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**HELLERSTEDT AND THE UNDUE BURDEN STANDARD**

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HELLERSTEDT AND THE UNDUE BURDEN STANDARD:

THE SUPREME COURT’S FAILURE TO ADEQUATELY

PROTECT ABORTION RIGHTS

by

Sara Elizabeth Weimar

In Partial Fulfillment of the

Requirements for the Degree

of

Master of Arts

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American Public University

Charles Town, WV
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In the case *Whole Woman’s Health v. Hellerstedt*, the Supreme Court once again discussed and ruled on abortion rights. The Court claimed to have re-affirmed the basic principles of the landmark abortion rights decision of *Roe v. Wade*, but then only applied the undue burden standard as outlined in *Planned Parenthood v. Casey*, rather than use the opportunity to protect abortion as a fundamental right. Since states cannot officially outlaw abortion within their borders, many state legislatures have specifically attempted to regulate abortion clinics out of existence by passing onerous and unnecessary health regulations concerning the practice of abortion. In this current political climate, abortion rights need to be protected by the strict scrutiny standard as befitting a fundamental right, otherwise many women will effectively lose their right to seek a termination when they are unable to obtain an abortion in their state.
INTRODUCTION

Abortion has a long and divisive history in the United States, ranging from casually acceptable, to outright prohibited (but still practiced in secret), to legalized, but still under attack. Most recently in the years since the 1973 landmark case of Roe v. Wade\(^1\) legalized abortion nationwide, several state legislatures have tried to regulate the practice out of existence. Despite the several Supreme Court cases re-affirming the right to abortion, this contentious issue periodically returns to the Court docket in one form or another as states continue to use backdoor methods to circumvent what the Court has held as a constitutionally-protected right: that of a woman’s choice whether to terminate her pregnancy or not.

This paper will analyze the latest Supreme Court case on the hot-button issue of abortion, Whole Woman’s Health v. Hellerstedt, 579 U.S. ___ (2016), as well as look at the historical context of abortion in America and legislative arguments for abortion as a fundamental right. In Whole Woman’s Health, the Court refined its Planned Parenthood v. Casey\(^2\) “undue burden” standard, leaving less room for interpretation than Casey itself allowed, but still not returning the “teeth” to the law that the strict scrutiny standard outlined in Roe allowed for. The breakthrough case of Roe v. Wade thoroughly outlined the Supreme Court’s initial reasoning in reversing the criminalization of abortion and remains relevant today.

The Court, while ruling properly to strike down the Texas legislation which was intended to regulate abortion clinics out of existence in that state, did so with equivocation. Rather than keep the undue burden standard, the Court should have re-adopted the strict scrutiny standard when it comes to abortion rights. The Court has found the right to an abortion to be protected under the 14th Amendment and used a living constitutionalist approach on this topic. However,

\(^1\) Roe v. Wade, 410 U.S. 113 (1973).
despite this latest ruling in *Hellerstedt*, conservative state legislatures will likely continue their attempts to undermine abortion rights; adopting the strict scrutiny standard would have sent a clear message that in fact abortion rights will be treated as constitutionally-protected by the judiciary. Instead, the Supreme Court left open the possibility of states using other legislation to effectively bar the practice of abortion in their states. Perhaps, if (or more likely when) the issue of abortion right is once again before the Supreme Court, they will adopt the strict scrutiny standard in the future to unequivocally protect a woman’s right to an abortion in America.

BACKGROUND

Abortion rights has long been a divisive and polarizing issue in the United States. In fact, a 2015 Gallup poll found that 21% of Americans would only vote for candidates who shared their views on abortion and 46% saying that abortion is a major issue they consider when voting.³ The preeminence of abortion rights on the national conscience was not always the case and abortions were in fact, “until about 1880…allowed under common law and widely practiced.”⁴ Says historian Leslie Reagan, “At conception and the earliest stage of pregnancy…no one believed that a human life existed; not even the Catholic Church took this view. Rather, the popular ethic regarding abortion and common law were grounded in the female experience of their own bodies.”⁵ Under common law, abortions were legal up until “quickening” (the first noticeable fetal movement, which was usually around sixteen to twenty weeks following conception), and many medical texts of the time referenced methods of

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⁵ *Id.*
abortion. 6 Ironically, the American Medical Association (which now recently advocated for abortion rights) 7 led the campaign against legal abortion in the 19 th century as “partly a professional move, to establish the supremacy of ‘regular’ physicians over midwives and homeopaths,” as well as an effort to control poisons, since many means of abortion including taking drugs that amounted to poisons and were oftentimes fatal. 8 Making abortion illegal in the 19 th century was also an effort at nativism and anti-Catholicism, since birth rates among white Protestant women were on the decline (and they were the primary abortion patient of their day), while immigration of non-whites and Catholics was on the rise. 9

Between approximately 1880 and 1973, abortion was unlawful in the United States, though many women still sought abortions through illegal or self-induced means. Wealthier women could leave the country or obtain “therapeutic” abortions (or those for the health and safety of the mother). 10 However, by 1902 “the editors of the Journal of the American Medical Association endorsed the by then common policy of denying a woman suffering from abortion complications medical care until she ‘confessed’ [to the abortion]—a practice that, Reagan shows, kept women from seeking timely treatment, sometimes with fatal results.” 11 In 1930, abortion accounted officially for the deaths of 2,700 women, despite its illegal status, with

7 Brief of Amici Curiae American College of Obstetricians and Gynecologists and the American Medical Association in Support of Plaintiffs-Appellees and in Support of Affirmance, Planned Parenthood v. Abbott, 734 F. 3d 406 (5 th Cir. 2013); “[We] oppose legislative interference with the practice of medicine and a woman’s relationship with her doctor…Access to safe and legal abortion is an important aspect of women’s health care. Abortion is one of the safest medical procedures performed in the United States.”
9 Id.
10 Id.
11 Id.
mortality rates declining in following decades with medical advances such as antibiotics.\textsuperscript{12} The Guttmacher Institute estimates there were about 200,000 to 1.2 million illegal abortions every year in the 1950s and 1960s.\textsuperscript{13} Much of the purpose of banning abortion, according to Leslie Reagan, was “to expose and humiliate women caught in raids on abortion clinics or brought to the hospital with abortion complications, and thereby send a message to all women about the possible consequences of flouting official gender norms;”\textsuperscript{14} it should come as no surprise then that the abortion rights movement should become inevitably tied to the women’s rights movement which started gaining ground by the 1960s. Betty Friedan, who arguably launched the modern feminist movement in 1963 with the book “The Feminine Mystique,” was staunchly for the abortion right tied feminism and abortion rights inexorably together.

