Digital Commons
@ LMU and LLS

Loyola Marymount University and Loyola Law School
Digital Commons at Loyola Marymount
University and Loyola Law School

Loyola of Los Angeles Law Review

Law Reviews

1-1-2017

Returning to Roe: The Renewed Promise of Whole Woman's Health

Cristina Salcedo
Loyola Law School, Los Angeles

Recommended Citation

Cristina Salcedo, Returning to Roe: The Renewed Promise of Whole Woman's Health, 50 Loy. L.A. L. Rev. 297 (2017).

This Comments is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

RETURNING TO *ROE*: THE RENEWED PROMISE OF *WHOLE WOMAN'S HEALTH*

Cristina Salcedo∗

"Liberty finds no refuge in a jurisprudence of doubt."[1] Yet nearly a quarter-century after Justice Kennedy first penned those words, abortion rights still stand on uncertain ground.

Constitutional protections for abortion have been eroded since first announced in *Roe v. Wade*. Federal courts, including the Supreme Court, have narrowly construed the sweeping pronouncements of *Roe*.[2] And state legislatures, largely in conservative states, have enacted laws restricting abortion under the guise of protecting women's health.[3]

In 2013, the Texas state legislature passed such a law: House Bill 2 ("H.B. 2").[4] The Bill was ostensibly aimed at "protect[ing] life and protect[ing] women."[5] However, critics of the Bill argued it would "dramatically reduce some women's access to safe, legal abortion."[6]

∗ J.D. Candidate, May 2017, Loyola Law School, Los Angeles; B.A., Political Science, 2013, California State University, Northridge. I would like to thank my parents for their unconditional love and support during law school. Special thanks are owed to Professor West-Faulcon for her invaluable guidance and feedback throughout the writing process. Cristina Salcedo is an associate at Wilmer Cutler Pickering Hale and Dorr LLP. The views expressed in the article are the author's alone and should not be attributed to Wilmer Cutler Pickering Hale and Dorr LLP or any other attorneys at the firm.

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

2. *See infra*, Section III.

3. *See* Amber Phillips, *14 States Have Passed Laws This Year Making It Harder to Get an Abortion*, WASH. POST (June 1, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/06/01/14-states-have-passed-laws-making-it-harder-to-get-an-abortion-already-this-year.

4. H.B. 2, 83rd Leg., 2nd Called Sess. (Tx. 2013); Amber Phillips, *Three States' Abortion Laws Just Fell Thanks to the Supreme Court. These Could be Next.*, WASH. POST (June 28, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/06/27/how-many-states-could-see-their-abortion-restrictions-struck-down-after-the-supreme-courts-big-ruling.

5. Ariel Walden, *Governor Rick Perry Says Senate Bill 5 Will Defend Women's Health And Rights of Unborn Children*, 790 KYFO (July 1, 2013), http://kfyo.com/governor-rick-perry-says-senate-bill-5-will-defend-womens-health-and-rights-of-unborn-children-audio/ (statements made by Texas Governor Rick Perry, who signed the Bill into law) (referring to H.B. 2 as Senate Bill 5).

6. Steffi Badanes, *5 Stories Show How Texas' HB2 and Other Trap Laws Hurt Abortion Access*, PLANNED PARENTHOOD (June 22, 2016), https://www.plannedparenthoodaction.org/blog/5-womens-stories-show-how-texas-hb2-and-other-trap-laws-hurt-abortion-access.

Several women's health clinics filed suit against Texas.[7] The clinics challenged two provisions of the Bill: (1) a requirement that doctors performing abortions have admitting privileges at a nearby hospital (the "admitting privileges" requirement); and (2) a requirement that all abortion-providing facilities meet the rigorous standards of a surgical center (the "surgical center" requirement).[8]

The case reached the Supreme Court, which struck down both provisions at issue by a 5-3 vote.[9] Abortion activists across the country declared the decision as a victory. This paper argues that *Whole Woman's Health* hewed closer to the vision articulated in *Roe* than the Court's other post-*Roe* jurisprudence.

