-consciously adopt a diplomatic approach that aspired to strike a more accommodating balance between the many societal views on abortion. The plurality acknowledged that the Court's decision in *Roe* "call[ed] the contending sides of a national controversy to end their national

---

25. *See id.*; *see also id.* at 883 ("[W]e permit a State to further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion.").

26. *Id.* at 878.

27. *Id.* (emphasis added).

28. *See id.* at 882 ("It cannot be questioned that psychological well-being is a facet of health. Nor can it be doubted that most women considering an abortion would deem the impact on the fetus relevant, if not dispositive, to the decision."); *see also* Doe v. Bolton, 410 U.S. 179, 192 (1973) (defining "health" for purposes of the health exception to include "all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient").

29. *Casey*, 505 U.S. at 882 (plurality opinion).

30. *See id.* at 877.

division by accepting a common mandate rooted in the Constitution,"[31] but that abortion nevertheless remained as divisive as it did in 1973.[32] It also recognized that, in practice, *Roe* systematically devalued state interests, which in turn prevented states "from expressing a preference for normal childbirth" through the "democratic processes."[33] Thus, the plurality stated that, unlike *Roe*'s overly rigid framework, the undue burden standard provided "the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty."[34]

B. Stenberg v. Carhart

Eight years later, the Supreme Court had occasion to test *Casey*'s attempt at conciliation in *Stenberg v. Carhart*.[35] There, an abortion provider challenged a Nebraska statute that criminalized performing "partial-birth" abortions. Writing for a five-Justice majority that included Justices O'Connor and Souter, Justice Breyer struck down the law as facially unconstitutional.[36]

Before delving into its analysis, the Court described the procedures involved. As the Court explained, a partial-birth abortion, clinically known as an intact dilation and evacuation (intact D & E), refers to a second-trimester abortion that "begins with induced dilation of the cervix. The procedure then involves removing the fetus from the uterus through the cervix 'intact,' *i.e.*, in one pass, rather than in several passes."[37] The mechanics of the procedure depend on the presentation of the fetus. "If the fetus presents head first (a vertex presentation), the doctor collapses the skull; and the doctor then extracts the entire fetus through the cervix."[38] But "[i]f the fetus presents feet first (a breech presentation), the doctor pulls the fetal body through the cervix, collapses the skull, and extracts the fetus through the cervix."[39]

---

31. *Id.* at 867.
32. *See id.* at 869.
33. *Id.* at 872 (quoting Webster v. Reprod. Health Servs., 492 U.S. 490, 511 (1989)).
34. *Id.* at 876.
35. 530 U.S. 914 (2000).
36. *See id.* at 922.
37. *Id.* at 927.
38. *Id.*
39. *Id.*

The intact D & E differs from its more standard counterpart, which also requires dilation of the cervix, because intact D & E involves the insertion of instruments through the cervix into the uterus.[40] After about fifteen weeks, due to increased fetal head size and bone rigidity, "dismemberment or other destructive procedures are more likely to be required" in a standard D & E.[41] If so required, the abortion provider maneuvers forceps into the uterus, grips a part of the fetus, pulls it back through the cervix and vagina, and "continu[es] to pull even after meeting resistance from the cervix. The friction causes the fetus to tear apart. . . . A doctor may make 10 to 15 passes with the forceps to evacuate the fetus in its entirety."[42]

Abortion providers use intact D & Es to perform both pre- and post-viability abortions.[43] As a result, Nebraska needed to demonstrate that it did not run afoul of the pre-viability undue burden standard, which provides States with considerably less room to regulate compared to the post-viability timeframe.[44] Nebraska argued that the Act advanced its interests in "concern for the life of the unborn and 'for the partially-born,'" "preserving the integrity of the medical profession," and "erecting a barrier to infanticide."[45] Justice Breyer's majority opinion struck down the statute for two reasons. First, the act lacked a "health exception," which the Court read *Casey* and *Roe* to require.[46] Additionally, the statute imposed an undue burden by prohibiting both standard and intact D & Es.[47]

Regarding the need for a health exception, the Court quoted *Casey* and *Roe*'s statement that, "subsequent to viability, the State . . . may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judg-

40. *See id.* at 924–25.

41. *See id.* at 925. (citation omitted).

42. Gonzales v. Carhart, 550 U.S. 124, 135–36 (2007).

43. *See Stenberg*, 530 U.S. at 927–28.

44. *See id.* at 921, 930 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 870, 877 (1992)).

45. *Id.* at 961 (Kennedy, J., dissenting) (citation omitted).

46. *See id.* at 930 (majority opinion).

47. *See id.*

ment, for the preservation of the life or health of the mother."[48] If the health exception attached post-viability, the Court observed that it must also apply pre-viability, where a state's interests are "considerably weaker."[49] Thus, no recitation of state interests could obviate the need for the inclusion of a health exception.[50] Moreover, Justice Breyer's majority opined that the law did "not directly further an interest 'in the potentiality of human life' by saving the fetus in question from destruction, as it regulates only a method of performing abortion."[51]

The Court also addressed Nebraska's assertion that a health exception was not required because banning intact D & Es posed no risk to women.[52] In assessing this argument, the Court recognized the "division of medical opinion" regarding the safety of intact D & Es.[53] However, Justice Breyer's majority opinion credited the district court's findings that intact D & E is sometimes the safest option for women, a conclusion the Court determined was supported by "significant medical authority."[54] Nebraska and certain supporting amici proffered contrary evidence, but rather than deferring, the Court considered their arguments "insufficient" to overcome the need for a health exception.[55] Instead, the majority concluded that the district court's finding and the support in the record tipped the scales in favor of requiring a health exception, especially when combined with a division of medical opinion.[56] As Justice Breyer explained, division among medical professionals "at most means uncertainty, a factor that signals the presence of risk, not its absence."[57] Justice Breyer emphasized that "unanimity of medical opinion" is not required.[58] However, he went on to observe that, "[w]here a significant body of medical opinion be-

48. *Id.* (emphasis omitted) (quoting *Casey*, 505 U.S. at 879 (internal quotation marks omitted)).

49. *Id.*

50. *See id.* at 930–31.

51. *Id.* at 930. (emphasis omitted).

52. *See id.* at 931.

53. *See id.* at 937.

54. *Id.* at 932.

55. *See id.* at 934.

56. *See id.* at 936–37.

57. *Id.* at 937.

58. *See id.*

lieves a procedure may bring with it greater safety for some patients and explains the medical reasons supporting that view, we cannot say that the presence of a different view by itself proves the contrary."[59] It bears noting that neither the American Medical Association nor the American College of Obstetricians and Gynecologists were able to identify even one *actual case* in which the challenged procedure was necessary to preserve the health of a pregnant woman.[60]

The Court next turned to answering the undue burden question. It first stated that "Nebraska [did] not deny that the statute imposes an 'undue burden' if it applies to the more commonly used D & E procedure."[61] After establishing this concession, the Court analyzed the statute's text, which defined a partial-birth abortion as "an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery."[62] Because standard D & Es also often involve movement of some part of the fetus into the cervix,[63] the Court determined that the statute's failure to include specific anatomical landmarks meant that its text covered the broader category of D & E procedures, and it struck down the statute.[64]

Interestingly, Justice Kennedy's dissent took issue with both the majority's treatment of state interests and its failure to defer to the state's regulatory solution in an area of medical uncertainty. Justice Breyer's majority included the two other Justices who co-authored *Casey*'s joint opinion. And yet, Justice Kennedy described the decision as a "misinterpretation of *Casey*" because it "close[d] its eyes to [the State's] profound concerns" even though the state "protected the woman's autonomous right of choice as reaffirmed in *Casey*."[65] Accordingly, he dissented "[f]rom the decision, the reasoning, and the judgment."[66]

---

59. *Id.*

60. *See id.* at 965–66 (Kennedy, J., dissenting).