By the 1960s and 1970s, the arguments surrounding abortion became that of the protecting the health of the mother and the life (and soul) of the fetus (driven primarily by the Catholic Church’s Pope Pius IX deeming abortion before and after “quickening” to be murder\textsuperscript{15} and Pope Pius XI’s remarks against abortion in 1930)\textsuperscript{16} versus a departure from the traditional gender-role of the woman primary as a child-bearer, agency over her own body, and as a woman’s right. Polarized political views aside, many in the 1960s and 1970s realized the public

\begin{itemize}
\item \textsuperscript{12} Gold, \textit{supra}.
\item \textsuperscript{13} \textit{Id}.
\item \textsuperscript{14} Pollitt, \textit{supra}.
\item \textsuperscript{15} Loren G. Stern, \textit{Abortion: Reform and the Law}, 59 J. Crim. L. Criminology & Police Sci. 84, 90 (1968).
\item \textsuperscript{16} Pope Pius XI, \textit{Casti Connubii}, The Vatican: Encyclicals (December 31, 1930), http://w2.vatican.va/content/pius-xi/en/encyclicals/documents/hf_p-xi_enc_19301231_casti-connubii.html; “[H]owever much we may pity the mother whose health and even life is gravely imperiled in the performance of the duty allotted to her by nature, nevertheless what could ever be a sufficient reason for excusing in any way the direct murder of the innocent? This is precisely what we are dealing with here. Whether inflicted upon the mother or upon the child, it is against the precept of God and the law of nature: ‘Thou shalt not kill.’ The life of each is equally sacred, and no one has the power, not even the public authority, to destroy it.”
\end{itemize}
health effects of criminalizing abortion. Contemporary abortion laws purportedly to safeguard women actually “had an adverse effect on the mother’s health. Although the statute may on occasion act as a deterrent to the would-be abortionist, the more usual effect is merely to drive him underground. The operation is often performed incompetently and under unsanitary conditions. Even more serious is the fact that patients rarely receive the proper post-operative care following one of these clandestine operations.”

Zad Leavy, of the California Bar, and Jerome Kummer, of the U.C.L.A. School of Medicine posed the issue this way: “is society in fact protecting the mother’s welfare by maintaining harsh and unyielding laws which drive her to unskilled criminal abortionists?” Further, they looked toward the prohibition era “when the indirect evils of the prohibition law far exceeded the evil at which the law was directed.”

In response to the health of the mother arguments, Colorado reformed its abortion laws in 1967 to allow for abortions in the case the woman’s life was endangered, or the child would be born with severe abnormalities, physical or mental, or in those cases of pregnancies resulting from rape or incest. Colorado based its abortion reform on the American Legal Institute’s Model Penal Code issued in 1962, which among other things, was the “first authoritative recommendation by any group to liberalize American criminal abortion laws;” thirteen states followed suit with similar abortion-reform laws in the next five years. In 1970, New York state shocked the nation when it outright legalized abortion, including no residency requirement to

19 Stern, supra at 91.
20 Gold, supra.
obtain an abortion (essentially legalizing “abortion on demand”). One of the key legislators of
the bill, Manfred Ohrenstein, said on the thirty-year anniversary of the bill:

We were living in a time of enormous change. There was the war. There was the
women’s movement, which was really bringing the abortion issue to a crescendo. It was
the end of the civil rights era, and we viewed this as a civil right. In ’65, we had repealed
the death penalty, which people thought was impossible. There was a sense that
extraordinary things were possible.22

Following legalization of abortion in New York state, the maternal-mortality rate in that state
dropped by 45%.23 In the first two years of legalization, “60 percent of women having abortions
in New York were from out of state.”24 Four other states had repealed anti-abortion laws and all
but five states had some form of abortion reform at least introduced by the early seventies.25

These movements toward reform of abortion laws represented the tectonic shifts occurring
socially and in politics with regards to abortion law; they set the stage for the landmark abortion
case of Roe v. Wade, which began again an era of legal abortion in America.

ROE v. WADE

Justice Blackmun, delivering the Supreme Court’s opinion in Roe v. Wade, recognized
how polarizing an issue abortion rights had become in the United States:

york-said-yes-stunning-the-nation.html.
23 Pollitt, supra.
24 Perez-Pena, supra.
25 Gold, supra.
We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One’s philosophy, one’s experience, one’s exposure to the raw edges of human existence, one’s religious training, one’s attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one’s thinking and conclusions about abortion….Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and of predilection.26

The issue, of course, was whether the government could, in fact, prohibit the practice of abortions or if the Constitution protected the practice as a matter of privacy.

In 1970, Norma McCorvey was an unmarried pregnant woman who sought to terminate her pregnancy, but was prohibited by the Texas Penal Code Arts. 1191-1194 and 1196. These articles criminalized abortions in all cases except those for the express “purpose of saving the life of the mother.”27 McCorvey was unable to receive a legal termination by a licensed medical practitioner because her life was not directly threatened by the pregnancy; she was unable to travel out-of-state to get a legal abortion elsewhere. She filed suit under the pseudonym “Jane Roe,” seeking declaratory relief and an injunction against further enforcement of the Texas statutes which criminalized abortion on the basis that such “statutes were unconstitutionally vague and that they abridged her right of personal privacy, protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.”28

26 Roe, 410 U.S. at 116.
28 Roe, 410 U.S. at 158.
In its opinion, the Court looked first at the historical context of abortion legality through the ages, realizing that only relatively recently in the United States was abortion criminalized and was never derived from the English common law, the source for many of the laws in the country. Further, much of the initial reason for prohibiting abortion in America in the early- and mid-19th century stemmed from Victorian-era social mores, as well as the danger associated with abortion procedures of the era. Even so, many states initially “dealt severely with abortion after quickening but were lenient with it before quickening.”