I. PRELUDE TO *WHOLE WOMAN'S HEALTH*

A. Factual Background

H.B. 2's passage was contentious. Before the Bill was voted on, the floor of the Texas legislature was filled with "often-angry debate[s]" between proponents and opponents of the legislation in what was described by some as an "unruly mob."[10] The Bill was also met with an eleven-hour filibuster conducted by Wendy Davis, a Democratic state Senator.[11] But H.B. 2 still passed by a vote of 96 to 49.[12]

The controversy surrounding the Bill did not fade away. Several Texas abortion providers—health clinics and physicians—filed suit in the Western District of Texas to challenge the constitutionality of two of the Bill's provisions: the admitting privileges requirement and the surgical center requirement.[13] The admitting privileges provision required a "physician performing . . . an abortion" to "have active admitting privileges at a hospital that [] is located not further than 30 miles from where the abortion [was] performed."[14] The surgical center provision required that abortion facilities satisfy the "minimum

7. *Id.*

8. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2300 (2016).

9. *Whole Woman's Health v. Hellerstedt*, SCOTUSBLOG (June 27, 2016), http://www.scotusblog.com/case-files/cases/whole-womans-health-v-cole.

10. John Schwartz, *Texas Resumes Efforts on Abortion Restrictions*, N.Y. TIMES (July 9, 2013), http://www.nytimes.com/2013/07/10/us/texas-resumes-efforts-at-abortion-restriction.html.

11. *Id.*

12. LEGISCAN, https://legiscan.com/TX/bill/HB2/2013/X2 (last visited Sept. 11, 2016).

13. *Whole Woman's Health*, 136 S. Ct. at 2300.

14. TEX. HEALTH & SAFETY CODE § 171.0031(a) (Supp. 2014).

standards adopted by [Texas Health & Safety Code] Section 243.010 for ambulatory surgical centers," including adhering to "detailed specifications relating to the size of the nursing staff, building dimensions, and other building requirements."[15]

These two provisions had a devastating effect on women's access to abortions in Texas. The court initially entered an injunction that was later lifted.[16] In the lead-up to enforcement, several abortion clinics closed their doors.[17] Upon taking effect, the number of abortion-providing facilities in Texas dropped to only eight.[18] In essence, the Bill meant "fewer doctors, longer waiting times, and increased crowding" for Texas women seeking abortions.[19]

B. Procedural History

The district court found H.B. 2 unconstitutional.[20] It found that both provisions together and independently violated the Fourteenth Amendment Due Process Clause.[21] The court ruled that H.B. 2's provisions substantially burdened abortion rights "in a way that is incompatible with the principles of personal freedom and privacy protected by the United States Constitution for the 40 years since *Roe v. Wade*."[22]

Nevertheless, on appeal, the Fifth Circuit reversed the district court on the merits.[23] The Fifth Circuit applied a two-part test in which it first reviewed the law under rational basis scrutiny, then examined to see if the law unduly burdened abortion rights.[24] It found that there was "no record evidence" to support the district court's finding that the Bill imposed an undue burden on abortion.[25] The Fifth Circuit held that both provisions were constitutional because the admitting

15. *Id.* § 245.010(a); 25 TEX. ADMIN. CODE § 139.40 (2012); *Whole Woman's Health*, 136 S. Ct. at 2314.
16. *Whole Woman's Health*, 136 S. Ct. at 2300.
17. *Id.* at 2301.
18. *Id.* at 2313 (citing Whole Woman's Health v. Lakey, 46 F. Supp. 3d 673, 680–81 (2014) ("After September 1, 2014, only seven facilities and a potential eighth will exist in Texas.")).
19. *Id.*
20. *Lakey*, 46 F. Supp. 3d at 676.
21. *Id.* at 678.
22. *Id.* at 686.
23. Whole Woman's Health v. Lakey, 769 F.3d 285, 296 (5th Cir. 2014).
24. *Id.* at 293.
25. *Id.* at 294–95.

privileges requirement and the surgical center requirement were rationally related to a legitimate state interest.[26]

II. HISTORICAL FRAMEWORK

A. Roe v. Wade *(1973)*

The Supreme Court first recognized a constitutional right to an abortion four decades ago in *Roe v. Wade*.[27] The *Roe* Court faced the issue of whether a Texas statute criminalizing abortion was constitutional.[28] It held that the Due Process Clause of the Fourteenth Amendment implies a right to privacy that includes the right to terminate a pregnancy.[29]

