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IN CONTESTED ABORTION REGULATIONS

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THE FUTURE OF WOMEN’S HEALTH ANALYSIS IN CONTESTED ABORTION REGULATIONS

Megan M. Skiba *

Behind the rationale of many abortion regulations exists an alleged concern for women’s health from conservative legislators. Throughout the years, lawmakers have attempted to restrict access to abortions by placing rigorous requirements for both abortion providers and women who are seeking the procedure. In 2013, the Texas legislature passed House Bill 2 (H.B. 2), which attempted to place stringent regulations on abortion providers and gave rise to litigation in *Whole Woman’s Health v. Hellerstedt*.¹ Such requirements included demanding that physicians who perform abortions have admitting privileges at a hospital within thirty miles of where the abortion was performed, and requiring abortion clinics in the state to have facility standards comparable to an ambulatory surgical center.² The petitioners, Whole Woman’s Health, a group of women’s healthcare providers, argued that H.B. 2 denied equal protection under the Fourteenth Amendment, unlawfully delegated lawmaking authority, and constituted arbitrary and unreasonable state action.³

The Court found that this placed a substantial obstacle in the path of women seeking an abortion.⁴ Justice Breyer opined in detail regarding issues of whether these regulations were part of the state’s legitimate interest of protecting the health of the women who would be undergoing abortion procedures in Texas clinics.⁵ This opinion held that H.B. 2 does not confer medical benefits that are sufficient to justify

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¹ *See generally* *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

² *Id.* at 2300.

³ *Id.* at 2301.

⁴ *Id.* at 2300.

⁵ *See id.*

the burdens that they impose, and that, therefore, imposed an undue burden.⁶ The Court held that the judicial review of such statutes need not be wholly deferential to the legislative fact-finding, because H.B. 2 did not advance the state's interest in protecting women's health, but did place a substantial burden in the path of a woman seeking an abortion by forcing almost half of the state's abortion clinics to close.⁷ The Court found that the second requirement, that the clinics meet the standards for ambulatory surgical centers, did not lower the risks of abortions compared to those that are performed in centers that do not have surgical requirements.⁸ Additionally, if these procedures were put into effect, only seven or eight facilities in the sizeable state of Texas would be able to function.⁹ This inaccessibility to safe and legal abortion would not meet the healthcare demand of potential patients.¹⁰

Although the Court held this legislation as unconstitutional, the opinion focused largely on a balancing act between medical scrutiny and the safety level of operating in Texas's currently legal abortion clinics, against the undue burden standard.¹¹ The concurring opinion, written by Justice Ruth Bader Ginsburg, states that modern abortions are so safe relative to other medical procedures that any law that made accessing abortions more difficult in the name of safety could not pass judicial review.¹² In addition to rebuking the majority's argument that the number of doctors allowed to provide abortion services would become so reduced that these services would be unduly limited that it would constitute an undue burden, Justice Ginsburg notes that many medical procedures, including childbirth, are far more dangerous to patients, yet are not subject to the same requirements.¹³ Justice Ginsburg suggests that evidence shows that targeted regulation of abortion providers laws like H.B. 2 "do little or nothing for health, but rather strew impediments to abortion."¹⁴ Through this conclusion, Ginsburg presents another option to the

⁶ *Id.* at 2300.

⁷ *Id.* at 2310.

⁸ *Id.* at 2302.

⁹ *Id.* at 2316.

¹⁰ *Id.*

¹¹ *See id.*

¹² *Id.* at 2320 (Ginsburg, J., concurring).

¹³ *Id.*

¹⁴ *Id.* at 2321 (citing *Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908, 921 (7th Cir. 2015)). Targeted regulations of abortion providers (TRAP laws) are state laws that only apply to abortion providers and generally impose fees or licensing requirements that are not imposed on other comparable

previous analysis of Court-examined abortion laws: she attempts to deny the legitimacy of those laws that are rooted in the false notion that requirements of already safe state practices must be heightened to protect women's health.¹⁵

This Note advocates for Justice Ginsburg's approach to contested abortion regulations from her concurring opinion in *Hellerstedt* by striking down laws that advocate for heightened restrictions based in the name of safety. Thus, this abortion specific analysis should be used sparingly, and the Court should concentrate more fully on the undue burden test that is set forth in *Planned Parenthood v. Casey*.¹⁶ Part I will provide a brief historical overview of Supreme Court abortion decisions leading up to *Hellerstedt*. Part II will analyze research concerning the safety of legal abortion procedures. Part III will examine the Court's balancing test of medical scrutiny and the undue burden standard set forth in *Planned Parenthood v. Casey*.¹⁷ Part IV will demonstrate through public policy discussion that these regulations are a poorly veiled attempt at restricting access to abortion by creating an issue of women's health. Part V will conclude by discussing the future of court analysis concerning abortion regulations.