Eventually, the quickening benchmark was abandoned by the late 19th century and penalties for violating the law increased. Most jurisdictions, by the end of the 1950’s, had “banned abortion, however and when ever performed, unless done to save or preserve the life of the mother.”

Given this historical context of abortion in America, the Supreme Court in *Roe* significantly noted that:

> It is thus apparent that at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect. Phrasing it another way, a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today.

Also of note was the fact that after states initially started criminalizing abortions, the law continued to punish abortions performed early in the pregnancy, showing a preference to allow a woman’s choice in the matter before the pregnancy was very far along.

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29 *Roe*, 410 U.S. at 139.
30 *Id.*
31 *Id.*
32 *Id.* at 140.
33 *Id.* at 141.
Beside the historical context of abortion law and social standards, the Court also looked to professional medical bodies for their opinions on the matter. The American Medical Association was especially influential in the early passing of abortion laws in the United States, protesting “against such unwarrantable destruction of human life.”\(^{34}\) After abortion laws were passed, the Association was mostly silent on the issue until 1970 when its Board of Trustees noted “polarization of the medical profession on this controversial issue,” eventually adopting resolutions “[t]hat abortion is a medical procedure and should be performed only by a duly licensed physician and surgeon in an accredited hospital acting only after consultation with two other physicians.”\(^{35}\) Further, the “Principles of Medical Ethics of the AMA do not prohibit a physician from performing an abortion that is performed in accordance with good medical practice and under circumstances that do not violate the laws of the community in which he practices.”\(^{36}\)

The American Public Health Association also took a stance on the issue in October 1970, issuing “Standards for Abortion Services.” Key components of the standards emphasized readily available referral of abortion services from health providers, as well as counseling on such services, but that “[p]sychiatric consultation should not be mandatory. As in the case of other specialized medical services, psychiatric consultation should be sought for definite indications and not on a routine basis.”\(^{37}\) The American Public Health Association also found that “[t]he factor of gestational age is of overriding importance.”\(^{38}\) They recommended abortions be performed by adequately trained and licensed practitioners, as well as having the procedure

\(^{34}\) 12 Trans. Of the Am. Med. Assn. 73-78 at 78 (1859).
\(^{35}\) AMA House of Delegates 220 (June 1970).
\(^{36}\) AMA Judicial Council (1970).
\(^{38}\) id. at 398.
being completed in either “a well-equipped hospital” (with that being of more import the further along the fetus, specifically the second trimester) or in a facility designed to accommodate any unforeseen circumstances.\textsuperscript{39}

Far from outright advocacy for the practice of abortion, the stances of the American Medical Association and the American Public Health Association in the 1970s emphasized less the moral aspects of the practice and focused solely on the medical aspects. Much of this was out of recognition that many of the medical professionals in these associations were divided on the issue, while at the same time there were “rapid changes in state laws and by the judicial decisions which tend to make abortion more freely available” and the thought “that this trend will continue.”\textsuperscript{40} The medical profession, perhaps recognizing changing attitudes, became more concerned with the safe practice of abortion, rather than attempting to have it criminalized outright.

The Court recognized that much of the medical profession’s advocacy for abortion laws in the 19\textsuperscript{th} century stemmed from not only the moral stigma that became associated with abortion, but also from the danger inherent to the medical practices at the time. States had a legitimate interest at the time to “protect the pregnant woman, that is, to restrain her from submitting to a procedure that placed her life in serious jeopardy.”\textsuperscript{41} Following New York’s legalization of abortion in 1970, the concern for the health of the mother because of dangers associated with abortion had proven to be diminished with modern medical practices. The Supreme Court found that:

\textsuperscript{39} \textit{Id.} at 398.
\textsuperscript{40} AMA House of Delegates 220 (June 1970)
\textsuperscript{41} \textit{Roe}, 410 U.S. at 149.
Mortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low as or lower than the rates for normal childbirth. Consequently, any interest of the State in protecting the woman from an inherently hazardous procedure, except when it would be equally dangerous for her to forgo it, has largely disappeared. The State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient.42

As well as the State interest in the health of the mother, many contend that the State has a legitimate interest in protecting the potential life involved.

While many pro-life advocates argue that life begins at conception and should thus be protected from termination by the State. However, “those trained in the respective disciplines of medicine, philosophy, and the theology are unable to arrive at any consensus [of when life begins], the judiciary, at this point in the development of man’s knowledge, is not in a position to speculate as to the answer.”43 Further, the Court examined whether the unborn could even be considered to have rights, but found that “the unborn have never been recognized in the law as persons in the whole sense.”44 With fetal viability occurring between 24-28 weeks and later, the State’s interest however becomes more convincing when the fetus has the chance to survive outside the womb.45 The question became whether a woman did in fact have right to an abortion under the Constitutional right to privacy and whether that outweighed the government’s interest in protecting potential life.

42 Roe, 410 U.S. at 149-150.  
43 Id. at 159. 
44 Id. at 162. 
45 Id. at 160.
The right to privacy is not specifically enumerated in the text of the U.S. Constitution, but the Supreme Court has long recognized privacy as a fundamental right with its basis found in the First, Fourth, Fifth, Ninth, and Fourteenth Amendments and in the penumbras of the Bill of Rights.\textsuperscript{46} In previous decisions, the Court has found the right to privacy to encompass “only personal rights that can be deemed ‘fundamental’ or ‘implicit in the concept of ordered liberty,’” \textit{Palko v. Connecticut}, 302 U.S. 319, 325 (1937), are included in this guarantee of personal privacy;” the court has made clear that the right to privacy extends to “activities relating to marriage, … procreation, … contraception, … family relationships, … and child rearing and education.”\textsuperscript{47} The \textit{Roe} Court had to decide whether the right to privacy covered a woman’s right to seek an abortion.