Roe did not shy away from confronting the consequences of an unwanted pregnancy in the lives of women.[30] It recognized that forcing a woman to carry a pregnancy to term may cause "the woman a distressful life and future."[31] *Roe* even went so far as to state that "[p]sychological harm may be imminent" in an unwanted pregnancy and "[m]ental and physical health may be taxed by child care."[32]

However, *Roe* did not hold that women have a limitless right to an abortion.[33] Rather, *Roe* concluded that women (and their doctors) had full control of abortion decisions only through the first trimester of pregnancy.[34] *Roe* declared that states could regulate abortion after the first trimester to protect women's health.[35] States could also regulate to protect the potential life of the fetus—including entirely prohibiting abortion—at the point of fetal viability, which the Court held to be the start of the third trimester.[36]

---

26. *Id.* (internal quotation marks omitted). The Fifth Circuit did not explicitly state what the "legitimate state interest" was.

27. 410 U.S. 113, 153(1973).

28. *Id.* at 166; *see* 1857 TEX. CRIM. STAT. 531–536, *invalidated by* Roe v. Wade, 410 U.S. 113 (1973); GEO W. PASCHAL, LAWS OF TEXAS 447 (5th ed. 1878); 1879 TEX. CRIM. STAT. 536–541; 1911 TEXAS REV. CRIM. STAT. 1071–1076.

29. *Roe*, 410 U.S. at 153 ("This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."); *see* U.S. CONST. amend. XIV.

30. *Roe*, 410 U.S. at 153–54.

31. *Id.* at 153.

32. *Id.*

33. *Id.* at 160, 164–65.

34. *Id.* at 164.

35. *Id.*

36. *Id.* at 163–64.

B. Planned Parenthood v. Casey *(1992)*

The Court constricted abortion rights in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[37] The *Casey* Court deviated from *Roe*'s categorical prohibition on first-trimester abortion regulations in crafting the "undue burden" standard.[38] It held that laws regulating abortion were constitutional unless the "purpose or effect" of the law was "to place substantial obstacles in the path of a woman seeking an abortion before the fetus attains viability."[39] But the Court did identify unnecessary health regulations" as imposing an undue, and thus unconstitutional, burden on abortion rights.[40]

Casey set forth three major guidelines for applying the "undue burden" standard.[41] First, prior to viability, a woman has the right to obtain an abortion without "undue interference" from a state.[42] Second, states retain the right to restrict abortion rights post-viability, so long as the law provides exceptions when the life of the mother is endangered.[43] Third, a "[s]tate has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child."[44] In so holding, *Casey* rejected *Roe*'s trimester model in order "[t]o promote the State's profound interest in potential life."[45]

C. Gonzales v. Carhart *(2007)*

In *Gonzales v. Carhart*, the Court dealt with the constitutionality of the Partial-Birth Abortion Ban Act of 2003.[46] The *Carhart* Court reiterated *Casey*'s "undue burden" standard.[47] But the Court nevertheless upheld a ban on intentionally performing partial-birth abortions in the second trimester that are not necessary to save the life of the mother.[48] The Court focused on the third prong of *Casey* in

---

37. 505 U.S. 833 (2007); *After Ayotte: The Need to Defend Abortion Rights With Renewed "Purpose"*, 119 HARV. L. REV. 2552, 2556 (2006). ("In 1992, the Supreme Court decided *Casey*, redefining abortion doctrine.").
38. *Casey*, 505 U.S. at 846.
39. *Id.* at 837.
40. *Id.*
41. *Id.* at 846.
42. *Id.* at 846.
43. *Id.*
44. *Id.* (emphasis added).
45. *Id.* at 878.
46. 550 U.S. 124, 124–32 (2007).
47. *Id.* at 146.
48. *Id.* at 168.

holding that "[r]egulations which do no more than create a structural mechanism by which the State . . . may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose."[49] In the face of "medical uncertainty" as to whether the Act "subject[ed] women to significant health risks," the Court held that "the Act can survive facial attack when this medical uncertainty persists."[50]