I. HISTORY OF WOMEN'S HEALTH IN ABORTION CASES

The road to establishing constitutional abortion regulations in the United States has been long and tumultuous, and appears to be far from over. Many of these opinions focused on issues of women's health and how to balance that part of the analysis with the constitutional protections that the Court believed, or did not believe, a person to have regarding abortion. Largely, this journey began in *Roe v. Wade*, where the Supreme Court invalidated a Texas law that prohibited abortion in all cases except when necessary to save a woman's life.¹⁸ This opinion placed a large emphasis on women's health and carefully discussed the intricacies of each stage of pregnancy based on trimester. The Court held that after the first trimester, a state may regulate abortion for the purpose of promoting women's health and that after

health-care providers or medical facilities. Marshall H. Medoff, *State Abortion Policies, Targeted Regulation of Abortion Provider Laws, and Abortion Demand*, REVIEW OF POLICY RESEARCH (Sept. 2010).

¹⁵ See *id.* at 2320.

¹⁶ See generally *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833 (1992). For the sake of brevity, I will refer to this case as *Casey* or *Planned Parenthood v. Casey* from this point on in the text of this Note.

¹⁷ *Casey*, 505 U.S. 833.

¹⁸ See generally *Roe v. Wade*, 410 U.S. 113 (1973).

fetal viability, abortion may be regulated or prohibited only if there are exceptions to protect the woman's life and health.¹⁹ Before this point, which the Court referred to as "compelling," the attending physician, in consultation with his patient is "free to determine without regulation by the state, that, in his medical judgment, the patient's pregnancy should be terminated."²⁰

Subsequently, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the constitutionality of five provisions of the Pennsylvania Abortion Control Act of 1982 came before the Court which Planned Parenthood argued were unconstitutional.²¹ The Supreme Court held for *Casey*, but maintained that the central holding of *Roe* should be retained.²² According to the *Planned Parenthood v. Casey* opinion, but consistent with *Roe*, a woman has the right to choose to have an abortion before viability without undue interference by the state and established that the state has a legitimate interest in protecting the health of a woman and the life of a fetus that may become a child.²³

In *Planned Parenthood v. Casey*, the Court recognized that not every law making a right more difficult to exercise infringes upon that right, but held that "only where state regulation imposes an undue burden on a woman's ability to procure an abortion does the power of the State reach into the heart of the liberty that is protected by the Due Process Clause."²⁴ An undue burden would be a substantial obstacle in the path of a woman seeking an abortion before a fetus attains viability.²⁵ The Court held that means chosen by the state to further its interest in protecting the health of a woman must "be calculated to inform the woman's free choice and not to hinder it."²⁶ This decision affirmed a state's right to restrict abortion services after fetal

¹⁹ *Id.*

²⁰ *Id.* at 861.

²¹ See generally *Planned Parenthood of S. E. Pa. v. Casey*, 505 U.S. 833 (1992) (Among these issues were the requirements for a 24-hour waiting period, parental consent for a minor (with allowance for judicial bypass), a signed statement indicating spousal consent, exemptions only in the case of medical emergencies, and certain reporting requirements on facilities that provide abortion services, which Planned Parenthood sought to be held as unconstitutional.).

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 874.

²⁵ *Id.* at 877.

²⁶ *Id.*

viability but required that any restrictions include exceptions to protect a woman's life and health.²⁷ Though the Court did not expand on a woman's right to make choices about her reproductive health, it did expand the interest in protecting women's health. Instead of the *Roe* viewpoint of protecting the health of both the woman and the life of the fetus that may become a child, the Court narrows the holding to emphasize the state's right to regulate certain abortion procedures but emphasized the need for health exceptions for the mother.²⁸

After *Planned Parenthood v. Casey*, in *Ayotte v. Planned Parenthood*, respondents brought suit alleging that a New Hampshire statute, known as the Parental Notification Prior to Abortion Act, was unconstitutional because it failed to provide an emergency health exception.²⁹ The Act prohibited physicians from performing an abortion on a pregnant minor (or a woman for whom a guardian or conservator has been appointed) until forty-eight hours after written notice of the pending abortion is delivered to her parent or guardian.³⁰ Holding that the parts of the statute that subjected minors to significant health risks presented a constitutional problem, the Court stated, "New Hampshire does not dispute, and our precedents hold, that a State may not restrict access to abortions that are 'necessary, in appropriate medical judgment, for preservation of the life or health of the mother.'"³¹ The Supreme Court agreed with the federal district court in that an exemption in the law for abortions is necessary to prevent the death of the mother, but not for those abortions necessary to protect merely her health, was unconstitutionally narrow.³²

The women's health analysis continued in *Stenberg v. Carhart*.³³ In this slim majority, the Supreme Court held that Nebraska's ban on abortion care was unconstitutional because it lacked any exception for the preservation of the health of the mother.³⁴ The statute banned abortions as early as the 12th week of pregnancy in some cases, as it wanted to prohibit what the state referred to as "partial-birth

²⁷ *Id.* at 846.