61. *Id.* at 938 (majority opinion) (emphasis omitted); *see also id.* at 978 (Kennedy, J., dissenting).

62. *Id.* at 922 (majority opinion) (quoting NEB. REV. STAT. ANN. § 28–328(9)).

63. *See id.* at 939.

64. *See id.* at 938–40, 945–46.

65. *Id.* at 979 (Kennedy, J., dissenting).

66. *Id.*

Justice Kennedy began his blistering dissent by criticizing the majority's "failure to accord any weight to Nebraska's interest[s]."[67] In Justice Kennedy's view, "[w]hen the [*Casey*] Court reaffirmed the essential holding of *Roe*, a central premise was that the States retain a critical and legitimate role in legislating on the subject of abortion, as limited by the woman's right."[68] This includes a state's ability to "take sides in the abortion debate and come down on the side of life."[69] Thus, he took pains to remind the majority that "[t]he political processes of the State are not to be foreclosed from enacting laws to promote the life of the unborn and to ensure respect for all human life *and its potential*."[70] He reiterated this point by noting that "*Casey* is premised on the States having an important constitutional role *in defining their interests* in the abortion debate,"[71] and that decision accordingly deemed it "inappropriate" to "provide an exhaustive list of state interests implicated by abortion."[72]

Against this backdrop, Justice Kennedy proceeded to argue that Nebraska's "critical" interests were legitimate under a proper reading of *Casey*.[73] He described the standard and the intact D & E procedures in great detail, noted that a fetus can remain alive for some time during a standard D & E as the abortionist removes its limbs, and explained that witnesses of intact D & Es have reported seeing the fetus's body move outside the woman's body.[74] Citing *Casey*'s statement that "abortion is 'fraught with consequences for . . . the persons who perform and assist in the procedure [and for] society which must confront the knowledge that these procedures exist,'"[75] Justice Kennedy asserted that states "have an interest in forbidding medical procedures which, in the State's reasonable determination, might cause the medical profession or society as a whole

67. *Id.* at 957.

68. *Id.* at 956–57 (citation omitted).

69. *Id.* at 961.

70. *Id.* at 957 (emphasis added) (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 871 (1992)).

71. *Id.* at 961 (emphasis added).

72. *Id.* (citing *Casey*, 505 U.S. at 877).

73. *See id.* at 957.

74. *See id.* at 958–59.

75. *Id.* at 962 (alteration in original) (quoting *Casey*, 505 U.S. at 852).

to become insensitive, even disdainful, to life, including life in the human fetus."[76] This legitimate interest also permits them to protect the integrity of the medical profession through "measures to ensure . . . its members are viewed as healers, sustained by a compassionate and rigorous ethic and cognizant of the dignity and value of human life, even life which cannot survive without the assistance of others."[77]

Notably, Justice Kennedy acknowledged outright that Nebraska's decision to proscribe intact D & Es while permitting standard D & Es based on concern for the "humane" treatment of the fetus involved moral judgments. Yet, he contended that this was a decision that the State was "entitled" to make,[78] and he stressed that the Court was "without authority to second-guess" Nebraska's conclusion that intact D & E blurs the line between abortion and infanticide in a manner that puts the medical profession and all of society at risk.[79] He went so far as to say that "[t]he Court's refusal to recognize [Nebraska's moral choice] [was] a dispiriting disclosure of the illogic and illegitimacy of the Court's approach to the entire case."[80]

Justice Kennedy next turned to the majority's approach to the health exception question, which he argued evinced "a further and basic misunderstanding of *Casey*."[81] According to Justice Kennedy, the majority's approach "award[ed] each physician a veto power over the State's judgment that the procedures should not be performed."[82] He reasoned that "[c]ourts are ill-equipped to evaluate the relative worth of particular surgical procedures[,] [whereas] [t]he legislatures of the several States have superior factfinding capabilities in this regard."[83] Thus, rather than taking on the role of "the Nation's *ex officio* medical board with powers to approve or disapprove medical and operative practices and standards throughout the

76. *Id.* at 961.
77. *Id.* at 962 (citing Washington v. Glucksberg, 521 U.S. 702, 730–34 (1997)).
78. *See id.* at 962–63.
79. *See id.* at 963.
80. *Id.* at 962.
81. *Id.* at 964.
82. *Id.*
83. *Id.* at 968.

United States,"[84] Justice Kennedy argued that the Court should remember that "the State may regulate based on matters beyond 'what various medical organizations have to say about the physical safety of a particular procedure.'"[85] Accordingly, especially where confronted with areas of disagreement within the medical field, the Court should defer to legislatures rather than to physicians.[86]

In sum, Justice Kennedy's *Stenberg* dissent offered a threefold critique of Justice Breyer's interpretation of *Casey*. First, he criticized the majority for giving the state's interest too little weight. In particular, he described the majority as "view[ing] the procedures from the perspective of the abortionist, rather than from the perspective of a society shocked when confronted with a new method of ending human life."[87] Second, he took issue with the majority's unduly narrow view of permissible state interests because the opinion seemed to insinuate that states may only justify abortion regulations if they protect a pregnant woman's health or the life of the fetus within her.[88] Third, he stated that courts should defer to legislative factfinding rather than to physicians, especially in areas of medical uncertainty. All three critiques accused the Court of turning back the clock to a pre-*Casey* regime, where state regulations needed to survive strict scrutiny and where courts employed a "physician-first view."[89] All told, his stinging rebuke indicates that Justice Kennedy understood the plurality opinion in *Casey* as an effort to craft a balanced and statesmanlike solution to the perennially vexed issue of abortion, which the majority—including the two other co-authors of *Casey*'s joint opinion—had disregarded.[90]

---

84. *Id.* (quoting City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 456 (1983) (O'Connor, J., dissenting)).

85. *Id.* at 967 (quoting *Akron*, 462 U.S. at 467 (O'Connor, J., dissenting) (emphasis omitted)).

86. *See id.* at 968–70.

87. *Id.* at 957.

88. *See id.* at 960.

89. *See id.* at 960, 969, 976.

90. Justice Kennedy also spoke out vehemently against Justice O'Connor's separate concurrence, accusing her of "ignor[ing] the settled rule against deciding unnecessary constitutional questions" and offering "the people of Nebraska meaningless assurances." *Id.* at 972, 978. He also cited some of Justice O'Connor's

C. Gonzales v. Carhart

In 2007, the Supreme Court once again took up the issue of partial-birth abortion, this time with Justice Kennedy at the helm.[91] In *Gonzales v. Carhart*,[92] the Court assessed the validity of the federal Partial-Birth Abortion Act of 2003.[93] The Act banned the same procedure at issue in *Stenberg*, and it only provided for an exception "to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself."[94] Congress argued that the Partial-Birth Abortion Act prevented the coarsening of society and protected the integrity of the medical profession.[95]

The Court held that the Act withstood the facial attack brought by four abortion providers.[96] In doing so, many of the points first presented in Justice Kennedy's *Stenberg* dissent made their way into his *Gonzales* majority. First, Justice Kennedy's opinion implicitly adopted the idea that it is permissible to assess an abortion method from the point of view of society writ large, rather than from the perspective of an abortion provider. The majority's elaborate description of the procedure

---

previous dissents as support for the proposition that courts should defer to the legislatures in areas of medical uncertainty. *See id.* at 967–68.