Justice Ginsburg's *Carhart* dissent rejected the majority's view that claimed medical uncertainty justified a blanket ban on an abortion procedure prior to viability.[51] She observed that the opinion "tolerates, indeed applauds, federal intervention to ban nationwide a procedure found necessary and proper in certain cases by the American College of Obstetricians and Gynecologists" and, "for the first time since *Roe*," "blesses a prohibition with no exception safeguarding a woman's health."[52]

III. THE *WHOLE WOMAN'S HEALTH* DECISION

The 2016 case of *Whole Woman's Health v. Hellerstedt* marked the Court's most recent foray into the realm of abortion rights.[53] The Court was tasked with determining the constitutionality of H.B. 2, which the Texas legislature passed two years earlier.[54] Overruling the Fifth Circuit, the Court engaged in a skeptical factual analysis and ultimately struck down the bill.

Before reversing the Fifth Circuit, the *Whole Woman's Health* Court stated it was following the "undue burden" rule set out in *Casey*.[55] But unlike the *Casey* Court, the *Whole Woman's Health* Court held that courts must consider not only "the burdens a law imposes on abortion access," but also "the benefits those laws confer" in ruling on a law's constitutionality.[56]

---

49. *Id.* at 146.
50. *Id.* at 129.
51. *Id.* at 169–71. (Ginsburg, J., dissenting).
52. *Id.* at 170–71.
53. 136 S. Ct. 2292 (2016).
54. *See* Schwartz, *supra* note 10; *Whole Woman's Health*, 136 S. Ct. at 2300.
55. *Whole Woman's Health*, 136 S. Ct. at 2300 ("[E]ach [provision] constitutes an undue burden on abortion access, and each violates the Constitution.").
56. *Id.* at 2309.

A. The Court's Admitting Privileges Analysis

The Court first considered whether the admitting privileges provision placed an undue burden on abortion rights.[57] H.B. 2 required doctors who performed abortions to possess admitting privileges at a hospital within thirty miles of where the doctor was performing the abortion.[58] After engaging in a skeptical analysis, the Court struck down the provision for imposing a substantial burden without a corresponding benefit.

There was no evidence that admitting privileges actually provided a benefit to women's health.[59] Texas claimed "the purpose of the admitting-privileges requirement is to help ensure that women have easy access to a hospital should complications arise during an abortion procedure."[60] However, at oral argument, Texas admitted that it could not name a single instance in which the admitting-privileges requirement could have "helped even one woman obtain better treatment."[61]

The admitting privilege requirement was also extremely arduous to satisfy. Hospitals often condition admitting privileges "on reaching a certain number of admissions [to an emergency room] per year."[62] However, it is very rare that someone getting an abortion needs to be transferred to an emergency room.[63] Of the 17,000 abortions performed over a decade at one El Paso clinic, no patient required emergency service.[64] It was thus extremely unlikely that any doctor providing abortions could even obtain the admitting privileges required under the Bill.

Nor was the requirement logical. Admitting privileges do not indicate quality, as they typically do not correspond to a doctor's skill level. At academic hospitals, for example, admitting privileges may be given to physicians on the condition that they accept a faculty appointment.[65]

---

57. *Id.* at 2310–19.
58. *Id.* at 2310.
59. *Id.* at 2311–12.
60. *Id.* at 2311.
61. *Id.* at 2311–12.
62. *Id.* at 2312.
63. *Id.* at 2311.
64. *Id.* at 2312. (citing Brief of Society Hospital Medicine et al. as Amici Curiae, No. 15-274, 136 S. Ct. 2292, 2016 WL 74953 at * 11).
65. *Id.* at 2312.

B. The Court's Surgical Center Requirement Analysis

The Court next examined the surgical center requirement of H.B. 2.[66] H.B. 2 required abortion-providing facilities to satisfy the same minimum standards as those of ambulatory surgical centers.[67] Here too, the Court struck down the requirement.

The Court agreed with the district court's finding that the "surgical-center [requirement did] not benefit patients and [was] not necessary."[68] It did not help patients who suffer complications after the procedure because "complications . . . almost always arise only after the patient has left the facility."[69] The Court also recognized that abortions performed in Texas were "extremely safe"—even more so than procedures that were not subject to the surgical-center requirement—and thus "there was no significant health-related problem that the new law helped to cure."[70]

In light of this evidence, the Court held that both provisions at issue posed an undue burden on abortion rights.[71]

IV. ANALYSIS

Casey and *Carhart* departed from *Roe*'s articulation of abortion rights in both reasoning and result. An examination of the Court's jurisprudence illustrates how *Whole Woman's Health*, though imperfect, was truer to the spirit of *Roe*.

