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Whole Woman's Health and the Supreme Court's Kaleidoscopic Review of Constitutional Rights

*Elizabeth Price Foley**

> *There is no such thing as a new idea. It is impossible. We simply take a lot of old ideas and put them into a sort of mental kaleidoscope. We give them a turn and they make new and curious combinations.*
>
> –Mark Twain

In 1973, the Supreme Court, in *Roe v. Wade*, held that laws regulating abortion were subject to "strict scrutiny" because abortion was part of a woman's fundamental "right to privacy."[1] Nineteen years later, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the kaleidoscope turned, and the Court held that laws regulating abortion were now subject to a less rigorous standard, pursuant to which such regulations would be unconstitutional only if they imposed an "undue burden" on a woman's ability to make the abortion decision prior to fetal viability.[2]

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[1] Roe v. Wade, 410 U.S. 113, 155 (1973) ("Although the results are divided, most of these courts have agreed that the right of privacy, however based, is broad enough to cover the abortion decision; that the right, nonetheless, is not absolute and is subject to some limitations; and that at some point the state interests as to protection of health, medical standards, and prenatal life, become dominant. We agree with this approach. Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a compelling state interest, and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.") (internal citations and quotation marks omitted).

[2] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 874 (1992) ("Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due

Fifteen years after *Casey*, the colors shifted again in *Gonzales v. Carhart*, which held that a federal law banning "partial birth" abortions did not impose an undue burden on the right to abortion, even though the law did not contain a maternal health exception. The *Carhart* Court concluded, "Considerations of marginal safety, including the balance of risks, are within the legislative competence when the regulation is rational and in pursuit of legitimate ends. . . . The Act is not invalid on its face where there is uncertainty over whether the barred procedure is ever necessary to preserve a woman's health, given the availability of other abortion procedures that are considered to be safe alternatives."[3] With this statement, the Court appeared to embrace some degree of deference to laws regulating abortion, so long as the maternal health question was debatable or "uncertain"—a significant shift from *Roe*'s across-the-board strict scrutiny, and a further softening of judicial review from *Casey*'s "undue burden" standard.

This summer—nine years after *Carhart*—the Supreme Court's abortion kaleidoscope tumbled into yet another new and curious combination in *Whole Woman's Health v. Hellerstedt*, when the Court struck down—without any *Carhart*-like deference to the legislature—two provisions of a Texas abortion law that the state justified as maternal health protections.[4]

Within the span of 43 years—from 1973 to 2016—the level of review that the Supreme Court has applied to abortion regulations has shifted from strict scrutiny, to undue burden, to undue burden "plus" (with a dose of legislative deference), to undue burden "minus" (without the deference). Like Alice's adventures in Wonderland, the Supreme Court's abortion jurisprudence just keeps getting curiouser and curiouser. This article will explore not only the Court's ever-shifting standard of judicial review for abortion cases, but also on a more fundamental level, its increasingly incoherent standards of judicial review for *all* constitutional rights cases.

Process Clause."); *id.* at 876 ("The very notion that the State has a substantial interest in potential life leads to the conclusion that not all regulations must be deemed unwarranted. Not all burdens on the right to decide whether to terminate a pregnancy will be undue. In our view, the undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty.").

[3] Gonzales v. Carhart, 550 U.S. 124, 166–67 (2007).

[4] Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016).

I. The Kaleidoscopic Standard of Judicial Review in Abortion Cases

A. Roe v. Wade

The introductory section of *Roe v. Wade*—to which I had not paid close attention in many years—is replete with irony. Justice Harry Blackmun, writing for the majority, declares that the justices view their task as "to resolve the issue by constitutional measurement, free of emotion and of predilection."[5] He then asserts that the Court has "inquired into, and in this opinion place[d] some emphasis upon, medical and medical-legal history" and must "bear in mind, too, Mr. Justice Holmes' admonition in his now-vindicated dissent in *Lochner v. New York*," to the effect that the Constitution "is made for people of fundamentally differing views."[6]

The invocation of *Lochner*[7] in the fourth paragraph of *Roe*—albeit to Holmes's dissent—is especially intriguing with the benefit of 2016 hindsight. It did not go unnoticed at the time by then-Justice William Rehnquist, whose dissent observed that the *Roe* majority "is more closely attuned to the majority opinion of Mr. Justice Peckham in [*Lochner*]."[8] Rehnquist asserted that using substantive due process to invalidate "economic and social welfare legislation," such as abortion, "will inevitably require this Court to examine the legislative policies and pass on the wisdom of these policies in the very process of deciding whether a particular state interest put forward may or may not be 'compelling.'"[9] The process of judges ascertaining whether a given state interest is "compelling" enough to justify a law, said Rehnquist, "partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment."[10]

Rehnquist argued that the proper level of judicial review for social and economic legislation is the rational basis test of *Williamson v. Lee Optical Co.*,[11] whereby the law is presumptively constitutional

[5] Roe, 410 U.S. at 116.

[6] *Id.* at 117.

[7] Lochner v. New York, 198 U.S. 45 (1905).

[8] Roe, 410 U.S. at 174 (Rehnquist, J.) (concurring in the judgment in part and dissenting in part).

[9] *Id.*

[10] *Id.*

[11] 348 U.S. 483 (1955).

and will be invalidated by the judiciary only if it lacks any *conceivable* rational relationship to a valid state objective.[12] A more aggressive standard of review—such as the *Roe* majority's use of strict scrutiny[13]—would require "the conscious weighing of competing factors," a function Rehnquist believed is "more appropriate to a legislative judgment than a judicial one."[14]

The *Roe* majority, of course, did not see its approach as legislative in nature but rather as a classic, judicial balancing of an asserted individual right versus state police power. Indeed, once the *Roe* majority determined that the Court's previously recognized "right to privacy" was capacious enough to encompass a woman's right to abortion, such balancing of interests became both unavoidable and unremarkable, albeit confined within the relatively well-defined parameters of strict scrutiny.

The larger ideological battle in *Roe* and all subsequent abortion cases, therefore, is over the antecedent question: Should abortion be considered part of the "right to privacy" or "liberty" protected by the Fourteenth Amendment? Rehnquist, for example, made it clear in his *Roe* dissent that he did not believe abortion had anything to do with "privacy" because a "transaction resulting in an operation such as this is not 'private' in the ordinary usage of that word." Rehnquist likewise did not agree that banning abortion deprived women of "liberty" in violation of the Due Process Clause because the enactment of such a law, provided it had a rational police power objective, provided all the "process" that was "due."[15]

But assuming that the Court—including the conservatives on it—feels bound by *stare decisis* not to "take away" an individual right once it has been recognized, the judicial and ideological battle necessarily shifts. The battle pragmatically can no longer be over the recognition of the right itself (and thus, whether any real balancing

[12] Roe, 410 U.S. at 173 (Rehnquist, J., concurring in the judgment in part and dissenting in part).

[13] See *id.* at 163 (majority op.) ("With respect to the State's important and legitimate interest in the health of the mother, the 'compelling' point, in the light of present medical knowledge, is at approximately the end of the first trimester."); *id.* ("With respect to the State's important and legitimate interest in potential life the 'compelling' point is at viability.").

[14] *Id.* at 173 (Rehnquist, J., concurring in the judgment in part and dissenting in part).

[15] All quotes in this paragraph are from *id.* at 172–73.

should be conducted at all), but over *how* the right should be balanced against competing police power objectives: Should the balance be tilted in favor of state police power to protect maternal health and potential life? Should it be tilted in favor of the woman's liberty to choose? Or should it not be tilted one way or another, and be evenly balanced? Answering these questions has proven to be a highly contentious and ideological exercise itself, and the Court's inconstancy increasingly has led to accusations of subjectivism that permeates criticism of *Lochner*—ironically, the first case cited by the *Roe* majority in its exegesis of the interpretative method it was trying *not* to employ with a Constitution "made for people of fundamentally differing views."[16]

B. Planned Parenthood v. Casey

In 1992—almost 20 years after *Roe*—criticism of a constitutional right to abortion raged on,[17] and the Supreme Court was finally forced to decide whether, or to what extent, *stare decisis* would define its approach to future abortion cases. Its answer, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, was lukewarm and fractured.