91. By this point, Justice Alito had replaced Justice O'Connor.

92. 550 U.S. 124 (2007).

93. *See id.* at 132.

94. 18 U.S.C. § 1531(a).

95. *See Gonzales*, 550 U.S. at 156–57.

96. *See id.* at 133. This ruling rested on differences between the Nebraska law and the Partial-Birth Abortion Act, which, unlike the Nebraska law, defined the prohibited conduct more narrowly to include:

> [D]eliberately and intentionally vaginally deliver[ing] a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus.

18 U.S.C. § 1531(b)(1)(A). These linguistic differences led the Court to conclude that the Act was not void for vagueness, *see Gonzales*, 550 U.S. at 147–50, and that it did not create an undue burden by prohibiting all D & Es, *id.* at 150–54. However, in noting that the law applied pre-viability as well as post-viability, Justice Kennedy made a striking passing comment that "by common understanding and scientific terminology, the fetus is a living organism while within the womb, whether or not it is viable outside the womb." *Id.* at 147.

supports this conclusion. Whereas Justice Breyer succinctly described an intact D & E as requiring the abortion provider to "collapse the [fetal] skull,"[97] Justice Kennedy provided the following extended narrative:

> In the usual intact D & E the fetus' head lodges in the cervix, and dilation is insufficient to allow it to pass . . . . At this point, the right-handed surgeon slides the fingers of the left [hand] along the back of the fetus and 'hooks' the shoulders of the fetus with the index and ring fingers (palm down). While maintaining this tension, lifting the cervix and applying traction to the shoulders with the fingers of the left hand, the surgeon takes a pair of blunt curved Metzenbaum scissors in the right hand. He carefully advances the tip, curved down, along the spine and under his middle finger until he feels it contact the base of the skull under the tip of his middle finger. [T]he surgeon then forces the scissors into the base of the skull or into the foramen magnum. Having safely entered the skull, he spreads the scissors to enlarge the opening. The surgeon removes the scissors and introduces a suction catheter into this hole and evacuates the skull contents. With the catheter still in place, he applies traction to the fetus, removing it completely from the patient.[98]

More importantly, as in his *Stenberg* dissent, Justice Kennedy's majority cited *Casey* to explicitly recognize the legitimacy of state interests in protecting society from becoming coarsened to "all vulnerable and innocent human life" and in protecting the integrity of the medical profession.[99] These interests remained permissible, even though they relied upon "ethical and moral concerns."[100] Additionally, in contrast to Justice Breyer's statement in *Stenberg*, Justice Kennedy's majority held that the Act "further[ed] the legitimate interest of the Government in protecting the life of the fetus *that may* become a child."[101] This remained true, even though the Act still permitted alternative

---

97. Stenberg v. Carhart, 530 U.S. 914, 927 (2000).

98. *Gonzales*, 550 U.S. at 138 (internal quotation marks, citations, and paragraph indications removed) (first ellipsis added); *see also id.* at 138–39 (providing additional, equally vivid descriptions).

99. *See id.* at 157–58.

100. *Id.* at 158.

101. *Id.* at 146 (emphasis added).

ways to cause the death of the fetus through abortion.[102] Lastly, Justice Kennedy went beyond his *Stenberg* dissent by explicitly contending that the state could assert an interest in the pregnant woman's psychological health to justify the prohibition of partial-birth abortions. As he explained, many physicians do not describe intact D & Es to their patients in great detail; this failure can later negatively impact a woman's psychological health once she realizes the mechanics of the procedure.[103] All three interests indicated that the law did not have the impermissible purpose of erecting a substantial obstacle in the path of a woman seeking an abortion.

Justice Kennedy also employed his *Stenberg* approach, as opposed to Justice Breyer's, to assess the law's effects.[104] As stated above, the act did not include a broad health exception. Like the *Stenberg* majority, *Gonzales* read *Casey*'s "preservation of the mother's health" language[105] to prohibit laws that "subject[] [women] to significant health risks."[106] And so, for Justice Kennedy, the question became whether women would experience adverse health risks as a result of the prohibition.[107] Departing from *Stenberg*, Justice Kennedy's *Gonzales* majority noted that this "ha[d] been a contested factual question," with medical professionals supporting each side's position.[108] Faced with this disagreement, Justice Kennedy observed that "[t]he Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertain-

---

102. *See id.* at 164–65.

103. *See id.* at 159–60 ("It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.").

104. Like the respondent in *Stenberg*, the Attorney General conceded that the Act would impose an undue burden if it covered standard D & Es. *Id.* at 147.

105. *Id.* at 161 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 879 (1992)).

106. *Id.* (second alteration in original) (quoting Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 328 (2006)); *see also* Stenberg v. Carhart, 530 U.S. 914, 931 (2000).

107. *See Gonzales*, 550 U.S. at 161.

108. *See id.* at 162–63.

ty."[109] Again mirroring his thoughts in his *Stenberg* dissent, he noted that *Casey* is inconsistent with the view that a law must "give abortion doctors unfettered choice in the course of their medical practice" or "elevate their status above other physicians in the medical community."[110] Accordingly, medical uncertainty provided "a sufficient basis" to stave off the facial attack,[111] especially given that alternative abortion procedures existed.[112]

In emphasizing the proper deference owed to the legislature, however, Justice Kennedy's majority pointed out that the Court must not give such findings "dispositive weight," especially where, as here, some of Congress's findings were incorrect.[113] Even so, it would be equally inappropriate for courts "to leave no margin of error for legislatures to act in the face of medical uncertainty."[114] Instead of this "zero tolerance policy," courts must keep in mind that "[c]onsiderations of marginal safety, including the balance of risks, are within the legislative competence when the regulation is rational and in pursuit of legitimate ends."[115] Thus, "[w]here [the State] has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power" to pass laws "in furtherance of its legitimate interests."[116]

Justice Breyer did not write separately, but he joined a dissent authored by Justice Ginsburg that (correctly) described Justice Kennedy's majority as an "undisguised conflict with *Stenberg*."[117] The dissent looked to *Stenberg* to assess the state's interests and the law's effects.

Regarding the law's purposes, the dissent reiterated that the state cannot invoke an interest in fetal life when an act only

---

109. *Id.* at 163 (citing cases, including his *Stenberg* dissent, 505 U.S. at 969–72 (Kennedy, J., dissenting)).

110. *Id.* (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. at 884).

111. *See id.* at 164.

112. *See id.* at 167.

113. *See id.* at 165. Importantly, Justice Kennedy did not state outright that Congress's findings were incorrect. Rather, he noted that "[w]hether or not accurate at the time, some of the important findings have been superseded." *Id.* This phrasing also reflects a more deferential approach to the legislature.

114. *Id.* at 166 (citations omitted).

115. *Id.*

116. *Id.* at 158.

