Liberty and the Politics of Balance: The Undue-Burden Test After *Casey/Hellerstedt*

*Mary Ziegler**

Whole Woman's Health v. Hellerstedt *represents the Supreme Court's most important intervention in the constitutional politics of abortion in more than a decade. However, as this Article shows,* Hellerstedt *does not represent the clean break some commentators identify. Instead, the decision comes at the end of a decades-long movement-countermovement conflict about the meaning of an unconstitutional undue burden on a woman's right to abortion.*

Positioning Hellerstedt *in historical context matters because doing so underscores the Court's ongoing responsiveness to popular views of what the Constitution says about abortion. The historical trends studied here reveal what will likely happen when the Court applies* Hellerstedt *to fetal-protective, rather than woman-protective, anti-abortion laws. To maintain the delicate balance created by* Casey*, the Court should require evidence that both fetal-protective and woman-protective abortion regulations are substantially related to their stated goal.*

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* Mary Ziegler is the Stearns Weaver Miller Professor at Florida State University College of Law. She would like to thank Jamie Abrams, Susan Appleton, Barry Friedman, Dawn Johnsen, Jessie Hill, Maya Manian, Gillian Metzger, Jeff Redding, Johanna Schoen, and Neil Siegel for agreeing to share their thoughts on this piece.

INTRODUCTION

The Supreme Court's recent decision in *Whole Woman's Health v. Hellerstedt* represents the most significant shift in the Court's abortion jurisprudence in decades.[1] However, as this Article shows, *Hellerstedt* does not represent the clean break from prior abortion jurisprudence that some identify. Instead, the decision comes at the end of a decades-long movement-countermovement conflict about the meaning of an unconstitutional undue burden on a woman's right to choose abortion.

Positioning *Hellerstedt* in historical context matters because doing so underscores the Court's ongoing responsiveness to popular views of what the Constitution says about abortion.[2] The history studied in this Article also

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[1] For commentary on the case's significance, see, e.g., Erwin Chemerinsky, *A New Era on Abortion Rights?*, CNN (Jun. 28, 2016), http://www.cnn.com/2016/06/27/opinions/scotus-abortion-ruling-chemerinsky/, *archived at* https://perma.cc/7LWF-RSBE; Lyle Denniston, *Opinion Analysis: Abortion Rights Reemerge Strongly*, SCOTUSBLOG (Jun. 27, 2016), http://www.scotusblog.com/2016/06/opinion-analysis-abortion-rights-reemerge-strongly/, *archived at* https://perma.cc/QCC2-QWLU; Hannah Levintova, *Here's Why Today's Supreme Court Decision on Abortion Is So Important*, MOTHER JONES (Jun. 27, 2016), http://www.motherjones.com/politics/2016/06/supreme-court-abortion-texas-undue-burden-requirements-unconstitutional, *archived at* https://perma.cc/27AU-8FQ2; O. Carter Snead, *For SCOTUS, A New Era of Judicial Interference*, CNN (Jun. 28, 2016), http://www.cnn.com/2016/06/28/opinions/abortion-distortion-whole-womans-health-carter-snead/, *archived at* https://perma.cc/H2SZ-XY6B; Mary Ziegler, *The Supreme Court's Texas Abortion Ruling Reignites a Battle Over Facts*, WASH. POST (Jun. 28, 2016), https://www.washingtonpost.com/posteverything/wp/2016/06/28/the-supreme-courts-texas-abortion-ruling-reignites-a-battle-over-facts/, *archived at* https://perma.cc/6JT5-F2K7.

[2] For a sample of the scholarship documenting the Court's responsiveness to popular opinion, see generally, e.g., Robert Post & Reva B. Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007); BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009); Katie Eyer, *Lower Court Popular Constitutionalism*, 123 YALE L.J. ONLINE 197 (2013); Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV. 1027 (2004); Lani Guinier, *Courting the People: Demosprudence and the Law/Politics Divide*, 89 B.U. L.

reveals what should happen when the Court considers fetal-protective, rather than woman-protective, antiabortion laws. To maintain the delicate balance created by *Casey*, the Court should require evidence that both fetal-protective and woman-protective abortion regulations are substantially related to their stated goal.

This Article proceeds in three parts. Part I explores the evolution of a liberty-enhancing undue-burden test developed by the pro-choice movement during the 1970s. This idea took root in the political arena when abortion-rights supporters worked to show that reproductive rights and children's best interests were not diametrically opposed. Movement attorneys reworked these arguments when challenging new abortion regulations in court, borrowing from free exercise, welfare rights, and right-to-travel jurisprudence. Over time, these activists began working to make an undue-burden test synonymous with the requirement that abortion laws substantially serve their stated goal.

Part II studies the evolution of an alternative understanding of the undue-burden test developed by the pro-life movement in the 1980s and 1990s. As the Court sometimes used undue-burden rhetoric, pro-life lawyers positioned the Court's use of the undue-burden test as nothing more than rational basis review. Pro-lifers argued for a different understanding of tailoring requirements: If the legislature set out a sufficiently important purpose, courts should defer to lawmakers without questioning the fit between the means and ends of a statute.

Part III positions *Hellerstedt* in the history of the movement-countermovement conflict about the undue-burden test. *Hellerstedt* clarifies how courts should approach abortion regulations that purport to protect women's health. However, when put in historical context, *Hellerstedt* also represents an opportunity to give more guidance about how the undue-burden test applies to any regulation.

Casey's undue burden test strikes a careful balance between the state's interests and women's constitutional liberty.[3] To maintain this balance, even if a law is designed to protect fetal interests, legislators must demonstrate a substantial relationship between legislative purpose and the means used to accomplish it. Requiring such an explanation would help the courts to differentiate laws promoting a sincere, if divisive, interest in fetal life from those primarily intended to stigmatize abortion or reinforce a particular view of women's proper role in society. At the same time, demanding an explanation of how a law protects unborn and born children should make for a more meaningful application of *Casey*. Part IV offers a brief conclusion.

REV. 539 (2009); Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CALIF. L. REV. 959 (2004).

[3] *See generally* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

I. A Liberty-Protective Undue-Burden Test

For some time, pro-choice advocates have associated the undue-burden test with the Court's retreat from protecting abortion rights,[4] but it was not always that way. In the 1970s and early 1980s, as the Court backed away from strict adherence to the trimester framework, abortion rights activists and attorneys created an undue-burden test that would maintain protection for reproductive rights.[5] If the Court was willing to uphold regulations that restricted abortion access before viability, movement members hoped to provide the justices with a framework that would preserve key constitutional protections.

This Part chronicles the rise of this approach. First, it explores the political roots of a pro-choice vision of a constitutional undue burden. This campaign grew out of a longstanding debate about the harms experienced by unwanted children.[6] Seeking to reconcile the rights of children and women, activists argued that abortion bans were poorly tailored to accomplish their stated end, harming children as much as protecting them.[7] Several years after *Roe*, the Court upheld certain pre-viability abortion restrictions, encouraging abortion-rights supporters to rework claims about the tailoring of abortion laws.[8]

When pro-life activists successfully promoted abortion funding bans, members of the abortion rights movement looked for a more robust complement to the trimester framework. Drawing on unconstitutional conditions doctrine, these attorneys argued that women faced an impermissible choice between receiving government benefits and exercising a protected constitutional right.[9] When the Court rejected this argument, movement attorneys

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[4] *See, e.g.*, Caitlin E. Borgmann, *Abortion, the Undue Burden Standard, and the Evisceration of Women's Privacy*, 16 Wm. & Mary J. Women & L. 291, 291 (2010) (arguing that the undue burden test "has fostered extensive encroachments on women's personal privacy" and that *Casey* "opened the door to physical, familial, and spiritual invasions of women's privacy that serve little purpose but public shaming and humiliation."); Gillian Metzger, *Abortion, Equality, and Administrative Regulation*, 56 Emory L.J. 865, 867 (2007) (describing the "diminished protection for abortion rights under due process that resulted from *Casey*'s replacing the trimester framework of *Roe v. Wade* with the undue burden standard."); Linda Wharton et al., *Preserving the Core of* Roe*: Reflections on* Planned Parenthood v. Casey, 18 Yale L.J. 317, 317 (2006) ("[In *Casey*,] the Supreme Court backed away from affording women the highest level of constitutional protection for the abortion choice.").

[5] *See infra* Part IE.

[6] *See infra* Part IC.

[7] *Abortion Part IV: Testimony Before the Subcommittee on Constitutional Amendments of the Senate Judiciary Committee*, 94th Cong. 1st Sess. 710 (1975) (Statement of Betty Friedan); *Abortion Part IV: Testimony Before the Subcommittee on Constitutional Amendments of the Senate Judiciary Committee*, 94th Cong. 1st Sess. 863 (1975) (NOW Brochure, "True Love: Women and the Wanted Child" (1974)).

[8] For the decisions that encouraged pro-choice lawyers to change tactics, see generally, e.g., *Beal v. Doe*, 432 U.S. 438 (1977); *Maher v. Roe*, 432 U.S. 464 (1977); *Poelker v. Doe*, 432 U.S. 419 (1977); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 552 (1976).

[9] *See, e.g.*, Brief of Appellees, at 13–15, Maher v. Roe, 432 U.S. 464 (1976) (No. 75-1440).

revised their understanding of an undue burden.[10] By the mid-1980s, pro-choice activists did not abandon an undue-burden framework, but instead made it shorthand for the requirement that the means and ends of abortion regulations be substantially related to one another.[11]

A. Psychologists Map Out the Damage Done to Unwanted Children

The idea of an undue burden took shape partly during the debate about the effect of family planning and abortion restrictions on unwanted children. In 1961, when Yale professor Fowler Harper argued in *Poe v. Ullman* that Connecticut's ban on contraceptive use for married couples was unconstitutional,[12] members of an emerging family planning movement insisted that birth control restrictions did not effectively serve their stated goal of protecting the family. The *Poe* brief contended: "Scientific opinion is that unwanted children are unhappier than planned children and are more likely to become anti-social."[13] Because unwanted children experienced "maternal hatred," they were more likely to be racially prejudiced, mentally ill, and willing to break the law.[14] In this formulation, birth control bans sabotaged the marital families those laws were intended to protect.

Harper's *Poe* brief reflected a broader claim about children's right to be wanted. The reasoning behind a right to be wanted came into view in the 1920s and 1930s, with the growth of what historian Kathleen Jones calls the "child guidance" industry.[15] In the 1920s, as Estelle Freedman and John D'Emilio have shown, "a distinctive subculture took shape among the middle class young."[16] This "youth culture" sparked unprecedented anxiety among parents and other authority figures.[17] As Ben Lindsey, a juvenile court judge, explained: "Not only is this revolt from the old standards of conduct taking place, . . . but it is unlike any revolt that has ever taken place before."[18]

In the face of shifting patterns of social and sexual behavior among the young middle-class, white parents often turned to manuals and psychologists

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[10] *See, e.g.*, Brief of Appellees at 112–21, Harris v. McRae, 448 U.S. 297 (1980) (No. 79-1268).

[11] *See id.*

[12] *See* Brief for Appellants at *17–19, Poe v. Ullman, 367 U.S. 497 (1961), 1960 WL 98679.

[13] *Id.* at *9.

[14] *Id.* at *34.

[15] See KATHLEEN W. JONES, TAMING THE TROUBLESOME: AMERICAN FAMILIES, CHILD GUIDANCE, AND THE LIMITS OF PSYCHIATRIC AUTHORITY 91 (1999), for more about the "child guidance" industry; s*ee also* Kathleen W. Jones, *"Mother Made Me Do It": Women Blaming and the Women of Child Guidance*, *in* BAD MOTHERS: THE POLITICS OF BLAME IN TWENTIETH-CENTURY AMERICA 99–101 (Molly Ladd-Taylor et al. eds., 1998).

[16] JOHN D'EMILIO AND ESTELLE FREEDMAN, INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA 257 (3d Ed. 2012).

[17] *See id.*

[18] *Id.*

for answers about parenting rebellious youth.[19] The new child guidance experts warned parents about the dangers posed to children by "maternal rejection," a constellation of behaviors associated with mothers who "consciously or unconsciously [had] a desire to be free of the child and consider[ed] the child to be a burden."[20] According to the child guidance movement, maternal rejection plagued women regardless of class or race.[21] Noted New York psychiatrist David M. Levy summarized a widespread view that "morbid motherhood" occurred "with monotonous regularity."[22]

According to the 1920s child guidance literature, maternal rejection mattered primarily because of the damage it did to the larger society.[23] In Levy's view, a child's "hunger for maternal love" could explain everything from ordinary misbehavior to full-blown juvenile delinquency.[24] Maternal rejection also initiated a vicious cycle, damaging children who later had a "lack of any emotional ties" with their own children.[25]

B. Family Planning Activists Transform Arguments About Unwanted Children

Beginning in the 1940s, family planning activists reworked maternal rejection claims, reformulating them as a rationale for changing laws on contraception. Writing in 1949, Mrs. R. N. Edelman of the Planned Parenthood Federation of America explained the goal: "Any program that can reduce parental hostility and thereby lessen the tragedy of the child's rejection is a contribution to family security and society."[26] By forcing parents to bring unwanted pregnancies to term, the law ensured that unwanted children would suffer the trauma of maternal rejection. More worryingly, unwanted children could spell the end to otherwise stable families. Commentators tied divorce and "family instability" to a couple's failure to plan a family — a failure explained partly by harsh and restrictive contraception laws.[27]

By the 1950s and 1960s, in the wake of a panic about juvenile delinquency, members of Planned Parenthood painted a dire picture of the consequences of "compulsory pregnancy," including a perceived spike in juvenile delinquency.[28] While opponents of birth control argued that access to contraception encouraged sexual promiscuity and other bad behavior, Planned

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[19] *See* JONES, *supra* note 15, at 122.
[20] *Id.* at 181–82.
[21] *See id.* at 183.
[22] *Id.* at 174–75.
[23] *See id.* at 182.
[24] *Id.*
[25] *Id.*
[26] Mrs. R. N. Edelman, *Planned Parenthood*, 20 BIOS 114, 114 (1949).
[27] *See id.*
[28] *See* Mary Ziegler, Roe*'s Race: The Supreme Court, Population Control, and Racial Justice*, 25 YALE J. L. & FEMINISM 1, 9–12 (2013).

Parenthood leaders insisted that unwanted children were more likely to commit crimes.[29]

Consider the 1960 case of Virginia McLaughlin, a mother whose daughter already had two children by the age of fourteen.[30] McLaughlin allegedly advised her daughter on how to use and obtain "rubbers," and on this basis, prosecutors charged McLaughlin with contributing to the delinquency of a minor.[31] Harriet Pilpel and other Planned Parenthood leaders responded that it was immoral to deny people access to birth control, because unwanted children were likely to misbehave.[32]

Planned Parenthood leader William Vogt also tied juvenile delinquency to uncurbed population growth and unwanted children.[33] In criticizing the delinquency reforms recently championed by then-New York State Attorney General Jacob Javits,[34] Vogt wrote: "It is well known that unloved and 'rejected' children are prone to becoming neurotics. Much juvenile misbehavior shows a marked neurotic pattern."[35] Vogt further contended that some working mothers, many of them likely poor, were guilty of "maternal neglect."[36] In either case, Vogt insisted: "Perhaps these poor youngsters should never have been born at all to parents who, because of their own deficiencies, are unable to provide children the emotional and spiritual environment indispensable to their health."[37]

Vogt's comments reflected a new spin on the rhetoric of maternal rejection forged by therapists in the 1920s and 1930s. Starting after World War II, the perceived growth of poor populations at home and abroad inspired a new social movement centered on concerns about the Cold War, international instability, and the costs of aid to the poor.[38] Prior to the late 1960s and early 1970s, the population control movement included refugees from the eugenic legal reform movement of the early twentieth century, anti-poverty activists, and Cold War hawks, all of whom agreed on the need to re-

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[29] *See* LINDA GORDON, THE MORAL PROPERTY OF WOMEN: A HISTORY OF BIRTH CONTROL IN AMERICA 261, 276 (2002); Ziegler, *supra* note 28, at 9–12.

[30] *See* State v. McLaughlin, 212 N.E.2d 635, 636–37 (Ohio Ct. App. 1965).

[31] *See* Harriet Pilpel, *The Crazy Quilt of Our Birth Control Laws*, 2 J. SEX RESEARCH 135, 136 (1965).