A. Casey & Carhart: Departures from Roe

After *Roe*, the Court narrowed its abortion rights jurisprudence. Later opinions modified, limited, and rejected various aspects of *Roe*'s broad view of abortion rights.

Roe embodies the most expansive view of abortion rights yet embraced by the Court. *Roe* held that when "fundamental rights"—including abortion rights—are at issue, the Court must examine the legislation at issue with strict scrutiny.[72] *Roe* ruled that in

66. *Id.* at 2314.
67. *Id.*
68. *Id.* at 2315.
69. *Id.*
70. *Id.* at 2311.
71. *Id.* at 2299.
72. *Roe v. Wade*, 410 U.S. 113, 155 (1973) ("Where certain 'fundamental rights' are involved, the Court has held regulation limiting these rights may be justified by only a 'compelling state interest.'") (citations omitted).

the first trimester of pregnancy, a woman's decision of whether to elect to have an abortion is within the sole discretion of her and her doctor.[73] *Roe* also held that states can only regulate abortion to protect "the potentiality of human life" after the "compelling point" of viability.[74]

Casey departed from *Roe* in a significant manner. The plurality opinion purported to "reaffirm" *Roe*'s "essential holding" that women have a constitutional right to an abortion pre-viability.[75] Yet rather than following *Roe*'s lead in casting this right as virtually unassailable, the *Casey* Court hedged: the right to a first-trimester abortion could not be subjected to "undue" state interference, such as the imposition of a "substantial obstacle to the woman's effective right to elect the procedure."[76]

Casey also rejected some of the critical tenets of *Roe* as "rigid."[77] Unlike *Roe*, *Casey* held "that the State has legitimate interests *from the outset of the pregnancy* . . . in protecting the life of the fetus."[78] Thus, under *Casey*, states could restrict abortion rights "from the outset of pregnancy."[79]

Casey also did away with the strict scrutiny analysis followed in *Roe*. Instead, the plurality in *Casey* engineered the amorphous "undue burden" standard.[80] While *Roe* had allowed pre-viability restrictions on abortion only to promote "the health of the mother,"[81] the new standard set forth no such limitations. Instead, such restrictions were only impermissible if they imposed "[a] substantial obstacle to the woman's effective right to" have an abortion.[82] The Court admitted that this rule was crafted in part to "accommodat[e] the State's profound interest in potential life."[83] Most strikingly, under *Casey*, legislation would be upheld even "if [its] purpose is [to encourage women] to choose childbirth over abortion."[84]

---

73. *Id.* at 163.
74. *Id.*
75. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 845–46 (1992).
76. *Id.* at 846.
77. *Id.* at 837 ("*Roe*'s rigid trimester framework is rejected.").
78. *Id.* at 834 (emphasis added).
79. *Id.*
80. *Id.*
81. *Roe v. Wade*, 410 U.S. 113, 163 (1973).
82. *Casey*, 505 U.S. at 846.
83. *Id.* at 837.
84. *Id.*

Given *Casey*'s limited reading of *Roe*, it is not surprising that the Court blessed many of the provisions at issue. *Casey* found that both the 24-hour waiting period and parental consent requirements did not impose an "undue burden" on abortion rights,[85] though it overturned the provision that would require women to notify their husbands before obtaining an abortion.[86]

Casey's analysis largely disregarded the factual background. Though ostensibly determining whether the provisions at issue posed an undue burden to abortion access, the Court focused on precedent to the exclusion of facts. In striking down the parental notification requirement, the Court relied entirely on precedent.[87] And the Court ignored the underlying facts in upholding both the 24-hour waiting period and the parental notification provisions.[88] The Court's decision to do so was curious; it is difficult to gauge whether something imposes an undue burden on abortion rights without examining the facts.