²⁸ See generally *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833 (1992).

²⁹ *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 324–25 (2006).

³⁰ *Id.* at 323–24.

³¹ *Id.* at 327 (citing *Casey*, 505 U.S. at 879 (plurality opinion) (quoting *Roe v. Wade*, 410 U.S. 113, 164–65 (1973))).

³² *Ayotte*, 546 U.S. at 320.

³³ See generally *Stenberg v. Carhart*, 530 U.S. 914 (2016).

³⁴ *Id.* at 945–46.

abortions” and wished to restrict the types of abortions that could be performed.³⁵ The Court held that “[A] risk to a woman’s health is the same whether it happens to arise from regulating a particular method of abortion, or from barring abortion entirely.”³⁶ The Court also recognized that the absence of a health exception will place women at an unnecessary risk of tragic health consequences.³⁷ The Court increased abortion availability in the framework of women’s health in this case holding that “where substantial medical authority supported the proposition that banning a particular abortion procedure could endanger women’s health, a prohibitory statute must include a health exception when the procedure is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.”³⁸

Although the holding of the Court maintained that an exception for the health of the woman is necessary, Justice Ginsburg, in a separate opinion, identified that a state could not force physicians to use procedures other than what they believed to be the safest, and that this was part of “life and liberty” protected under the Constitution.³⁹ This particular caveat is where the Justices of the Court disagreed.⁴⁰ Justice Anthony Kennedy in dissent claimed that the laws such as the Nebraska ban were permitted by the Court’s ruling in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, which allows laws to preserve prenatal life to a certain extent and went as far as to call Justice O’Connor’s separate opinion a “repudiation” of the understandings and assurances given in *Casey*.⁴¹ Although the statute was deemed to be unconstitutional by a narrow majority, the Supreme Court ultimately valued the importance of a health exception for pregnant women who may not be able to safely carry a pregnancy to term over Kennedy’s interpretation of *Casey*, which would put “prenatal life” as the highest-ranking priority.⁴²

³⁵ *Id.* at 947 (O’Connor, J., concurring). The unconstitutional Nebraska statute prohibited “delivering into the vagina a living unborn child, or a substantial portion thereof for the purpose of performing a procedure that does kill the unborn child.” NEB. REV. STAT. § 28-326(9).

³⁶ *Id.* at 931.

³⁷ *Id.* at 937.

³⁸ *Id.* at 938.

³⁹ *Id.* at 952 (Ginsburg, J., concurring).

⁴⁰ *Id.* at 957 (Kennedy, J., dissenting).

⁴¹ *Id.*

⁴² *See id.*; *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833 (1992).

The most recent Supreme Court case concerning women's health in abortion regulations, *Whole Woman's Health v. Hellerstedt*, looked at several provisions related to abortions in Texas's H.B. 2.⁴³ Texas legislators, who claimed to promote the government interest of women's health, attempted to promulgate heavy regulatory standards with which abortion clinics must comply.⁴⁴ The petitioners argued that this was arbitrary and unreasonable state action, as it did not further women's health and that it placed an undue burden within a woman's path to choose between reproductive options.⁴⁵ The issue that the Court analyzed was whether a court's "substantial burden" analysis takes into account the extent to which laws that restrict access to abortion services actually serve the government's stated interest in promoting health.⁴⁶ According to the majority opinion written by Justice Breyer, in applying the substantial burden test, courts must weigh the extent to which the laws in question actually serve the state government interest against the burden that they impose.⁴⁷

The majority goes on to state that the provisions of H.B. 2 that were at issue did not confer medical benefits that are sufficient to justify the burdens that they impose on women seeking to exercise their constitutional right to an abortion, and therefore the provisions unconstitutionally impose an undue burden.⁴⁸ Similarly, the requirement that abortion clinics meet the standard for ambulatory surgical centers did not appreciably lower the risks of abortions compared to those performed in non-surgical centers.⁴⁹ The Court held that the requirements promulgated in H.B. 2 were so tangentially related to the actual procedures involved in an abortion that they were essentially arbitrary.⁵⁰ Additionally, upholding these requirements was held to be a substantial burden on women seeking abortions because the few that would remain open would be so small a number, that the remaining facilities would not be able to meet the demand.⁵¹

⁴³ See generally *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

⁴⁴ *Id.* at 2296.

⁴⁵ *Id.*

⁴⁶ *Id.* at 2300.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 2302.

⁵⁰ *Id.* at 2316.