[32] *See id.*

[33] *See* Letter from William Vogt to the Editor of the New York Times, *in* THE PPFA II PAPERS (Jan. 17, 1952) (on file at the Sophia Smith Collection, Smith University).

[34] *See id.*; *see also* MICHAEL JAVEN FORTNER, BLACK SILENT MAJORITY: THE ROCKEFELLER DRUG LAWS AND THE POLITICS OF PUNISHMENT 81–82 (2015).

[35] Vogt, *supra* note 33, at 1.

[36] *Id.*

[37] *Id.*

[38] See SIMONE CARON, WHO CHOOSES?: AMERICAN REPRODUCTIVE HISTORY SINCE 1850 150–51, 153–55, 160–63 (2008), for more history on the movement for population control; *see also* MATTHEW CONNELLY, FATAL MISCONCEPTION: THE STRUGGLE TO CONTROL WORLD POPULATION 7–16 (2000); DONALD CRITCHLOW, INTENDED CONSEQUENCES: BIRTH CONTROL, ABORTION, AND THE FEDERAL GOVERNMENT IN MODERN AMERICA 4–16, 21–40 (1999).

form family planning laws.[39] Partly because of the influence of eugenics supporters, some activists argued that population growth naturally involved a decline in the "quality" of the population, since the poor and "unfit" — the very groups that most contributed to increasing crime rates — tended to have more children.[40] According to some population controllers, expanding the use of legal contraception would decrease population growth and perhaps reduce crime and welfare expenses.[41] As a preliminary draft of the Population Council Charter explained, such initiatives could also reverse "a downward trend in the genetic quality of the population."[42] As Vogt put it, unplanned pregnancies tended to plague those suffering from "deficiencies" — persons who could never be good parents.[43]

C. Family Planners and Abortion-Rights Supporters Make a Claim for Children's Rights

In the 1940s and 1950s, leaders of organizations like Planned Parenthood played up the social harms produced by unwanted children, including growing welfare rolls, crime rates, and an out-of-control pace of population growth. By the 1960s, as feminists and environmentalists exerted greater influence over the family planning movement, activists translated concerns about the unwanted child into constitutional arguments. Instead of presenting unwanted children as a social problem, the leaders of groups like Planned Parenthood and the National Association for the Repeal of Abortion Laws (NARAL, later the National Abortion Rights League) began characterizing legal contraception (and later abortion) as a right owed to children themselves.[44]

These new children's rights arguments debuted in *Poe v. Ullman*, a constitutional challenge to Connecticut's contraception ban.[45] The disputed statute prevented married persons from using contraception.[46] As David Garrow has shown, Fowler Harper's brief revived the Due Process Clause as a source of substantive rights.[47] According to the brief, a law would violate the Due

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[39] For the diversity of the population-control movement, see Ziegler, *supra* note 28, at 7–12.

[40] On the connection between eugenics and population control, see, e.g., ALEXANDRA STERN, EUGENIC NATION: FAULTS AND FRONTIERS OF BETTER BREEDING IN AMERICA 153–55 (2005); IAN ROBERT DOWBIGGIN, THE STERILIZATION MOVEMENT AND GLOBAL FERTILITY IN THE TWENTIETH CENTURY 113 (2008).

[41] CRITCHLOW, *supra* note 38, at 5.

[42] John D. Rockefeller III, *On The Origins of the Population Council*, 3 POPULATION & DEV. REV. 496, 496 (1977).

[43] Vogt, *supra* note 33.

[44] *See infra* Part ID.

[45] *See generally* Poe v. Ullman, 367 U.S. 497 (1961).

[46] *See id.* at 500.

[47] *See* DAVID GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF *ROE V. WADE* 151–89 (1994).

Process Clause if it was "arbitrary, capricious or discriminatory."[48] In making such a judgment, the court would "weigh . . . the supposed evils against which the law [was] directed, against the hardship on the individual and any adverse social effects which [might] be expected."[49]

Harper's brief argued that the challenged contraceptive ban actually undermined its stated end rather than serving it.[50] The brief focused on a mismatch between the means and ends of the Connecticut law.[51] By outlawing contraceptives for married couples, Connecticut sought to preserve traditional family structures. But according to the brief, the Connecticut law shattered the family and damaged the psyche of both members of a married couple and any unwanted child they had after being denied contraceptive access.[52] Since "sex life is essential for a satisfactory marital union," contraceptive bans contributed to a rise in marital breakdown and divorce.[53] By contributing to the births of unwanted children, the law created social harms that far outweighed any of its benefits, thereby offending the balancing aspect of the Due Process Clause.

After the *Poe* majority held that the Court lacked Article III jurisdiction to resolve the appeal,[54] in *Griswold v. Connecticut*, attorney Catherine Roraback and Yale law professor Thomas Emerson again highlighted arguments about the unwanted child in mounting a second attack on the Connecticut law.[55] Doctrinally, Emerson and Roraback's brief became known for its articulation of the privacy right implicated by contraception bans.[56] The brief also addressed the proper level of scrutiny applicable to this new right, asking whether the law was "arbitrary and capricious" and "reasonably related to a proper legislative purpose."[57] According to the *Griswold* brief, the harms experienced by parents and children as the result of an unwanted pregnancy severed any relationship between the means and ends of the Connecticut law.[58]

In *Griswold*, rather than addressing the issue of unwanted children, the Court adopted a different constitutional analysis, the notorious "penumbral" theory — the Bill of Rights contained penumbras and therefore implied the

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[48] Brief for Appellants at *10–11, Poe v. Ullman, 367 U.S. 497 (1961), 1960 WL 98679.
[49] *Id.* at *19.
[50] *See id.*
[51] *See id.*
[52] *See id.* at *31–35.
[53] *Id.* at *32.
[54] Poe v. Ullman, 367 U.S. 497, 505–09 (1961).
[55] *See* Brief for Appellants at 65–66, Griswold v. Connecticut, 381 U.S. 479 (1965) (No. 496).
[56] *See* Steve Sanders, *The Constitutional Right to (Keep Your) Same-Sex Marriage*, 110 MICH. L. REV. 1421, 1428 (2012); Christopher Leslie, Lawrence v. Texas *as the Perfect Storm*, 38 U.C. DAVIS L. REV. 509, 518 (2008).
[57] Brief for Appellants, *supra* note 55, at 21.
[58] *See id.* at 65–66.

existence of other unstated rights.[59] While *Griswold* did not rely on family planners' arguments about the tailoring of a law,[60] movement members did not abandon them. In *Eisenstadt v. Baird*, Human Rights for Women, a feminist group, stressed the mismatch between the law's goal and the means used to accomplish it.[61] As the group explained, the law served "no valid public purpose at all," partly because "the statute creates unwanted children, who not only suffer a large share of that insidious crime known as 'child-abuse,' but also a higher rate of juvenile delinquency, failure in school, drug addiction, and mental illness, than do wanted children."[62]

While arguments like the ones made by Human Rights for Women took shape in battles about contraception, the abortion wars prompted a fundamental reworking of constitutional arguments about unwanted children. As the anti-abortion movement developed arguments about the rights of the unborn, activists had more reason to present themselves as invested in the well-being of children.[63] Finally, pro-choice advocates gradually exercised greater influence over a divided abortion-rights movement, moving it away from earlier rhetoric involving population control.[64]

In response to these new developments, the leaders of groups like NARAL and the National Organization for Women (NOW) explained what the law owed to children, borrowing from an evolving language of human rights.[65] In particular, drawing on the idea of social, cultural, and economic rights, advocates connected abortion access for women to children's interest in quality of life after birth.[66] In this context, quality of life did not have the eugenic implications associated with pro-abortion arguments based on population control. Instead, activists tried to put the right to life in context, spot-

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[59] *See* Griswold v. Connecticut, 381 U.S. 479, 483–84 (1965). Justice Douglas reasoned that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." *Id.* at 484. For more on the theory and scholarly responses to it, see, e.g., Ryan C. Williams, *The Path to* Griswold, 89 NOTRE DAME L. REV. 2155, 2177–83 (2014).

[60] *See Griswold,* 381 U.S. at 483–84.

[61] *See* Brief for Human Rights for Women as Amicus Curiae at 8–9, Eisenstadt v. Baird, 405 U.S. 438 (No. 70-17).

[62] *Id.*

[63] For more on the rise of the pro-life movement in the period, see ZIAD MUNSON, THE MAKING OF PRO-LIFE ACTIVISTS: HOW SOCIAL MOBILIZATION WORKS 82 (2012) and Keith Cassidy, *The Right to Life Movement: Sources, Origins, Development*, *in* THE POLITICS OF ABORTION AND BIRTH CONTROL IN HISTORICAL PERSPECTIVE 128–59 (Donald Critchlow ed., 1995).

[64] *See* Mary Ziegler, *The Framing of a Right to Choose:* Roe v. Wade *and the Changing Debate on Abortion Law*, 27 L. & HIST. REV. 281, 304–05 (2009).

[65] *See* Marya Mannes, *Whose Right to What Life?*, N.Y. TIMES, Nov. 22, 1972, at 35; *Statement of Wilma Scott Heide, "Maude: To See or Not to See?"*, *in* The NARAL Papers (Aug. 1973) (on file at Carton 1, Schlesinger Library, Harvard University).

[66] See sources cited *supra* note 65 for more on the rise of reasoning on social, economic, and cultural rights in the 1960s and 1970s; SAKIKO FUKUDA-PARR ET AL., FULFILLING SOCIAL AND ECONOMIC RIGHTS 229 (2015); Cass Sunstein, *Why Does the American Constitution Lack Social and Economic Rights?*, *in* AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 109–110 (Michael Ignatieff ed., 2014).

lighting important interests in love, support, and socioeconomic security after birth.[67] Framed in this way, allowing women to control their fertility advanced children's right to be wanted and to enjoy the financial support and love more often available to intended children.

D. The Right to Be Wanted

In the years immediately before and after the Court's decision in *Roe v. Wade*, leaders of the abortion-rights movement devised a new conception of children's rights. Movement members continued to make arguments about the social ills that some associated with unwanted children — the high illegitimacy rates and the potential crime and welfare costs some linked to unintended pregnancy. At the same time, as the pro-life movement focused attention on the unborn child, and as the identity of the abortion-rights movement shifted, activists had more reason than ever to emphasize the rights of children.

While the antiabortion movement remained fragmented before 1973, pro-life activists dramatized the personhood of the unborn child, presenting slideshows on fetal life and acting as guardian ad litem for fetuses scheduled to be aborted.[68] Without always challenging the idea that women had an interest in bodily integrity or privacy, pro-lifers carved out what they saw as a more fundamental right to life belonging to the unborn child.[69] Strategically, abortion-rights activists had reason to present themselves as the true defenders of children's rights. Moreover, advocating for children's rights reflected many activists' genuine interest in the wellbeing of mothers and children after birth — an interest demonstrated by demands for state and federal support for healthcare, continuing education, family planning, and protection against sex discrimination.[70]

In the early 1970s, activists within both NARAL and NOW began arguing that compulsory pregnancy violated the rights of both women and children.[71] Instead of serving the stated goal of protecting children's lives at

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[67] *See* Statement of Betty Friedan, *supra* note 7, at 710; NOW Brochure, *supra* note 7, at 863.

[68] *See* Fred C. Shapiro, *"Right to Life" Has Message for New York State Legislators*, N.Y. Times, Aug. 20, 1972, at SM10; Robert Byrn, *Abortion: Old Right or New Ethic*, N.Y. Times, May 10, 1971, at 32.

[69] For examples of early articulations of the right to life, see *National Right to Life Committee Statement of Purpose* in The American Citizens Concerned for Life Papers (on file at Box 4, Gerald Ford Memorial Library, University of Michigan); *Americans United for Life, Declaration of Purpose* (n. d., c. 1971) (on file at the Executive File, Concordia Seminary, Lutheran Church-Missouri Synod, St. Louis, Missouri).

[70] On feminists' work on childcare and other programs for mothers in the period, see Deborah Dinner, *The Universal Child Care Debate: Rights Mobilization, Social Policy, and the Dynamics of Feminist Activism, 1966-1974*, 28 L. & Hist. Rev. 577, 577–90 (2010); Mary Ziegler, *The Bonds That Tie: The Politics of Motherhood and the Future of Abortion Rights*, 21 Texas J. Women & L. 47, 57–60 (2011).

[71] *See infra* notes 73–74.

every stage of development, existing laws burdened women significantly while doing very little to protect children before and after birth.[72] At an early NARAL convention, essayist Marya Mannes argued: "Only the repeal of all abortion laws will ensure the equally profound right of every child born to be wanted and loved."[73] After the Supreme Court decided *Roe*, NOW President Wilma Scott Heide argued in August 1973 that restrictive abortion laws violated "the right of the living woman to decide whether or not she wishes to become a parent and the right of every child to be wanted."[74] NOW fundraising materials similarly presented abortion rights as recognizing that "each child in this country has a right to be wanted."[75]

On some occasions, pro-choice advocates highlighted a mismatch between legislative means and ends to smoke out the impermissible purposes underlying a law theoretically designed to protect children. For example, Marion Treadwell Barry, an influential African-American feminist, used the idea of social and economic rights to castigate pro-life legislators: "While rejecting abortion, these very men refuse to fund quality, inexpensive pre- and post-natal care for women denied access to abortion. While rejecting legalized abortion, these very men refuse to fund quality education and training for the children of the women without access to abortion."[76]

At the state and federal level, NOW members further emphasized the disconnect between the means and ends of the supposedly child-protective laws. While testifying against a constitutional amendment banning abortion, Betty Friedan described unwanted children as its ultimate potential victims.[77] According to Friedan, safe and legal abortion ensured "the right of children to be born to loving parents."[78] Speaking on behalf of other abortion-rights activists, Friedan explained: "We consider the quality of human life to be a priority, the right of a child to be wanted."[79] The harms once spotlighted by population controllers became injuries against which lawmakers should protect children. As Friedan reasoned:

> [T]he unwanted children are going to be abused; these are the children who are likely to grow up criminally delinquent or violent themselves. So, [we protect abortion] in the interest of quality of human life and respect for human life, as well as on behalf of the fundamental right of women to choose.[80]

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[72] *See, e.g.*, *id.*

[73] Mannes, *supra* note 65, at 35.

[74] Statement of Wilma Scott Heide, *supra* note 65, at 1.

[75] NOW Fundraising Letter, *in* The NOW Papers (n. d., c. 1973) (on file at Box 24, Schlesinger Library, Harvard University).

[76] *Abortion Part IV: Testimony Before the Subcommittee on Constitutional Amendments of the Senate Judiciary Committee*, 94th Cong. 1st Sess. 684 (1975) (Statement of Marion Treadwell Barry).

[77] Statement of Betty Friedan, *supra* note 7, at 710.

[78] *Id*.

[79] *Id.*

[80] *Id.*

State chapters of NOW elaborated on this idea of children's rights. Unwanted children almost necessarily lost out on crucial rights, for "the child that is born against the will of his mother because an abortion was not available, suffers the ultimate rejection, the ultimate insult — of not being wanted in the world."[81] NOW activists maintained that *Roe v. Wade*[82] and *Doe v. Bolton*[83] advanced important rights for children to quality of life. As NOW explained: "The US Supreme Court decisions, affirming a woman's right of choice in abortion, shall usher in an era, where every child will be loved, wanted, and cared for."[84]

By mid-decade, abortion-rights supporters sought to translate these arguments into constitutional law. This effort drew on the language from the Supreme Court's early decisions on minors' access to abortion. Starting in 1976, the Court did not apply *Roe*'s trimester framework in a straightforward way. Instead, the justices vowed to strike down only unduly burdensome regulations.[85] Movement leaders seized on this language as an entry point for rethinking constitutional abortion doctrine as a whole.