The *Casey* plurality's application of the undue burden standard rang hollow. The Court claimed that laws that impose an "undue burden" on abortion rights must be struck down. Yet the plurality was not concerned that the waiting period would "result in delays for some women that might not otherwise exist,"[89] nor that the waiting period would "subject many women to the harassment and hostility of anti-abortion protestors."[90] Instead, it stated "[t]he idea that important decisions will be more informed and deliberate if they follow some period of reflection does not strike us as unreasonable."[91] Overlooking the lower court's factual findings, it claimed "they do not demonstrate that the waiting period constitutes an undue burden."[92]

The Court ultimately found the waiting period was constitutional because it "in no way prohibit[ed] abortion."[93] In essence, the Court held that legislation does not impose an "undue burden" on abortion if

85. *Id.* at 840–41.
86. *Id.* at 896–99.
87. *Id.* at 899 ("Our cases establish, and we reaffirm today, that a State may require a minor seeking an abortion to obtain the consent of a parent or guardian.").
88. *Id.* at 881–82, 899.
89. *Id.* at 969 (Rehnquist, C.J., concurring in part and dissenting in part).
90. Planned Parenthood v. Casey, 744 F. Supp. 1323, 1351 (E.D. Pa. 1990).
91. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 885 (1992).
92. *Id.* at 886
93. *Id.* at 969 (Rehnquist, C.J., concurring in part and dissenting in part).

it does not prohibit abortion, even if it may significantly prevent women from obtaining one.

Carhart exacerbated the problem created by *Casey*. The case essentially gutted whatever protections *Casey* retained.[94] The *Carhart* Court shifted its focus away from the rights of women and effectively applied the lowest level of scrutiny to abortion rights.

Unlike in *Casey*, the Court in *Carhart* did not bother with the pretense of being concerned with the right of women to control their own reproductive functions.[95] Instead, *Carhart* centered its analysis on the State's interest in potential life and on the purported side effects of abortion on women. *Carhart* echoed the *Casey* Court's comment that "the Court's precedents after *Roe* had 'undervalue[d] the State's interest in potential life.'"[96] Without citing to any evidence, the Court concluded that a troubling "phenomenon" of women regretting their abortions existed.[97] According to the Court, abortion can thus cause "[s]evere depression and loss of esteem."[98]

The *Carhart* Court missed the question it should have asked. *Roe* established that abortion is a fundamental right, and any infringement on a fundamental right must be substantially justified. For all its flaws, *Casey*'s "undue burden" standard focused on the right question: To what extent did the law at issue restrict the exercise of a fundamental right? Contrarily, *Carhart* focused on whether the perceived harms posed by abortion justified the law at issue.

The Court also applied an improper level of scrutiny. In considering whether the provision should be upheld, the Court noted that Congress "[had] a rational basis to act."[99] It also thought Congress had acted in "furtherance of its legitimate interests . . . to promote respect for life, including life of the unborn."[100] Effectively, the Court applied rational basis review. When the lowest standard of review is applied to a fundamental right, it ceases to be a fundamental right.

---

94. *See* Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151, 209–10 (2016).

95. *Compare Casey*, 505 U.S. at 835 ("The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."), *with* Gonzales v. Carhart, 550 U.S. 124, 159 (2007) ("[S]ome women come to regret their choice to abort the infant life they once created and sustained.").

96. *Carhart*, 550 U.S. at 157–58 (quoting *Casey*, 505 U.S. at 873).

97. *Id.* at 159.

98. *Id.*

99. *Id.* at 158–59.

100. *Id.* at 158.

With respect to partial-birth abortions, *Carhart* effectively overturned the rights announced in *Roe*.

B. The (Partial) Remedy of Whole Woman's Health

Whole Woman's Health was a significant improvement on the Court's recent jurisprudence and truer to the spirit of *Roe*. Though the Court did not return to the strict line-drawing that *Roe* resorted to, it treated restrictions on abortion with skepticism and an unwillingness to defer to the legislature.