Given the areas of concern the Court had previously found to be included by the right to privacy, the \textit{Roe} Court had no problem finding that privacy was “broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”\textsuperscript{48} They found the right to be apparent, as well as the possible damage the State could impose upon a pregnant woman by denying her the option for an abortion.\textsuperscript{49} Forcing a woman to carry to term an unwelcome pregnancy “may force upon the woman a distressful life and future.”\textsuperscript{50} There was also the potential suffering, “for all concerned, associated with the unwanted child, and there is the


\textsuperscript{48} Id. at 153.

\textsuperscript{49} Id.

\textsuperscript{50} Id.
problem of bringing a child into a family already unable, psychologically and otherwise, to care for it.” These factors, as well the liberalization of abortion laws in the country at the time, helped the Court reach the conclusion that a woman’s right to terminate her pregnancy was a fundamental right.

While abortion defenders often advocate for the right to choose to be considered an absolute right. Much like other fundamental rights, they are often curbed when the restrictions can be justified by a compelling governmental interest. The Court in *Roe* found that State’s interest in protecting life of the mother becomes “compelling” at around the end of the first trimester. During the first trimester, the mortality rate as a result of abortion is less than that of childbirth and the State’s interest in the mother’s health passes the strict scrutiny standard; as for the interest in the potential life of the fetus, the State’s interest is “compelling” at the point of fetal viability.

Following this reasoning, the Supreme Court, with a 7-2 decision, struck down the Texas statutes as unconstitutionally vague and because it violated a woman’s right to privacy. In its decision, the *Roe* Court adopted the trimester framework to balance a woman’s fundamental right to terminate her pregnancy with the opposing compelling State interests. During the first trimester, the “abortion decision and its effectuation must be left to the medical judgment of the pregnant woman’s attending physician.” Following the first trimester, the government may regulate abortion when it promotes and is “reasonably related” to the health of the mother; after

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51 *Id.*
52 *Id.* at 163.
53 *Id.*
54 *Id.* at 164.
the fetus becomes viable, the State may regulate or even ban abortion in its interest in the potential life of the fetus.\textsuperscript{55}

\textit{PLANNED PARENTHOOD v. CASEY}

Following the Supreme Court’s decision in \textit{Roe v. Wade}, the right to an abortion continually faced challenges in many different aspects. In the intervening years, the issue became no less contentious than in 1973. The next truly landmark case regarding abortion rights came with \textit{Planned Parenthood v. Southeastern Pennsylvania v. Casey}, 505 U.S. 833 (1992), which became foundational to the rule of law utilized decades later in \textit{Whole Woman’s Health v. Hellerstedt}.

The concerns at the heart of the \textit{Casey} case were Pennsylvania statutes passed in 1988 and 1989 which amended their abortion laws in several important ways, the most significant of which required a married woman to notify her husband prior to obtaining an abortion, as well as a signed statement to that effect. Also at issue in the case were provisions that directed un-emancipated minors to obtain the informed consent of a parent or guardian (with a judicial bypass option). Additionally, there was a mandated waiting period of at least 24 hours before the abortion procedure could be performed.

The judicial system has long recognized that minors may lack the maturity to make informed decisions. In the area of contract law, a person’s minority may be a valid reason for a contract to become void; in the area of criminal law, courts often treat minors less harshly than adults and holds them less accountable for their actions since they lack the experience and reasoning skills expected of adults. The \textit{Casey} Court accepted that it was “quite [a] reasonable

\textsuperscript{55} \textit{Id. at} 164-165.
assumption that minors will benefit from consultation with their parents and that children will often not realize that their parents have their best interests at heart." The Court upheld the constitutionality of the parental notification and consent requirements under this reasoning, especially considering the judicial bypass procedures in place for a minor to petition the court to allow the abortion if she was unable to obtain parental consent. However, the “[Court could not] adopt a parallel assumption about adult women.”

In analyzing the spousal notification requirement, the Supreme Court explicitly rejected the strict trimester framework outlined in Roe for an “undue burden analysis,” including the time before fetal viability, which Roe had protected most ardently. Rejecting Roe’s reasoning that the State’s interest essentially does not vest until after the point of viability, the Court effectively declawed the legal protection women experienced early in their pregnancy by allowing the State to regulate abortion in the first trimester in-so-far as it did not place a “substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.”

The State may also seek to convince the pregnant woman to “choose childbirth over abortion,” thus promoting the government’s interest in potential life. The State could also pass regulations in furtherance of its interest in the health of the mother, but “[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.” What might constitute an “undue burden” was not very refined by the Court, besides an immediate analysis of the specific issues presented by the Pennsylvania statutes the case sought to resolve.

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56 Casey, 505 U.S. at 895.
57 Id.
58 Id. at 878.
59 Id.
60 Id.
The Court made clear, however, that its adoption of this undue burden standard “does not disturb the central holding of Roe v. Wade, and we reaffirm that holding. Regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.” However, the right to an abortion, held as a fundamental right under Roe was effectively no longer protected as such, despite the Court’s words.

As for the challenged provision requiring spousal notification, the Supreme Court struck it down. In Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52, 69 (1976), the notion that a woman required her husband’s permission to terminate her pregnancy was held unconstitutional. For comparable reasons, the requirement of a wife to notify her husband of her decision to abort a pregnancy would leave her similarly situated as the woman required to obtain spousal consent. Danforth rejected the traditional gender role of women being subservient and legally tied to her husband. While the husband does have an interest in the life of his potential child, this interest does not override the rights of the mother. The Court, recognizing that a married couple are not necessarily one entity legally where pregnancies are concerned and “state regulation with respect to the child a woman is carrying will have a far greater impact on the mother’s liberty than on the father’s.” To put the husband’s interest over the wife’s in the case of the abortion decision would “empower him with [a] troubling degree of authority over his wife,” so the “balance weighs in her favor.”