At first, abortion-rights activists looked to the unconstitutional conditions doctrine forged by the Supreme Court in the 1960s.[86] The unconstitutional conditions doctrine "holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether."[87] Movement attorneys initially argued that abortion-funding bans created just such a condition on women's right to choose.[88] Even early on, however, movement attorneys suggested that a unique undue-burden test applied to abortion doctrine.[89] Particularly as the Court made clear that it would uphold some first trimester restrictions, movement attorneys used undue-burden reasoning to explain that many regulations had the functional effect of eliminating abortion access.[90] Invoking an undue burden, abortion-rights supporters started urging the courts to examine the fit between the means and ends of a law.[91]

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[81] NOW Brochure, *supra* note 7, at 863.
[82] 410 U.S. 113 (1973).
[83] 410 U.S. 179 (1973).
[84] NOW Brochure, *supra* note 7, at 848.
[85] *See, e.g.*, Maher v. Roe, 432 U.S. 465, 473–74 (1977) (reasoning that abortion "right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy"); Bellotti v. Baird, 428 U.S. 132, 147 (1976) (holding that law involving abortion rights of minors "is not unconstitutional unless it unduly burdens the right to seek an abortion").
[86] *See* Brief of Appellees, *supra* note 9, at 14–15.
[87] Kathleen Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989).
[88] *See, e.g.*, Brief of Appellees, *supra* note 9, at 14–15.
[89] *See id.* at 20–22.
[90] *See id.*
[91] *See id.*

E. The Court Hints at the Existence of an Undue-Burden Test

1976 proved to be a watershed year for lawyers dedicated to protecting constitutional abortion rights. In *Planned Parenthood of Central Missouri v. Danforth*, the Court upheld several provisions of a Missouri law even though those measures applied early as well as late in a woman's pregnancy, including an informed consent regulation, a statutory definition of viability, and a recordkeeping requirement for all abortion clinics.[92] *Danforth* suggested that the Court would not simply focus on the state's interest or the phase of pregnancy, as *Roe* had suggested.[93]

In *Bellotti v. Baird*, a case evaluating a parental consultation law, the justices made explicit what *Danforth* had suggested: At least under certain circumstances, the Court looked to more than the trimester framework in analyzing abortion regulations and would apply the undue-burden test.[94] The Court evaluated a Massachusetts law requiring minors to receive the written consent of both parents before obtaining an abortion.[95] A three-judge district court had held the statute unconstitutional; finding that the lower court should have abstained pending construction of the statute by state courts, the justices vacated and remanded, certifying questions about the proper interpretation of the law to the Massachusetts Supreme Judicial Court.[96]

The Court used undue-burden rhetoric to frame the question to be answered by the state court: whether the law "create[d] a 'parental veto,' require[d] the superior court to act other than in the best interests of the minor, or impose[d] undue burdens upon a minor capable of giving an informed consent."[97] While the *Danforth* Court had previously struck down a parental consent law because it awarded a veto to the parents of a minor seeking abortion,[98] *Bellotti* seemed to suggest the existence of a broader test applicable to parental-consultation laws.[99] The Court did not decide "what factors are impermissible or at what point review of consent and good cause in the case of a minor becomes unduly burdensome."[100]

After *Bellotti*, the Court seemed likely to apply an undue-burden test, whatever it required, only to parental consultation laws.[101] This area of abor-

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[92] *See* Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 552, 563–65, 565–68, 581–82 (1976).

[93] *Compare id. with Roe v. Wade*, 410 U.S. 113, 160–65 (1973).

[94] *See, e.g.*, Maher v. Roe, 432 U.S. 465, 473 (1977); Bellotti v. Baird, 428 U.S. 132, 147 (1976).

[95] *See Bellotti*, 428 U.S. at 133–36.

[96] *See id.* at 133–34, 151.

[97] *Id.* at 147–48.

[98] *See* Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 552, 572–75 (1976).

[99] *See Bellotti*, 428 U.S. at 147–48.

[100] *Id.* at 148.

[101] For a sample of discussion of the undue-burden test from the period, see John A. Siciliano, *The Minor's Right of Privacy: Limitations of State Action After* Danforth *and* Carey, 77 COLUM. L. REV. 1216, 1230 (1977); Barbara Freeman Wand, *Parental Consent Abortion Statutes: The Limits of State Power*, 52 IND. L. J. 837, 849 (1976–1977).

tion doctrine was unique, involving questions of balancing the constitutional rights of parents against the less expansive constitutional rights of juveniles, in the context of abortion.[102] Nevertheless, supporters of abortion rights looking at the undue-burden test saw the possibility of something more. Given that the Court had already upheld certain restrictions applicable in the first trimester, pro-choice attorneys hoped to ground doctrinal analysis in something more compelling than *Roe*'s trimester framework. If properly understood, the undue-burden test offered just such an opportunity.

F. Abortion-Rights Supporters Create Their Own Undue-Burden Test

In the mid-1970s, when a number of states and cities introduced laws banning the use of public money or public facilities for abortion, abortion-rights attorneys saw broader potential in the idea of an undue-burden test.[103] In 1976, Congress moved to ban the use of Medicaid funding for elective abortions.[104] NOW joined other pro-choice organizations like the American Civil Liberties Union (ACLU) in arguing that the Medicaid ban would "hit poor women first and hardest."[105]

Joined by Lucy Katz, Catherine Roraback of Planned Parenthood used an undue-burden argument to challenge the constitutionality of a Connecticut Welfare Department regulation limiting the use of Medicaid funding for elective, first-trimester abortions.[106] Roraback, Katz, and their colleagues challenged the law in 1974, at first primarily arguing that it was preempted by the federal Social Security Act.[107] After the Second Circuit reversed, holding that the Social Security Act was neutral on abortion funding, the district court struck down the Connecticut regulation on constitutional grounds, and the state successfully sought review by the Supreme Court.[108]

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[102] *See* Bellotti v. Baird, 443 U.S. 622, 638 (1979) ("[T]he guiding role of parents in the upbringing of their children justifies limitations on the freedoms of minors"); Ginsburg v. New York, 390 U.S. 629, 638 (1968) ("[E]ven where there is an invasion of protected freedoms 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults' ") (quoting Prince v. Massachusetts, 321 U.S. 158, 170 (1944)).

[103] For more on the push for Medicaid funding bans in the 1970s, see THOMAS BORSTELMANN, THE 1970S: A NEW GLOBAL HISTORY FROM CIVIL RIGHTS TO ECONOMIC INEQUALITY 158 (2012); Suzanne Staggenborg, *The Survival of the Pro-Choice Movement*, *in* THE POLITICS OF ABORTION AND BIRTH CONTROL IN HISTORICAL PERSPECTIVE 163–65 (Donald Critchlow ed., 1995); MARY ZIEGLER, AFTER *ROE*: THE LOST HISTORY OF THE ABORTION DEBATE 121–44 (2015).

[104] *See Curb on Medicaid Defended*, N.Y. TIMES, Feb. 15, 1977, at 49; Joyce Maynard, *Health Aides and Abortion Rights Groups Assail Proposed Medicaid Control*, N.Y. TIMES, Sep. 18, 1976, at 9; Max H. Siegel, *US Court Bars Curb on Funds For Abortions Defended*, N.Y. TIMES, Oct. 2, 1976, at 1.

[105] NOW, Legislative Alert on the Right to Choose, *in* The NOW Papers (Aug. 1974) (on file at Box 54, Folder 27, Schlesinger Library, Harvard University).

[106] *See* Roe v. Norton, 380 F. Supp. 726, 728 (D. Conn. 1974).

[107] *See id.*

[108] For the Second Circuit's decision, see *Roe v. Norton*, 522 F.2d 928 (2d Cir. 1975); for the District Court decision striking down the Connecticut regulation, see *Roe v. Norton*, 408 F. Supp. 660, 663–64 (D. Conn. 1975).

Well known for her work on *Griswold*,[109] Roraback worked with Katz and argued in their brief to the Court that the case "was about the state's ability to use a public benefit program to penalize the exercise of a fundamental right."[110] *Maher* came less than a decade after a series of decisions on the right to travel suggesting, as Roraback and Katz put it, that "the withholding of public benefits can constitute an unwarranted interference with Constitutional rights is now beyond debate."[111] The brief pointed to a pair of cases, *Shapiro v. Thompson*, an opinion striking down a one-year residency requirement for state welfare recipients, and *Memorial Hospital v. Maricopa County*, which struck down a one-year residency requirement for those seeking publicly funded non-emergency medical care.[112] In Roraback and Katz's view, *Shapiro* and *Maricopa County* showed that a "challenged regulation need not necessarily prevent the exercise of a Constitutional right; [t]he law prohibits as well a penalty imposed upon persons who assert the right in question."[113] Roraback and Katz also turned to free exercise jurisprudence for guidance.[114] In particular, the brief referred to *Sherbert v. Verner*, a 1963 case where the Court had held that South Carolina could not withhold unemployment benefits from a Seventh Day Adventist unable to find work because her religion treated Saturday as the Sabbath.[115] Roraback identified a similar burden at work in *Maher*: just as the religious believer in *Sherbert* had to choose between gainful employment and her religious beliefs, women in *Maher* had to pick either the exercise of their rights or access to welfare benefits.[116]

However, the brief did more than rely on rarely used unconstitutional conditions doctrine. Indeed, Roraback and Katz argued that the Court had already created an abortion-specific undue-burden test in *Belloti* and *Danforth*.[117] The brief explained that in abortion cases, the Court had struck down laws that "unduly burden[ ] the right to seek an abortion."[118] To identify such an undue burden, the Court had to look beyond the plain text of a law to discern "the actual impact on the abortion decision."[119] For example, the Court had struck down parental and spousal consent laws that did not formally prohibit the procedure because they would effectively bar some

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[109] *See* MARC STEIN, SEXUAL INJUSTICE: SUPREME COURT DECISIONS FROM *GRISWOLD* TO *ROE* 99–100 (2010) (mentioning Roraback's involvement in *Griswold*); GARROW, *supra* note 47, at 166–72; LEIGH ANN WHEELER, HOW SEX BECAME A CIVIL LIBERTY v-xlv (2013).

[110] Brief of Appellees, *supra* note 9, at 14.

[111] *Id.* at 13–14.

[112] *See id* at 13. For the cases Roraback and Katz mentioned, see *Shapiro v. Thompson*, 394 U.S. 618 (1969) and *Mem'l Hosp. v. Maricopa Cty.*, 415 U.S. 250 (1954).

[113] Brief of Appellees, *supra* note 9, at 13–14.

[114] *See id.* at 14–15.

[115] *See id.* (citing Sherbert v. Verner, 374 U.S. 398, 404 (1963)).

[116] *See* Brief of Appellees, *supra* note 9, at 14–15.

[117] *See id.* at 20–21.

[118] *Id.* at 21 (quoting Belloti v. Baird, 428 U.S. 132, 147 (1976)).

[119] *Id.* at 20.

women from seeking abortions.[120] Similarly, in *Danforth*, the Court had struck down a ban on saline abortions because the measure would have "the effect of inhibiting the vast majority of abortions after the first 12 weeks."[121] An undue burden arose whenever a law effectively eliminated most women's access to abortion. If a law created such an undue burden, Roraback argued that a statute was constitutional only if it served a compelling state interest.[122]

To be sure, as Part II argues, feminists and pro-choice activists came to view the idea of a freestanding undue-burden test with wariness. Any hint that the undue-burden test could replace strict scrutiny review seemed dangerous to those already worried that the Court had retreated from its protection of abortion rights. Indeed, over time, pro-choice attorneys concluded that anything less than strict scrutiny was tantamount to the complete overruling of *Roe v. Wade*.[123] In the 1970s, however, movement lawyers using the idea of an undue burden pointed out the real-world impact of an abortion regulation that stopped short of a formal ban.

Maher's use of the undue-burden test disappointed pro-choice attorneys. While adopting undue-burden rhetoric, the *Maher* Court disagreed with Roraback and Katz about its application. "[W]e have held that a requirement for a lawful abortion is not unconstitutional unless it unduly burdens the right to seek an abortion," wrote Justice Powell for the majority.[124] In Powell's view, the undue-burden test resembled a more conventional form of intermediate scrutiny, focused on the "degree [of interference imposed by the law] and the justification for it."[125] The Court held that the Connecticut law did not create any obstacles for women seeking abortions. Instead, "[t]he indigency that may make it difficult — and in some cases, perhaps, impossible — for some women to have abortions is neither created nor in any way affected by the Connecticut regulation."[126]

Maher unquestionably represented a setback for the abortion-rights movement. Nevertheless, because other funding restrictions differed in language and scope, pro-choice lawyers did not entirely abandon the unconstitutional conditions approach Roraback and Katz had used. For example, in *Doe v. Kenley*, Roy Lucas, one of the attorneys behind the litigation of *Roe v. Wade*,[127] challenged a Virginia Medicaid policy banning reimbursement

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[120] *See id.* at 20–21.

[121] *Id.* at 20 (quoting Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 79 (1976)) (alterations in original).

[122] *See id.* at 21.

[123] These arguments became the most prominent during the litigation of *Casey*. *See, e.g.*, JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 48–49, 55–56 (2008).

[124] Maher v. Roe, 432 U.S. 464, 473 (1976) (internal quotations omitted).

[125] *Id.* at 473 (quoting Bellotti v. Baird, 428 U.S. 132, 149–50 (1976)).

[126] *Id.* at 474.

[127] On Lucas's role in *Roe*, see CYNTHIA GORNEY, ARTICLES OF FAITH: A FRONTLINE HISTORY OF THE ABORTION WARS 152–55 (2000).

for abortions except in cases in which a woman's life was at risk.[128] Because Virginia's policy would harm the health of Medicaid recipients denied abortions, Lucas distinguished it from the law upheld in *Maher*, arguing that the burden imposed on women was far heavier than in cases involving elective abortions.[129] As in *Maricopa County*, Lucas argued that *Kenley* involved a particularly heavy burden on women's health unjustified by any compelling interest.[130]

However, when movement lawyers challenged federal Medicaid bans, a different, more abortion-specific understanding of the undue-burden test began to emerge. This shift started when the Supreme Court considered the constitutionality of two funding bans, the federal Hyde Amendment and an Illinois law; both challenged laws banned Medicaid funding for all abortions unless a woman's life was at risk, including those procedures that a physician deemed to be medically necessary.[131] In *Williams v. Zbaraz*, the Illinois case, Planned Parenthood Federation of America repeated Lucas's argument in *Kenley*, applying unconstitutional conditions logic in a different way: while the law in *Maher* might have forced women to choose between an elective abortion and Medicaid benefits, *Kenley* required women to either lose their benefits or sacrifice their health.[132] While *Maher* had involved a choice between forgoing state benefits and exercising abortion rights, Planned Parenthood insisted that *Williams* concerned a far more suspect burden — "the substantial deleterious effects on . . . health" experienced by women denied medically necessary abortions.[133]

In *Harris*, the challenge to the Hyde Amendment, the ACLU Reproductive Freedom Project (RFP) tried to move away from unconstitutional conditions reasoning.[134] Instead, the RFP described an undue-burden test that resembled some form of conventional heightened scrutiny: courts evaluating abortion restrictions had to consider the degree of interference with the abortion right and the strength of the justification for that interference.[135] Even if the government had a legitimate state interest, lawmakers could not advance that interest in "ways which unduly burden the freedom of the woman and her physician to protect her health."[136]

Applying this test, the RFP easily distinguished the Hyde Amendment from the law upheld in *Maher*.[137] By defunding medically necessary abor-

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[128] *See* Doe v. Kenley, 584 F.2d 1362, 1363–65 (4th Cir. 1978).

[129] *See* Brief for Appellants at 52–55, Doe v. Kenley, 584 F.2d 1362 (4th Cir. 1978) (No. 78-1330).

[130] *See id.*

[131] For the Court's decision on the Hyde Amendment suit, see *Harris v. McRae*, 448 U.S. 297 (1980). For the Illinois challenge, see *Williams v. Zbaraz*, 448 U.S. 358 (1980).

[132] *See* Brief of Amici Curiae Planned Parenthood Federation of America, et al. at 35–39, Williams v. Zbaraz, 448 U.S. 358 (1980) (No. 79-4); *see also Kenley*, 584 F.2d at 1363–65.

[133] *Id.* at 38.

[134] *See* Brief of Appellees, *supra* note 10, at 118–21.

[135] *See id.* at 116–21.

[136] *Id.* at 118.