In *Whole Woman's Health*, the Court claimed to follow *Casey*'s "undue burden" standard, but in reality pivoted back to *Roe*'s stringent skepticism of abortion regulations. First, *Whole Woman's Health* held that "courts [must] consider the burdens a law imposes on abortion access together with the benefits those laws confer."[101] More importantly, the Court's analysis in *Whole Woman's Health* was generally more skeptical of whether the provisions at issue placed an undue burden on abortion, and thus more reminiscent of *Roe*'s strict scrutiny standard. In *Casey*, only one of the three provisions at issue was struck down.[102] *Whole Woman's Health*, though claiming to follow in *Casey*'s footsteps, invalidated both of the provisions at issue.[103]

Whole Woman's Health added to *Casey*'s "undue burden" test by weighing whether the medical benefits of a regulation justified the burden on abortion rights.[104] Under this standard, a law with no medical benefits could be struck down even if it imposed only a minimal burden on abortion rights. This standard permits the Court to strike down pretextual laws that collectively add up to destroy access to abortions, even if individually they pose few obstacles.

This new formulation of the "undue burden" test is more in line with the spirit of *Roe*. *Roe* recognized abortion as a fundamental right.[105] Courts generally view restrictions on fundamental rights with disfavor, and require such restrictions to further compelling state interests.[106] *Roe* laid out clear guidelines as to what constitutes such a state interest and when such interests arise. *Whole Woman's Health*'s

---

101. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2309 (2016).
102. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 881–82 (1992).
103. *Whole Woman's Health*, 136 S. Ct. at 2309.
104. *Id.*
105. *Roe v. Wade*, 410 U.S. 113,153 (1973).
106. *See, e.g.*, *id.* at 155.

focus on the benefits posed by abortion-restricting legislation reflects a similar concern about interfering with a fundamental right.

Whole Woman's Health also engaged in a careful factual analysis of the effects of the provision that is more in keeping with the strict scrutiny standard articulated in *Roe*. Such a factual analysis—which the *Casey* Court refused to engage in—allows the Court to look at the negative effects that abortion restrictions have on access to abortions, rather than relying on findings made by a legislature possibly acting in bad faith. Looking at facts is necessary to determine not only what the benefits of the law are, but also the level of burden posed by a particular restriction. *Whole Woman's Health* showed that facts matter. In support of its opinion, the Court cited fifteen factual conclusions that the trial court had reached.[107] Each factual conclusion illustrated the effect H.B. 2 had on women seeking abortions in Texas.[108]

C. Justice Ginsburg's Concurrence

In her concurrence, Justice Ginsburg went farther than the Court in rebuking the Texas Legislature. Beyond merely determining that the Bill substantially burdened abortion rights, she also rejected the notion that H.B. 2 was passed in good faith.[109] She penned, "it is beyond rational belief that H.B. 2 [was enacted to] protect the health of women."[110]

Justice Ginsburg argued that H.B. 2 was nothing more than an "impediment[] to abortion."[111] Ginsburg pointed out that "[c]omplication rates from abortion are very low."[112] In contrast to the majority, she noted that childbirth—the proposed alternative to abortion—has a higher risk of medical complications than abortion itself.[113] Yet childbirth is not "subject to ambulatory-surgical-center or hospital admitting-privileges requirements."[114]

107. *Whole Woman's Health*, 136 S. Ct. at 2301–03.
108. *Id.*
109. *Id.* at 2321 (Ginsburg, J., concurring).
110. *Id.*
111. *Id.* at 2321 (citing Planned Parenthood of Wis., Inc. v. Schimel, 806 F.3d 908, 912 (7th Cir. 2015)).
112. *Id.* at 2320 (citing Brief of Amicus Curiae of The American Civil Liberties Union, The ACLU of Alabama, The ACLU of Wisconsin, 2015 WL 958314 at *7).
113. *Id.* at 2320.
114. *Id.*

Ginsburg argued that, if anything, regulations such as H.B. 2 put women's health in jeopardy. When "a State severely limits access to safe and legal procedures, women in desperate circumstances may resort to unlicensed rogue practitioners."[115] She claimed that H.B. 2 was one of a species of regulations targeting abortion providers that "do little or nothing for health, but rather strew impediments to abortion."[116] Thus, she stated, "they cannot survive judicial inspection."[117]

Although *Whole Woman's Health* was a clear improvement on *Casey* and *Carhart*, Justice Ginsburg's concurrence is even closer to the spirit of *Roe*. Justice Ginsburg did not explicitly argue for a return to the strict scrutiny standard. Yet she openly questioned the true intent of the Texas Legislature and thereby essentially subjected the law to a heightened level of scrutiny.