The Court essentially split along 3-2-4 lines, with a moderate-liberal plurality of three justices (Sandra Day O'Connor, Anthony Kennedy, and David Souter) writing together to salvage the basic contours of a constitutional right to abortion while replacing strict scrutiny with an "undue burden" standard, another conservative plurality of four justices (Rehnquist, Byron White, Antonin Scalia, and Clarence Thomas) voting to overrule *Roe*, and the two holdouts—liberal Justices Blackmun (the author of the majority opinion in *Roe*) and John Paul Stevens—voting to reaffirm *Roe*'s strict scrutiny standard. In total, there were five justices willing to continue supporting the constitutional right to abortion and four justices willing to abandon it. Under the logic that the greater includes the lesser, The tri-authored

[16] *Id.* at 117 (majority opinion) (quoting and citing Lochner, 198 U.S. at 76 (Holmes, J., dissenting)).

[17] See Casey, 505 U.S. at 869 (plurality op.) ("Whether or not a new social consensus is developing on [abortion], its divisiveness is no less today than in 1973, and pressure to overrule the decision, like pressure to retain it, has grown only more intense.").

plurality opinion—embracing the undue burden standard—generally has been accepted as representing the Court's standard of review for the constitutionality of abortion regulations.

The O'Connor plurality rejected *Roe*'s trimester framework, drawing the constitutional line in the sand at the point of fetal viability, and concluded that, after viability, the state's interests in protecting the potential life of the fetus were sufficiently compelling to permit prohibition of all abortion "except, where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."[18] *Casey* notably deviated from *Roe* in its approach to state regulation of previability abortion, articulating a new standard of judicial review—the "undue burden" standard:

> Numerous forms of state regulation might have the incidental effect of increasing the cost or decreasing the availability of medical care, whether for abortion or any other medical procedure. The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it. Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.[19]

The *Casey* plurality tried to elucidate the meaning of "undue" burden, asserting that it was "a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[20]

Applying this new standard of review to Pennsylvania's abortion law, the plurality upheld the law's definition of "medical emergency," its requirement of 24-hour advance informed consent prior to performing abortions, and its recordkeeping/reporting requirements for abortions and abortion facilities.[21] It struck down only the spousal notification requirement of the statute, concluding that it was a

[18] *Id.* at 879 (quoting Roe, 410 U.S. at 164–65).

[19] *Id.* at 874.

[20] *Id.* at 877.

[21] *Id.* at 879–887, 900–01.

"substantial obstacle" to abortion because it would "prevent a significant number of women from obtaining an abortion . . . not merely make abortions a little more difficult or expensive to obtain."[22]

The four dissenting justices in *Casey* took issue with the undue burden standard, asserting that it was "plucked from nowhere" and "created out of whole cloth" by the plurality to avoid overruling *Roe* and "preserve some judicial foothold in this ill-gotten territory" of abortion.[23] While Justice O'Connor had used the phrase "undue burden" in her prior dissents in several abortion cases, it had never captured the support of her fellow justices. Moreover, as Justice Scalia's dissent pointed out, O'Connor's own recitation of the standard varied considerably from case to case, with her previously describing it as the imposition of "*absolute* obstacles or *severe* limitations on the abortion decision" (rather than merely a "substantial" obstacle), asserting that an undue burden could be upheld if it "reasonably relate[s] to the preservation and protection of maternal health" and even characterizing the state's interest in protecting potential human life as "compelling," which would likely pass the more demanding strict scrutiny standard (so long as the law was narrowly tailored) and *ipso facto* would not constitute an undue burden.[24]

The *Casey* dissenters viewed the undue burden standard as a "standard which is not built to last" because it is "inherently manipulable," based "on a judge's subjective determinations" and leaves judges free to "roam[] at large in the constitutional field guided only by their personal views."[25] To bolster this assertion, the four dissenters suggested that the Constitution and correspondingly, the legitimacy of the Supreme Court, had suffered from the Court's freewheeling "substantive" due process jurisprudence, in which the Court too often appears to be sticking a wet finger in the air to

[22] *Id.* at 893–94.

[23] *Id.* at 964–65 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part); *id.* at 988 (Scalia, J., concurring in the judgment in part and dissenting in part).

[24] *Id.* at 988–89. See also *id.* at 985 n.3 (discussing why the O'Connor plurality is "clearly wrong" in suggesting that earlier abortion cases had employed an undue burden standard).

[25] *Id.* at 965 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part); *id.* at 986 (Scalia, J., concurring in the judgment in part and dissenting in part).

ascertain from which direction, and how forcefully, the current political winds blow when ascertaining whether to protect an asserted liberty.[26]

To the *Casey* plurality and its two separately concurring liberal brethren, the word "liberty" in the Due Process Clauses protects a substantive right, defined broadly as "the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy" including "the right to define one's own concept of existence, of meaning, of the universe, and the mystery of human life."[27] To the four *Casey* dissenters, by contrast, the word "liberty" likewise has a substantive component, but any law affecting an asserted liberty interest should be subject to strict scrutiny only when the liberty may be characterized as "fundamental," meaning that it is something that has deep roots in history and tradition.[28] Otherwise, according to the conservatives on the Court, a law affecting an asserted liberty interest that is not deeply rooted in history and tradition should be subject only to highly deferential "rational basis" review exemplified by *Williamson v. Lee Optical*, whereby the law will be upheld it if is rationally related to any conceivable legitimate governmental interest.[29]

[26] *Id.* at 980–81 (Scalia, J., concurring in the judgment in part and dissenting in part) ("The issue is whether [abortion] is a liberty protected by the Constitution of the United States. I am sure it is not . . . because of two simple facts: (1) the Constitution says absolutely nothing about it; and (2) the longstanding traditions of American society have permitted it to be legally proscribed."); *id.* at 963 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) ("The Judicial Branch derives its legitimacy not from following public opinion, but from deciding by its best lights whether legislative enactments of the popular branches of Government comport with the Constitution.").

[27] *Id.* at 851 (plurality op.); *id.* at 915 (Stevens, J.. concurring in part and dissenting in part) ("One aspect of this liberty is a right to bodily integrity, a right to control one's person.... [It] also involves her freedom to decide matters of the highest privacy and the most personal nature."); *id.* at 926–27 (Blackmun, J., concurring in part, concurring in the judgment, and dissenting in part) ("Throughout this century, this Court also has held that the fundamental right to privacy protects citizens against governmental intrusion into such intimate family matters as procreation, childrearing, marriage, and contraceptive choice. These cases embody the principle that personal decisions that profoundly affect bodily integrity, identity, and destiny should be largely beyond the reach of government.").

[28] *Id.* at 951–53 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part); *id.* at 980–81 (Scalia, J., concurring in the judgment in part and dissenting in part).

[29] *Id.* at 966 (citing *Williamson* and stating, "[W]e think that the correct analysis is that . . . [a] woman's interest in having an abortion is a form of liberty protected by the Due Process Clause, but States may regulate abortion procedures in ways rationally related to legitimate state interests.").

The differing approach to substantive due process among liberals and conservatives on the Court is thus mainly centered on the applicable standard of review that should attach to a given liberty interest, with the liberal wing of the Court preferring strict scrutiny for any liberty that touches on "personal dignity and autonomy" and the conservative wing reserving strict scrutiny only for asserted liberty interests that have a discernable historical pedigree. The O'Connor plurality's use of the "undue burden" standard in *Casey* was a notable departure from prior substantive due process cases and an apparent attempt to carve out an ideological middle ground somewhere between deferential, *Williamson*-style rational basis review and *Roe*'s strict scrutiny.