⁵¹ *Id.*

In her concurring opinion, Justice Ginsburg states that abortions are so safe relative to other medical procedures that any law that made accessing abortions more difficult in the name of safety could not survive judicial inspection.⁵² Ginsburg discusses that women in desperate circumstances may resort to unlicensed, rogue practitioners, when States severely limit access to safe and legal abortion procedures, and greatly risk their health and safety.⁵³ In a society of modern medicine where abortions can be performed safely, it appears that the law is made to make it more difficult for women to obtain abortions, not merely for the safety of women who need the procedure.⁵⁴

II. SAFETY ANALYSIS OF LEGAL ABORTION PROCEDURES

After the ruling in *Casey*, the Court now holds that states can pass regulations after the first trimester, but only to safeguard a woman's health, not to limit a woman's access to abortions.⁵⁵ In *Hellerstedt*, the State said that they had a legitimate concern in protecting women's health and that these regulations should help further that goal.⁵⁶ Abortions should no longer be considered a "dangerous procedure" as they are not statistically harmful enough for a court to engage in a fact-finding process about their safety. Abortions are safer in terms of both minor and serious complications than many routine medical procedures that are not subject to the same scrutiny.

In-clinic procedures, the targeted type of abortion in *Hellerstedt*, are statistically safe.⁵⁷ Most side effects are generally only increased if the patient chooses to use general anesthesia.⁵⁸ Possible risks of general anesthesia include allergic reactions, infections and heavy bleeding, which are often able to be treated

⁵² *Id.* at 2321 (Ginsburg, J., concurring).

⁵³ *Id.*

⁵⁴ *Id.* at 2320–21 (citing Brief for Social Science Researchers 9–11) (comparing statistics on risks for abortions with tonsillectomy, colonoscopy, and in-office dental surgery).

⁵⁵ *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 878 (1992).

⁵⁶ *Hellerstedt*, 136 S. Ct. at 2301.

⁵⁷ *Hellerstedt*, 136 S. Ct. at 2292; *How Safe is an In-Clinic Abortion?*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/abortion/in-clinic-abortion-procedures/how-safe-is-an-in-clinic-abortion> (last visited June 24, 2018).

⁵⁸ *How Safe is an In-Clinic Abortion?*, *supra* note 57.

with medicine or other treatment.⁵⁹ All medical procedures do come with risk, and in that sense, abortion is not different.⁶⁰ In very infrequent cases, serious complications could turn fatal.⁶¹ But, this is extremely rare—so rare, in fact that the risk of death from childbirth is eleven times greater than the risk of death from an abortion procedure during the first twenty weeks of pregnancy.⁶² Abortions that are performed after twenty weeks carry the same risk of death that childbirth does.⁶³

The risk that is associated with abortion is minimal.⁶⁴ In a recent study, less than 0.87% of abortion patients required hospitalization for an abortion-related complication.⁶⁵ In this study, among all 54,911 abortions, one in 1035 (0.10%) were followed by an emergency room visit on the day of the abortion and one of 5491 (0.03%) were transferred by ambulance for immediate care, although not all resulted in an abortion-related diagnosis or treatment.⁶⁶ This is much lower than the complication rate that is found during childbirth.⁶⁷ Any regulation of abortion care must recognize the full range of health risks that pregnant women face.⁶⁸ Making access to abortion much more difficult ignores a portion of these women, who may have to terminate a pregnancy out of medical necessity.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Ushma D. Upadhyay et al., *Incidence of Emergency Department Visits and Complications After Abortion*, OBSTETRICS & GYNECOLOGY, Jan. 2015, vol. 125, Issue 1, at 175–83 (This study used patient-level billing data from California's state Medicaid program. California covers abortion and subsequent care for women enrolled in Medicare and in 2011, approximately 51% of abortions in California were covered by the state's Medicaid program.).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ E.G. Raymond & D.A. Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, OBSTETRICS & GYNECOLOGY, vol. 119, Issue 119, at 215–19 (Jan. 2012).

⁶⁸ *Abortion Bans Endanger Women's Health*, NARAL PRO-CHOICE AM. (Jan. 1, 2017), <https://www.prochoiceamerica.org/wp-content/uploads/2017/01/2.-Abortion-Bans-Without-Exceptions-Endanger-Womens-Health.pdf>.

III. BALANCING MEDICAL SCRUTINY AND THE “UNDUE BURDEN” STANDARD

The “undue burden” standard set forth in *Planned Parenthood v. Casey*, and not the medical scrutiny test, should be the focus of the Court when assessing the constitutional validity of abortion regulations.⁶⁹ Although states can promulgate abortion legislation so long as the legislation does not create an undue burden on the patient seeking an abortion and protects a legitimate state interest, “medical purposes” of heightened abortion regulations no longer furthers a state interest because of the extremely low risk of danger arising from legal abortion procedures.⁷⁰ Women’s health is clearly an interest that the state wants to protect. The purpose of the admitting privileges requirement, as alleged by the state, is to help ensure that women have easy access to a hospital should complications arise during an abortion procedure.⁷¹ But, the great weight of evidence demonstrates that abortion in Texas is extremely safe, thus there was not a significant health-related problem that the new law is helping to “cure.”⁷² The Court continues to support that view by adding that when directly asked at oral argument whether Texas knew of a single instance in which the new requirement would have helped even one woman obtain better treatment, Texas admitted that there was no evidence in the record of such a case.⁷³ The answer that the state of Texas provided to that question is consistent with other findings of Federal District Courts that have considered the health benefits of other States’ similar admitting-privileges laws.⁷⁴