[137] *See id.* at 121–23.

tions, the Hyde Amendment burdened women to a significant degree, forcing them to carry some health-threatening pregnancies to term, consuming poor women's already limited resources, or requiring them to seek illegal abortions.[138] According to the RFP, the Hyde Amendment did not set out any reasonable justification for its sweeping ban and therefore failed the undue-burden test.[139]

While concluding that the Hyde Amendment was constitutional, the Court's *Harris* decision reconfirmed the importance of some version of the undue-burden test.[140] Reiterating that the Constitution "protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy," the Court emphasized the source, rather than impact, of a burden on women's decisions.[141] Although women's interest in receiving needed medical care was important, the obstacle they faced resulted from poverty, not from the Hyde Amendment itself.[142] As the *Harris* Court reasoned: "The financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency."[143]

Pro-choice strategy in *Harris* evolved as the result of a decade-long experiment with undue-burden reasoning. In the political arena, family planners and abortion-rights supporters had first highlighted the mismatch between the means and ends of abortion laws in discussing the right of children to be wanted. These activists argued that sweeping abortion bans denied women autonomy while doing nothing to help children after birth.

As the abortion battle returned to the courts, movement lawyers brought up the fit between the means and ends of a law in the context of the unconstitutional conditions doctrine. At first, pro-choice lawyers argued that the Constitution prohibited any state from forcing women to choose between exercising a fundamental right and receiving otherwise available health benefits.[144] Later, movement attorneys defined a potential threat to women denied medically necessary abortions as an impermissible burden.[145]

Gradually, however, movement lawyers created an abortion-specific idea of an undue burden. This approach focused on the relationship between the purpose of a law and the means used to achieve it.[146] The more restrictive the law, as these attorneys argued, the more narrowly a law should be tailored to accomplish its end. Moreover, in evaluating the burden produced

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[138] *See id.*
[139] *See id.* at 128–36.
[140] *See* Harris v. McRae, 448 U.S. 247, 314–17 (1980).
[141] *Id.* at 314 (quoting Maher v. Roe, 432 U.S. 464, 473–4 (1976)).
[142] *See id.* at 314–17.
[143] *Id.* at 316.
[144] *See, e.g.*, Brief of Appellees, *supra* note 10, at 135.
[145] *See, e.g.*, Brief for Appellants, *supra* note 129, at 52–55; Brief of Planned Parenthood, *supra* note 132, at 35–39.
[146] *See, e.g.*, Brief of Appellees, *supra* note 10, at 118–21.

by a law, pro-choice lawyers urged courts to examine the practical impact of a law, not just its formal terms.[147] As Part II shows, as pro-life groups made their own arguments about the undue-burden test, pro-choice attorneys often came to see the standard as an inferior alternative to strict scrutiny — a Trojan horse that would allow the Court to overrule *Roe* without saying so.

II. The Undue-Burden Test and Pro-Life Incrementalism

For pro-life advocates the undue-burden test came to make sense as part of a new overarching strategy called incrementalism.[148] For much of the 1970s, leaders of the movement prioritized a fetal-protective constitutional amendment that would ban abortion coast-to-coast.[149] But by mid-decade, the leaders of Americans United for Life (AUL), an Illinois pro-life group, advocated for a different approach, one centered on a litigation strategy to reverse *Roe v. Wade*.[150] In the late 1970s, Patrick Trueman, a leading member of the organization, explained on behalf of his colleagues: "The need for a full-time public interest law firm for the right to life movement has become very apparent to all involved in our cause."[151]

In the late 1970s, AUL attorneys developed a close and sometimes competitive relationship with attorneys at the National Right to Life Committee (NRLC), then the nation's largest antiabortion organization.[152] Both groups saw litigation as the start of a new tactical approach intended not to establish far-reaching fetal rights but a campaign to "chip away [at] and erode" the *Roe* decision.[153]

This Part unearths the creation of a new version of the undue-burden test by pro-life incrementalist attorneys between 1975 and 1992. First, the Part studies the parallel development of targeted regulation of abortion provider laws (TRAP laws) and pro-life understandings of the undue-burden test. Although not formally connected at first, these two legal strategies drew on similar ideas about what ought to matter to abortion jurispru-

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[147] *See, e.g.*, *id.* at 121–23.

[148] On the rise and influence of pro-life incrementalism, see, e.g., Ziegler, *supra* note 103, at 58–91; Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under* Casey/Carhart, 117 Yale L.J. 1694, 1707–12 (2008); David J. Garrow, *Significant Risks:* Gonzales v. Carhart *and the Future of Abortion Law*, 2007 Sup. Ct. Rev. 1, 34–42 (2007).

[149] *See, e.g.*, Ziegler, *supra* note 103, at 15, 59, 70; Daniel K. Williams, Defenders of the Unborn: The Pro-Life Movement Before *Roe v. Wade* 4–8, 197–200 (2015) (describing constitutional arguments); Munson, *supra* note 63, at 87–88, 103–05.

[150] *See, e.g.*, Ziegler, *supra* note 103, at 62–68.

[151] *Id.* at 66.

[152] On the influence of the NRLC, see, e.g., *id.* at 43–47; Williams, *supra* note 149, at 264–65; Carol Maxwell, Pro-Life Activists in America: Meaning, Motivation, and Direct Action 48–49 (2002).

[153] Ziegler, *supra* note 103, at 68 (quoting interview by Mary Ziegler with John Gorby, August 22, 2011).

dence.[154] In either case, attorneys defended laws that formally allowed access to abortion but had functional impacts similar to the impacts of the legal bans clearly prohibited under *Roe*.[155]

Next, this Part examines incrementalists' increasing emphasis on an undue-burden test in the 1980s, as attorneys jockeyed to shape the Court's understanding of a new approach to abortion regulations. As the Part shows, abortion opponents came to monopolize the undue-burden idea, convincing most pro-choice leaders that it was the same thing as a formal rejection of *Roe*. Finally, after closely analyzing *Casey*'s definition of an undue burden, this Part explores how incrementalists capitalized on the 1992 decision. Taking TRAP laws as a crucial case study, the Article shows that pro-life approaches to the undue-burden test were intended to eliminate any tailoring requirement for abortion regulations.

A. Incrementalists Develop a Different Undue-Burden Test

For much of the 1970s, incrementalists gained ground by promoting laws that had the practical impact of outlawing abortion while theoretically leaving the abortion right untouched. TRAP laws served this agenda by imposing regulations so onerous and expensive that many clinics would have to close.[156] So too did funding bans defended by pro-life activists in the Court, putting abortion financially out of reach for many Medicaid recipients.[157] In the 1970s, a pro-life version of the undue-burden test served as a particularly important vehicle for this tactic.

From the beginning, incrementalists proposed laws intended to close clinics. In 1978, for example, AUL defended an Illinois model law that required all second-trimester abortions to be performed in a hospital.[158] As more hospitals refused to perform abortions because of the stigma surrounding the procedure and the influence of Catholic hospitals, such laws promised to prevent women from accessing the procedure after the first trimester.[159]

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[154] *See, e.g.*, Brief of Intervening Defendants-Appellees at 66, Williams v. Zbaraz, 448 U.S. 358 (1980) (No. 79-4); Brief Amicus Curiae of the National Right to Life Committee at 6, Williams v. Zbaraz, 448 U.S. 358 (1980) (No. 79-4).

[155] *See infra* Part IIB. and text accompanying.

[156] On the movement's promotion of TRAP laws in the period, see, e.g., Americans United for Life, LEX VITAE, at 2, *in* THE WILCOX COLLECTION (Jun. 29, 1978) (on file at Lex Vitae Folder, University of Kansas).

[157] On the importance of Medicaid bans to movement incrementalists, see, e.g., ZIEGLER, *supra* note 103, at 75–76.

[158] *See* Americans United for Life, LEX VITAE, at 1, *in* THE WILCOX COLLECTION (May 8, 1978) (on file at Lex Vitae Folder, University of Kansas).

[159] On the reasons that such laws forced clinics to close, see Sandhya Somashekhar, *Admitting-Privilege Laws Have Created High Hurdle for Abortion Providers to Clear*, WASH. POST (Aug. 10, 2014), https://www.washingtonpost.com/national/2014/08/10/62554324-1d88-11e4-82f9-2cd6fa8da5c4_story.html, *archived at* https://perma.cc/Z26E-Z2RY.

Other laws regulated clinics more directly. For example, in 1977, in Cocoa Beach, Florida, James Bopp of the NRLC represented a city council that had passed a law requiring the only abortion clinic in town to comply with state regulations governing ambulatory surgical centers.[160] Pro-lifers contended that these regulations advanced the state's interest in protecting women's health — a governmental purpose explicitly recognized by the *Roe* decision.[161] Although the courts often struck down these laws, emphasizing that they singled out abortion clinics, incrementalists refused to give up on a court-centered strategy. "We must not . . . consider ignoring the courts in our effort to seek protection for the unborn," AUL explained in 1978.[162] "To do so would disenfranchise the pro-life voter because all significant legislation is, and will continue to be, challenged by our opponents in the courts."[163]

The incrementalist attorneys behind TRAP laws immediately saw value in some kind of undue-burden test, particularly in defending funding bans. Throughout the 1970s, when the Court had adopted undue-burden rhetoric, its meaning was inherently ambiguous. Pro-choice attorneys saw the potential recognition of circumstances under which heightened — and even strict — scrutiny should apply to regulations that did not directly interdict abortion. Incremetalists, by contrast, saw undue-burden rhetoric as a signal that the Court would uphold a meaningful number of abortion restrictions.

AUL and NRLC sought to exploit the ambiguity of the undue-burden language in *Williams* and *Harris*. This strategy relied on the same logic underlying TRAP laws: the burden created by a law resulted not from the statute itself but rather from economic and political circumstances over which the government had no control. "Regardless of the nature of the woman's interest at stake, there exists no state action which impinges upon the woman's rights in this context," AUL argued in *Williams*.[164] AUL argued that the problem arose not because of the government but because of factors beyond its control, particularly "the refusal of the physician to render a particular treatment."[165]

The NRLC explicitly contended that the undue-burden test — a far less protective approach — had replaced *Roe*'s trimester framework.[166] "Where the obstacle does not impact upon the woman's freedom to make a constitu-

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[160] *See, e.g.*, Americans United for Life, *supra* note 156, at 2.

[161] For examples of this argument, see *Friendship Medical Ctr., Ltd. v. Chi. Bd. of Health*, 505 F.2d 1141, 1151–52 (7th Cir. 1974); *Women's Medical Ctr. Of Providence v. Cannon*, 463 F.2d 531, 536–38 (D. R.I. 1978); *Village of Oak Lawn v. Markowitz*, 427 N.E.2d 36, 41–44 (Ill. 1981).

[162] AUL Perspective, LEX VITAE, at 5, *in* THE WILCOX COLLECTION (Feb. 1, 1979) (on file at Lex Vitae Folder, University of Kansas).

[163] *Id.*

[164] Brief of Intervening Defendants-Appellees, *supra* note 154, at 66.

[165] *Id.*

[166] *See* Brief Amicus Curiae of the National Right to Life Committee, *supra* note 154, at 6.

tionally protected decision, or if they merely make the physician's work more laborious or less independent without any impact on the patient," NRLC asserted in *Williams*, "the regulations are evaluated under relaxed standards of scrutiny and the state is afforded broader power to encourage actions thought to be in the public interest."[167]

The Court's decision in *Harris* intensified incrementalists' interest in the undue-burden test. In 1981, AUL attorneys contended that *Harris* and *Williams* had fundamentally changed the constitutional law governing abortion, clarifying "that the right to be free of undue governmentally imposed obstacles to abortion does not mean the right to require the government to obviate obstacles not of its own creation."[168] After *Harris* and *Williams*, AUL attorneys also concluded that the Court had backed away from protecting abortion providers. As the group explained: "physicians have no abortion-related rights which are independent of the women they abort."[169] As pro-life activists put greater focus on targeting clinics, the movement would use its idea of an undue-burden test to strip service providers of the remaining constitutional protections.

B. The Court Considers Multiple Approaches to the Undue-Burden Test

The future of both the undue-burden test and TRAP laws took center stage in *City of Akron v. Akron Reproductive Health Services* (*Akron I*), a 1983 case involving an ordinance that required, among other things, that all abortions after the first trimester be performed in a hospital.[170] In defending this provision, the AUL developed an elaborate argument about the application of the undue-burden test:

> In evaluating the constitutionality of abortion-related legislation, a court should first ask whether a statutory provision impacts on the freedom of choice to abort or bear a child. . . . Laws which do not create obstacles in the way of an abortion do not impact on the liberty, whether they are laws which may influence a woman to carry her child to term, laws which impact on physicians who provide abortions, laws which assure the medical consultation without which the liberty does not exist, or laws protective of the fetus or of other state interests. Therefore, such laws are constitutional. The court's second inquiry should be whether statutory provisions that do impact on the *Roe* liberty do so in a manner that benefits or burdens its exercise. To the extent that a provision enhances the

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[167] *Id.*

[168] AUL Perspective at 5, LEX VITAE, *in* THE WILCOX COLLECTION (Mar. 9, 1981) (on file at Lex Vitae Folder, University of Kansas).

[169] *Id.*

[170] *See* City of Akron v. Akron Ctr. For Reproductive Health, 462 U.S. 416, 421–23 (1983).

> exercise of the liberty, it should not be subject to strict scrutiny . . . This conclusion . . . suggests that laws in areas such as informed consent, pathological reporting, and hospitalization and waiting period requirements may be subject only to rational basis review since the impact of such provisions on the *Roe* liberty may be primarily to benefit its exercise. The Court's third inquiry should be whether any burden that does exist is substantial or insubstantial.[171]

The AUL brief suggested that the Court should defer to the legislature's understanding of whether a law benefitted or burdened the abortion right, as well as whether a law was substantially burdensome.[172] Obviously, the clinics challenging the hospital requirement believed that it burdened their patients' right to choose abortion. Nevertheless, the AUL suggested that the Court should not closely scrutinize the tailoring of laws claimed to benefit women. If designed to serve an important state interest, such laws should survive without a hard look at the fit between the ends of a law and the means used to achieve it.[173]

In an amicus curiae brief on behalf of the United States, Solicitor General Rex Lee similarly insisted that the Court had already adopted an undue-burden test that required considerable deference to state legislators.[174] "Whether or not a particular legislative enactment unduly burdens the abortion choice depends upon the resolution of competing public policy issues upon which reasonable people readily disagree," the brief asserted.[175] "Because the legislature has superior fact-finding capabilities, is directly responsible to the public for its resolution of the policy issues it treats, and has greater flexibility than the courts to fine-tune and redirect its efforts if a particular solution is ill-founded or unwise, the courts should test the constitutionality of legislation impacting upon the abortion choice by an appropriately deferential standard."[176]

Although the *Akron I* Court rejected this argument, both pro-choice and pro-life attorneys understood that the meaning of the undue-burden test was increasingly contested. In a majority opinion by Justice Powell, the Court struck down much of the Akron ordinance.[177] In referring to the hospital requirement, the majority emphasized that it "imposed a heavy, and unnecessary, burden on women's access to a relatively inexpensive, otherwise accessible, and safe abortion procedure."[178] Joined by two other justices in a

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[171] Brief for Americans United for Life at 2, City of Akron v. Akron Ctr. for Reproductive Health, 462 U.S. 416 (1983) (No. 81-746).

[172] *See id.* at 2–4.

[173] *See id.*

[174] *See* Brief for the United States as Amicus Curiae at 5–6, City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983) (No. 81-746).

[175] *Id.*

[176] *Id.*

[177] *See* City of Akron v. Akron Ctr. For Reproductive Health, 462 U.S. 416, 427–45 (1983).