117. *See id.* at 179 (Ginsburg, J., dissenting).

eliminates a particular method of abortion,[118] and it argued that the purported worries over societal coarsening are no more than "moral concerns" that Congress has used to "overrid[e] fundamental rights."[119] Moreover, Justice Ginsburg noted that these same interests could be invoked to proscribe the standard D & E procedure, which "could equally be characterized as 'brutal,' involving as it does 'tear[ing] [a fetus] apart' and 'ripp[ing] off' its limbs."[120] Finally, Justice Ginsburg's dissent dismissed the majority's invocation of psychological health as reflecting "ancient notions about women's place in the family and under the Constitution—ideas that have long since been discredited," and asserted that any problems with physicians withholding information should be solved by requiring that they provide women with the tools necessary to make an informed and autonomous choice.[121]

With respect to the law's effects, the dissent cited *Stenberg* to argue that a health exception is required "as long as 'substantial medical authority supports the proposition that banning a particular abortion procedure could endanger women's health.'"[122] It adopted *Stenberg*'s view that courts retain an active role in reviewing legislative fact finding, even implying that they may have greater institutional competence in this regard.[123]

D. Whole Woman's Health v. Hellerstedt

Most recently, in 2016, Justice Breyer authored an opinion in *Whole Woman's Health v. Hellerstedt* that struck down two Texas regulations governing abortion providers.[124] Rather than representing another direct volley in the war over interests and effects, the *Whole Woman's Health* opinion took an entirely different tack.[125] Overall, *the decision* marks a shift by Justice Kennedy—who joined the opinion in full and did not write

118. *See id.* at 181.
119. *See id.* at 182 (citations omitted).
120. *Id.* at 181–82 (alterations in original) (citations omitted).
121. *See id.* at 183–85 (citations omitted).
122. *Id.* at 174 (quoting Stenberg v. Carhart, 530 U.S. 914, 938 (2000)).
123. *See id.* at 177–79.
124. 136 S. Ct. 2292, 2300 (2016).
125. *See id.* at 2323–24 (Thomas, J., dissenting).

separately—and a departure from the stance he took in *Stenberg* and *Gonzales*.

Whole Woman's Health assessed the validity of two provisions of a Texas law. The first required abortion providers to have admitting privileges at a hospital within thirty miles of where the abortion took place,[126] and the second mandated that abortion facilities employ the same minimum standards as those applicable to ambulatory surgical centers.[127] The statute contained no legislative findings, but the Court inferred that the two provisions sought to protect the health of women seeking abortions.[128]

In applying the undue burden standard, the Court discussed a state's ability to further its interest in insuring "maximum safety for the patient."[129] When assessing such regulations, 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."[130] This consideration is required because, as *Casey*'s plurality explained, "[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."[131] In direct contradiction of both *Casey* and *Gonzales*, Justice Breyer also asserted that the Court "now use[s] 'viability' as the relevant point at which a State may begin limiting women's access to abortion for reasons *unrelated to maternal health*."[132]

A six-Justice majority concluded that both provisions were unnecessary and had impermissible effects.[133] For instance, alt-

126. *See id.* at 2300 (majority opinion).

127. *See id.*

128. *See id.* at 2310; *see also id.* at 2303 (noting the Fifth Circuit's holdings that both requirements related to the State's interest in "rais[ing] the standard and quality of care for women seeking abortions and . . . protect[ing] the health and welfare of women seeking abortions" (alterations in original) (quoting Whole Woman's Health v. Cole, 790 F.3d 563, 584 (per curiam), *modified*, 790 F.3d 598 (5th Cir. 2015))).

129. *Id.* at 2309 (quoting Roe v. Wade, 410 U.S. 113, 150 (1973)).

130. *Id.*

131. *Id.* (alteration in original) (emphasis added) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 878 (1992) (plurality opinion)).

132. *Id.* at 2320 (emphasis added).

133. *See id.* at 2300.

hough Texas argued that the admitting privileges requirement would keep women safe if complications arose during an abortion, the district court found that complications were quite rare before the law's enactment.[134] The majority credited the district court's findings of fact and concluded that Texas failed to demonstrate that "compared to [the] prior law . . . the new law advanced Texas' legitimate interest in protecting women's health."[135] Moreover, because the provision caused significant clinic closures,[136] it imposed a substantial obstacle to abortion access, especially "when viewed in light of the virtual absence of any health benefit" conferred by the law.[137]

The Court analyzed the surgical center requirement similarly. It again accepted the district court's factual findings that this provision did not lower risks for patients or positively affect their care in any meaningful way.[138] Again looking to the reduction in clinics resulting from the requirement and the associated effects on driving time, wait time, and overly taxed facilities,[139] the Court credited the district court's finding that the law erected a substantial obstacle to a woman's access to abortion.

As the above discussion indicates, Justice Kennedy's decision to join the benefits-and-burdens approach seems to mark a striking retreat from the position he took in *Stenberg* and *Gonzales*. In contrast to *Gonzales*, Justice Breyer's majority opinion reasserted a more active role for the Court in reviewing legislative fact finding. Citing *Casey*, the majority argued that the Court has often assessed abortion regulations by "plac[ing] considerable weight upon evidence and argument presented in judicial proceedings."[140] The majority sought to reconcile this

---

134. *See id.* at 2311.

135. *Id.*

136. *See id.* at 2301 (describing the district court's finding of fact that the number of facilities providing abortions dropped by half leading up to and following enactment of the admitting privileges requirement). Justice Alito argued in dissent that this point had not been adequately demonstrated. *See id.* at 2341 (Alito, J., dissenting).

137. *See id.* at 2313.

138. *See id.* at 2315.

139. *See id.* at 2316 (noting that the parties stipulated that the requirement would reduce the number of clinics to about seven or eight); *id.* at 2317–18 (describing the effects on the remaining clinics).

140. *Id.* at 2310 (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 888–94 (1992)).

approach with *Gonzales* by pointing to that opinion's admonition not to give legislative findings "dispositive weight" nor to accept them "uncritical[ly]."[141] The discussion, however, neglected the broader context in which those pronouncements were made. In particular, it did not grapple with *Gonzales*'s contradictory declaration that the "traditional rule," the rule "consistent with *Casey*," instructs courts to defer to the discretion of legislatures, lest their "legitimate abortion regulations" be struck down "if some part of the medical community were disinclined to follow the proscription."[142]

Additionally, as pointed out by Justice Thomas in dissent, applying the benefits-and-burdens approach broadly has serious ramifications for States.[143] The provisions in *Whole Woman's Health* only implicated the state's interest in promoting maternal health, but the majority did not cabin its benefits-and-burdens test to that interest. It also declared that states may not regulate for reasons unrelated to maternal health until after viability.[144] This assertion directly conflicts with Justice Kennedy's *Stenberg* view, which read *Casey* both to recognize a broader range of permissible state interests and to explicitly refrain from providing an exhaustive list of such interests.[145] As Justice Thomas observed, mirroring Justice Kennedy's concern in his *Stenberg* dissent, the benefits-and-burdens approach looks "far more like the strict-scrutiny standard that *Casey* rejected, under which only the most compelling rationales justified restrictions on abortion."[146]

---

141. *Id.* (quoting Gonzales v. Carhart, 550 U.S. 124, 165, 166 (2007)).

142. *Gonzales*, 550 U.S. at 163, 166; *see also* Stenberg v. Carhart, 530 U.S. 914, 971 (2000) (Kennedy, J., dissenting) (noting that the Court's cases had "establish[ed] beyond doubt the right of the legislature to resolve matters upon which physicians disagreed").