D. What the Opinion Lacked

Whole Woman's Health is still far from perfect. Under traditional constitutional jurisprudence, when fundamental rights such as abortion rights are at stake, a court must examine the statute with strict scrutiny.[118] Yet *Whole Woman's Health* did not return to *Roe*'s strict scrutiny standard and instead claimed to apply *Casey*'s more deferential standard.[119] Many have criticized *Casey*'s "undue burden" standard as being not only "more permissive"[120] than the strict scrutiny standard used in *Roe*, but also "weakly and inconsistently" applied.[121] The undue burden standard, even as applied in *Whole Woman's Health*, still permits courts to apply the standard subjectively and thus inconsistently.

115. *Id.* at 2321.

116. *Id.* (citing *Schimel*, 806 F.3d at 912) (internal quotation omitted).

117. *Id.*

118. *See* Roe v. Wade, 410 U.S. 113, 155 (1973) (citing Kramer v. Union Free School District, 395 U.S. 621, 627 (1969); Shapiro v. Thompson, 394 U.S. 618, 634 (1969); Sherbert v. Verner, 374 U.S. 398, 406 (1963)).

119. *See Whole Woman's Health*, 136 S. Ct. at 2310–19.

120. Wharton, et al., *Preserving the Core of Roe: Reflections of Planned Parenthood v. Casey*, 18 YALE J.L. & FEMINISM 317, 330 (2006).

121. Margaret Talbot, *The Supreme Court's Just Application of the Undue-Burden Standard for Abortion*, THE NEW YORKER, (June 27, 2016), http://www.newyorker.com/news/news-desk/the-supreme-courts-just-application-of-the-undue-burden-standard-for-abortion.

Nor did the *Whole Woman's Health* majority question the Texas legislature's motivations for passing H.B. 2.[122] Perhaps it should have followed Justice Ginsburg's lead. Given the Bill's negligible medical benefits, and the devastating impact of the Bill on access to abortions, it seems clear that the legislation was enacted for the purpose of reducing abortions. The Court's failure to critique the Texas Legislature is more in keeping with *Casey* than *Roe*; the *Casey* Court held that legislation may not be an undue burden on abortion rights even "if [its] purpose is [to encourage women] to choose childbirth over abortion."[123]

The opinion also struck an overly sterilized tone. Commentators have criticized *Whole Women's Health* for its almost surgical approach to an issue that affects women across the country on a very personal level.[124] Yale Law Professor Linda Greenhouse argued that if an alien had landed on earth and read the opinion, it "would have had no hint of the decades-long battle over women's right to abortion and dogged efforts by states to put obstacles in their way."[125] Put another way, "[t]here is no poetry in the 40-page opinion."[126]

Despite its flaws, the *Whole Woman's Health* decision has undoubtedly protected abortion rights throughout the country. The decision clears the way for challenges to abortion statutes in roughly a dozen other states, including ten states with similar "admitting privileges" requirements.[127] After the decision, Alabama's attorney general vowed he would no longer defend his state's own admitting privileges statute because he could no longer argue in good faith that it is constitutional.[128]

---

122. Lyle Denniston, *Opinion Analysis: Abortion Rights Reemerge Strongly*, SCOTUSBLOG (June 27, 2016), http://www.scotusblog.com/2016/06/opinion-analysis-abortion-rights-reemerge-strongly.

123. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 837 (1992).

124. Linda Greenhouse, *The Facts Win out on Abortion*, N.Y. TIMES (June 27, 2016), http://www.nytimes.com/2016/06/28/opinion/the-facts-win-out-on-abortion.html.

125. *Id.*

126. *Id.*

127. Phillips, *supra* note 4; Denniston, *supra* note 122. The states with similar admitting privileges statutes are Alabama, Kansas, Louisiana, Mississippi, Missouri, North Dakota, Oklahoma, Tennessee, Utah, and Wisconsin.

128. *Id.*

V. CONCLUSION

Whole Woman's Health is a welcome relief to abortion rights activists across the country. Not only did the decision invalidate one of the most restrictive anti-abortion laws in the country, it also reinvigorated abortion rights after decades of Court retrenchment post-*Roe*. Though claiming to follow the undue burden standard, the *Whole Woman's Health* Court has plotted a new course—one that may lead back to *Roe*'s America.