Admittedly, the Court states “the great weight of evidence demonstrates that, before the act’s passage, abortion in Texas was extremely safe with particularly low rates of serious complications and virtually no deaths occurring on account of the procedure.”⁷⁵ Still, the Supreme Court looks at medical scrutiny in addition to the

⁶⁹ *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016).

⁷⁰ *Id.* at 2300.

⁷¹ *Id.* at 2311.

⁷² *Id.*

⁷³ *Id.* at 2311–12.

⁷⁴ *Id.* at 2312 (citing *Planned Parenthood of Wis., Inc. v. Van Hollen*, 94 F. Supp. 3d 949, 953 (W.D. Wis. 2015), *aff’d sub nom.* *Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908 (7th Cir. 2015)); *Planned Parenthood Se., Inc. v. Strange*, 33 F. Supp. 3d 1330, 1342 (M.D. Ala. 2014).

⁷⁵ *Hellerstedt*, 136 S. Ct. at 2311 (citing *Whole Woman’s Health v. Lakey*, 46 F. Supp. 3d 673, 684 (W.D. Tex. 2014)).

undue burden standard in this case. In the procedural history of *Whole Woman's Health*, the Court of Appeals held that “the district court erred by substituting its own judgment for that of the legislature” when it conducted its undue burden inquiry, partly because of medical uncertainty underlying a statute is for resolution by legislatures, not the courts.⁷⁶ Justice Breyer rebuts this point by saying that the articulation of the relevant standard is incorrect, and that the rule announced in *Casey* requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer.⁷⁷ The majority opinion notes the potentially unwarranted nature of the regulations in this instance stating that “[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.”⁷⁸

The statement that is made by the District Court in *Hellerstedt*—that the legislatures, and not the courts, must resolve questions of medical uncertainty—is inconsistent with the Court’s case law.⁷⁹ The majority states that the Court, when determining the constitutionality of law regulating abortion procedures, has placed considerable weight upon evidence and argument presented in judicial hearings.⁸⁰ The Court used this strategy in both *Casey* and *Carhart*, finding that it must review legislative fact-finding under a deferential standard but not place dispositive weight on those findings.⁸¹ But, *Gonzales* points out that the Court “retains an independent constitutional duty to review factual findings where constitutional rights are at stake.”⁸² The relevant statute here does not set forth any of these findings, so the Court considered expert evidence and inferences if the legislature sought to further any constitutionally acceptable objectives, such as protecting women’s health.⁸³ The problem with the Court’s analysis in this case is the issue that Justice Ginsburg discusses in the concurrence—if abortion, legal under *Roe*, is considered to be one of the safest medical procedures, why use the time to perform analysis on medical

⁷⁶ *Id.* at 2309.

⁷⁷ *Id.* at 2310.

⁷⁸ *Id.* at 2300 (citing *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833 (1992)).

⁷⁹ *Id.* at 2309.

⁸⁰ *Id.* at 2310.

⁸¹ *See, e.g., id.; Casey*, 505 U.S. at 888–94; *Gonzales v. Carhart*, 550 U.S. 124, 165 (2007).

⁸² *Gonzales*, 550 U.S. at 166.

⁸³ *See generally Hellerstedt*, 136 S. Ct. 2292.

safety to begin with?⁸⁴ These regulations should not be allowed to stand, as they are unconstitutional from an undue burden standpoint.

The Supreme Court also analyzed the undue burden standard at length after establishing that the proposed legislation in H.B. 2 was not furthering the alleged legitimate interest of protecting the women of Texas from health-related consequences.⁸⁵ They thoughtfully showed that, by using the standard that is outlined in *Casey*, that after the enactment of the surgical-center requirement, enough clinic facilities would close that it would constitute an undue burden to women seeking abortion services.⁸⁶ Abortions would become extremely difficult to access for many women, especially those in rural areas.⁸⁷

Texas already required that facilities were subject to a host of health and safety requirements including anesthesia standards, medical and clinical services standards, and patient-rights standards, and clinics were subject to administrative penalties, injunctions, civil penalties and criminal penalties for certain violations.⁸⁸ The majority ends their analysis of the weight of the legitimate state interest against the undue burden standard by stating: “We agree with the District Court that the surgical-center requirement, like the admitting-privileges requirement, 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.”⁸⁹ The overwhelming examination that has been undertaken with the health standards of abortion procedures has been discussed over many cases, and *Hellerstedt* undertakes an exceptionally analysis of the issue.⁹⁰ Although the Court does give weight to this issue, this may be a way to set the stage to move away from this particular type of analysis in the future. The health standards that Texas had in place for clinics that perform abortion procedures were already safe, thus it may be more efficient moving forward to examine solely whether or not the regulation would create an undue burden, with less of a balancing act between that problem and the issue of women’s health.