While the undue burden standard may have been designed as a peacemaking compromise between the Court's left and right wings, neither its derivation nor its implementation—as the next section's discussion of *Whole Woman's Health* will show—has proven helpful in bridging the ideological divide on abortion. Arguably, this standard has deepened the divide and created the kind of crisis in the Court's legitimacy that the *Casey* plurality so palpably tried to avoid.[30]

One of the primary and enduring criticisms of the undue burden standard, for example, is that the point at which an abortion regulation crosses an imaginary line of burdens and becomes "undue" is so amorphous and fact-sensitive as to become not merely subjective—for many judicial standards invite some degree of subjectivity, even strict scrutiny and rational basis review—but inherently legislative in nature. Rehnquist's dissent makes this observation when discussing the *Casey* plurality's conclusion that Pennsylvania's spousal notification provision constitutes an undue burden, while simultaneously concluding that the parental consent provision does not pose an undue burden:

> The joint opinion is forthright in admitting that it draws this distinction based on a policy judgment that parents will have

[30] *Id.* at 866–67 (plurality op.) ("Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* . . . its decision has a dimension that the resolution of the normal case does not carry. . . . So to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question.").

> the best interests of their children at heart, while the same is not necessarily true of husbands as to their wives. This may or may not be a correct judgment, but it is quintessentially a legislative one. . . . Under the guise of the Constitution, this Court will still impart its own preferences on the States in the form of a complex abortion code.[31]

The plurality did not assuage these concerns by confessing that it believed substantive due process analysis requires "reasoned judgment," the boundaries of which "are not susceptible of expression as a simple rule."[32]

Indeed, this larger fight about the proper method of constitutional interpretation of the word "liberty" plays out in both the plurality's and dissenters' discussion of *Lochner,* which recognized a substantive liberty to contract. The dissenters characterize *Lochner* as "erroneous"[33] from the get-go, since the Constitution does not enumerate a liberty to contract and it is not properly characterized as a "fundamental" liberty.[34] The plurality, by contrast, characterizes *Lochner* as an opinion that history proved wrong, as the "facts upon which [*Lochner*] had premised a constitutional resolution of social controversy had proven to be untrue, and history's demonstration of their untruth not only justified but required the new choice of constitutional principle" that the New Deal Court adopted.[35]

To the *Casey* plurality, in other words, whether or not the Constitution recognized a substantive liberty to contract was a question that could be answered differently at different moments in history, and judges were free to make a "new choice of constitutional principle" when they believed that new "facts" on a social controversy

[31] *Id.* at 965–66 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

[32] *Id.* at 849 (plurality op.).

[33] *Id.* at 957, 959, 961 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

[34] *Id.* at 961 ("[T]he *Lochner* Court did not base its rule upon the policy judgment that an unregulated market was fundamental to a stable economy; it simply believed, erroneously, that 'liberty' under the Due Process Clause protected the 'right to make a contract.'"). Given the conservative justices' characterization of "fundamental" rights as those that have deep roots in our nation's history and tradition, it is odd that the *Casey* dissenters so quickly dismiss the possibility that the liberty to contract is properly characterized as a "fundamental" liberty.

[35] *Id.* at 861–62 (plurality op.).

necessitated such a new constitutional principle. The dispute among the justices in *Casey* about *Lochner* is thus a larger debate about the proper method of constitutional interpretation—namely, originalism versus living constitutionalism.

Another major battle in *Casey* that rages on today—and proved to be of particular salience in both *Gonzales v. Carhart* and *Whole Woman's Health*—is the nature of the relationship between the undue burden standard and findings of fact by district court judges who initially apply the standard. For example, in assessing the constitutionality of Pennsylvania's definition of "medical emergency," the federal district court found that there were three serious medical conditions that would *not* qualify under the statute's definition: preeclampsia, inevitable abortion, and premature ruptured membrane. The court of appeals disagreed with the district court, construing the statute to embrace these three conditions as medical emergencies. The plurality in *Casey* then deferred to the construction of the statute given by the court of appeals, not the findings of facts by the district court, and concluded (with no further analysis) that the medical emergency definition imposed no undue burden on the right to abortion.[36]

In analyzing the 24-hour waiting period and informed consent provisions of the Pennsylvania statute, the O'Connor plurality spent most of its time distinguishing—and ultimately overruling—the Court's then-recent abortion-related decisions, *Akron I* and *Thornburgh*.[37] The district court judge had made findings of fact that the 24-hour waiting period would, as a practical matter, delay a woman's right to abortion by much more than a day due to the distances that many women must travel to reach an abortion provider and the harassment they may face while going there, and that these burdens would fall disproportionately on poor women, those who travel long distances, and those who have difficulty explaining their whereabouts to husbands and employers.[38] Yet the plurality did not defer to these findings. Instead, it found them "troubling in some

[36] *Id.* at 880 (citing Planned Parenthood v. Casey, 744 F. Supp. 1323, 1378 (E.D. Pa. 1990) and Planned Parenthood v. Casey, 947 F.2d 682, 701 (3d Cir. 1991)).

[37] Casey, 505 U.S. at 881–82 (plurality op.) (discussing Akron v. Akron Ctr. for Reproductive Health, Inc., 462 U.S. 416 (1983) (Akron I) and Thornburgh v. Am. College of Obstetricians and Gynecologists, 476 U.S. 747 (1986)).

[38] *Id.* at 885–86 (citing 744 F. Supp. at 1351–52).

respects," but concluded that a law that has the "effect of increasing the cost and risk of delay of abortions" is not sufficient to constitute an undue burden.[39] Moreover, the plurality disagreed with the district court's conclusion that the waiting period would be "particularly burdensome" on some women, because "[w]hether a burden falls on a particular group is a distinct inquiry from whether it is a substantial obstacle even as to the women in that group."[40]

Because the district court did not specifically state that the waiting period was a "substantial obstacle" for the women whom it characterized as "particularly burden[ed]" by it, the *Casey* plurality felt no need to remand for further factual finding or clarification but instead summarily announced that it was "not convinced that the 24-hour waiting period constitutes an undue burden."[41]

Justice Stevens took the plurality to task for its failure to defer to the district court's factual findings regarding the severity of the burden posed by the 24-hour waiting period. In Stevens's view, "[a] burden may be 'undue' either because the burden is too severe or because it lacks a legitimate, rational justification."[42] The district court's finding as to the severity of the waiting period's burden was conclusive to Stevens, but he also concluded that "in [his] opinion, [the waiting period is] 'undue' because there is no evidence that such a delay serves a useful and legitimate purpose. . . . [T]here is no legitimate reason to require a woman who has agonized over her decision to leave the clinic or hospital and return again another day."[43] Stevens's analysis shows not only that there is disagreement as to the meaning and scope of undue burden, but also substantial disagreement as to the degree of deference to give to district judges' findings of fact regarding the severity of a burden.

These disagreements—about the meaning of undue burden and the degree of deference to be given to the trial judge's factual findings—were amplified by the O'Connor plurality's analysis of the constitutionality of the spousal notification requirement. In supporting its conclusion that the spousal notification provision constituted

[39] *Id.* at 886.

[40] *Id.* at 886–87.

[41] *Id.* at 887.

[42] *Id.* at 920 (Stevens, J., concurring in part and dissenting in part).