The other primary issue with the spousal notification requirement was the possible physical endangerment of requiring a wife to notify her husband of her decision to terminate her

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61.Id. at 879.
62.Id. at 896.
63.Id.
64.Id. at 898.
pregnancy. In healthy marital relationships, communication between husband and wife often flows freely and the decision to have an abortion may be reached by the couple mutually. In tumultuous relationships, or when the pregnancy results from an extramarital affair, the spousal notification may often result in violence.\textsuperscript{65} The Pennsylvania statute allowed an exception by having the woman provide:

\begin{quote}
[A]n alternative signed statement certifying that her husband is not the man who impregnated her; … that the pregnancy is the result of spousal sexual assault which she has reported; or that the woman believes that notifying her husband will cause him or someone else to inflict bodily injury upon her.\textsuperscript{66}
\end{quote}

The statute would also require that the woman had reported the abuse from her husband to the police, a scenario often avoided by many women in abusive relationships for numerous reasons. Beyond the threat of physical violence, women in abusive marriages may suffer in other ways, as well: “Psychological abuse, particularly forced social and economic isolation of women, is also common.”\textsuperscript{67}

Despite respondents’ arguments that a limited number of women would be adversely affected or deterred from seeking an abortion as a result of the spousal notification requirement, the Court found the requirement unconstitutional as it would pose a “substantial obstacle” for many women.\textsuperscript{68} Rather than operate in an insular fashion, the Court held:

\begin{flushleft}
\textsuperscript{66} \textit{Casey}, 505 U.S. at 887-888.
\textsuperscript{68} \textit{Casey}, 505 U.S. at 894.
\end{flushleft}
We must not blind ourselves to the fact that the significant number of women who fear for their safety and the safety of their children are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases.\footnote{Id.}

This recognition that perhaps only a small proportion of women seeking an abortion would be adversely affected by the spousal notification requirement sought to protect the rights of those women who may not be in a position to protect themselves.

The Court also applied their undue burden standard to Pennsylvania’s 24-hour waiting period requirement. While the District Court found that the waiting period would be “particularly burdensome” for some women, especially those without much capital or those who may be forced to travel long distances to get an abortion.\footnote{Planned Parenthood v. Casey, 744 F. Supp. 1323, 1352 (E. D. Pa. 1990).} Further, the waiting period would increase the cost because of the additional visit required with the practitioner, as well as time spent away from employment or husbands or partners whom the woman may not want to explain their absence to. The District Court also noted that the waiting period requirement would potentially increase a woman’s exposure to “the harassment and hostility of antiabortion protestors demonstrating outside a clinic.”\footnote{Id. At 1351.} The District Court found the burden of the 24-hour waiting period to be unconstitutional.

The Supreme Court dismissed these hardships, placing the State’s interest in potential life over the rights of the woman, even during the period before non-viability. Their reasoning was “that important decisions will be more informed and deliberate if they follow some period of reflection does not strike us as unreasonable, particularly where the statute directs that important

\footnote{Id.}
\footnote{Planned Parenthood v. Casey, 744 F. Supp. 1323, 1352 (E. D. Pa. 1990).}
\footnote{Id. At 1351.}
information become part of the background of the decision” and that the 24-hour waiting period did “not amount to an undue burden.”

MODERN CONTEXT

Abortion battles in recent years in the United States center around a woman’s right to choose versus the protection of fetal life. In 2016, the United Nations warned of the dangers posed to women in societies where abortion is illegal and held the right to an abortion as a woman’s human right:

Criminalization of abortion and failure to provide adequate access to services for termination of an unwanted pregnancy are forms of discrimination based on sex. Restrictive legislation which denies access to safe abortion is one of the most damaging ways of instrumentalising [sic] women’s bodies and a grave violation of women’s human rights.

Despite abortion being legal in the U.S. since the Supreme Court’s ruling in Roe v. Wade in 1973, state legislatures continue to try to find inventive ways to deny women access to abortions in their states. Since they cannot outright ban abortions, the circuitous ways they try to regulate abortion out of existence in their states now goes by the term Targeted Regulation of Abortion Providers (TRAP) laws.

States which pass these TRAP laws often do so with little compunction and little secrecy about the true intention behind the laws. For example, Mississippi passed a law requiring admitting privileges and that abortion practitioners be board certified OB/GYNs; the legislature

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72 Casey, 505 U.S. at 885.
claimed that this new law was in the interest of protecting women. However, Governor Phil Bryant stated: “It’s historic. Today you see the first step in a movement, I believe, to do what we campaigned on—to say that we’re going to try to end abortion in Mississippi.” The state only has one remaining abortion clinic and one of the legislators who helped pass the bill state “I’m very pro-life….If this legislation causes less abortion, then that’s a good thing.”

Two of the more common TRAP laws adopted in recent years by states hostile to abortion rights, include laws requiring abortion providers to have admitting privileges at a local hospital and demanding abortion clinics to meet unnecessary and costly building requirements. Texas passed two such laws in 2013, which became the central issue in *Whole Woman’s Health v. Hellerstedt*, 579 U.S. ___ (2016), the most recent abortion rights case to reach the Supreme Court.

**WHOLE WOMAN’S HEALTH v. HELLERSTEDT**

In 2013, Texas passed House Bill 2 (H.B. 2) which contained two major provisions affecting abortion law in that state: an admitting-privileges requirement and a surgical-center requirement. The admitting-privileges requirement mandated that “physician performing or inducing an abortion…must, on the date the abortion is performed or induced, have active admitting privileges at a hospital that…is located not further than 30 miles from the location at which the abortion is performed or induced.” Previously, abortion practitioners needed only to have written protocols in place in the event of an emergency situation during an abortion

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75 *Id.*
76 *Id.*
procedure. The surgical-center requirement directed that “the minimum standards for an abortion facility must be equivalent to the minimum standards adopted under [the Texas Health and Safety Code section] for ambulatory surgical centers.”

The District Court deemed H.B. 2 to have created an “undue burden” on a woman’s right to terminate her pregnancy and enjoined enforcement of the admitting-privileges and surgical-center provisions. The Fifth Circuit heard the case on appeal and overturned the lower court, deferring to the legislature and finding the provisions to be constitutional and not violative of a woman’s right to choose.