⁸⁴ *Id.* at 2320–21.

⁸⁵ *Id.* at 2310–15.

⁸⁶ *Id.* at 2313.

⁸⁷ *Id.* at 2302.

⁸⁸ *Id.* at 2314.

⁸⁹ *Id.* at 2318.

⁹⁰ See *Hellerstedt*, 136 S. Ct. at 2292.

IV. THE ACTUAL PROTECTION OF WOMEN'S HEALTH

These regulations are a thinly veiled attempt at restricting access to abortion by creating an issue within women's health that simply does not exist. In this era of medical and technological advances, legal abortion no longer requires a court to examine if heightened safety measures, that are not required of other similarly situated procedures are necessary. Even the more conservative Justices do not make much of an attempt in their dissents to justify the state of Texas's action in the framework of women's health, the state's alleged point to bring forth these restrictions in the first place. Justice Alito's dissent attempts to justify the state's action by saying that Texas may have been motivated to protect women because of the Kermit Gosnell case in Pennsylvania, in which a doctor had been convicted on three charges of murder and one of manslaughter in his abortion clinic.⁹¹

Although the specific instance that Justice Alito discusses illustrates a physical crime against a trusting patient, the connection to the matter at hand does not seem to exist. Gosnell was a criminal, committing a variety of other atrocities that were entirely unrelated from the routine procedure that is described in *Hellerstedt*.⁹² This part of Justice Alito's rationale does not have a place in this case, as it in no way describes a concern for women's health that is related to the issue that Texas claims it is furthering. A murderer is not analogous to a medical professional that spend their life trying to provide safe and skilled care to their patients. Additionally, Justice Alito argues that if Gosnell had been actively supervised by the state or local authorities or by his peers, the facility may have been shut down before his crimes.⁹³ According to Justice Alito, if there were any similarly unsafe facilities in Texas, H.B. 2 was clearly intended to put them out of business.⁹⁴ Unfortunately, Texas does not make this argument, and even if they had, it would still not erase the undue burden that women would face in the wake of this bill, nor does it relate to the specific goal of furthering women's health.

Conversely, there are certain parts of the population that believe that abortion should be illegal or heavily regulated.⁹⁵ Unfortunately for those who support

⁹¹ *Id.* at 2343 (Alito, J., dissenting).

⁹² *Id.* at 2343–44.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Public Opinion on Abortion*, PEW RESEARCH CTR. (July 7, 2017), <http://www.pewforum.org/fact-sheet/public-opinion-on-abortion/>.

stringent regulations on abortions, legislators should be careful about proceeding in this manner, as public views on abortion may not reflect their personal, conservative attitudes. As of 2016, public support for legal abortion is as high as it has been in two decades of polling.⁹⁶ Currently, 57% say that abortion should be legal in all or most cases, while 39% say it should be illegal in all or most cases.⁹⁷ Although the stated aim of the regulations in Texas was not to make abortion illegal, the reality of the situation is that if H.B. 2 was held to be constitutional, women, particularly those who are living in poverty, would have had their access restricted to the point of unattainability.⁹⁸ For many women, these regulations would have the same effect as making abortion procedures illegal.

Justice Thomas, in his dissenting opinion, argues that the majority opinion bent the rules of judicial scrutiny and misinterpreted precedent to reach its conclusion because it misconstrued the undue burden test as requiring courts to apply a standard of review similar to strict scrutiny in assessing laws that regulate abortions, despite the fact that there was no precedential support for that level of scrutiny in these cases.⁹⁹ He states that by adding further tiers to the levels of judicial scrutiny, the majority created a test that was a “meaningless formalism” that provided little guidance to lower courts because the result is based on whether a right is favored instead of being actually enumerated in the Constitution.¹⁰⁰ “Meaningless formalism” is a strong, and overly simplistic description. Where provisions are unclear, it is entirely proper for courts to consider the broader values underlying the Constitution, like democracy, equality, or privacy, in deciding what is or is not constitutional.¹⁰¹ If the nation was forced to wait for the political process to reflect constitutional values as we face new challenges and conditions, this could be

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ See *Hellerstedt*, 136 S. Ct. at 2292.

⁹⁹ *Hellerstedt*, 136 S. Ct. at 2322 (Thomas, J., dissenting).

¹⁰⁰ *Id.* at 2327.