[178] *Id.* at 438.

dissenting opinion, Justice Sandra Day O'Connor clearly defined the undue-burden test in a way that reflected the influence of the pro-life strategy.[179] "In my view, [the] 'unduly burdensome' standard should be applied to the challenged regulations throughout the entire pregnancy without reference to the particular 'stage' of pregnancy involved," O'Connor wrote.[180] Applying that standard, she reasoned that the entire Akron ordinance was constitutional, including the second trimester hospital requirement.[181] Restrictions created an undue burden only "in situations involving absolute obstacles or severe limitations on the abortion decision," not wherever a state regulation only "'inhibit[ed]' abortions to some degree."[182]

Following *Akron I*, pro-choice activists and pro-lifers agreed that the meaning of the undue-burden test had taken on unprecedented importance. Recognizing that the Court had defined an undue burden in conflicting ways, AUL attorneys argued that the constitutionality of clinic- and hospital-based regulations was unclear.[183] Janet Benshoof of the RFP also recognized that members of the Court defined an undue burden in conflicting ways. The *Akron I* majority seemed convinced that "a state may enact some regulations 'touching' on a woman's right in the first trimester so long as such regulations have 'no significant impact' and so long as they are justified by important state health objectives."[184] By contrast, O'Connor would "find[ ] that the State has compelling interests . . . throughout pregnancy, and would require that state interference 'infringe substantially' or 'heavily burden' the abortion right before triggering strict scrutiny."[185] Benshoof suggested that challenging TRAP laws would be an important step in clarifying the meaning of the undue-burden test.[186] She explained: "Any first trimester regulation which can be shown to impose a burden on the exercise of the abortion right is invalid."[187]

Throughout the 1980s, interest in the meaning of undue-burden rhetoric intensified. In *Thornburgh v. American College of Obstetricians and Gynecologists*, a 1986 case involving a multi-restriction Pennsylvania law, the Reagan Administration called for the adoption of a deferential undue-burden

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[179] *See id.* at 453 (O'Connor, J., dissenting).
[180] *Id.*
[181] *See id.* at 461–69.
[182] *Id.* at 464.
[183] *See* AUL Perspective, LEX VITAE, at 5–6, *in* THE WILCOX COLLECTION (Dec. 1, 1981) (on file at Lex Vitae Collection, University of Kansas).
[184] Janet Benshoof, ACLU Reproductive Freedom Project, The New Supreme Court Abortion Decision: A Legal Analysis with Questions and Answers 2, *in* THE PAULI MURRAY PAPERS (Jul. 18, 1983) (on file at Box 114, Folder 2040, Schlesinger Library, Harvard University).
[185] *Id.* at 5.
[186] *See id.* at 10–11.
[187] *Id.* at 15.

test, and writing in dissent, O'Connor and Chief Justice Rehnquist again concluded that the Court should adopt it.[188]

Energized by the Court's receptivity to their definition of an undue-burden test, pro-life lawyers reinvigorated their campaign for TRAP laws. These laws simultaneously advanced two core aspects of incrementalist strategy: the gradual elimination of abortion access and the improvement of the pro-life movement's image on issues of women's rights.[189]

In 1989, the significance of these goals clearly surfaced when AUL hosted a legislative strategy conference designed to exploit the latest polling data on the abortion wars.[190] By that time, NRLC had already publicized the experiences of women who claimed to suffer psychiatric disorders as a result of abortion.[191] AUL leaders made arguments about post-traumatic abortion syndrome part of a larger push to change the movement's image.[192] "The [pro-life movement's] naturally strong focus on the unborn child neglects mention of the mother of that child," Mary Ellen Jensen, a public-relations specialist at AUL, told conference attendees.[193] "Communicating greater concern for the woman who faces the challenge of an unplanned pregnancy must be a key objective of any pro-life communications strategy."[194] Clarke Forsythe, one of the movement's most sophisticated attorneys, agreed:

> We must use all our expertise, experience, and ingenuity to persuade [the justices] that *Roe*'s legalization of abortion on demand has been bad for women and children in American society. . . . Abortion on demand has isolated women, subjected them to male coercion, maimed their bodies, and wounded their psyches. Evidence of these consequences must be brought before these uncertain justices to persuade them that *Roe* should be discarded *once and for all*.[195]

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[188] For briefs offering a pro-life slant on the undue-burden test, see, e.g., Brief for the United States as Amicus Curiae at 16–17, Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 474 (1986) (No. 84-495); Brief for National Right to Life Committee, Inc. as Amicus Curiae at 6–10, Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 474 (1986) (No. 84-495). For the Court's decision in *Thornburgh*, see *Thornburgh v. Am. Coll. Of Obstetricians and Gynecologists*, 476 U.S. 747, 759–71 (1986).

[189] *See infra* Part II.

[190] *See, e.g.*, Lynn Sweet, *Foes of Abortion Learn New Strategy*, CHI. SUN TIMES, Nov. 26, 1989, at 20.

[191] For examples of these arguments, see, e.g., Mary Chris Kuhr, *Holds Convention: Right to Life Group Keeps Up Fight*, ALBANY TIMES UNION, Oct. 18, 1987, at 2B; Marshall Fightlin, *Post-Abortion Counseling: A Pro-Life Task*, *in* TO RESCUE THE FUTURE: THE PRO-LIFE MOVEMENT 273–79 (Dave Andrusko ed., 1983).

[192] *See infra* notes 193, 196 and accompanying text.

[193] Mary Ellen Jensen, How Public Opinion Polls Should Guide Pro-Life Strategy at 5, *in* THE MILDRED F. JEFFERSON PAPERS (1989) (on file at Box 13, Folder 6, Schlesinger Library, Harvard University).

[194] *Id.*

[195] Clark Forsythe, The Year in Review: Litigation and Supreme Court Decisions at 4, *in* THE MILDRED F. JEFFERSON PAPERS (1989) (on file at Box 13, Folder 6, Schlesinger Library, Harvard University).

TRAP laws like the ones introduced in Illinois in 1985 represented the perfect vehicle for these new woman-protective arguments. These laws had first gained support in the state after a 1978 exposé by the *Chicago Sun Times* on the state's abortion industry.[196] Working undercover, reporters revealed unsterile, dangerous, dishonest, and unprincipled practices at four Chicagoland clinics.[197] The 40 stories published by the *Sun Times* sparked new regulations, and in 1982, at the urging of the pro-life movement, the state introduced more detailed and onerous regulations.[198] In the decades to come, pro-lifers would renew the push for similar regulations when clinic scandals emerged in other states and cities.[199]

When providers challenged those regulations in 1989, pro-life incrementalists celebrated. The leader of the Illinois Right to Life Committee, a NRLC state affiliate, told reporters that his colleagues hoped that the Court would agree to hear the case, *Turncock v. Ragsdale*.[200] "We want [the Court] to have as many opportunities as possible to look at Roe vs. Wade to overturn it or chip away at it some more," he explained.[201] Paige Cunningham, a leader of AUL, presented the state's targeted regulations as a necessary means of protecting women from abortion.[202] Not only did the law not create an undue burden, the Illinois measure was needed to keep women safe from "unqualified physicians, unsanitary conditions or debilitating injury."[203]

The Court never heard *Ragsdale* because Illinois settled the suit.[204] Nevertheless, hoping that the Supreme Court was ready to overrule *Roe*, a variety of pro-life groups repeated related arguments about the undue-burden test in amicus curiae briefs in *Webster v. Reproductive Health Services*, a challenge to another multi-part Missouri law.[205] By 1989, when the Court

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[196] On the *Chicago Sun Times* series, see, e.g., JOHANNA SCHOEN, ABORTION AFTER *ROE*: ABORTION AFTER LEGALIZATION 96–118 (2015); BROOKE KROEGER, UNDERCOVER REPORTING: THE TRUTH ABOUT DECEPTION 248 (2012).

[197] *See id.* and accompanying text.

[198] *See, e.g.*, Kathleen Best, *Coalition Gave Life to Illinois Abortion Law*, ST. LOUIS POST-DISPATCH, Jul. 30, 1989, at 1A. The law included physical-plant requirements that would be prohibitively expensive for most clinics to meet, as well as elaborate licensing and reporting provisions. *See* Ragsdale v. Turncock, 841 F.2d 1341, 1358–63 (7th Cir. 1988).

[199] For examples of this strategy, see, e.g, Donna O'Neal, *Martinez to HRS: Shut Clinics*, ORLANDO SENTINEL, Sep. 23, 1989, at G1; Ed Anderson, *Bill That Would Regulate Abortions in La. Is Filed*, NEW ORLEANS TIMES PICAYUNE, Apr. 18, 1991, at 1A.

[200] *See infra* notes 201, 202 and accompanying text.

[201] Lynn Sweet, *Abortion Foes Fight Deal on Key Case*, CHI. SUN TIMES, Aug. 31, 1989, at 14.

[202] *See, e.g.*, Jim Merriner, *Another Group Opposes Settling of Abortion Case*, CHI. SUN TIMES, Sep. 1, 1989, at 8.

[203] *Id.*

[204] *See, e.g.*, *Justices Let Stand Deal to Ease Abortion Regulations*, HOUSTON CHRON., Dec. 3, 1990, at A4.

[205] For examples of these tactics, see, e.g., Brief of Feminists for Life et al. at 6–13, Webster v. Reproductive Health Servs., 490 U.S. 492 (1989) (No. 88-605) (arguing that *Roe* should be overruled); Brief of the United States Catholic Conference at 4–13, Webster v. Reproductive Health Servs., 490 U.S. 492 (1989) (No. 88-605); Brief of the National Right to Life

decided *Webster*, Presidents Reagan and George H. W. Bush had left a mark on the Court, replacing several of the justices who had decided *Roe*, *Akron I*, and *Thornburgh*.[206] In *Webster*, it seemed possible that the Court would either formally adopt a liberty-restricting undue-burden test or overrule *Roe* altogether.

In a plurality opinion, the Court upheld the Missouri law, questioning the ongoing legitimacy of *Roe*'s trimester framework.[207] Although the majority did not explicitly address the undue-burden test, Justice O'Connor, writing in concurrence, described it as the best path forward.[208] After *Webster*, incrementalists celebrated what they saw as a meaningful victory for their understanding of the undue-burden test. According to the AUL, *Webster* had made clear that "Justice O'Connor's 'undue-burden' standard ha[d] replaced the 'strict scrutiny' standard of review."[209]

Webster also marked a turning point in pro-choice understandings of the undue-burden test. Some movement members had thought of the undue-burden standard as an alternative route to success. Insisting that the Court should apply strict scrutiny, these attorneys contended that certain abortion regulations also failed the undue-burden test. Between *Webster* and *Casey*, however, pro-choice leaders increasingly identified the undue-burden test as part of a sneak attack on legal abortion.

Partly for this reason, in the lead-up to *Casey*, Katherine Kolbert, Linda Wharton, and other attorneys at the Reproductive Freedom Project successfully promoted a strategy equating the undue-burden test with overruling *Roe*. At a 1991 meeting coordinating amicus advocacy in *Casey*, Kolbert and Wharton summarized the argument on which all pro-choice groups had agreed.[210] "By adopting either the undue[-]burden test or the rational[-]basis test," the group argued, "the Court has overruled *Roe v. Wade*."[211] Pro-choice attorneys further agreed to argue that the undue burden test, already adopted by the Third Circuit earlier in the litigation of *Casey*, was "subjective" and "unworkable," resulting in "arbitrary and discriminatory distinctions."[212] In a separate memorandum, Kolbert and her colleagues ex-

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Committee as Amicus Curiae at 6–1, 2 Webster v. Reproductive Health Servs., 490 U.S. 492 (1989) (No. 88-605). For the challenged law in *Webster*, see MO. REV. STAT. §§ 1.205.1(1), (2) (1986).

[206] On the influence of the changing composition of the Supreme Court, see, e.g., JAMES RISEN AND JUDY THOMAS, WRATH OF ANGELS: THE AMERICAN ABORTION WAR 292 (1998).

[207] *See* Webster v. Reproductive Health Servs., 492 U.S. 490, 514–18 (1989).

[208] *See id.* at 514–518, 522–24.

[209] Americans United for Life Briefing Memo, The Implications of the Supreme Court's Decision to Review *Planned Parenthood v. Casey* at 2, *in* THE PRO-LIFE NEWSLETTER COLLECTION (Mar. 1992) (on file at Carton 1, Americans United for Life Folder, Schlesinger Library, Harvard University).

[210] *See* Kathryn Kolbert to *Planned Parenthood v. Casey* Work Team, *in* The Kathryn Kolbert Papers (Dec. 10, 1991) (on file at Box 1, *Casey* Memoranda Folder, Barnard College).

[211] *Id.* at 1.

[212] *Id.* at 2.

plained the reason for this strategy: a belief that "the inevitable loss of *Roe*" would "spark massive protest" that the movement could exploit.[213]

Just the same, when the Court agreed to hear *Planned Parenthood v. Casey*, pro-life incrementalists were uncertain of what to expect. AUL attorneys recognized that the Court could overrule *Roe*, strengthen its protections, or take a middle course by adopting some version of the undue-burden test.[214] *Casey* ultimately created a delicate balance that conformed to neither movement's earlier idea of an undue burden. This outcome did nothing to deter incrementalists invested in the undue-burden test. Over the course of the next two decades, incrementalists used TRAP laws to redefine *Casey* and promote their own understanding of the test, one that eliminated any relationship between the purpose and effect of a law.

C. Casey Adopts an Ambiguous Version of the Undue-Burden Test

For the first time, in *Casey*, the Court formally adopted a version of the undue-burden test.[215] The case involved a multi-restriction Pennsylvania law, but the Court also confronted questions about the ongoing validity of *Roe*.[216] In a divided opinion, the Court preserved what it called the "essential" holding of the 1973 decision, thereby maintaining some kind of constitutional protection for the right to abortion.[217] Nevertheless, the plurality made clear that the test would protect abortion rights less than the trimester framework originally announced in *Roe*.[218] "The very notion that the State has a substantial interest in potential life leads to the conclusion that not all regulations must be deemed unwarranted," the *Casey* plurality explained.[219] "Not all burdens on the right to decide whether to terminate a pregnancy will be undue."[220]

Casey offered some insight into how the undue-burden test applied, upholding all but one of the challenged restrictions.[221] The opinion emphasized that certain informed-consent or parental-consultation regulations would not constitute undue burdens, representing "[r]egulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn."[222] By contrast, the Court struck down a spousal-consultation law,

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[213] Kathryn Kolbert and Lynn Paltrow to Nadine Strossen et al., *in* THE KATHRYN KOLBERT PAPERS (Dec. 24, 1991) (on file at Box 1, *Casey* Memoranda Folder, Barnard College).

[214] *See* Americans United for Life, *supra* note 209, at 1–5.

[215] *See* Planned Parenthood of Se. Penn. v. Casey, 505 U.S. 833, 874 (1992) (plurality opinion).

[216] *See id.* at 878–79.

[217] *Id.* at 845–46.

[218] *See id.* at 872–74.

[219] *Id.* at 876.

[220] *Id.*

[221] *See id.* at 900–02.

[222] *Id.* at 877.

emphasizing that it would render access to abortion illusory for a substantial fraction of women.[223]

Which version of the undue-burden test had the *Casey* Court adopted? The Court offered no clear guidance on this question. Did the test require the kind of substantial deference demanded by pro-life activists in the 1980s, particularly in the context of the fit between the means and ends of a law? Or did the undue-burden test require the kind of heightened scrutiny that pro-choice attorneys had long called for? The stakes of these questions grew in the decades to come. Inside and outside of court, activists on either side of the abortion question forged definitions of the undue-burden test that seemed likely to make a difference to the future of the abortion wars.

D. Working with Targeted Regulations, Abortion Opponents Reshape the Undue-Burden Test

Pro-life incrementalists recognized that *Casey*'s version of an undue-burden test was more protective of abortion rights than the version articulated by Justice O'Connor in earlier dissenting opinions.[224] In 1992, in a confidential analysis of the *Casey* decision, AUL attorneys explained: "The new test modifies (lowers) both the degree of interference that will constitute an undue burden (a substantial obstacle will now suffice rather than an absolute obstacle or severe limitation) and now states unequivocally that an undue burden imposed before viability will be unconstitutional."[225]

At the same time, AUL lawyers saw new potential in *Casey* for woman-protective arguments that the movement had emphasized since the 1980s.[226] The Court had upheld an informed consent provision, highlighting the potential regret women might experience if they chose abortion without fully understanding its consequences.[227] "Why are the laws upheld in *Casey* the best news the pro-life movement has received in 20 years?," AUL attorneys wrote in explaining the potential of new "right to know" laws.[228] "Because they can change abortion policy where it counts — in the hearts of women and teenage girls considering abortion."[229]

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[223] *See id.* at 893–94.

[224] *See* Americans United for Life Briefing Memo, The Good News About *Planned Parenthood v. Casey* at 3, *in* THE PRO-LIFE NEWSLETTERS COLLECTION (Jul. 1992) (on file at Carton 1, Americans United for Life Folder, Schlesinger Library, Harvard University).

[225] *Id.*

[226] For more on these debates, *see infra* Part II.

[227] *See* Planned Parenthood of Se. Penn. v. Casey, 505 U.S. 833, 882 (1992) ("In attempting to ensure that a woman apprehend the full consequences of her decision, the State 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.").