Texas argued that each of these provisions promoted and protected women’s health, despite the relative safety of modern abortion practices. The Supreme Court cited several reasons for why the admitting-privileges and surgical-center requirements would not actually improve or protect the health of a woman seeking to terminate her pregnancy at one of Texas’ abortion clinics.

For the admitting-privileges requirement, the District Court had noted that “[t]he great weight of evidence demonstrates that, before the acts passage, abortion in Texas was extremely safe with particularly low rates of serious complications and virtually no deaths occurring on account of the procedure.” Also, expert testimony cited the low instances of those rare complications even needing hospital admittance would likely occur well after the procedure and the woman would simply go to the hospital nearest her home and that the “quality of care that the patient receives is not affected by whether the abortion provider has admitting privileges.”

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80 Hellerstedt, 579 U.S. at 23.
Thus, the new requirement did not truly further Texas’ interest in women’s health and in actuality often restricted a woman’s right to choose.\textsuperscript{81}

The admitting-privileges requirement proved to shut down clinics, rather than make them safer for women. Many abortion practitioners could not gain admitting privileges at a local hospital, not only because of the stigma associated with abortion in a conservative stronghold like Texas, but also because they almost never have patients to admit because abortion are generally very safe. Also of note is the fact that the “admitting-privileges requirement does not serve any relevant credentialing function” and instead shut down about half of Texas’ abortion clinics, resulting in “fewer doctors, longer waiting times, and increased crowding.”\textsuperscript{82} The closure of clinics also increased driving times, sometimes dramatically so, but the Court deigned not to view that as an undue burden on its own merits.\textsuperscript{83}

Similar to the admitting-privileges requirement, the surgical-center requirement equally did not advance Texas’ legitimate state interest in women’s health. Before passage of H.B. 2, abortion clinics already had to meet numerous facility requirements.\textsuperscript{84} The new law would require clinics to meet a whole host of regulations including, “among other things, detailed specifications relating to the size of the nursing staff, building dimensions, and other building requirements” to be considered ambulatory surgical centers.\textsuperscript{85}

The District Court found that the surgical-center requirement does not advance women’s health and “is not necessary.”\textsuperscript{86} Indeed, statistically speaking, abortions, with the advent of modern medical practices, are now “safer than numerous procedures that take place outside

\textsuperscript{81} Id. at 24.
\textsuperscript{82} Id. at 25-26.
\textsuperscript{83} Id. at 26.
\textsuperscript{84} Id. at 28.
\textsuperscript{85} Id.
\textsuperscript{86} Id. at 29.
hospitals and to which Texas does not apply its surgical center requirements.” 87 The Court also noted that the mortality rate for childbirth is 14 times that of abortions, yet “Texas law allows a midwife to oversee childbirth in the patient’s own home.” 88 Further, Texas has granted waivers or grandfathered the surgical-center requirements for approximately two-thirds of the locations which state law mandates meet those standards; yet no waivers or grandfathering of surgical-center requirements was offered to abortion providers, despite the relative low risk of the procedure and the fact that patients are not put under general anesthesia. 89

This evidence, as well as other conclusions, led the District Court to determine that “[m]any of the building standards mandated by the act and its implementing rules have such a tangential relationship to patient safety in the context of abortion as to be nearly arbitrary.” 90 If H.B. 2 had been fully enforced, the number of clinics in Texas would have been reduced to approximately seven or eight that could meet the “arbitrary” surgical-center requirements, while the other clinics would be forced into closure because upgrading their facilities to those standards would be size- or cost-prohibitive. 91 These seven or eight clinics would need to provide approximately five times the amount of abortion annually to meet the “demand,” not to mention the drastically increased driving times women would face, as well as the longer wait times and

87 Id. at 30; “Colonoscopy, a procedure that typically takes place outside a hospital (or surgical center) setting, has a mortality rate 10 times higher than an abortion....the mortality rate for liposuction, another outpatient procedure, is 28 times higher than the mortality rate for abortion....Medical treatment after an incomplete miscarriage often involves a procedure identical to that involved in a nonmedical abortion, but it often takes place outside a hospital or surgical center.”

88 Id.

89 Id. at 30-31.

90 Lakey, 46 F. Supp. 3d, at 684.

91 Hellerstedt, 579 U.S. at 36; “[T]he District Court found that the costs that a currently licensed abortion facility would have to incur to meet the surgical-center requirements were considerable, ranging from $1 million per facility (for facilities with adequate space) to $3 million per facility (where additional land must be purchased.”
less individualized patient attention such a reduction in clinics would mean.\textsuperscript{92} Texas was also not able to provide any evidence that the remaining clinics would be able to expand to five times their current operations, as well as the facilities still operating after partial enforcement of H.B. 2 stating they could not meet the increased demand.\textsuperscript{93}

After reviewing each of the provisions of H.B. 2 and their impacts, the Supreme Court concluded that

More fundamentally, in the face of no threat to women’s health, Texas seeks to force women to travel long distances to get abortions in crammed-to-capacity superfacilities. Patients seeking these services are less likely to get the kind of individualized attention, serious conversation, and emotional support that doctors at less taxed facilities may have offered. Healthcare facilities and medical professionals are not fungible commodities.\textsuperscript{94} Additionally, contrary to Texas’ stated assertions, the practical effect of the provisions of H.B. 2 “provides few, if any, health benefits for women, poses a substantial obstacle to women seeking abortions, and constitutes an ‘undue burden’ on their constitutional right to do so.”\textsuperscript{95}

RELEVANT LAW REVIEW ARTICLES

Several law reviews have addressed the issues associated with the undue burden standard outlined in \textit{Casey} and further refined by the Court’s ruling in \textit{Hellerstedt}. Many law review authors have argued that the undue burden standard is inherently flawed and not appropriate to protect the fundamental right to choose; this has been borne out in many cases in the years

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\textsuperscript{92} Id. at 32; See Brief for National Abortion Federation et al. as Amici Curiae 17-20: “citing clinics’ experiences since the admitting-privileges requirement went into effect of 3-week wait times, staff burnout, and waiting rooms so full, patients had to sit on the floor or wait outside.”
\textsuperscript{93} Id. at 35.
\textsuperscript{94} Id. at 35-36.
\textsuperscript{95} Id. at 36.
\end{flushleft}
between *Casey* and *Hellerstedt* that courts have “applied *Casey* inconsistently and unfaithfully.”