[43] *Id.* at 921.

an undue burden, the plurality began its analysis with an extensive recitation of the district court's findings of fact. It then bolstered these findings of fact with citations to numerous studies and journal articles discussing the incidence and impact of domestic violence and concluded that the "spousal notification requirement is thus likely to prevent a significant number of women from obtaining an abortion. It does not merely make abortions a little more difficult or expensive to obtain; for many women, it will impose a substantial obstacle."[44] While Pennsylvania had argued that the percentage of women seeking an abortion who might conceivably be deterred from seeking an abortion due to the spousal notification provision was no more than one percent,[45] the O'Connor plurality concluded that the relevant denominator was the number of "married women seeking abortions who do not wish to notify their husbands of their intentions and do not qualify for one of the statutory exceptions to the notice requirement."[46] This was so because the constitutionality of the law "must be judged by reference to those for whom it is an actual rather than irrelevant restriction."[47]

The dissenters disagreed with this characterization of undue burden, pointing out that just because a small percentage (less than one percent) of women seeking abortion did not wish to notify their husbands because they may fear spousal abuse, this did not mean that the law, *on its face*, was an "undue burden" on women seeking abortion. Instead, the dissenters noted that because this was a facial challenge to the law, the fact that the spousal notification provision might operate unconstitutionally upon a small subset of women did not render the law unconstitutional as to *all* women, though it might result in a finding of unconstitutionality in a future as-applied challenge.[48]

[44] *Id.* at 893–94 (plurality op.).

[45] *Id.* at 894 ("They begin by noting that only about 20 percent of the women who obtain abortion are married. Then they note that of these women, about 95 percent notify their husbands of their own volition. Thus, respondents argue, the effects of [the spousal notification provision] are felt by only one percent of the women who obtain abortions.").

[46] *Id.* at 895.

[47] *Id.*

[48] *Id.* at 972–73 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

More broadly, Justice Scalia's opinion took issue with the plurality's adhoc conclusions regarding whether particular provisions amounted to an undue burden. Although he stated that he had no objection to relying on facts contained in the record (or those that are judicially noticeable), he believed the plurality's use of factual findings was inconsistent:

> [T]he approach of the joint opinion is, for the most part, simply to highlight certain facts in the record that apparently strike the three Justices as particularly significant in establishing (or refuting) the existence of an undue burden; after describing these facts, the opinion then simply announces that the problem either does or does not impose a "substantial obstacle" or an "undue burden." We do not know whether the same conclusions could have been reached on a different record or in what respects the record would have had to differ before an opposite conclusion would have been appropriate. The inherently standardless nature of this inquiry invites the district judge to give effect to his personal preferences about abortion. By finding and relying upon the right facts, he can invalidate, it would seem, almost any abortion restriction that strikes him as "undue."[49]

As will be discussed in detail below, this issue, about the potential power granted to the trial judge under the undue burden standard, became a particularly strong point of contention in *Whole Woman's Health*.

C. Gonzales v. Carhart

Casey's undue burden standard took on a distinctly deferential cast in *Gonzales v. Carhart*, when a closely divided (5–4) Court upheld a federal ban on partial-birth abortion, reversing the decisions of two federal appellate courts that had enjoined the law as unconstitutional.[50] The *Gonzales* majority upheld the federal Partial-Birth Abortion Ban Act (PBABA), even though it contained only an exception for the life, but not the health, of the mother.[51]

[49] *Id.* at 991–92 (Scalia, J., concurring in the judgment in part and dissenting in part) (internal citations omitted).

[50] 550 U.S. 124, 132–33 (2007).

[51] The PBABA stated that the law "does not apply to a partial-birth abortion that is necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself." *Id.* at 141.

The PBABA was enacted in 2003, largely as a response to the Supreme Court's decision in *Stenberg v. Carhart* in 2000, which struck down a partial-birth abortion ban enacted by Missouri.[52] The *Stenberg* Court based its decision on two alternative conclusions: (1) Because the district court made a factual finding that the banned procedure (Dilation and Extraction, or D&X) may be the safest abortion method for some women, the law's failure to provide an exception for maternal health rendered it unconstitutional;[53] and (2) The law constituted an undue burden because the statute's language was sufficiently vague and broad to criminalize not merely partial-birth abortion (D&X), but also the most commonly used form of previability, second-trimester abortion (Dilation and Evacuation, or D&E).[54] The *Gonzales* Court found that neither of those two conclusions applied to the PBABA.

First, the Court found that, in drafting the PBABA, Congress had vitiated the vagueness and overbreadth concerns expressed in *Stenberg*, concluding that the PBABA had clearly prohibited *only* partial-birth abortion (D&X), not the more common abortion procedure of D&E.[55] Second, it found that both the lower courts and Congress had heard evidence from medical experts who asserted that partial-birth abortion (D&X) was never "the safest" abortion method, since there was always an equally safe alternative available.[56] Given the "documented medical disagreement whether the Act's prohibition would ever impose significant health risks on women," the Supreme Court framed the question as "whether the Act can stand when this medical uncertainty persists."[57]

The *Gonzales* Court observed that Congress had made extensive findings in the PBABA, including a finding that a medical consensus existed that partial-birth abortion (D&X) is "never medically necessary."[58] It also observed that the two district courts that had ruled on the PBABA's constitutionality had taken evidence and disagreed with this congressional finding.

[52] 530 U.S. 914 (2000).

[53] *Id.* at 936–37.

[54] *Id.* at 938–46.

[55] Gonzales, 550 U.S. at 150–53.

[56] *Id.* at 162.

[57] *Id.* at 162–63.

[58] *Id.* at 165–66.

The Court concluded that "[u]ncritical deference to Congress' factual findings in these cases is inappropriate" and refused to uphold the PBABA on the basis of the legislature's factual findings alone.[59] It noted that while a court owes deference to a legislature's factual findings, it would not "place dispositive weight" on such findings because the courts "retain an independent constitutional duty to review factual findings where constitutional rights are at stake."[60]

In assessing whether partial-birth abortion is ever necessary for a woman's health, the *Gonzales* majority concluded that there was no medical consensus on this factual question, and that "[m]edical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts."[61] More precisely, the Court asserted that "[c]onsiderations of marginal safety, including the balance of risks, are within the legislative competence when the regulation is rational and in pursuit of legitimate ends."[62]

The legislature, in other words, enacted the PBABA to pursue various legitimate ends, including expressing respect for the dignity of human life and protecting the integrity and ethics of the medical profession. While Congress did not provide an exception for the health (only the life) of the mother in the PBABA, it did so based upon its finding that partial-birth abortion was never necessary to protect maternal health, therefore banning the procedure would not harm maternal health. While the petitioners challenging the PBABA and the district courts both disagreed with Congress's factual finding, the *Gonzales* Court undertook its own review and concluded that "medical uncertainty" existed on this issue. In the face of such medical uncertainty, the majority concluded that the legislature should enjoy deference to its balancing of risks and benefits, thus concluding that the law did not pose an "undue burden" and upholding the law:

> Where it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of

[59] *Id.*

[60] *Id.* at 165.

[61] *Id.* at 164.

[62] *Id.* at 166.

> its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn.[63]

The *Gonzales* decision thus re-embraced the undue burden standard articulated by the plurality in *Casey* while adding its own gloss: So long as adequate alternative methods of obtaining abortion are available, the state may ban previability abortion methods, provided it does so in rational furtherance of legitimate ends. The undue burden standard of *Casey*, in other words, appeared watered down, approaching something akin to rational basis review, with the added necessity of an independent judicial check to ensure that adequate alternative abortion methods remained available.

Which party bears the burden of proof was not entirely clear. Nonetheless, *Casey*'s undue burden standard inherently suggests that the plaintiff bears the burden of establishing that the challenged law rises to the level of an "undue" burden. In addition, *Gonzales*'s legislative deference as to the means–end fit—upholding the law in the face of any medical "uncertainty"—further suggests that the *Gonzales* Court engaged in something akin to rational basis review—or as I have come to think of it, "undue burden plus," with the plus representing an extra dose of deference to the legislature on means–end fit. Thus, the plaintiff seems to bear the burden of proffering evidence that the burden is "undue," but if there is an evidentiary dispute about underlying medical facts as to whether the law furthers the interest it purports to further—that is, it will have the legitimate effect the legislature desires—then the legislature will be entitled to deference when it relies on evidence to the contrary. So long as some reasonable abortion alternatives remain available, therefore, *Gonzales* suggests the law should be upheld. The next case, however, *Whole Woman's Health*, casts this conclusion into doubt.