143. *See Whole Woman's Health*, 136 S. Ct. at 2326 (Thomas, J., dissenting).

144. *See id.* at 2320 (majority opinion).

145. *See Stenberg*, 530 U.S. at 961 (Kennedy, J., dissenting) (citing *Casey*, 505 U.S. at 877); *see also Whole Woman's Health*, 136 S. Ct. at 2325 (Thomas, J., dissenting) (contending that the majority failed to acknowledge a state's ability to "'use its regulatory power' to impose regulations 'in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn.'" (quoting *Gonzales*, 550 U.S. at 158)).

146. *Whole Woman's Health*, 136 S. Ct. at 2326. *See also Stenberg*, 530 U.S. at 976 (Kennedy, J., dissenting) ("*Casey* disavows strict scrutiny review; and Nebraska must be afforded leeway when attempting to regulate the medical profession.").

II. TEXAS SENATE BILL 8: TESTING THE CONTINUED VIABILITY OF *GONZALES*

The preceding Part has demonstrated that the Court has been far from consistent in its approach to assessing whether an abortion regulation imposes an undue burden. Most of this inconsistency centers on Justice Kennedy's and Justice Breyer's seemingly conflicting interpretations of the principles set forth in *Casey*, but it has been further compounded by Justice Kennedy's silent acquiescence in *Whole Woman's Health*. May states promulgate abortion regulations aimed at upholding the integrity of the medical profession and preventing the coarsening of society? May they regulate on behalf of life that "may become a child," even if that life nevertheless ends by abortion? May they expressly base these decisions on moral grounds? How much latitude should courts extend to legislatures to regulate in areas of medical uncertainty? The contradictory approaches taken by the *Stenberg* and *Gonzales* majorities, exacerbated by the novel framework set forth in *Whole Woman's Health*, leave all of these questions unanswered. Meanwhile, state legislatures are left in the lurch, knowing that their efforts may or may not be upheld as constitutional depending on which opinion a given court looks to for guidance. Similarly, courts are left to decipher and attempt to reconcile the Supreme Court's conflicting messages as they decide constitutional challenges to abortion regulations.

This Part describes Texas's recent effort to prohibit live dismemberment abortions and argues that this legislation provides an apt opportunity for Justice Kennedy to reaffirm his *Stenberg*-*Gonzales* view of *Casey* as a pragmatic compromise between fundamentally opposed interests. Moreover, it enables him to confirm the wide latitude enjoyed by States to restrict particularly gruesome and controversial abortion procedures when substantial medical authority supports the availability of safe alternatives. At a minimum, evaluating Texas's law permits the Court to provide some much-needed guidance to States, abortion providers, and patients about the interests at play and the standards that must be met for a law to survive scrutiny under *Casey*.

A. The Texas Law and District Court Proceedings

On May 26, 2017, Texas passed Senate Bill 8 (S.B. 8), which prohibits and criminalizes "live dismemberment abortions."[147] This term is not used in the clinical setting, but the act defines it as an:

> [A]bortion in which a person, with the purpose of causing the death of an unborn child, dismembers the living unborn child and extracts the unborn child one piece at a time from the uterus through the use of clamps, grasping forceps, tongs, scissors, or a similar instrument that, through the convergence of two rigid levers, slices, crushes, or grasps, or performs any combination of those actions on, a piece of the unborn child's body to cut or rip the piece from the body.[148]

S.B. 8 shares three characteristics with the laws at issue in *Stenberg* and *Gonzales*. First, because it regulates abortions in the second trimester, it applies to pre-viability abortions.[149] Second, the act does not contain a broad health exception. It only permits dismemberment abortions "in a medical emergency,"[150] which is defined as "a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that, as certified by a physician, places the woman in danger of death or a serious risk of substantial impairment of a major bodily function."[151] Third, S.B. 8 has a similar scope: rather than proscribe abortion outright, it prohibits a specific method of abortion. Namely, it prevents an abortion provider from performing a standard D & E on a living fetus.[152] S.B. 8 instead requires induction of fetal demise prior to dismemberment, either through an injection of digoxin or potassium chloride into the fetus or through an umbilical-cord transection.[153] The abor-

147. *Id.*

148. TEX. HEALTH & SAFETY CODE §§ 171.151, 171.153.

149. Subject to exceptions for maternal health and fetal anomalies, Texas proscribes all abortions after twenty weeks. *See id.* §§ 171.044, 171.046.

150. *Id.* § 171.152.

151. *Id.* § 171.002.

152. *See id.* § 171.151 (noting that the Act also does not cover vacuum aspiration abortions).

153. *See* Whole Woman's Health v. Paxton, 280 F. Supp. 3d 938, 947 (W.D. Tex. 2017) (describing an umbilical-cord transection as a method whereby the abortion provider passes an instrument through a woman's cervix and into her uterus, cuts the fetus's umbilical cord, and waits for the cessation of fetal heart activity).

tion provider can then remove the deceased fetus using standard D & E procedures.[154]

Though S.B. 8 contains no legislative findings, Texas also asserts many of the same interests as those discussed in *Stenberg* and *Gonzales:* the Act "promotes respect for the dignity of the life of the unborn," "protects the integrity of the medical profession," and prevents the further coarsening of society.[155] Though not developed at length, the state also asserts that ensuring fetal demise prevents deleterious psychological stress to "both mothers and abortion providers."[156]

Regarding respect for the fetus's life, Texas explains that most standard D & Es within the state take place between fifteen and twenty-two weeks gestation, as measured by a woman's last menstrual period.[157] Texas notes that, at fifteen weeks gestation, the fetus "looks like a fully formed baby, with arms, legs, fingers, toes, and facial features," and it retains these characteristics as it grows in size over the ensuing seven weeks.[158] Quoting Justice Kennedy's *Stenberg* dissent, Texas observes that during a standard D & E "[t]he fetus, in many cases, dies just as a human adult or child would: It bleeds to death as it is torn limb from limb."[159] Texas accordingly views the standard D & E as "brutal, gruesome and inhumane,"[160] especially because medical technology now makes it possible for fetuses born at twenty-two weeks to survive.[161] Finally, Texas mentions that some physicians believe fetuses can feel pain at

---

154. *See* Defendants' Response to Plaintiffs' Motion for a Temporary Restraining Order at 4, Whole Woman's Health v. Paxton, 280 F. Supp. 3d 938 (No. A-17-CV-690-LY) [hereinafter *Defendants' Response to TRO*]. As providers recognize, induction of fetal demise by similar means prior to a standard D & E delivery likewise provides a method of compliance with the federal partial birth abortion law. *See, e.g.*, Colleen C. Denny et al., *Induction of Fetal Demise Before Pregnancy Termination: Practices of Family Planning Providers*, 92 CONTRACEPTION 241, 243–44, tbl. 3 (2015).

155. *See Defendants' Response to TRO*, *supra* note 154, at 5.

156. *Id.* at 6.

157. *See* Defendants' Proposed Post-Trial Findings of Fact and Conclusions of Law at 3, 13, Whole Woman's Health v. Paxton, 280 F. Supp. 3d 938 (No. A-17-CV-690-LY) [hereinafter *Defendants' Proposed Findings*].

158. *See id*. at 11–12.

159. *Defendants' Response to TRO*, *supra* note 154, at 3 (quoting Stenberg v. Carhart, 530 U.S. 914, 958–59 (2000) (Kennedy, J., dissenting)).