[228] Americans United for Life, 1992 Legal and Education Highlights, 3, *in* The Wilcox Collection, (on file at AUL Briefing Memo Folder, University of Kansas).

[229] *Id.*

In the next decade, AUL and NRLC attorneys debated which strategy would best advance the movement's woman-protective arguments and vision for the undue-burden test, seeing both as crucial to the future of the cause. At a 1993 board meeting, Myrna Gutierrez, a public-relations specialist at AUL, saw a woman-protective message as indispensable to the movement's image.[230] She urged her colleagues to "use cultural and patriotic language to focus on the harm abortion does to the woman."[231] Paige Cunningham reinforced this point, insisting that abortion opponents "must help people understand that abortion hurts the woman too."[232] In Cunningham's view, *Casey* allowed the movement "to start reducing abortion now by passing and enforcing laws relating to the woman."[233]

In the short term, pro-life activists pursued this agenda by promoting "informed consent" laws that expanded on the *Casey* blueprint.[234] These laws required women to read or listen to a determined list of facts about everything from fetal development to the theoretical availability of child support; other laws required women to hear disputed statements about the connection between abortion and breast cancer or mental illness.[235] By the late 1990s, however, pro-lifers experimented with a more aggressive agenda, promoting bans on the late-term abortion procedure pro-lifers called "partial birth abortion."[236] As Reva Siegel has shown, in defending such laws before the Court, pro-lifers relied on woman-protective arguments.[237]

In the same period, pro-life movement members redoubled their efforts to introduce TRAP laws.[238] While *Casey* did not say anything explicitly about these laws, pro-lifers believed that the Court had signaled an openness to arguments that abortion hurt women, and TRAP laws sent a woman-protective message, albeit a different one from the rationale for right-to-know

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[230] *See* Americans United for Life, Board Meeting Minutes at 4–5, *in* THE MILDRED F. JEFFERSON PAPERS (Apr. 24, 1993) (on file at Box 13, Folder 5, Schlesinger Library, Harvard University).

[231] *Id.* at 4.

[232] *Id.* at 3.

[233] *Id.*

[234] On the emphasis put on "informed consent" laws, see, e.g., Americans United for Life, Board Meeting Minutes at 3, *in* THE MILDRED F. JEFFERSON PAPERS (Oct. 27, 1993) (on file at Box 13, Folder 6, Schlesinger Library, Harvard University).

[235] For a representative criticism of these laws, see Maya Manian, *The Irrational Woman: Informed Consent and Abortion Decision-Making*, 16 DUKE J. GENDER L. & POL'Y 223, 250 (2009) (arguing that "*Casey* permitted states to mandate information biased against abortion under the guise of abortion-specific 'informed consent' legislation").

[236] *See, e.g.*, Neal Devins, *How* Planned Parenthood v. Casey *(Pretty Much) Settled the Abortion Wars*, 118 YALE L.J. 1318, 1339 (2009) ("*Casey* [. . .] prompted a flurry of legislation implementing versions of the very laws that the Supreme Court approved in *Casey*.").

[237] *See* Siegel, *supra* note 148, at 1697–1702. For an example of such an argument made in *Carhart*, see Brief of Sandra Cano, the Former "Mary Doe" of *Doe v. Bolton*, and 180 Women Injured by Abortion as Amici Curiae in Support of Petitioner at 22, Gonzales v. Carhart, 550 U.S. 124 (2006) (Nos. 05-380; 05-1382).

[238] On the spread of TRAP laws, see, e.g., *Targeted Regulations of Abortion Providers*, GUTTMACHER INSTITUTE (Jan. 2016), https://www.guttmacher.org/state-policy/explore/targeted-regulation-abortion-providers, *archived at* https://perma.cc/48WC-Q4Z8.

laws: abortion clinics were dangerous and threatened women's physical wellbeing. Pro-lifers often had the most success pushing clinic regulations in the aftermath of health scandals at particular abortion clinics.[239] Movement leaders framed these incidents as evidence that women could not take for granted that any abortion clinic would provide safe treatment.[240] The champions of TRAP laws pitted providers against women, framing abortion as almost universally detrimental to women's health.

At the same time, TRAP laws created a platform for pro-life interpretations of the undue-burden test. The movement used these laws as a vehicle for understandings of the undue-burden test that effectively eliminated any tailoring requirement. If legislators stated an acceptable governmental purpose, there was no need for courts to closely examine whether the law advanced that purpose.

In 1999, for example, South Carolina used this strategy in defending its TRAP law before the Fourth Circuit and in Supreme Court filings.[241] The State had introduced a law requiring the licensure of clinics that performed more than a threshold number of abortions and mandated that the state health department promulgate regulations to govern abortion clinics.[242] Regulators responded by issuing a complex set of rules, requiring among other things that all abortion clinics (and no other freestanding medical facility) undertake extensive physical plant changes, test all patients for both pregnancy and sexually transmitted diseases, and ensure that only a registered nurse, rather than a physician, supervise nursing staff.[243]

The State defended these regulations primarily by explaining that the regulations were intended to protect women's health:

> Regulation 61-12 was drafted and enacted to serve a valid purpose: to promote the State's legitimate interest from the outset of pregnancy in protecting the health and welfare of women as well as of the unborn. The regulation is reasonably related to the State's legitimate interest in ensuring that women have abortions performed under safe conditions. This Regulation does not look to strike at a woman's right to choose whether to have an abortion; rather, these regulations look to protect the health of women who seek abortions by ensuring, among many other things, that women will be offered medical tests to determine whether they have venereal diseases which could complicate abortions and cause other health problems; that abortion providers are housed in facilities which are properly equipped to handle the complications associ-

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[239] *See, e.g.*, Susan Baer, *Abortion Conflict Sees New Strategy*, BALTIMORE SUN, May 9, 2001, at 1A; Best, *supra* note 198, at 1A.

[240] *See* Baer, *supra* note 239 at 1A; Best, *supra* note 198, at 1A.

[241] *See* Brief of Appellants at 57, Greenville Women's Clinic v. Bryant, 222 F.3d 157 (4th Cir. 2000) (Nos. 99-1319; 99-1710; 99-1725).

[242] *See* S.C. CODE ANN. § 44-41-75.

[243] *See* S.C. CODE ANN. REGS. 61–12.205.

> ated with abortions; and that women are treated by medical providers who possess the skills required to perform the abortion procedure safely.[244]

The State relied on relatively little evidence in making these assertions. With respect to the physical plant requirements, for example, South Carolina relied on a single expert witness with experience constructing ambulatory surgical centers who testified that the regulations would make for safer clinics.[245]

From South Carolina's standpoint, the undue-burden test required nothing more.[246] Given that the state's regulations simply made abortion more expensive and shuttered only a handful of clinics, the undue-burden test was satisfied, regardless of whether the law actually advanced its stated end.[247] For the providers challenging the regulations, the undue-burden test had a very different meaning. As they explained: "The Supreme Court's abortion jurisprudence demonstrates that the state may not burden access to abortion with alleged health regulations unless those regulations actually promote maternal health."[248]

While the Supreme Court never heard *Greenville Women's Clinic*, pro-life activists continued to see TRAP laws as the perfect way to push both woman-protective reasoning and a new understanding of the undue-burden test. Citing the potential importance of *Greenville Women's Clinic*, Clarke Forsythe told other AUL members: "In most states, veterinary clinics face more regulations than abortion clinics, which has resulted in numerous deaths of women (the second victims of abortion)."[249] If the movement could convince the Supreme Court that such laws did not fail the undue-burden test, Forsythe predicted that the movement would "be in a position to regulate abortion clinics in all 50 states."[250]

After Barack Obama's election in 2008, TRAP laws again took on new importance.[251] Without an ally in the White House, pro-lifers refocused on state legislation.[252] In January 2009, NRLC Executive Director David N. O'Steen insisted that, "affiliates can still be effective in passing state legislation," maintaining that such laws had "saved 9 million babies since 1973, a

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[244] Brief of Appellants, *supra* note 241, at 57–58.

[245] *See id.* at 17.

[246] *See id.*

[247] *See id.* at 30–43.

[248] Brief of Appellees at 27, Greenville Women's Clinic v. Bryant, 222 F.3d 157 (4th Cir. 2000) (Nos. 99-1319, 99-1710, 99-1725).

[249] Americans United for Life, Fundraising Letter at 1, *in* THE MILDRED F. JEFFERSON PAPERS (Oct. 13, 2000) (on file at Box 13, Folder 6, Schlesinger Library, Harvard University).

[250] *Id.* at 2.

[251] *See, e.g.*, National Right to Life Committee, Board of Directors Meeting Minutes at 1–3, *in* THE MILDRED F. JEFFERSON PAPERS (Nov. 15, 2008) (on file at Box 5, Folder 7, Schlesinger Library, Harvard University); National Right to Life Committee Board of Directors Meeting Minutes at 1–3, *in* THE MILDRED F. JEFFERSON PAPERS (Jan. 24-25, 2009) (on file at Box 5, Folder 7, Schlesinger Library, Harvard University).

[252] *See* January Meeting Minutes, *supra* note 251, at 2.

victory that the Obama administration cannot take away."[253] By the time the Court agreed to hear *Hellerstedt*, twenty-four states had introduced some kind of targeted regulation.[254]

Pro-life briefs in *Hellerstedt* made explicit the longstanding relationship between the movement's embrace of targeted regulations and its reworking of the undue-burden test. In a brief on behalf of Texas legislators who had voted for the challenged law, AUL argued that the undue-burden test required no scrutiny of the fit between the law's means and ends.[255] "[T]he State is not required to prove the positive impact of HB 2 in order for a court to determine that the requirement has a rational basis (and is, thus, not an undue burden)," AUL asserted.[256] "The burden is on the Plaintiffs challenging to prove that the State has absolutely no rational justification for enacting the regulation."[257]

In turn, amici supporting the challenge to the law revived earlier pro-choice understandings of the undue-burden test. While pro-choice lawyers had viewed the undue-burden test with skepticism for some time, *Hellerstedt* prompted pro-choice attorneys to seize on understandings forged by their movement in earlier decades. In this analysis, the undue-burden test did provide less protection than either an absolute application of the trimester framework or strict scrutiny. Nevertheless, the undue-burden test required a substantial relationship between the means and ends of a law. The petitioners and amici in *Hellerstedt* drew on these understandings of the undue-burden test. For example, the Yale Information Society Project stressed that some attention to the fit between the means and ends of the law is necessary to strike the balance *Casey* envisions, urging the Court to "examine the evidence to determine whether a statute actually serves a valid interest in order to preserve limitations of a constitutional rule."[258] Briefs submitted by the petitioners and by prominent constitutional scholars adopted a similar stance.[259]

Hellerstedt finally clarified the question *Casey* had left open decades ago: What level of scrutiny did the undue-burden test involve? Part III explores what the Court's decision tells us about the future of the undue-burden test, particularly when lawmakers claim to protect women. Next, this Part argues that the Court should offer guidance on whether any law, even a

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[253] *Id.*

[254] On the status of TRAP laws, see, e.g., Guttmacher Institute, *supra* note 238.

[255] *See* Amici Curiae Brief of 44 Texas Legislators in Support of Defendants-Appellants and Reversal of the District Court at *15, Whole Woman's Health v. Cole, (5th Cir. 2016) (No. 14-50928), 2014 WL 6647162.

[256] *Id.*

[257] *Id.*

[258] Brief for Amicus Curiae Information Society Project at Yale Law School in Support of Petitioners at *26, Whole Woman's Health v. Cole, (No. 15-274), (2016) 2016 WL 74992.

[259] *See* Brief of Constitutional Law Scholars Ashutosh Bhagwat et al., at *151–59, Whole Woman's Health v. Hellerstedt, (No. 15-274), (2016) 2016 WL 106616; *see also* U.S. Brief for Petitioners at *36–42, Whole Woman's Health v. Cole (U.S.) (No. 15-274.) 2015 WL 9592289.

fetal-protective statute, should have to actually advance its stated end. Part III then studies how a balancing approach should work with fetal-protective laws. If *Casey*'s balance continues to have meaning, the courts should not take any account of the purpose of a law at face value. The competing constitutional values at stake in the abortion conflict require a harder look.

III. *Hellerstedt*, The Undue-Burden Test, and Means and Ends

In resolving the questions about Texas's abortion law, the *Hellerstedt* Court emphasized the careful balance that *Casey* had struck between women's interests in liberty, equality, and dignity and the state's interest in fetal life and women's health. To maintain this equilibrium, the Court required evidence that abortion restrictions advance their stated ends.

What comes next? As a matter of strategy, some antiabortion groups have already turned back to laws focused on fetal rights, including "fetal pain" laws that effectively ban abortion after twenty weeks.[260] *Hellerstedt* offers less guidance about the fate of such laws.

To evaluate what comes next for abortion jurisprudence, this Part begins by examining the balance created in *Casey* and *Gonzales v. Carhart* (*Carhart II*). Next, the Part analyzes how the Court's decision in *Hellerstedt* carefully preserves the equilibrium defining *Casey*/*Carhart II*. While focusing on woman-protective laws, the Court lays out an approach that should apply with equal force to any abortion regulation. Next, the Part examines how the Court should apply a similarly robust balancing analysis to fetal-protective laws, ensuring that the balance *Casey* created holds for all abortion regulations, not just a few.

A. *Constitutional Balance in* Casey/Carhart II

The guiding principle of *Casey* was respect for the deeply important constitutional values on either side of the abortion question. While preserving the "essential holding" of *Roe*, the Court rejected the trimester framework and reasoned that it undervalued fetal life.[261] *Casey*'s command to pay more attention to the state's interest in fetal life explained the Court's rejection of *Roe*'s trimester framework.[262] *Casey* also highlighted the potential value of informed consent laws that made women aware of the moral, political, and legal arguments on both sides of the abortion question.[263] The government could express its belief in the value of fetal life by encouraging women "to know that there are philosophic and social arguments of great

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[260] *See, e.g.*, Mary Ziegler, *Where the Pro-Life Movement Goes Next*, N.Y. Times (July 2, 2016), http://www.nytimes.com/2016/07/03/opinion/sunday/where-the-pro-life-movement-goes-next.html, *archived at* https://perma.cc/8MG4-NYAE.

[261] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 845–46 (1992).

[262] *See id.*

[263] *See id.* at 872.

weight that can be brought to bear in favor of continuing the pregnancy to full term."[264]

At the same time, *Casey* recognized that the moral stakes of the abortion question made it all the more important to preserve a woman's liberty to make her own decision about pregnancy.[265] *Casey* explicitly recognized the personhood of women, connecting liberty in the abortion context to the "right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[266] The responsibilities of gestation, childbirth, and childrearing also partly explained the importance of preserving the liberty women enjoyed under *Roe*. Here, *Casey* recognized that abortion involved not only questions of the dignity of fetal life but also the equality and dignity of women.[267] As the Court explained, a woman's "suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture."[268]

The undue-burden test seemed to preserve the equilibrium *Casey* called for. The Court framed many of the restrictions it upheld as variations on informed consent requirements that made women aware of competing views on abortion without eliminating access. For example, a measure requiring a waiting period, in the Court's view gave women time to deliberate about the important decision they faced.[269]

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[264] *Id*. Feminist scholars have roundly criticized *Casey*'s treatment of informed consent and mandatory waiting periods as being at odds with the recognition of abortion rights for women in the opinion. *See, e.g.*, Linda C. McClain, *The Poverty of Privacy?*, 3 COLUM. J. GENDER & L. 119, 143–44 (1992) ("In particular, the piece of information the Court fears the woman may lack is 'the impact on the fetus,' something the Court claims that 'most women considering an abortion would deem . . . relevant, if not dispositive to the decision.' This remarkable, if enigmatic, sentence stands without any cited support."); Linda J. Wharton et al., *Preserving the Core of* Roe*: Reflections on* Planned Parenthood v. Casey, 18 YALE J.L. & FEMINISM 317, 335 (2006) ("[T]he joint opinion has been widely criticized by commentators who have correctly noted the perplexing inconsistency between its treatment of the spousal notification provision and most of the other challenged provisions."); *cf.* Susan Frelich Appleton, *Physicians, Patients, and the Constitution: A Theoretical Analysis of the Physician's Role in "Private" Reproductive Decisions,* 63 WASH. U.L.Q. 183, 233 (1985) ("When the state singles out abortion patients or female birth-control patients for special protection from their physicians by mandating waiting periods and detailed disclosure requirements, the state perpetuates outmoded and pernicious stereotypes of women as indecisive and incompetent health-care consumers, incapable of obtaining necessary information and time for reflection without paternalistic government intervention."). While *Casey* certainly limited the scope of the abortion right in upholding informed-consent and waiting-period laws, the Court carefully circumscribed those limits, as the Article later describes.