D. Whole Woman's Health v. Hellerstedt

Following the death of Justice Antonin Scalia on February 13, 2016, an eight-justice Supreme Court decided, 5-3, *Whole Woman's Health*.[64] The four-justice liberal wing of the Court—Justices Stephen Breyer, Ruth Bader Ginsburg, Sonia Sotomayor and Elena Kagan, were joined in the majority opinion by Justice Kennedy, the Court's current

[63] *Id.* at 158.

[64] Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016).

"swing" vote. The opinion, penned by Justice Breyer, struck down two provisions of a Texas abortion law, H.B. 2: (1) an "admitting-privileges" provision, which required that physicians performing abortions have active admitting privileges at a hospital not further than 30 miles from the place at which the abortion is performed; and (2) a "surgical-center" provision, which required abortion facilities to meet the same statutory standards as required of ambulatory surgical centers.

The unusual procedural posture of *Whole Woman's Health* is worth a brief discussion. After Texas passed H.B. 2, but before it could go into effect, a group of abortion providers filed a lawsuit in federal district court, seeking a declaration that the admitting-privileges provision was unconstitutional and a corresponding injunction against its enforcement. The district court granted the injunction, but it was vacated by the U.S. Court of Appeals for the Fifth Circuit, which then ruled that the admitting privileges provision was constitutional, reversing the district court.[65] The plaintiffs in the first lawsuit did not seek review in the U.S. Supreme Court.

One week after the Fifth Circuit's ruling, another group of abortion providers—including many of the plaintiffs in the first, unsuccessful lawsuit—filed a second lawsuit, in the same federal district court, seeking two things: (1) a declaration of the unconstitutionality of the surgical-center provision and injunction against its enforcement; and (2) a declaration and injunction against enforcement of the admitting privileges requirement *as applied* to two specific abortion facilities in McAllen and El Paso. The second district court held that *both* the surgical-center and admitting privileges requirements were facially unconstitutional, even though the plaintiffs requested only an as-applied, not facial, invalidation of the admitting privileges requirement (because it had already been unsuccessfully litigated in the first lawsuit). The Fifth Circuit reversed the district court on the merits, concluding that the district court should not have allowed either the admitting-privileges or surgical-center provisions to be heard on the merits because the first lawsuit precluded the re-litigation of both claims—that they were, as lawyers say, *res judicata*. It alternatively concluded that both provisions were, in fact, not an undue burden on a woman's right to abortion, and were therefore facially constitutional.[66]

[65] *Id.* at 2300.

[66] For this procedural background, see *id.* at 2301.

To reach the merits of the constitutional claims in *Whole Woman's Health*, the Supreme Court engaged in remarkable contortions of procedural law, including distortion of the principle of *res judicata*. Specifically, the majority concluded that the second lawsuit was not the same claim as the first lawsuit, invoking an obscure and controversial comment found in the Restatement (Second) of Judgments that suggested that cases involving "important human values" should generally not be dismissed if a "slight change of circumstances may afford a sufficient basis for concluding that a second action may be brought."[67] But as Justice Samuel Alito's dissent points out, this conclusion is "plainly wrong" because both the first and second lawsuits arose out of the same transaction or occurrence—namely, the passage of H.B. 2.[68] Justice Alito also pointed out that the majority's broad interpretation of the Restatement "would revolutionize the rules of claim preclusion—by permitting a party to relitigate a lost claim whenever it obtains better evidence."[69] Contrary to the majority's claim, the Restatement comment relied on by the majority was designed only to illustrate the unremarkable proposition that a new legal claim based on *postjudgment acts* should generally be permitted in cases such as child custody or similar status adjudications, not cases seeking to relitigate the *same transaction* challenged in the prior lawsuit with "better evidence."[70]

Once the *Whole Woman's Health* majority had stretched the law of *res judicata* to permit its determination on the merits, it proceeded to apply *Casey*'s undue burden analysis in a way that was distinct from its approach in *Gonzales*.

Specifically, the *Whole Woman's Health* majority stated that *Casey* "requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer."[71] Justice Thomas's

[67] *Id.* at 2305 (citing Restatement (Second) of Judgments § 24, cmt. f). In a prior case, Justice Scalia stated that comment f to Section 24 "must be regarded as a proposal for change rather than a restatement of existing doctrine, since the commentary refers to not a single case, of this or any other United States Court."; *id.* at 2339 (Alito, J., dissenting) (citing United States v. Stuart, 489 U.S. 353, 375 (1989)).

[68] *Id.* at 2332 (Alito, J., dissenting).

[69] *Id.* at 2336.

[70] *Id.* at 2336–37.

[71] *Id.* at 2309 (majority op.).

dissent disagreed with this characterization, asserting that *Casey* did not engage in "free-form balancing" of benefits and burdens.[72] Thomas is right: The *Casey* plurality assessed only the *burdens* of the medical emergency, informed consent, parental consent, spousal notification, and recordkeeping provisions of Pennsylvania's abortion law.

It was Justice Stevens's *Casey* concurrence—not the tri-authored plurality—that weighed the benefits of Pennsylvania's law against its burdens. Stevens stated that he believed a "burden may be 'undue' either because the burden is too severe, or because it lacks a legitimate, rational justification."[73] He then explained that the informed consent provision was unconstitutional because there was "no evidence that such a [24-hour] delay serves a useful and legitimate purpose" and providing information about abortion alternatives is "clearly useless" for some women, such as "those who are fully convinced that abortion is their only reasonable option."[74] Likewise, the requirement of informing women of the gestational age of the fetus "is of little decisional value in most cases" because most abortions are provided in the first trimester, and therefore the law does "not serve a useful purpose."[75] Justice Stevens's approach thus embraced the notion that a "useless" law that does not provide the benefits the state seeks is tantamount to an "undue burden"; its burden is "undue," in his view, because the law provides no discernible benefits.

The majority in *Whole Woman's Health* agreed with this balancing approach, concluding that the admitting-privileges provision was purported to provide "easy access to a hospital should complications arise," but deferring to the district court's factual finding that the provision "brought about no such health-related benefits."[76] It then concluded that the admitting-privileges provision constituted a substantial obstacle because evidence in the record indicated that many abortion doctors could not obtain privileges for various reasons and that approximately half of Texas's abortion clinics had closed since

[72] *Id.* at 2324 (Thomas, J. dissenting).

[73] Casey, 505 U.S. at 920 (Stevens, J., concurring in part and dissenting in part).

[74] *Id.* at 921.

[75] *Id.* at 921–22.

[76] Whole Woman's Health, 136 S. Ct. at 2311.

the provision went into effect.[77] The Court stated that these burdens "when viewed in light of the virtual absence of any health benefit, leads us to conclude that the record adequately supports the District Court's 'undue burden' conclusion."[78]

The majority's analysis of the surgical-center requirement was virtually identical. The Court noted that the district court judge had made "well supported" findings of fact that "risks are not appreciably lowered for patients who undergo abortions at ambulatory surgical centers as compared to nonsurgical center facilities" and that women "will not obtain better care or experience more frequent positive outcomes at an ambulatory surgical center as compared to a previously licensed facility."[79] The surgical-center provision thus "provides no benefit" and the "record evidence thus supports the ultimate legal conclusion that the surgical-center requirement is not necessary."[80] After finding no discernible health benefit in the surgical-center requirement, the *Whole Woman's Health* majority recited the district court's findings of fact that the provision constituted a "substantial obstacle" to women seeking abortion because it would further reduce the number of abortion facilities and the remaining facilities did not have the capacity to handle statewide demand for abortion.[81] Given these burdens, and the lack of health benefits, the Court concluded that the surgical-center requirement constituted an undue burden.