In her law review article, Emma Freeman states that “abortion is a fundamental right and should trigger the strictest constitutional scrutiny,” but then proceeds to argue simply for a better version of the undue burden standard, as a return to the strict scrutiny applied by the *Roe* Court is perhaps too idealistic. She argues for a more rational basis review to be applied to the undue burden standard to “give *Casey* its bite back.” Freeman contends that the *Casey* undue burden standard fails in that it is not explicitly a balancing test between the rights of the woman versus the state’s interests and the *Casey* Court did not clarify the undue burden standard enough. Adding more of a rational basis review to the undue burden standard would have courts analyze and scrutinize the state’s purported interest in the abortion regulations it puts into law and also look at other indications of the state’s true purpose behind the regulations it passes. This would then be balanced against the woman’s right to choose and whether it would have the effect of creating an undue burden on that right.

In her journal article, *More Than Mileage: The Preconditions of Travel and the Real Burdens of H.B. 2*, Madeline Gomez argues that the undue burden standard adopted by the *Casey* Court is essentially “toothless” and unable to adequately protect a woman’s right to choose. She maintains that the Court in *Hellerstedt* applied the undue burden standard “in a vacuum, divorced from the lived realities of the women who experience them and their attendant

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97 *Id.* at 281.
98 *Id.* at 321-322.
99 *Id.* at 320.
Specifically, the Court did not put enough weight to the actual effect the closing of clinics and the resulting increases in travel distances had on women’s access to abortions. While the Court recognized increased travel distances as a potential burden, they did not view it as an undue burden, nor did they meaningfully discuss why it might be a burden, perhaps thinking the answers obvious. Gomez contends that the increased travel distances negatively affect a great many women, but disproportionately affect poorer Latina women in Texas because

These factors—time, money, accommodations, school, work, childcare, travel, and immigration enforcement—and others create an intricate series of obstacles, each entangled with the other, that stand between a woman and the care she requires. For many women, the first or second barrier may be possible to overcome, but the third, fourth, or fifth ultimately proves an insurmountable hurdle, even before the issue of travel distance or time arises.

The *Hellerstedt* Court did not consider any of these factors, which the closing of clinics exacerbated. *Hellerstedt* only commented on the balance between the state’s professed intent to protect women’s health with the provision of H.B. 2 (and whether those provisions actually met that stated intent) versus the undue burden presented by overcrowded clinics and poor patient care if Texas’ number of clinics was reduced to seven or eight as a result of full enforcement of H.B. 2.

The District Court noted the effect partial enforcement of H.B. 2, which reduced abortion clinics from 42 to 19, had on travel distances for women in Texas:

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101 Id. at 52.
103 Gomez, *supra* at 56.
104 *Hellerstedt*, 579 U.S. at 36.
[The] number of women of reproductive age living in a county…more than 150 miles from a provider increased from approximately 86,000 to 400,000…and the number of women living in a county more than 200 miles from a provider from approximately 10,000 to 290,000.\(^{105}\)

These numbers are significant, with travel distances only increased if H.B. 2 had been fully enforced. While not every woman in the state seeking an abortion would be affected, many women would be unable to obtain an abortion because Texas intentionally made clinics more unavailable. Gomez concludes that “[w]ithout the ability to actually secure the abortion one seeks, the fundamental right recognized in \textit{Roe v. Wade} is reduced to myth.”\(^{106}\)

In the article, \textit{Casey and the Clinic Closings: When “Protecting Health” Obstructs Choice}, Yale Law professors Linda Greenhouse and Reva Siegel looked at abortion decisions following the \textit{Casey} ruling and leading up to \textit{Hellerstedt}, as well as the advent of TRAP laws appearing in many states. The authors trace the great disparity between different courts applying \textit{Casey}’s undue burden standard, arguing that many courts have allowed so-called health-related abortion restrictions to serve the state interest in protecting fetal life, while other courts “have raised concern about this differential treatment [of abortion] as an indicator of unnecessary regulation and potential unconstitutionality.”\(^{107}\)

Greenhouse and Siegel cite the case of \textit{Greenville Women’s Clinic v. Bryant} as a stark example of how courts have been divided over the application of the undue burden standard and have allowed for what the authors call “abortion exceptionalism” in its application.\(^{108}\) In \textit{Bryant},

\(^{105}\) \textit{Lakey}, 46 F. Supp. 3d, at 681.

\(^{106}\) \textit{Gomez}, \textit{supra}.


\(^{108}\) \textit{Id.} at 1448.
the District Court struck down a South Carolina law which singled out abortion clinics which operated during the first trimester for special regulation, but which were “not justified by the stated interest in protecting the health of the women undergoing the procedure.” On appeal, applying the same *Casey* standard, the Fourth Circuit reversed, over a dissent that argued abortion was being unfairly singled out from other medical procedures. The Circuit Court upheld the South Carolina law as protective of women’s health, despite evidence to the contrary, and justified abortion as distinct from other medical procedures:

> It is regrettable that our good colleague in dissent would rule on the basis that abortion is like any other simple medical procedure that is directed at injury or disease. Thought of in this way, it is understandable that he, like the district court, might find many of South Carolina’s regulations unnecessary. Why have inspections, keep records, and minimize the medical risks for only the abortion procedure, when such a protocol is not mandated for comparable medical practices addressing injury or disease? But the importance of the deeply divided societal debate over the morality of abortion and the weight of the interests implicated by the decision to have an abortion can hardly be overstated. As humankind is the most gifted of living creatures and the mystery of human procreation remains one of life’s most awesome events, so it follows that the deliberate interference with the process of human birth provokes unanswerable questions, unpredictable emotions, and unintended social and, often personal consequences beyond simply medical ones.