[265] *Casey*, 505 U.S. at 850–52.

[266] *Id.* at 851.

[267] *See id.* at 852; *see also* Linda Greenhouse and Reva B. Siegel, Casey *and Clinic Closings: When Protecting "Health" Obstructs Choice*, 125 YALE L.J. (forthcoming 2016), http://www.scotusblog.com/wp-content/uploads/2015/12/11.25.15-Greenhouse-Siegel-12-28-new-years-fac-pg2.pdf, *archived at* https://perma.cc/M2QV-5DUW.

[268] *Casey*, 505 U.S. at 852.

[269] *See id.* at 887 ("Because the informed consent requirement facilitates the wise exercise of that right, it cannot be classified as an interference with the right *Roe* protects").

On the other hand, when discussing laws designed to protect women's health, *Casey* ruled out "[u]nnecessary health regulations."[270] Although the Court offered no clarification of when a health regulation became unnecessary, the justices gave insight into what counted as "unnecessary" in analyzing an unconstitutional spousal consultation law. The Court was particularly skeptical of such laws both because they relied on stereotypes about women's role in society and effectively blocked some women from accessing abortion altogether.[271] This analysis showed that under *Casey*, laws must show respect for the dignity of women as well as the dignity of fetal life.[272] Moreover, *Casey's* spousal consultation analysis showed that in evaluating the effect of a law, courts ought to consider not only its formal terms but also its practical effect.[273] As this analysis indicated, the purpose and effect of a law were not to be analyzed in isolation. Instead, the Court judged the effect of a law against the strength of the state interest supporting it. Because spousal notification laws advanced a stereotype-laden state interest, the effect of the law on a large fraction of women became even more suspect.[274]

Casey certainly did not resolve every question involving the relationship between the purpose and effect of the law. When upholding the informed-consent provision, *Casey* arguably drew on stereotypes about women's ability to make good decisions or to acquire adequate information about what abortion involved on their own — the kind of generalization criticized in the context of spousal notification.[275] Nor was it easy to distinguish the reason women choosing abortion would face an obstacle. *Casey* suggested that neither the poverty that might prevent women from navigating an informed-consent provision, or a waiting period nor the domestic violence that would prevent women from notifying their spouses could be blamed on the government.[276] Nevertheless, *Casey* suggested that in least some contexts, the benefits and burdens created by a law had to be balanced against one another.

While suggesting that a far wider range of informed-consent laws might be constitutional, *Gonzales v. Carhart* did not abandon the idea of balancing developed in *Casey.* In that case, the Court explicitly recognized an interest in protecting fetal dignity as well as fetal life. First, under *Carhart II*, the

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[270] *Id.* at 878.

[271] *See id.* at 887–96.

[272] *See id.*; *see generally* Siegel and Greenhouse, *supra* note 267.

[273] *See Casey*, 505 U.S. at 887–96.

[274] *See id.*

[275] *See, e.g.*, Samuel R. Bagenstos, *Disability, Life, Death, and Choice*, 29 HARV. J.L. & GENDER 425, 456 (2006) (suggesting that for some, "the 'informed consent' requirements in *Casey* [may] reflect a gender-based paternalism toward women"); Paula Abrams, *The Tradition of Reproduction*, 37 ARIZ. L. REV. 453, 489 (1995) (describing *Casey* as a "paternalis[tic] [decision that] undermines the independence of women as decisionmakers and furthers the stereotype that women are emotional and irrational decisionmakers, easily swayed by authority figures"); McClain, *supra* note 264, at 144 ("The Court's analysis of informed consent and women's health is patronizing, selective, and in part contrary to fact").

[276] *Casey*, 505 U.S. at 886–87, 890–94.

State can enhance the dignity of human life by targeting a particularly "brutal" or offensive procedure.[277] The Court measures brutality and offensiveness by looking at the impact of abortion not on the child but on the woman, on third-party observers, or on the larger society. As *Carhart II* explains, the prohibited abortion procedure, dilation and extraction (D&X), "threatens to further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life."[278] On the Court's theory, D&X procedures pose this threat because they so closely resemble infanticide: "The Court has in the past confirmed the validity of drawing boundaries to prevent certain practices that extinguish life and are close to actions that are condemned."[279] For observers, permitting such procedures blurs the line between acceptable and unacceptable conduct.

Respecting the value of human life also matters because of the supposed influence of abortion on the woman. The Court identifies the mother-child bond as "an ultimate expression" of respect for human life.[280] Here, *Carhart II* assumes that women value fetal welfare over anything else and likely would reject abortion if fully informed. Banning D&X abortion protects the woman against regret and facilitates discussion about where her best interests lie. As *Carhart II* reasons: "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."[281]

While an interest in fetal dignity reaches further than one in fetal life, *Carhart II* did nothing to change the kind of restriction countenanced by an undue-burden test. Notwithstanding a ban on D&X, women still enjoyed access to abortion.[282] While the Court still saw the importance of balancing the benefits and burdens of the law, the Court's analysis of the importance of

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[277] Gonzales v. Carhart, 550 U.S. 124, 129 (2007) (hereinafter "Carhart II"). I describe the case as *Carhart II* to distinguish it from the Supreme Court's earlier ruling on a dilation-and-extraction ban. *See* Stenberg v. Carhart, 530 U.S. 914 (2000).

[278] *Carhart II*, 550 U.S. at 157.

[279] *Id.* at 158.

[280] *Id.* at 159.

[281] *Id.* at 160.

[282] *See id.* at 165 ("Here the Act allows, among other means, a commonly used and generally accepted method, so it does not construct a substantial obstacle to the abortion right."). Feminists have identified significant problems with the woman-protective arguments at the heart of *Carhart II*, particularly the stereotypes on which they rely. *See, e.g.*, Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991, 991–94 (2007); Victoria Baranetsky, *Aborting Dignity: The Abortion Doctrine After* Gonzales v. Carhart, 36 HARV. J.L. & GENDER 123, 144 (2013) ("Writing for the Court in *Carhart*, Justice Kennedy revived *Roe*'s vision of women by invoking the stereotype of a mother incapable of aggressive self-protection, resigned to being the victim."); Neil Siegel and Reva B. Siegel, *Pregnancy and Sex Role Stereotyping: From* Struck *to* Carhart, 70 OHIO ST. L.J. 1095, 1113 (2009) ("As Justice Ginsburg's *Carhart* dissent cautions, when regulation of pregnant women reflects or enforces sex-role stereotypes of the separate spheres' tradition, the law may violate equal protection."). While these concerns are serious, *Carhart II* does require some fit between the means and ends of a law.

D&X deserved the criticism it received from scholars and medical professionals.[283] These commentators noted that D&X was clearly the safest procedure with certain medical conditions.[284] However, the fact that *Carhart II* might have misapplied a balancing analysis does not change the fact that it followed the approach that *Casey* laid out. The Court considered Congress's interest in protecting fetal dignity against the effect of a D&X ban, assuming (likely incorrectly) that the procedure was an uncommon and relatively minor part of reproductive health practice.[285]

Moreover, rather than analyzing Congress's intent in isolation, *Carhart II* evaluated how well the Partial Birth Abortion Ban Act (PBABA) advanced its stated purpose.[286] The Court emphasized the medical uncertainty surrounding the issue of whether D&X was necessary to protect women's health in certain circumstances, finding it too soon to identify an undue burden in a facial attack on the statute.[287] The Court also stressed that the safest, most common procedure, D&E, remained available.[288] The Court weighed the purposes underlying the PBABA against its relatively minor and even uncertain effect on abortion access. In this way, *Carhart II* explored the relationship between the purpose set for the PBABA and the means used to achieve it.

In addition, the Court framed the ban as a measure designed to ensure that women knew not only about the ethical debate surrounding abortion but also the precise details of the procedure.[289] *Carhart II*, like *Casey*, framed certain abortion regulations as laws that were primarily intended to allow women to make more reasoned decisions about abortion, not laws that took the ultimate decision away from a woman altogether. While many had rea-

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[283] For a sample of the arguments that *Carhart II* misread the medical evidence, see, e.g., *Carhart II*, 550 U.S. at 174–75 (Ginsburg, J., dissenting); B. Jessie Hill, *The Constitutional Right to Make Medical Decisions: A Tale of Two Doctrines*, 86 TEX. L. REV. 277, 338–41 (2007). D&X may reduce the risk of uterine perforation, decrease the likelihood of retained tissue, and lower the risk of infection. *See, e.g.*, Carhart v. Ashcroft, 331 F. Supp. 2d 805, 844–45 (D. Neb. 2004), *aff'd sub nom* Carhart v. Gonzales, 413 F.3d 791 (8th Cir. 2005), *rev'd*, 550 U.S. 124 (2007); Nat'l Abortion Fed'n v. Ashcroft, 330 F. Supp. 2d 436, 470–74 (S.D.N.Y. 2004); Planned Parenthood Fed'n of Am. v. Ashcroft, 320 F. Supp. 2d 957, 982–83 (N.D. Cal. 2004).

[284] *Carhart II*, 550 U.S. at 161–64.

[285] *See, e.g.*, Brief of the American College of Obstetricians and Gynecologists As Amicus Curiae Supporting Respondents at 7–22, Gonzales v. Carhart, 550 U.S. 124 (2007) (Nos. 05-380; 05-1382).

[286] *See Carhart II*, 550 U.S. at 161 ("The Act's furtherance of legitimate government interests bears upon, but does not resolve, [. . .] whether the Act has the effect of imposing an unconstitutional burden on the abortion right.").

[287] *See id.* at 164 ("The medical uncertainty over whether the Act's prohibition creates significant health risks provides a sufficient basis to conclude in this facial attack that the Act does not impose an undue burden.").

[288] *See id.* (emphasizing that "[a]lternatives are available to the prohibited procedure.").

[289] *See id.* at 159–60 ("The State has an interest in ensuring so grave a choice is well informed. 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.").

son to disagree with the Court's application of a balancing analysis, it seemed that both *Casey* and *Carhart II* weighed the benefits and burdens of a law against one another.

Nevertheless, because both opinions were vaguely reasoned and even internally contradictory, neither *Casey* nor *Carhart II* resolved the questions raised in social-movement conflict about the meaning of the undue-burden test, but *Hellerstedt* makes this step all but unavoidable. Next, this Part examines the questions raised in the case before proposing an interpretation of the undue-burden test.

B. Hellerstedt *and the Undue-Burden Test*

Whole Woman's Health v. Hellerstedt involved a challenge to two parts of Texas's HB2, a law passed in 2013. One required any physician performing an abortion to have admitting privileges at a hospital within thirty miles.[290] A second mandated that clinics comply with state regulations governing ambulatory surgical centers.[291] In December 2013, pursuant to this provision, the state introduced regulations on matters from quality standards to physical plant requirements.[292] The cost of building a new facility that complied with the state regulations would be roughly $3 million, while the price of compliance for existing facilities would run between $600,000 and $1 million.[293]

In 2013, a group of Texas abortion providers challenged several provisions of HB2, including the admitting privileges requirement.[294] Following a trial on the merits, the district court concluded that the admitting privileges provision would unduly burden a woman's abortion rights.[295] In May 2014, the Fifth Circuit reversed, reasoning that the providers had not persuasively shown that the Texas law had no rational basis.[296] Following the adoption of the December 2013 regulations and the impact of the admitting privileges requirement on existing clinics, the *Hellerstedt* petitioners again filed suit, challenging both the admitting privileges and ambulatory surgical center

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[290] *See* Tex. Health & Safety Code Ann. § 171.0031(a)(1)(A)); 25 Tex. Admin. Code §§ 139.53(c)(1), 139.56(a)(1).

[291] *See* Tex. Health & Safety Code Ann. § 245.010(a)); 25 Tex. Admin. Code § 139.40.

[292] *See* 25 Tex. Admin. Code § 139.40; 25 Tex. Admin. Code §§ 135.4–13.56.

[293] *See* Brief of Petitioners, *supra* note 259, at 7–8.

[294] *See* Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 951 F. Supp. 2d 891, 896 (W.D. Tex. 2013).

[295] *See id.* at 896–97.

[296] *See* Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 748 F.3d 583, 587 (5th Cir. 2014).

measures.[297] After a lengthy trial, the district court concluded that both provisions created an undue burden,[298] and the Fifth Circuit again reversed.[299]

In a surprisingly sweeping decision, a five-to-three majority of the Supreme Court struck down both parts of HB2 and infused the undue-burden test with new meaning.[300] After concluding that the petitioners' claim was not barred by res judicata, Justice Breyer's majority opinion took up the proper application of the undue-burden test:

> The first part of the Court of Appeals' test may be read to imply that a district court should not consider the existence or nonexistence of medical benefits when determining whether a regulation of abortion constitutes an undue burden. The rule announced in *Casey*, however, requires that courts consider the burdens a law imposes together with the benefits those laws confer.[301]

As an example of the kind of balancing *Casey* requires, the Court highlights the analysis of spousal notification and parental involvement laws in the 1992 decision itself.[302] In both instances, the Court not only considered the impact of a law on abortion access but also the value, if any, that the law achieved.[303] *Hellerstedt* held that a similar balancing applies to any regulation of abortion.[304]

The Court's decision also offers some guidance as to who will conduct this balancing — and how. *Hellerstedt* makes clear that courts retain the final decision as to when a law creates an undue burden and should weigh evidence on the subject independently rather than accepting legislative judgments without question.[305] The Court easily reconciled this holding with *Carhart II*.[306] Recognizing the weight *Carhart II* gave to Congress's findings on "partial-birth abortion," the *Hellerstedt* Court emphasized that the Texas legislature that passed HB2 had made no findings at all.[307] Moreover, as *Hellerstedt* framed it, *Carhart II* did not reach a conclusion solely on the basis of legislative findings.[308] Indeed, the ultimate decision about whether a

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[297] *See* Brief of Petitioners, *supra* note 259, at 11. These impacts included the closure of more than a dozen abortion clinics and a sharp increase in the number of women who lived 100 miles or more from a clinic. *See Opposition to Requirements for Hospital Admitting Privileges and Transfer Agreements for Abortion Providers* (2015), American Public Health Association, https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2015/12/14/11/04/opposition-to-requirements-for-hospital-admitting-privileges-for-abortion-providers, *archived at* https://perma.cc/X9FS-Q4EP.

[298] *See* Whole Woman's Health v. Lakey, 46 F. Supp. 3d 673, 678–79 (W.D. Tex. 2014).

[299] *See* Whole Woman's Health v. Cole, 790 F.3d 563, 567 (5th Cir. 2015).

[300] *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2298, 2310–18 (2016).

[301] *Id.* at 2309.

[302] *See id.*

[303] *See id.*

[304] *See id.* at 2310.

[305] *See id.* at 2309.

[306] *See id.*

[307] *Id.* at 2310.

[308] *See id.*

law constituted an undue burden should remain with a court focused on "the evidence in the record."[309]

The nuances of the Court's understanding of an undue burden came through in the majority's exploration of the admitting privilege and ambulatory surgical center requirements. To be sure, *Hellerstedt* leaves some questions open. The Court reviewed the trial court's findings of fact deferentially, asking whether there was "adequate factual and legal support for the District Court's conclusion[s]."[310] It is less clear how the Court would respond to a lower court that had deferred more to state legislators or looked less closely at the record.

Nevertheless, *Hellerstedt* offers some clues about how a lower court should identify an undue burden. First, the Court looked for evidence that either provision of HB2 actually served its stated purpose of protecting women's health.[311] The majority then canvassed the proof cited by the district court in finding that neither law provided a tangible health benefit.[312] Citing peer-reviewed studies, proof in amicus briefs from medical organizations, and expert testimony at trial, the Court also concluded that nothing in the record indicated that women would be safer after HB2 than before.[313] In evaluating the burden imposed by HB2, the Court similarly considered not only the findings of the trial court but also evidence presented in amicus briefs.[314]

Justice Alito's dissent also helps clarify what kind of proof the Court's revamped undue-burden test may *not* require. Alito concluded that the petitioners failed to establish a causal connection between clinic closures and the passage of HB2.[315] Alito would have required more proof of what caused individual clinics to close, including explicit consideration of alternative explanations.[316] Alito also would have wanted more evidence that clinics could not have ramped up their services to meet the needs that would be created if other facilities closed.[317] Compared to the majority's analysis, Alito's evaluation was less deferential to the trial court and attached less weight to either the record evidence or the factual arguments offered by amici. The majority's reading of the undue-burden test makes it far easier to establish an undue burden.