The *Whole Woman's Health* majority's heavy reliance on the district court's findings of fact raises interesting questions about the nature of the undue burden standard. The *Casey* plurality gave some deference to the findings of fact by the court of appeals (not the district court) on its broad construction of the Pennsylvania abortion statute's definition of "medical emergency," as well as some degree of deference to the district judge in his determination of the effect of the spousal notification provision. It did not otherwise defer to the lower courts' factual findings, however, in making its assessment of the constitutionality of the informed consent, 24-hour waiting

[77] *Id.* at 2312.

[78] *Id.* at 2313.

[79] *Id.* at 2315

[80] *Id.* at 2315, 2316.

[81] *Id.* at 2315–18.

period, or recordkeeping provisions.[82] For example, in assessing the constitutionality of the 24-hour waiting period, the *Casey* plurality stated:

> [T]he District Court concluded that the waiting period does not further the state "interest in maternal health" and "infringes the physician's discretion to exercise sound medical judgment." Yet, as we have stated, under the undue burden standard a State is permitted to enact persuasive measures which favor childbirth over abortion, even if those measures do not further a health interest. And while the waiting period does limit a physician's discretion, that is not, standing alone, a reason to invalidate it. . . . We also disagree with the District Court's conclusion that the "particularly burdensome" effects of the waiting period on some women require its invalidation.[83]

You may recall that Justice Scalia's dissent in *Casey* warned that the undue burden standard's heavily fact-dependent inquiry could place too much power in the hands of judges, who could manipulate outcomes with ideologically driven findings of fact.

The district court judge in the second *Whole Women's Health* lawsuit appears to have had a strong opinion about abortion, leading to findings of fact to which the Court majority was all-too-happy to defer. But let me be clear: findings of fact are essential in many lawsuits. In most constitutional cases, however, the findings of fact are not hotly contested—they are what they are. When they are hotly contested, the district court judge undoubtedly is in the best position to choose between the competing factual alternatives. But when a *legal standard* is heavily dependent on facts, it loses some of its law-like character simply because it increases the perception that the neutral umpire to the dispute—the judge—possesses not merely the power to choose

[82] I say "some deference" because in addition to reciting the facts as found by the district court, the *Casey* plurality also referenced several social science studies and concluded, "This information [social science studies] and the District Court's findings reinforce what common sense would suggest. In well-functioning marriages, spouses discuss important intimate decisions such as whether to bear a child. But there are millions of women in this country who are the victims of regular physical and psychological abuse at the hands of their husbands. Should these women become pregnant, they may have very good reasons for not wishing to inform their husband of their decision to obtain an abortion." Casey, 505 U.S. at 892–93 (plurality op.).

[83] *Id.* at 886.

between competing versions of facts, but also to use those facts to manipulate the ultimate determination of *law* as well. This is especially true when the legal standard is articulated as an open-ended "balancing" of risks and benefits.

A legal standard that is "tilted" in some way—such as strict scrutiny or rational basis review—at least offers the benefit of outcome predictability by demanding that, if the factual evidence is evenly balanced, the case should come out one way or the other. Moreover, by demanding the articulation of a "compelling," "important" or "legitimate" state interest, standards of judicial review limit judicial discretion somewhat by recognizing only a limited number of state interests as "compelling" or "important." These traditional standards of review likewise demand a predefined degree of means–end fit, which, at least in the case of strict scrutiny's narrow tailoring, is difficult to satisfy because there are often less intrusive means that the state may use to further its interests. A balancing test, by contrast, offers no similar benefits of predictability or cabining of judicial subjectivity; it provides no "default rule" as to which party should win in a close call, instead giving unfettered discretion to the judge, without any hard or fast rules for the judge to apply.

Along these lines, it should be noted that the *Whole Woman's Health* majority clearly did not apply the *Gonzales* "undue burden plus" standard, because it provided no deference at all to the Texas legislature's factual findings regarding the benefits to be derived from the admitting-privileges or surgical-center provisions of H.B. 2. By deferring to the district court's findings of fact—rather than the Texas legislature's—*Whole Woman's Health*'s application of the undue burden standard took a step away from rational basis review and back toward *Roe*'s strict scrutiny, but without the benefit of clear default rules such as which party bears the burden of proof and persuasion.[84] In this sense, I think of *Whole Woman's Health* as "undue burden minus," meaning that it took away *Gonzales*'s deference to legislative judgment in the face of factual uncertainty and gave more power to judges—particularly district court judges—to overtly substitute their own judgment for that of the legislature.

[84] Justice Thomas agrees: "The majority's undue-burden test looks far less like our post-*Casey* precedents and far more like the strict-scrutiny standard that *Casey* rejected, under which only the most compelling rationales justified restrictions on abortion." Whole Woman's Health, 136 S. Ct. at 2326 (Thomas, J., dissenting).

III. The Kaleidoscopic Standard of Judicial Review in Non-Abortion Cases

"Liberty finds no refuge in a jurisprudence of doubt."[85] That is the first sentence of *Casey*. Despite this promising introduction, the *Casey* plurality proceeded to sow many seeds of doubt, not only about how to properly analyze the constitutionality of laws regulating abortion, but about how to properly analyze the constitutionality of laws infringing *any* asserted unenumerated right. Indeed, the *Casey* plurality's embrace of a new, *sui generis* "undue burden" standard for analyzing the constitutionality of abortion laws led Justice Scalia to retort in *Casey* that "[r]eason finds no refuge in this jurisprudence of confusion."[86] The constitutional confusion extends well beyond abortion cases these days.

The traditional tiers of scrutiny in constitutional cases—strict scrutiny and rational basis review—were expanded to include "intermediate" scrutiny in certain cases involving the Equal Protection Clause.[87] But none of these tiers of scrutiny is driven by constitutional text or any original meaning reasonably ascribed to that text. Indeed, the standards of judicial review are entirely judge-made doctrine, devised to express some preference regarding the proper role of judges in a constitutional republic. These standards all attempt to answer the question: How deferential should unelected, relatively politically unaccountable federal judges be in assessing the constitutionality of laws enacted by the legislative branch? Should such judges presume that the laws are constitutional, or unconstitutional? Should the government merely articulate a "rational" purpose behind the law, an "important" purpose, or a "compelling" one? And even assuming these words convey some increasing degree of judicial scrutiny of a law, how does a judge know which governmental purposes are merely "rational," which are "important," and which are "compelling"?

The problem, of course, is that there is no precise dividing line between these words and thus, no precise dividing line between these tiers of scrutiny. Ineluctably, there must be a human being—a

[85] Casey, 505 U.S. at 843.

[86] *Id.* at 993 (Scalia, J., concurring in the judgment in part and dissenting in part).

[87] See, e.g., Craig v. Boren, 429 U.S. 190, 197 (1976) (laws based on gender classifications "must serve important governmental objectives and must be substantially related to achievement of those objectives"); see also *id.* at 217–21 (Rehnquist, C.J., dissenting) (questioning the validity of heightened scrutiny for gender classifications).

judge—who applies these words to a given set of facts. Subjectivism in the interpretation of laws—any laws—cannot be avoided to some degree. The words employed in the various tiers of scrutiny, therefore, are designed to convey a general *analytical mindset*—a *degree of deference* to the legislature—a general *warning* to judges that they should not invalidate a law (rational basis review) or may have freer rein in doing so (intermediate and strict scrutiny).