¹⁰¹ See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (“The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right; the Nation’s courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter, and an individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act.”); see also Kirsten D. Levingston, *Defending Our “Living Constitution,”* BRENNAN CTR. FOR JUST. (Mar. 13, 2008), <https://www.brennancenter.org/blog/defending-our-living-constitution>.

incredibly detrimental for many, but in this scenario, for women's health.¹⁰² As the founders could not have predicted many of the issues that we face today, over two hundred years later, they likely did not have the insight to predict the medical technology and health issues that women in the United States would face.¹⁰³ Laws may take a lifetime to change, and women who have discovered that they need abortion care have days or weeks, at most, to procure the appropriate medical attention.

The protections that Justice Thomas describe as problematic must be looked at from a modern viewpoint. Abortions that are not legal are very dangerous for women's health, and lead to "unsafe abortions."¹⁰⁴ Estimates say that 68,000 women die of unsafe abortions annually, and that one of the primary methods of preventing unsafe abortion is less restrictive abortion laws.¹⁰⁵ Prior to *Roe v. Wade*, as many as 5000 American women died annually as a direct result of unsafe abortions.¹⁰⁶ Conversely, abortion is one of the most commonly performed clinical procedures today in the United States and the death rate, 0.6 per 100,000 procedures is extremely low.¹⁰⁷ This issue has changed significantly due to the technological advances in modern medicine that society has achieved, and it is impractical and archaic if legislators desire to do what TRAP bills aim to do and prevent women from putting themselves in situations of danger to provide them with good healthcare.

It is clear from the research, and from the state of Texas's response about the heightened safety requirements,¹⁰⁸ that this bill was simply an attempt to regulate a woman's right to choose under the guise of women's health. Since there are people who may want to remove abortions as a legal option, social conservatives may be able to gain momentum with abortion regulation when using arguments of a specific religious or moral perspective or when approaching the legislation from an

¹⁰² *Id.*

¹⁰³ David A. Strauss, *The Living Constitution*, UNIV. CHI. SCH. L., <http://www.law.uchicago.edu/alumni/magazine/fall10/strauss> (last visited Mar. 7, 2017).

¹⁰⁴ See *infra* note 115 and accompanying text; Lisa B. Haddad, *Unsafe Abortion: Unnecessary Maternal Mortality*, REVS. IN OBSTETRICS & GYNECOLOGY (Spring 2009).

¹⁰⁵ *Id.*

¹⁰⁶ Katie Moriarty, *How Health Information and Stigma Has Changed in the Modern Era* (Apr. 19, 2016), <http://www.pbs.org/call-the-midwife/blogs/modern-day-midwives/past-vs-present-how-access-to-information-about-disease-has-changed/> (last visited Feb. 2, 2018).

¹⁰⁷ *Id.*

¹⁰⁸ *Hellerstedt*, 136 U.S. at 2311–12.

interpretation of the Constitution that is strictly textualist in nature that does not provide rights past what are specifically enumerated.¹⁰⁹ But, this would likely fall out of line with precedent, as the Court has already determined abortion and privacy rights on several occasions.

Extensive studies show that abortion, overall, is an incredibly safe procedure, yet legislators are attempting to block the right to procure an abortion. Conversely, the problem with this legislation is that blocking access to abortion is the actual danger to women's health, as women may end up seeking illegal abortions.¹¹⁰ The effects of these laws can be devastating for women, particularly those who live outside of major metropolitan areas.¹¹¹ For example, in Texas, there were no abortion providers in large parts of the state before this legislation was proposed.¹¹² This means that some women would have had to travel hundreds of miles to get care, carry a pregnancy to term against their will, or induce an abortion on their own.¹¹³ Specifically, the passing of H.B. 2 would have taken Texas from over thirty-five abortion providers to eight.¹¹⁴

The World Health Organization defines unsafe abortions as a procedure for terminating a pregnancy that is performed by an individual lacking the necessary skills, or in an environment that does not conform to minimal medical standards, or both.¹¹⁵ Unsafe abortion is common in places where abortion is illegal or inaccessible.¹¹⁶ Common complications from unsafe abortions are cervical tears, retained pregnancy tissue, severe heavy bleeding, sepsis, uterine perforation, bladder and bowel damage, which can lead to maternal death if patients are not treated in a

¹⁰⁹ This may be an efficient way for the anti-abortion movement to continue in the future, but is outside of the scope of this Note, which focuses solely on problems of using the women's health argument in the implementation of regulations that should not be used.

¹¹⁰ *What Trap Laws Mean for Women*, ACLU, https://www.aclu.org/files/assets/TRAP_FAQ_FactSheet.pdf (last visited Mar. 7, 2017).

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *See generally* *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

¹¹⁵ Bela Ganatra et al., *From Concept to Measurement: Operationalizing WHO's Definition of Unsafe Abortion*, WORLD HEALTH ORG., <http://www.who.int/bulletin/volumes/92/3/14-136333/en> (last visited Mar. 6, 2017).