In spite of the hints offered by *Hellerstedt*, the full scope of the undue-burden test remains unclear. The majority suggests that courts should balance the benefits and burdens created by a law regardless of its claimed purpose. In particular, *Hellerstedt* refers to two parts of the *Casey* opinion

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[309] *See id.*
[310] *Id.* at 2311.
[311] *See id.* at 2299.
[312] *See id.* at 2301–04, 2318.
[313] *See id.* at 2310–18.
[314] *See id.*
[315] *See id.* at 2315 (Alito, J., dissenting).
[316] *See id.* at 2345–46.
[317] *See id.* at 2346.

that involved a balancing analysis, those involving spousal and parental involvement.[318] However, nothing in these parts of *Casey* offers much insight into how the Court should evaluate the kind of fetal protective law most likely to come up for consideration. In the context of Pennsylvania's spousal notification provision, the Court weighed "the husband's interest in the life of the child" against a woman's liberty in making the decision to terminate a pregnancy.[319] *Casey* did not assume that the state sought primarily to protect fetal life by making abortion harder for some married women to get.[320] For this reason, the Court's opinion reveals little about how balancing would work if the government's interest in fetal life were more directly at stake.[321]

Casey's analysis of parental consent laws is even less informative. In discussing Pennsylvania's parental consent law, the Court simply reinforced earlier holdings that "a State may require a minor seeking an abortion to obtain the consent of a parent or guardian, provided that there is an adequate judicial bypass procedure."[322] At most, the Court incorporated by reference the balancing done in other decisions on parental involvement.[323] But even in earlier cases, the Court primarily weighed the minor's liberty interest in terminating a pregnancy against "the guiding role of parents in the upbringing of their children."[324]

While suggesting that courts should always conduct a careful balancing, *Hellerstedt* tells us very little about how the undue-burden analysis should play out when the government claims to protect fetal life or fetal dignity. It may seem harder to conduct a balancing test when fetal-protective laws are at issue. After all, any abortion restriction arguably protects fetal life somewhat by making abortions harder or more expensive to access. Nevertheless, *Hellerstedt* offers important guidance about how such an analysis should work. The Article turns next to this analysis.

C. Proof That a Fetal-Protective Law Serves Its Stated Purpose

Undue-burden analysis should require some explanation of how — and how well — a restriction protects fetal life or fetal dignity. By evaluating such an explanation, the Court can smoke out state interests ruled illegitimate by *Casey*, making for a more meaningful application of *Casey*'s purpose prong. At the same time, the Court should be more skeptical of the effect of a law when it does nothing to achieve its stated goal.

This idea of an undue burden, crafted by pro-choice lawyers and adopted by some members of the Court, differs from conventional strict

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[318] *See id.* at 2309.
[319] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 898 (1992).
[320] *See id.* at 876.
[321] *See id.* at 860–902.
[322] *Id.* at 899–901.
[323] *See id.*
[324] Bellotti v. Baird, 443 U.S. 662, 637 (1979).

scrutiny — a mode of analysis the Court has avoided in the abortion context.[325] Whereas conventional strict scrutiny requires a compelling state interest, the undue-burden test should demand only an important interest, and the Court has already approved of interests in protecting or expressing respect for fetal life or safeguarding women's health.[326] Clearly, the analysis *Casey*/*Hellerstedt* advances is not fatal to all abortion regulations. Nor would a tailoring requirement force the State to show that an abortion restriction was the least restrictive means of advancing its interest in fetal life — something often expected under conventional strict scrutiny analysis.[327]

Just the same, if *Casey* balances the interests of women and fetal life, the state should not be able to satisfy the undue-burden test simply by asserting a fetal protective interest. First, trial courts should not accept at face value that a fetal protective law accomplishes its stated ends. For example, some fetal protective laws rely on questionable medical assumptions.[328] Fetal pain statutes assume that unborn children experience physical suffering before most medical professionals believe pain to be possible.[329] Courts should not prejudge laws based on factual premises that are controversial at best, even if the state claims to protect the unborn child.

Other fetal-protective laws seem primarily focused on the perceptions of bystanders rather than fetal pain or death. Consider the bans on what prolifers call "dismemberment abortion," a term widely believed to include dilation and evacuation, the most common second trimester abortion procedure.[330] In a pamphlet on these laws, the National Right to Life Committee emphasizes that they would put a stop to procedures "laden with the power to devalue human life."[331] These laws, as the NRLC explain, operate not

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[325] *See, e.g.*, David L. Faigman, *Madisonian Balancing: A Theory of Constitutional Adjudication*, 88 NW. U. L. REV. 641, 686–87 (1994) (arguing that *Casey* rendered the fundamental right established by *Roe* less fundamental); Elizabeth A. Schneider, Comment, *Workability of the Undue Burden Standard*, 66 TEMP. L. REV. 1003, 1028–31 (1993) (arguing that *Casey* set forth a rationality standard for abortion restrictions).

[326] *See Casey*, 505 U.S. at 846, 871, 877.

[327] On the importance of least-restrictive-alternative analysis in conventional strict scrutiny review, see, e.g., Ian Ayres and Sidney Foster, *Don't Ask, Don't Tell: Narrow Tailoring After* Gratz *and* Grutter, 85 TEX. L. REV. 517, 519 (2007) (arguing that courts evaluate whether a law is the least restrictive alternative as a part of narrow-tailoring analysis in the context of race discrimination); RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH 3–69 (1994).

[328] *See, e.g.*, Sam Belluck, *Complex Science at Issue in Politics of Fetal Pain*, N.Y. TIMES (Sep. 26, 2013), http://www.nytimes.com/2013/09/17/health/complex-science-at-issue-in-politics-of-fetal-pain.html?_r=0, *archived at* https://perma.cc/2UW7-CKJ6; I; Glenn Cohen, *The Flawed Basis Behind Fetal-Pain Laws*, WASH. POST (Aug. 1, 2012), https://www.washingtonpost.com/opinions/the-flawed-basis-behind-fetal-pain-abortion-laws/2012/08/01/gJQAS0w8PX_story.html, *archived at* https://perma.cc/GQH5-ZU88.

[329] *See id.*

[330] For a summary of the state of the law on D&E bans, see, e.g., *Dilation and Evacuation Bans*, REWIRE, https://rewire.news/legislative-tracker/law-topic/dilation-and-evacuation-bans/, *archived at* https://perma.cc/338Q-MQE7.

[331] *See Talking Points: What Is Dismemberment Abortion?*, NATIONAL RIGHT TO LIFE COMMITTEE, 3–4, http://www.nrlc.org/uploads/stateleg/DismembermentFAQJan15.pdf, *archived at* https://perma.cc/H8AT-GE48.

primarily to preserve fetal life but to "foster . . . respect for life" and "protect . . . the integrity of the medical profession."[332]

Given its importance in *Casey*, the state's interest in expressing a point of view about fetal life should not be dismissed out of hand, particularly since the government may express its own views under the First Amendment.[333] Nevertheless, an interest in protecting fetal dignity or medical integrity is vague and harder to limit than one involving fetal life. How can courts know if the existence of a particular procedure will undermine the reputation of medical professionals? Might the availability of legal abortion enhance doctors' reputation, at least under certain circumstances? Courts should take a harder look at laws premised on the protection of the medical profession. Such statutes rely on factual assumptions that both parties should be able to dispute at trial. While *Carhart II* explicitly recognizes these interests, the Court has not explained how weighty they are when compared to the state's goal of protecting fetal life. *Hellerstedt* offers reason to be more skeptical of laws claimed to serve these alternate state goals.

Courts should also view laws claimed to protect fetal dignity with some skepticism. States should offer explanation as to why a particular abortion procedure especially impacts public attitudes about fetal worth. Like most medical procedures, the details of abortion procedures can be hard to stomach. Given that such procedures end fetal life, abortions might particularly trouble bystanders. But unless an interest in fetal dignity could justify a blanket ban on all abortions — something clearly off limits given the balance struck by *Casey* — states should have to do more than proclaim an interest in fostering respect for life. If lawmakers believe that one or another technique is particularly disturbing, legislators should clearly state the reasons for this belief and defend their position in court, even when courts consider the possibility that other abortion procedures could have similar effects on bystanders.

In the context of fetal-protective laws, courts should further weigh whatever benefits a law provides against the limits it imposes on abortion access. If a law does little to protect fetal life while severely limiting abortion access, the courts should take this as a signal that a proclaimed interest in fetal life may be mere pretext. Moreover, to give meaning to the balance *Casey* demands, courts should ask not only whether a law nominally advances an interest in fetal life but also how much value the law adds, particularly when weighed against the woman's interest in abortion access.

In evaluating how much a law restricts access, the courts should consider the kind of proof validated by *Hellerstedt* — "direct evidence and plausible inferences" — that a law will force clinics to close, compromise

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[332] *Id.*

[333] *See, e.g.*, Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 553 (2005) ("the government may be able to restrict private expression 'because of its message, its ideas, its subject matter, or its content,' so long as in so doing it is expressing its own viewpoint").

women's health, or otherwise eliminate access. To be sure, as the *Carhart II* Court recognized, lawmakers may act even in the face of scientific, medical, or factual uncertainty about the impact of a law. However, read together, *Hellerstedt* and *Carhart II* require courts to weigh all of the record evidence, including but not limited to legislative findings.

If the state has to demonstrate that abortion restrictions were properly tailored, the constitutionality of fetal-pain laws — and several others beyond those challenged in *Hellerstedt* — would fall into question. Fetal pain laws have enjoyed strong support among abortion opponents, and at least twelve states, including Texas, have already introduced them.[334] Such laws ban abortion at the point that a fetus can purportedly experience pain, often at or before the twentieth week of pregnancy.[335] As an initial matter, given disputed evidence about when pain sensitivity develops, experts disagree about whether such statutes actually protect unborn children against anything.[336]

Even if the evidence supporting fetal pain prior to viability is weak as it seems, the state would have reason to express concern about fetal suffering, particularly late in a woman's pregnancy. Just the same, many fetal-pain bans prohibit access to abortion across the board after a certain point in pregnancy, without a showing that the state has properly considered countervailing interests, including the health of women or the pain suffered by children who are born and who suffer from the aftermath of certain fetal abnormalities.[337] Fetal pain laws do not put enough value on women's interests in autonomy, equality, or bodily integrity. Even if one does not question the legitimacy of the scientific evidence surrounding fetal pain, existing laws would likely fail the undue-burden test given the mismatch between the means and ends of the law.

Other abortion restrictions would be even more suspect if the state had to demonstrate a fit between the means and ends used to protect fetal life. Fetal heartbeat laws of the kind struck down in North Dakota ban all but the earliest abortions, tilting the balance of competing interests too far in favor of fetal life and all but ignoring women's interests in dignity and equality.[338]

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[334] *See, e.g.*, John A. Robertson, *Fetal Pain Laws: Scientific and Constitutional Controversy*, BILL OF HEALTH (Jun. 26, 2013), http://blogs.harvard.edu/billofhealth/2013/06/26/fetal-pain-laws-scientific-and-constitutional-controversy/, *archived at* https://perma.cc/4CVJ-XW7E; Liz Halloran and Julie Rovner, *High Court's Pass on 'Fetal Pain' Abortion Debate Unlikely to Cool Debate*, NPR (Jan. 14, 2014), http://www.npr.org/sections/itsallpolitics/2014/01/13/262178284/high-court-wont-hear-fetal-pain-abortion-case-as-debate-rages, *archived at* https://perma.cc/CE6H-HYDM; Belluck, *supra* note 328; Cohen, *supra* note 328.

[335] *See id.*

[336] *See id.*

[337] *See id.*

[338] The Court recently declined to hear an appeal from a decision striking down North Dakota's heartbeat ban. *See, e.g.*, Bill Chappell, *Supreme Court Rejects North Dakota's Bid to Save Strict Abortion Law*, NPR (Jan. 25, 2016), http://www.npr.org/sections/thetwo-way/2016/01/25/464311731/supreme-court-rejects-north-dakota-s-bid-to-save-strict-abortion-law, *archived at* https://perma.cc/Y4WH-3MHG; Mike Nowatski, *US Supreme Court Refuses to Review North Dakota's Fetal Heartbeat Ban*, BISMARCK TRIB. (Jan. 25, 2016), http://bismarcktribune.com/news/state-and-regional/u-s-supreme-court-refuses-to-review-north-dakota-s/arti-

Fetal dismemberment laws, like one recently passed in Kansas,[339] seem equally problematic. Although many states have considered such laws, only Oklahoma has introduced a similar measure.[340] In defending such laws, prolifers invoke the interest in fetal dignity recognized in *Carhart II*.[341] A procedure that is arguably visually disturbing could have the same impact on the reputation of the medical profession and the coarsening of the culture mentioned in *Carhart II*. While *Carhart II* recognized an interest in fetal dignity that was hard to quantify, a similar move would be far more disturbing in the context of fetal-dismemberment bans, particularly since such laws would outlaw the most common and safe second-trimester technique.[342] The *Carhart II* Court there recognized that dilation and evacuation is unquestionably the safest and most widely used second-trimester procedure — a method that many women require to achieve a good health outcome. While other procedures theoretically remain available under Kansas or Oklahoma's law, these alternatives are unproven and uncommon.[343] Entirely outlawing such an often-used and important procedure because bystanders find it disturbing or disgusting does not balance women's rights with the state's interest in fetal life.

Would such a test ever allow the Court to uphold an abortion restriction? *Hellerstedt* and *Carhart II* suggest that the answer to this question is yes. Based on *Carhart II*'s reading of the medical evidence, states may restrict abortion when advancing interests in fetal life when doing so would have little impact on women's autonomy, equality, or safety. As *Carhart II* suggests, lawyers on opposing sides of the abortion wars will inevitably disagree about how much of an impact a law has, particularly when a vague interest like fetal dignity is in play. What is clear is that *Hellerstedt*'s balancing requires a meaningful look at the purpose and impact of every law, including those claimed to protect fetal life.

IV. Conclusion

Hellerstedt comes at the end of a long conflict about the meaning of the undue-burden test. The idea of an undue burden first took shape when prochoice lawyers recognized that the Court had moved away from a strict application of the trimester framework. In developing an alternative, these

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[339] *See* K.S.A. 2015 Supp. 65–6741 et seq.

[340] For a summary of the state of the law on D&E bans, see, e.g., *Dilation and Evacuation Bans*, *supra* note 330.

[341] *See, e.g.*, National Right to Life Committee, *supra* note 331, at 4; Cheryl Wetzstein, *Fetal Dismemberment Ban Touted as Abortion Game Changer*, Wash. Times (Jan. 18, 2015), http://www.washingtontimes.com/news/2015/jan/18/abortion-game-changer-fetus-dismemberment-ban-tout/?page=all, *archived at* https://perma.cc/T9EG-LKTX.

[342] *See, e.g.*, Hodes et al. v. Schmidt, 368 P.3d 667, 676–79 (Kan. Ct. App. 2016).

[343] *See id.*

lawyers looked first to unconstitutional conditions doctrine, describing the obstacles women faced when forced to choose between badly needed governmental benefits and the exercise of a protected right. After this doctrine fell out of use, movement attorneys updated these arguments, using the undue-burden test to argue that courts should scrutinize the fit between the means and ends of abortion regulations.

In cases on abortion funding, pro-lifers responded by developing a different version of the undue-burden test, asking the courts to closely examine only those obstacles directly traceable to state law. By mid-decade, abortion opponents had broadened the use of an undue-burden test, claiming that it represented a version of rational-basis review.

In the past several decades, competing views about the meaning of the undue-burden test have circulated on the Supreme Court and in movement circles, particularly in the context of TRAP laws. At least in the context of woman-protective abortion regulations, *Hellerstedt* brings this contest to the surface. The Court should clarify that the undue-burden test always requires analysis of the fit between the means and ends of law. Anything else would betray *Casey*'s promise.