160. *Id.* at 5.

161. *See Defendants' Proposed Findings*, *supra* note 157, at 12.

this gestational age, and ensuring fetal demise would alleviate the ethical concerns associated with dismembering a live, sentient human fetus.[162]

Though these justifications are most pertinent to the state's interest in fetal life, they also implicate Texas's interest in protecting the integrity of the medical profession and society as a whole. In support of these intertwining interests, Texas provides two graphic examples of events taking place during D & E procedures. In one, the face of the fetus "look[ed] back at the doctor" as dismemberment occurred.[163] In another, "part of a chest cavity [came] out with one lung attached and a still-beating heart."[164] Thus, because the state believes that the procedure affects all involved, it wishes to "require that a fully formed and nearly viable unborn child be accorded a more humane manner of death."[165]

Various abortion providers brought a facial challenge to the relevant provisions of S.B. 8 in the United States District Court for the Western District of Texas.[166] At trial, Texas contended that providers have utilized fetal demise procedures for many years, and such practices are already commonplace in Texas.[167] It argued that multiple abortion providers use digoxin and potassium chloride as means of safely inducing fetal demise, and empirical studies confirm the drugs' safety and efficacy.[168] Texas also asserted that a study similarly attested to the efficacy of umbilical-cord transection.[169] Aside from this research, Texas maintained that certain physicians prefer inducing fetal demise because it makes the ultimate D & E procedure easier, and some pregnant women prefer that the fetus be killed prior to being

162. *See id.* at 13.

163. *See* Transcript of Bench Trial Volume 5 at 205, Whole Woman's Health v. Paxton, 280 F. Supp. 3d 938 (W.D. Tex. 2017) (No. A-17-CV-690-LY).

164. *Id.*

165. *Id.* at 206.

166. *See* Whole Woman's Health v. Paxton, 280 F. Supp. 3d at 940, 952.

167. *See Defendants' Proposed Findings*, *supra* note 157, at 6.

168. *See id.* at 7–9.

169. *See id.* at 10.

removed in pieces.[170] Unsurprisingly, the abortion providers presented contrary testimony and data.[171]

The district court concluded that the plaintiffs had the better argument and struck down the provision as facially unconstitutional.[172] After citing the principles announced in *Casey* and expounded upon in *Stenberg* and *Gonzales*,[173] the district court discussed and applied *Whole Woman's Health v. Hellerstedt*'s benefits-and-burdens framework to assess the act's validity.[174] It did so even though the Texas law did not assert an interest in the health of the pregnant woman, which was the sole interest that justified the regulations at issue in that case.[175]

The court began by interpreting *Stenberg* and *Gonzales* in light of *Whole Woman's Health v. Hellerstedt*. It read those cases as holding that, "to the extent a law directly reached or might be interpreted in such a way to reach the previability standard D & E procedure performed before fetal demise, the law imposed an undue burden on a woman seeking a pre-fetal-viability abortion."[176] Under this view of the cases, the district court summarily concluded that "based on existing precedent alone, the Act must fail."[177]

Even though the district court considered its reading of *Stenberg* and *Gonzales* independently sufficient to dispose of the case, it went on to assess the parties' competing contentions regarding the safety of the methods used to cause fetal demise, the availability of those procedures, and other debated questions.[178] In doing so, it cited *Whole Woman's Health v. Hellerstedt* for the proposition that it is consistent with Supreme Court case law "[f]or a district court to give significant weight to evi-

---

170. *See id.* at 11.

171. *See* Whole Woman's Health v. Paxton, 280 F. Supp. 3d at 948.

172. *See id.* at 954.

173. *See id.* at 943.

174. *See id.* at 943–44.

175. *See* 136 S. Ct. 2292, 2309 (2016).

176. Whole Woman's Health v. Paxton, 280 F. Supp. 3d at 944 (citation omitted).

177. *Id.* at 945; *see also id.* at 954 ("This court concludes that *Stenberg* and *Gonzales* lead inescapably to the conclusion that the State's legitimate interest in fetal life does not allow the imposition of an additional medical procedure on the standard D & E abortion—a procedure not driven by medical necessity.").

178. *See id.* at 947–52.

dence in the judicial record" in circumstances where no legislative findings accompany a statute.[179]

The district court assumed, without deciding, that Texas's interests in fetal life and the medical profession were legitimate,[180] but these interests played no role in its analysis. Instead, the opinion focused exclusively on the benefits and burdens the law placed on the woman seeking an abortion.[181] After assessing the competing evidence presented, the district court found that all three proposed methods of inducing fetal demised carried serious health risks and were not safe alternatives to the standard D & E procedure.[182] The court also noted additional burdens resulting from the prohibition, such as the need for pregnant women to make additional visits to abortion providers, the increased duration of the procedure, and the imposition of additional training requirements on providers.[183] In sum, the district court concluded that it was "unaware of any other medical context that requires a doctor—in contravention of the doctor's medical judgment and the best interest of the patient—to conduct a medical procedure that delivers no benefit to the woman."[184] In so concluding, the court effectively adopted the arguments and narrative of the plaintiffs without a great deal of independent analysis or criticism. Accordingly, citing *Whole Woman's Health v. Hellerstedt*, the court held that "[t]he State's valid interest in promoting respect for the life of the unborn, although legitimate, is not sufficient to justify such a substantial obstacle to the constitutionally protected right of a woman to terminate a pregnancy before fetal viability."[185]

---

179. *See id.* at 947 (quoting Whole Woman's Health v. Hellerstedt, 136 S. Ct. at 2310); *see also id.* at 948–49.

180. *See id.*

181. *See id.* at 947–53.

182. *See id.* at 949–50 (digoxin); *id.* at 950–51 (potassium chloride); *id.* at 951–52 (umbilical-cord transection).

183. *See id.* at 949–51.

184. *Id.* at 953.

185. *Id.* (citing Whole Woman's Health v. Hellerstedt, 136 S. Ct. at 2299).

B. The Tension Exposed by S.B. 8 and the District Court's Reasoning

On the one hand, the district court's analysis amounts to nothing more than a straightforward application of *Whole Woman's Health v. Hellerstedt* to assess S.B. 8's constitutionality, even though the law does not promulgate health-related regulations. As a necessary result, the court made the pregnant woman's health its preeminent if not exclusive focus, downplayed the importance of the State's interests, and did not defer to Texas's fact finding.[186] Consequently, the district court's broad application makes the concerns raised by Justice Thomas's *Whole Woman's Health v. Hellerstedt* dissent a reality: the approach seems to displace if not nullify all state interests other than regulating the medical procedure itself, even those that the Supreme Court has previously declared to be legitimate.[187] Thus, the decision demonstrates how an expansive reading of *Whole Woman's Health v. Hellerstedt* conflicts with *Gonzales*'s reasoning. This litigation therefore serves as a perfect vehicle for the Court to explore whether *Gonzales* remains good law

---

186. The district court's application is not without its own problems. As stated above, the court also interpreted *Gonzales* and *Stenberg* to "lead inescapably to the conclusion that the State's legitimate interest in fetal life does not allow the imposition of an additional medical procedure on the standard D & E abortion" if it is "not driven by medical necessity." *Id.* at 954. This interpretation of *Gonzales* and *Stenberg* greatly misreads both decisions. The district court maintained that those cases held that any imposition on the standard D & E procedure constituted an undue burden, but in both cases, the defendant explicitly conceded this point. *See* Gonzales v. Carhart, 550 U.S. 124, 147 (2007) ("[T]he Attorney General does not dispute that the Act would impose an undue burden if it covered standard D & E."); Stenberg v. Carhart, 530 U.S. 914, 938 (2000) ("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 [intact D & E]. And we agree with the Eighth Circuit that it does so apply."). Thus, the Supreme Court in both cases assumed, but never held, that the laws would impose an undue burden if they covered standard D & Es, and the district court erred by treating this question as explicitly presented and decided.