But why? Why are some laws entitled to more judicial deference than others? That is a much harder question to answer. The genesis of the bifurcation of constitutional rights into "favored" and "disfavored" rights, necessitating differing standards of judicial review, is generally ascribed to footnote four of *Carolene Products*:

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth.
>
> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . .
>
> Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious or racial minorities; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.[88]

From this relatively innocuous footnote—nothing more than dicta in an opinion with a mere four-justice majority[89]—the Supreme

[88] United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (internal citations omitted).

[89] Footnote four is dicta because the four-justice majority's opinion upheld the economic legislation in question (a federal ban on the sale of filled milk) using rational basis review. *Id.* at 152. The *Carolene Products* majority opinion consisted of only four justices because two justices—Benjamin Cardozo and Stanley Reed—did not take part in the decision. The three remaining justices—Hugo Black, James McReynolds, and Pierce Butler—did not join the majority opinion or footnote four.

Court has subsequently devised elaborate standards of judicial review favoring some constitutional rights over others.

The first paragraph of footnote four—"[t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments"—makes some logical sense. If a law "appears on its face" to violate a "specific prohibition" in the Constitution, one would think that the law is inherently and presumptively unconstitutional, and therefore the government seeking to uphold such a law should bear the burden of proof and persuasion that the law is, in fact, not violative of the specific provision of the Constitution. In such a case, heightened judicial scrutiny of the law is warranted because of the specificity of both the statute and the Constitution's text.

But the second two paragraphs of footnote four—obscurely referencing laws that "restrict[] . . . political processes" or that are "directed at particular religious or racial minorities"—is nothing more than the musings of four justices of the New Deal Court, unmoored to any constitutional text itself. There is no explanation as to why these two situations—unlike the first paragraph involving enumerated constitutional rights—should warrant heightened judicial scrutiny. Indeed, to give the four-justice majority some credit, they did not suggest that heightened scrutiny was in fact appropriate, but merely suggested that it may be worth pondering in the future.

In the intervening 80 years since the fleeting utterance of footnote four, Supreme Court justices have managed to latch onto its (assumed) invitation and erect, albeit on an intellectually weak foundation, an elaborate superstructure for analysis of asserted constitutional rights, imposing rigorous judicial scrutiny on certain favored rights while relegating others solely to the political process. At the top of this precarious judicially constructed pyramid are the favored few—the so-called "personal" rights. This elite group of rights includes not only those enumerated in the Bill of Rights (such as First or Fourth Amendment rights) or elsewhere in the Constitution (such as *habeas corpus* or the prohibition on bills of attainder), but more remarkably, a fast-growing array of *unenumerated* personal rights such as the right to contraception, sexual liberty, marriage, and, of course, abortion.

At the bottom of the judicial pyramid of rights are a vast number of so-called "economic rights," which are insouciantly lumped under

this shibboleth for no other reason than a majority of the Supreme Court believes the law being challenged is a regulation of "business," the "economy," or "industrial relations" and therefore the right being asserted must be "economic" rather than "personal" in nature. But of course these rights—like all rights—*are* deeply personal in nature, attach only to individuals, and are as important to the "pursuit of happiness"[90] and as "central to personal dignity and autonomy"[91] as the rights that the Court routinely and cavalierly categorizes as preferred "personal rights." For example, the routinely maligned liberties to contract and pursuit of a lawful occupation are as essential to individual liberty as contraception but also have deep roots in our nation's history and tradition. How would an individual be truly free without the ability to choose one's job or employees, negotiate wages, or enter into a contract with others for the purchase of goods or services?[92] After all, without such liberties, we would each be little more than slaves.

[90] Declaration of Independence para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.").

[91] Casey, 505 U.S. at 851 (plurality op.); *id.* at 915 (Stevens, J., concurring in part and dissenting in part) ("One aspect of this liberty is a right to bodily integrity, a right to control one's person."); *id.* at 926–27 (Blackmun, J., concurring in part, concurring in the judgment, and dissenting in part) ("Throughout this century, this Court also has held that the fundamental right to privacy protects citizens against governmental intrusion into such intimate family matters as procreation, childrearing, marriage, and contraceptive choice.").

[92] See e.g., Adair v. United States, 208 U.S. 161, 174–75 (1908) ("[I]t is not within the functions of government—at least, in the absence of contract between the parties—to compel any person, in the course of his business and against his will, to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another. The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it."); West Coast Hotel v. Parrish, 300 U.S. 379, 410–11 (1937) (Sutherland, J., dissenting) ("The moral requirement implicit in every contract of employment, viz. that the amount to be paid and the service to be rendered shall bear to each other some relation of just equivalence, is completely ignored. The necessities of the employee are alone considered, and these arise outside of the employment, are the same when there is no employment, and as great in one occupation as in another. . . . In principle, there can be no difference between the case of selling labor and the case of selling goods. . . . Should a statute undertake to vest in a commission power to determine the quantity of food necessary for individual support, and require the shopkeeper, if he sell to the individual at all, to furnish that quantity at not more than a fixed maximum, it would undoubtedly fall before the constitutional test.").

Yet for some reason—perhaps little more than the New Deal Court's desire to clear the conceptual path to upholding New Deal "economic" legislation such as minimum wages and maximum hours[93]—these so-called "economic" liberties are now considered mere "liberty interests" rather than "fundamental rights," and consequently subject only to rational basis review as typified by *Williamson v. Lee Optical*.[94]

Even if one accepts the economic-personal rights bifurcation and the inevitability of some tiers of judicial scrutiny, the judge-made test for distinguishing mere "liberty interests" from "fundamental rights"—and hence the test for distinguishing between rational basis review and strict scrutiny—has itself eroded in recent years.

A majority of the Supreme Court articulated a two-part test for fundamental rights analysis in *Washington v. Glucksberg*: "Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition.' Second, we have required in substantive-due-process cases a 'careful description' of the asserted fundamental liberty interest."[95]

Applying this test to the asserted right to physician-assisted suicide, the *Glucksberg* majority concluded that the right was best carefully described *not* as a right of bodily autonomy or to control the manner or timing of one's death, but a right to commit suicide with the aid of a physician.[96] Once described that way, the *Glucksberg* majority had little difficulty concluding that Anglo-American history had condemned assistance with suicide for over 700 years, and therefore, in light of such history, the right in question could not be characterized as a "fundamental" right necessitating strict scrutiny.[97]

[93] See West Coast Hotel v. Parrish, 300 U.S. 379 (1937).

[94] Williamson, 348 U.S. at 487–88 ("But the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it. The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, *regulatory of business and industrial conditions*, because they may be unwise, improvident, or out of harmony with a particular school of thought.") (emphasis added).

[95] Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) (citations omitted).

[96] *Id.* at 722–23.

[97] *Id.* at 710–16, 728.

The *Glucksberg* two-part test has been given lip service in several recent high-profile cases, yet its application has not resembled that in *Glucksberg*. In particular, there have been three cases—all penned by centrist Justice Kennedy—that have notably deviated from *Glucksberg*'s analytical framework, and all three involved laws that singled out homosexuals.

In the first case, *Lawrence v. Texas*, a majority of the Court struck down, as violating substantive liberty, a Texas statute that banned homosexual sodomy.[98] The majority acknowledged the longstanding Anglo-American legal condemnation of sodomy, but softened this fact by suggesting that the laws were rarely enforced and not specifically aimed at homosexual sodomy. The *Lawrence* majority chose to describe the right being asserted *not* as a "right to engage in homosexual sodomy," as had the majority in *Bowers v. Hardwick*,[99] but instead a broader right to enter into an intimate personal relationship with another.[100]

While the historical prohibition against sodomy would have suggested, pursuant to *Glucksberg*, that the Texas law was subject to deferential rational basis review and hence presumptively constitutional, the *Lawrence* majority scrutinized the law with more rigor. Indeed, the *Lawrence* majority provided no clue as to the standard of review it was applying until the very end of the opinion when it obliquely declared: "The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."[101] With this one passing reference, the Court appeared to confess that the law failed rational basis review. If rational basis review was indeed the standard applied by the *Lawrence* majority, it certainly did not resemble deferential, *Williamson*-style rational basis review; it had discernible "bite."