¹¹⁶ *Id.*

timely manner.¹¹⁷ Death may also result from such complications as gas gangrene of the uterus and acute renal failure.¹¹⁸ Abortion patients, in unsafe procedures, could become permanently disabled due to stroke, or septic clots that form in the upper or lower extremities that lead to the necessity for removal.¹¹⁹ If a patient develops a severe infection from these unsafe procedures, she may suffer tubo-ovarian abscess or pelvic inflammatory disease, among other issues, which may result in a high incidence of infertility and ectopic pregnancy.¹²⁰ It appears then, that if the true desire was to protect a woman's health, that legislators would not seek to put such heavy burdens on Texas clinics that it would leave less than a fourth of the original amount remaining open.¹²¹ Making abortion illegal, or restricting it to the point that it is essentially illegal, has no effect on the total number of abortions that are performed.¹²² But, accessibility to legal abortion does dramatically reduce health complications and maternal mortality rates.¹²³

V. THE FUTURE OF COURT ANALYSIS

In the future, the only appropriate analysis of the court should rest on the undue burden standard and not the medical scrutiny analysis that the Court has continued to perform in cases such as *Hellerstedt*.¹²⁴ When a state severely limits access to safe and legal procedures, as the state of Texas attempted here, women in desperate circumstances may resort to unlicensed rogue practitioners, at great risk to their health and safety.¹²⁵ Abortion is one of the safest medical procedures that is performed in the United States, and even child-birth is not subject to ambulatory-surgical center or hospital admitting privileges requirements.¹²⁶

The concurrence of *Hellerstedt* discusses that in this case, it was beyond rational belief that H.B. 2 could genuinely protect the health of women, and laws like

¹¹⁷ Upadhyay et al., *supra* note 64.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ See generally *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

¹²² Upadhyay et al., *supra* note 64.

¹²³ *Id.*

¹²⁴ See *Hellerstedt*, 136 S. Ct. 2292.

¹²⁵ *Id.* at 2321 (Ginsburg, J., concurring).

¹²⁶ *Id.* at 2320.

H.B. 2 that “do little or nothing for health, but rather strew impediments to abortion” cannot survive judicial inspection.¹²⁷ This is a more appropriate analysis of what the law should be. The Court should use Justice Ginsburg’s analysis in all cases that want to heighten requirements for abortions in states that already have a well-established history of safety and care for their abortion patients.¹²⁸ As previously stated, states that attempt to promulgate this legislation appear to try to find loopholes to restrict abortions. If legislators were primarily concerned with women’s health there are many greater issues that do not revolve around a safe, yet controversial procedure.

As we have to move with the changing times, we also need to consider that the court analysis may need to change to accommodate that. As discussed earlier, Justice Thomas rejects the Court’s analysis of “meaningless formalism,” essentially regarding the decision as a way to coming to a particular result within a particular social issue that is favorable to those who joined in the majority.¹²⁹ The justices who share this way of thinking, view this response as appropriately limiting judicial discretion and protecting democracy.

In this particular case, sometimes a woman’s health is being affected by every moment that she is not able to receive abortion care. If, for example, a woman needed to procure an abortion to prevent her own death, she may have days to decide how to proceed. In a world where H.B. 2 is constitutional, a woman may not have meaningful or practical access to a clinic because getting an abortion will involve taking off work, driving across the state, and fulfilling any waiting requirements that may be necessary for the abortion to take place—that is, if the woman is even able to take on the financial burden behind all of those steps. If one does have time for this, there certainly will not be time to for the legislature to meet her needs, and she may be very well staring death in the face waiting for access.

Legal abortion is safe and there is no reason that legislators need to improve the quality if there is already minimal risk with the standards that are already implemented. The analysis used to examine whether abortion is a medically safe procedure has no place in a scenario like the one in Texas. The only place that this may have some use would be in the deregulation of a medical procedure. Texas already had many requirements that abortion clinics needed to follow in their

¹²⁷ *Id.*

¹²⁸ *Id.* at 2321.

¹²⁹ *Id.* at 2327 (Thomas, J., dissenting).

outpatient procedures. And changing for the worse would appear to be an unlikely scenario as clinics work very hard to stay open.

This is how the Ginsburg concurrence should be viewed, and may be a useful tool for structuring the future of Court consideration. The Court is wasting time doing the analysis of whether these heightened safety requirements are in the interest of women's health. They had to sift through mounds of evidence, amicus briefs and medical statistics that showed exactly what should now be considered a fact moving forward. Attitudes toward abortions and technological advancements have changed since *Roe v. Wade* in the 1970s, and the Court should build upon that trend to further it along. Ginsburg's view shows a modern understanding of where the United States is in terms of safety precautions in abortion procedures. It is inefficient to continue to weigh this part of the analysis because it is going to always come to the same result with the medical standard and technology that we have today.