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110 *Greenville Women’s Clinic v. Bryant*, 222 F.3d 157, 205 (4th Cir. 2000).
111 *Id.* at 175.
Greenhouse and Siegel note the “unusually frank judicial exchanges” in *Bryant*, that underscore that there remains “the notion that there is a special moral valence to abortion that, because it concerns the unborn, warrants special forms of health regulation not imposed on procedures of comparable risk.”\(^{112}\) *Casey* and *Hellerstedt* both reject this notion beyond the acknowledgement that a state has a legitimate interest in protecting fetal life, but yet some states and courts are still determined to treat the practice of abortion as distinct from other medical procedures of similar risk and allow for more regulations on that basis.

Greenhouse and Siegel argue that while the *Casey* standard is not the way they would have protected the abortion right, it “represent[s] the Court’s good-faith effort to pronounce the Constitution’s meaning for a divided nation.”\(^{113}\) They advocate however for the undue burden standard to require a more thorough analysis of evidence to support the state’s potentially unnecessary health restrictions on abortion, rather than defaulting to the state’s logic or treating abortion separately from other medical procedures.\(^{114}\)

**CONCLUSION**

While the Court in *Hellerstedt* appropriately struck down the admitting-privileges and surgical-center requirements of Texas’ H.B. 2, continuing to apply the flawed undue burden standard from *Casey* was a mistake. *Hellerstedt* only marginally improved the undue burden standard by seemingly adopting a more thorough analysis of whether a state’s health-related regulations on abortion actually serve their supposed purpose. However, the undue burden

\(^{112}\) Greenhouse and Siegel, *supra* at 1448.

\(^{113}\) *Id.* at 1479.

\(^{114}\) *Id.*
standard still leaves too much room open to lower court interpretation and does not unequivocally protect a woman’s right to an abortion.

With the number of states proving hostile to abortion only increasing, states determined to unconstitutionally regulate abortion clinics out of existence within their states will continue to pass laws restricting women’s access to their fundamental right to choose.\textsuperscript{115} \textit{Roe v. Wade} declared a woman’s right to an abortion as a fundamental right, protected constitutionally by the 14\textsuperscript{th} Amendment as a matter of privacy, yet the highest court in the United States deigns to not defend abortion rights as it would other fundamental rights. Perhaps it is too quixotic to hope that the Court would have taken the opportunity presented in \textit{Hellerstedt} to return to the strict scrutiny standard of \textit{Roe}, as the years of court battles following \textit{Casey} have proven that state legislatures will continue to act in bad-faith with regards to abortion rights and continue to pass unnecessary and onerous regulations to prevent women from obtaining an abortion in their states.

The Court in \textit{Hellerstedt} at least brings some level of common sense scrutiny to the undue burden standard by requiring that health-based abortion restrictions actually have the effect of protecting women’s health, rather than the purpose of promoting the state’s interest in fetal life. The two provisions of H.B. 2 were clearly not supportive of women’s health in actuality, so striking down the admitting-privileges and surgical-center requirements seemed a logical and inevitable conclusion once the Court looked beyond just the state’s claimed purpose. The fact that abortion practitioners almost never have a need to admit a woman to a hospital following a termination, nor do they ever put women under deep sedation, easily negates the

\textsuperscript{115} April Shaw, \textit{How Race-Selective and Sex-Selective Bans on Abortion Expose the Color-Coded Dimensions of the Right to Abortion and Deficiencies in Constitutional Protections for Women of Color}, 40 N.Y.U. Rev. L. & Soc. Change 545, 546 (2016); “In 2013 alone, twenty-two states curbed access to abortion through seventy separate legislative acts. Between 2000 and 2011 the number of states considered hostile to abortion rights, meaning that they enacted at least four major abortion restrictions, doubled from thirteen to twenty-six.”
supposed need for either the admitting-privileges or surgical-center requirements; very little analysis was needed by the District Court or the Supreme Court to determine these were superfluous regulations intended to shut down clinics.

However, how the undue burden standard will be applied to other, less facially discriminatory abortion laws remains unclear. Without the application of a strict scrutiny standard to ensure the legislature must have a compelling governmental and narrowly tailored laws when regulating abortion, the Court still leaves too much judicial interpretation to lower court who have proven they will often find ways to allow abortion restrictions to stand despite overwhelming evidence of how unnecessary those regulations often are. The deference to the legislature shown by the Fifth Circuit will now not pass the more clarified undue burden standard of *Hellerstedt*, at least when health-related abortion restrictions are at stake.

How courts will be expected to apply the undue burden test to abortion statutes not directly or purportedly relating to women’s health remains to be seen. Judicial decisions will likely continue to be tainted by the beliefs of individual judges and justices when cases do not so clearly mold to the cost-benefit framework of the undue burden analysis vaguely outlined in *Hellerstedt*. Arguably, lower courts may justify not even needing to apply *Hellerstedt* to anything but health-related restrictions to abortion, so states will likely find different ways to restrict abortion access.

The Supreme Court can claim it is upholding the essential principles of *Roe v. Wade* when it maintains *Casey’s* undue burden standard, but what good will women’s fundamental right to an abortion be if there is nowhere to obtain the procedure? While the *Hellerstedt* ruling stopped the further closing of even more clinics in Texas, partial enforcement of H.B. 2 had already reduced the number of clinics by over half. With a strict scrutiny standard, the Fifth
Circuit would not have had the wiggle room they had under *Casey* to defer to legislature’s desires and overturn the District Court’s injunction on the provisions of H.B. 2. *Hellerstedt* clarifies the issue of admitting-privilege and surgical-center requirements, but determined state legislatures will find new ways to undermine *Roe* and they will use the inadequacies and failings of the undue burden standard to do so. By the time the court system catches up to their newest machinations, the right to an abortion may cease to practically exist for many women when clinics are continually fighting battles to remain open.

The Supreme Court’s reasoning in *Roe v. Wade* remains as valid today as it was in 1973, with the abortion rights issue just as contentious. However, the Court continuing to uphold Casey’s undue burden standard only undermines the basic premise of *Roe*; that abortion rights are provided and protected by the right to privacy. The issue of abortion rights will inevitably return to the Court’s docket and only a return to the strict scrutiny standard of *Roe* will be enough to protect a woman’s fundamental right to choose.