187. *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. at 2326 (Thomas, J., dissenting) ("One searches the majority opinion in vain for any acknowledgment of the premise central to *Casey*'s rejection of strict scrutiny: that the government has a legitimate and substantial interest in preserving and promoting fetal life from conception, not just in regulating medical procedures. Meanwhile, the majority's undue-burden balancing approach risks ruling out even minor, previously valid infringements on access to abortion." (internal quotation marks and citations omitted)).

and whether *Gonzales* and *Whole Woman's Health v. Hellerstedt* may be peaceably reconciled.

Answering both of these questions requires Justice Kennedy to take a stance on which interpretation of *Casey* should prevail—the broad, pragmatic view he espoused in *Stenberg* and *Gonzales*, or the narrower, more radical view he tacitly endorsed in *Whole Woman's Health*. Most importantly, it invites him to determine whether protecting the medical profession, preventing the coarsening of society to the value of human life, and expressing respect for fetal life remain legitimate state interests. S.B. 8 implicates all three, just like in *Gonzales*.[188] Furthermore, as in *Gonzales*, Texas has demonstrated a rational relationship between the regulation and the asserted interests and has left alternative methods of procuring an abortion available to pregnant women. Thus, should this case make its way to the Court, Justice Kennedy would be forced to decide whether these interests remain legitimate or if *Whole Woman's Health* has effectively narrowed the field.

Should Justice Kennedy decide that these interests may no longer serve as legitimate state ends, he would need to explain this rather drastic departure from his previous conclusions. Here, too, Texas provides an apt opportunity because its reasons map almost perfectly onto Justice Kennedy's statements justifying both bans on partial-birth abortions. For instance, Justice Kennedy remarked in *Stenberg* that the intact D & E is employed "only when the fetus is close to viable or, in fact, viable; thus the state is regulating the process at the point where its interest is nearing its peak."[189] So too here, at least during

188. *See Gonzales*, 530 U.S. at 157–58. Importantly, Justice Kennedy relies on *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997) to support the State's ability to prohibit procedures that compromise the integrity of the medical profession. *Glucksberg*'s own continued viability has been called into question in the wake of *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the Supreme Court's landmark ruling that recognized a same-sex couple's constitutional right to marriage. Those critiques, however, focus on whether *Obergefell* swept aside *Glucksberg*'s mode of constitutional interpretation, not its ultimate holding. *See, e.g.*, Whole Woman's Health v. Hellerstedt, 136 S. Ct. at 2618 (Roberts, C.J., dissenting).

189. *Stenberg*, 530 U.S. at 968 (Kennedy, J., dissenting).

the latter half of the second trimester, when the probability increases that an unborn child could survive outside the womb.[190]

Furthermore, in *Stenberg*, Justice Kennedy found it permissible for a state to prohibit a method of abortion that resembles infanticide, which thus poses a greater risk to the medical profession and society as a whole.[191] Texas has made precisely the same choice here. Whether because of advancements in scientific knowledge, increasing cultural awareness regarding stages of fetal development, or both, Texas has decided that it blurs the line between abortion and infanticide to dismember a living human fetus that has already assumed a recognizable human form through methods that put the child at risk of "surviv[ing] for a time while its limbs are being torn off."[192] Not only was a state entitled, in Justice Kennedy's words, "to find the existence of a consequential moral difference" between a standard D & E and a procedure that first ensures fetal demise,[193] but the dis-

---

190. Such survivals are at this point extremely rare, but still possible. *See* Jacqueline Howard, *Born before 22 Weeks, "Most Premature" Baby is now Thriving*, CNN (Nov. 11, 2017, 6:46 PM), https://www.cnn.com/2017/11/08/health/premature-baby-21-weeks-survivor-profile/index.html [http://perma.cc/U4SY-JRN7] (discussing the survival of a Texas child born at twenty-one weeks and four days who weighed fifteen ounces). However, because legislatures enact broad, prospective laws, there is no reason why they should not account for promising advancements in medical technology aimed at keeping fetuses nearing the end of the second trimester alive. *See* Rob Stein, *Artificial Womb Shows Promise in Animal Study*, NPR (Apr. 25, 2017, 11:10 AM), https://www.npr.org/sections/health-shots/2017/04/25/525044286/scientists-create-artificial-womb-that-could-help-prematurely-born-babies [https://perma.cc/RM96-BNVM].

191. *Stenberg*, 530 U.S. at 963 (Kennedy, J., dissenting).

192. *Id.* at 959 (basing this description on of the testimony of an abortionist).

193. *Id.* at 962; *see also Gonzales*, 550 U.S. at 160 (noting that the medical profession "may find different and less shocking methods to abort the fetus in the second trimester, thereby accommodating legislative demand"). Justice Kennedy's explicit reference to a state's ability to consider moral considerations seems to be at odds with decisions he has authored relating to same-sex couples. For instance, after *Stenberg*, Justice Kennedy wrote in *Lawrence v. Texas* that, though many view same-sex sexual activity as immoral, *Casey* required the Court to "define the liberty of all." 539 U.S. 558, 571 (2003) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 850 (1992)); *see also Obergefell*, 135 S. Ct. at 2594. Yet, his analysis in *Gonzales* again relied in part on Congress's determination that an intact D & E procedure "requires specific regulation because it implicates additional ethical and moral concerns that justify a special prohibition." 550 U.S. at 158. It could be that, in the ensuing years since *Gonzales*, Kennedy now concurs with Justice Ginsburg's critique that a state cannot use moral considerations to prohibit a method of abortion in a way that "overrid[es]" a woman's ability to access abortion. *See id.*

tinction is also grounded in science. As Texas stated, the advancement of medical technology means that severely premature children are able to survive at earlier and earlier ages.[194] Thus, just like an intact D & E, a standard D & E "perverts the natural birth process,"[195] of medically fragile, severely disabled children.

Additionally, hearing this challenge would enable the Court to provide a clear standard regarding the appropriate deference owed to legislatures when regulating in areas of medical uncertainty. Justice Kennedy strongly condemned the majority in *Stenberg* for failing to extend deference, reminding it that "[c]ourts are ill-equipped to evaluate the relative worth of particular surgical procedures,"[196] and that "when a legislature undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad."[197] This remains so, even in situations where—as in the Nebraska case—a law contains no legislative fact-finding.[198] This attitude toward deference persisted in *Gonzales*, where Justice Kennedy noted that, although the Court retains an independent duty to review factual findings in constitutional cases,[199] it cannot "serve as the country's *ex officio* medical board with powers to approve or disapprove medical and operative practices and

---

at 182 (Ginsburg, J., dissenting). Yet, since *Casey*, Kennedy has stressed that abortion remains in part a philosophical inquiry and has emphasized the states' ability to use the democratic processes as a means of expressing divergent views. *See id.* at 160; *Stenberg*, 530 U.S. at 957 (Kennedy, J., dissenting); *Casey*, 505 U.S. at 872. This, combined with abortion's connection with human biology and medical science, could allow moral judgments to remain a permissible ground for regulation in the specific context of abortion. Either way, S.B. 8 provides an opportunity for Justice Kennedy to provide guidance and clarity on this important jurisprudential issue.

194. *See* Howard, *supra* note 190.

195. *Stenberg*, 530 U.S. at 962–63 (Kennedy, J., dissenting).

196. *Id.* at 968.

197. *Id.* at 970 (capitalization alteration removed) (internal quotation marks omitted) (quoting Kansas v. Hendricks, 521 U.S. 346, 360 n.3 (1997)).

198. *See id.* at 968–70; *see also Gonzales*, 550 U.S. at 164 (citing with approval Mazurek v. Armstrong, 520 U.S. 968, 973 (1997) (per curiam) (upholding a Montana law authorizing only physicians to perform abortions even though the law had no accompanying legislative findings and the respondents had argued that "all health evidence contradicts the claim that there is any health basis for the law")).

199. *See Gonzales*, 550 U.S. at 165 (citing Crowell v. Benson, 285 U.S. 22, 60 (1932)).

standards throughout the United States."[200] Yet, Justice Kennedy seemed to retreat from this stance by joining Justice Breyer's opinion in *Whole Woman's Health*, including its interpretation that a court's independent, in-depth evaluation of the evidence is consistent with *Casey*.[201]

Here, the Court would again be confronted with a state law endeavoring to regulate in an area of medical uncertainty, with empirical evidence on both sides of the equation. Texas opted to side with medical professionals who believe that fetal demise is a safe and effective alternative to the standard D & E procedure, but the district court concluded that Texas's decision was erroneous.[202] This, too, provides Justice Kennedy with an opportunity either to reaffirm an interpretation of *Casey* that seeks to accommodate both federalism concerns and the constitutional right to an abortion, or to provide an explanation for why this previous interpretation of *Casey* should no longer govern.

Finally, as an ancillary matter, Texas's case provides the Court with an opportunity to answer yet another question left open by its abortion jurisprudence: what role do the states play in identifying and promoting new interests implicated by abortion? As mentioned above, Texas initially asserted that its law furthered the state's interest in protecting both pregnant women and providers from the psychological distress that the state believes accompanies a standard D & E procedure.[203] In support of this contention, Texas cited a study that found that clinic staffers "reported serious emotional reactions that produced physiological symptoms, sleep disturbances, effects on interpersonal relationships, and moral anguish."[204] The authors provided similar self-reports and noted that "the feelings and

200. *Id.* at 163–64 (quoting Webster v. Reprod. Health Servs., 492 U.S. 490, 518–19 (1989) (plurality opinion)).

201. *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2310 (2016) (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 888–94 (1992)).

202. *See* Woman's Health v. Paxton, 280 F. Supp. 3d 938, 945 (W.D. Tex 2017).

203. *See Defendants' Response to TRO*, *supra* note 154, at 5–6.

204. *See* Warren M. Hern & Billie Corrigan, *What About Us? Staff Reactions to D & E*, 15 ADVANCES IN PLANNED PARENTHOOD 3, 3 (1980).

attitudes of those providing abortion services have a profound effect on the quality of care the patients receive."[205]

Texas did not pursue this argument vociferously at trial. Even so, the state's assertion of a novel interest implicates Justice Kennedy's acknowledgment that *Casey* did not lay out an "exhaustive" list of permissible state ends[206] because states "hav[e] an important constitutional role in defining their interests in the abortion debate."[207] Thus, unless Justice Kennedy now subscribes to the narrower view of permissible state interests intimated by *Whole Woman's Health*, the case presents the opportunity to either reaffirm the states' panoply of implicated interests or provide an explanation for the about-face. And, if the Court opts to discard *Gonzales*'s approach in favor of *Whole Woman's Health*, it enables the Court to discuss to whom the benefits of an abortion-related law may apply. Must such benefits be exclusively experienced by pregnant women, or may the state take cognizance of the burdens and benefits that such laws present to others involved in the abortion procedure? Answering this question, too, would provide some much-needed prospective guidance regarding the scope and meaning of *Whole Woman's Health*.

III. CONCLUSION

Eighteen years ago, Justice Kennedy dissented from both the reasoning and the judgment in *Stenberg v. Carhart*, calling both a "misinterpretation" of *Casey*.[208] To Justice Kennedy, the majority's decision to give the State interests "but slight

205. *Id.*; *see also* Colleen C. Denny, *supra* note 153, at 243–44 & tbl. 3 (noting that some clinics opt to induce fetal demise out of concern for the psychological well-being of providers and clinic operating room staff, including to reduce trauma); Justin Diedrich & Eleanor Drey, *Clinical Guidelines: Induction of Fetal Demise Before Abortion*, 81 CONTRACEPTION 462, 462, 464 (2010) (noting that "[i]nducing demise before induction terminations at near viable gestational ages to avoid signs of life at delivery is practiced widely" to avoid "the problem that faces the provider, the team of caregivers and the patient" should signs of life occur).

206. *See* Stenberg v. Carhart, 530 U.S. 914, 961 (2000) (Kennedy, J., dissenting) (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992)).

207. *Id.*

208. *See id.* at 979.

weight,"[209] its "substitut[ion of] its own judgment for the judgment of Nebraska" in an area of medical uncertainty,[210] and its application of heightened scrutiny[211] all amounted to a "basic misunderstanding of *Casey*."[212] Yet, if his decision to join the *Whole Woman's Health* majority provides any indication, Justice Kennedy may be retreating from the stance he took in *Stenberg*. And as Justice Thomas's dissent notes and the Western District of Texas decision exemplifies, *Whole Woman's Health*'s benefits-and-burdens approach seems to establish the "misinterpretation" of *Casey* as the proper framework for evaluating attempts to regulate abortion procedures.[213] Thus, *Whole Woman's Health* and *Gonzales* appear to be on a collision course, leaving the proper interpretation of *Casey* an open question.

Fortunately, S.B. 8 serves as an apt vehicle for providing some much-needed clarity on this issue. It squarely implicates the same interests as *Stenberg* and *Gonzales*, relies upon very similar reasoning, and requires the Court to take a stand on the level of deference owed to state legislatures. Thus, it affords an opportunity for the Court either to overrule *Gonzales* outright or to provide further guidance regarding *Whole Woman's Health*, particularly where states promulgate regulations for reasons other than protecting the health of pregnant women seeking abortions.

But perhaps most importantly, and aside from the practical, on-the-ground impact of any decision the Court might make, the challenge to S.B. 8 presents Justice Kennedy with the chance to opine again about which interpretation constitutes faithful adherence to *Casey*. Will *Casey* persist as an attempt at compromise in a pluralistic, civil society? Does "[t]he State's constitutional authority" still remain "a vital means for citizens to address these grave and serious issues, as they must if we are to progress in knowledge and understanding and in the

209. *Id.* at 956.

210. *See id.* at 979.

211. *See id.* at 960–61.

212. *Id.* at 964.

213. *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2326 (2016) (Thomas, J., dissenting).

attainment of some degree of consensus" about abortion?[214] One man's answer to these questions, it seems, may make all the difference.

214. *See* Gonzales v. Carhart, 550 U.S. 114, 129 (2007) ("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."); Stenberg v. Carhart, 530 U.S. 914, 957 (2000).