[98] Lawrence v. Texas, 539 U.S. 558 (2003).

[99] 478 U.S. 186 (1986).

[100] Lawrence, 539 U.S. at 567 ("The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals. . . . It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.").

[101] *Id.* at 578.

A similar, nontraditional application of rational basis review occurred in an equal protection case, *Romer v. Evans*.[102] That case involved a challenge to the constitutionality of Amendment 2 to the Colorado state constitution, which prohibited state or local governments from granting protected status to homosexuals. Because the Supreme Court had never granted homosexuals protected status under the Equal Protection Clause, the standard of judicial review for the constitutionality of Amendment 2 should have been, logically, rational basis review. Colorado asserted that it had legitimate interests in denying protected status to homosexuals, including respect for individuals' (for example, landlords' or employers') freedom of association and conservation of resources to fight discrimination against protected groups (such as racial or religious minorities).[103]

The *Romer* majority stated that it found it "impossible to credit" these articulated state interests because of what the majority saw as the "inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected."[104] The *Romer* majority explicitly conceded that it was employing rational basis review, but it concluded that Amendment 2 was motivated by hate against homosexuals and not by the legitimate purposes articulated by Colorado.[105] In so doing, the *Romer* majority's divination of the secret motivations of Colorado voters in enacting Amendment 2—animus toward homosexuals—was most unusual. Ascribing motives to a legislature comprising many people—much less an entire state population voting via state constitutional referendum—is an impossible task. As the Court stated long ago in *United States v. O'Brien*:

> [U]nder settled principles the purpose of Congress . . . is not a basis for declaring this legislation unconstitutional. It is a familiar principle of constitutional law that this Court will not

[102] 517 U.S. 620 (1996).

[103] *Id.* at 635.

[104] *Id.* at 634–35.

[105] *Id.* at 635 ("[I]n making a general announcement that gays and lesbians shall not have any particular protections from the law, [Amendment 2] inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it. We conclude that, in addition to the far-reaching deficiencies of Amendment 2 that we have noted, the principles it offends, in another sense, are conventional and venerable; a law must bear a rational relationship to a legitimate governmental purpose, and Amendment 2 does not.") (internal citation omitted).

> strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive. As the Court long ago stated: "The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted."[106]

The *Romer* Court's disregard of this usual judicial practice—refusing to inquire into a law's elusive "motive"—is a strong indication that something much more searching than deferential, *Williamson*-style rational basis review was at play. As with *Lawrence*, the Court gave lip service to rational basis review, but its application of the standard had discernibly more bite.

Finally, in the recent Supreme Court case striking down bans on gay marriage, *Obergefell v. Hodges*,[107] Justice Kennedy's majority opinion relied upon both substantive due process as well as equal protection. In addressing the substantive liberty claim, the majority assumed that the right being asserted was a right to marry, not a right of homosexual marriage. While the Court acknowledged that the right to marriage historically was limited to heterosexual unions, it stated that its prior cases had merely made "assumptions" that the right to marriage was limited to opposite-gender couples, and proceeded to identify four "essential attributes" of marriage that suggested the right should be extended to homosexual couples.[108]

Whatever the strength of the *Obergefell* majority's four reasons for extending the fundamental right to marry to homosexual couples, one thing is clear: The majority did not feel moored to historical understandings of marriage, nor did it narrowly describe the right being asserted as *Glucksberg* had instructed. Neither history nor a narrow description of the asserted right played a prominent role in the *Obergefell* analysis, and the practical effect is a broadening of the judiciary's ability to apply strict scrutiny to laws impacting rights that a majority of the Court considers "fundamental," notwithstanding historical understandings to the contrary. While this may (or may not) be a positive development in constitutional analysis, it is

[106] United States v. O'Brien, 391 U.S. 367, 382–83 (1968).

[107] 135 S. Ct. 2584 (2015).

[108] *Id.* at 2598–2601.

undoubtedly a broadening of judicial power and a concomitant restraint on the political process to resolve modern social controversies. Because the Court has more power to define "fundamental" rights—unmoored from historical practice and understandings—there is more room for federal judges to invalidate ordinary laws based upon their subjective beliefs as to what *should* be recognized—today—as a fundamental right, thereby placing such rights beyond the political sphere of debate and compromise.

Obergefell similarly broadened the notion of equal protection, following *Romer*'s lead and concluding that laws banning gay marriage were discriminatory in motive. As with *Romer*, the *Obergefell* majority did not conclude that classifications based on sexual orientation should trigger strict scrutiny. Instead, it concluded that denying marriage to homosexual couples "serves to disrespect and subordinate them" and thus was "unjustified," presumably employing some form of rational basis review with "bite."[109] Indeed, the *Obergefell* majority even attempted to explain *Lawrence* as a quasi-equal protection case, stating:

> In *Lawrence* the Court acknowledged the interlocking nature of these constitutional safeguards [due process and equal protection] in the context of the legal treatment of gays and lesbians. Although *Lawrence* elaborated its holding under the Due Process Clause, it acknowledged, and sought to remedy, the continuing inequality that resulted from laws making intimacy in the lives of gays and lesbians a crime against the State. *Lawrence* therefore drew upon principles of liberty and equality to define and protect the rights of gays and lesbians, holding the State cannot "demean their existence or control their destiny by making their private sexual conduct a crime."[110]

This *ex post* rationalization of *Lawrence*, combined with the *Obergefell* majority's intertwining of due process and equal protection, strongly suggests that the liberals on the Court—and even its center, Justice Kennedy—view the doctrines of liberty (substantive due process) and equality (equal protection) as a single doctrine, with something akin to the European conception of "individual

[109] *Id.* at 2604.

[110] *Id.*

dignity" at its core.[111] The standard of judicial review for this new hybrid constitutional doctrine would presumably not be the tiers of scrutiny that have defined constitutional law for the past 80 years—strict scrutiny, intermediate scrutiny, and rational basis review—but a more free-wheeling form of "reasoned judgment" akin to the Court's hopelessly incoherent "I know it when I see it" obscenity jurisprudence.[112]

Other recent high-profile Supreme Court cases have sent reverberations throughout the legal community, further signaling that the familiar tiers of scrutiny are beginning to crumble. It's not just rational basis review that seems to be transmogrifying before our eyes; it's also strict scrutiny. For example, in the recent affirmative action cases, *Grutter v. Bollinger*[113] and *Fisher v. University of Texas at Austin*[114]—both penned by the then-center of the Court, Justices O'Connor and Kennedy, respectively—the Supreme Court ruled that race-conscious university admission policies were consistent with the Equal Protection Clause, despite invocation of strict scrutiny in both cases.

In *Grutter*, O'Connor's majority explicitly deferred to the University of Michigan law school's assertion that racial diversity is essential to its educational mission.[115] This was a remarkable statement

[111] See James Q. Whitman, The Two Western Cultures of Privacy: Dignity Versus Liberty, 113 Yale L.J. 1151, 1160–62 (2004) ("[C]ontinental European and American sensibilities about privacy grow out of much larger and much older differences over basic legal values, rooted in much larger and much older differences in social and political traditions. The fundamental contrast, in my view, is not difficult to identify. . . . It is the contrast between two conceptions of privacy most recently distinguished by Robert Post: between privacy as an aspect of dignity and privacy as an aspect of liberty. Continental privacy protections are, at their core, a form of protection of a right to respect and personal dignity. . . . By contrast, America, in this as in so many things, is much more oriented toward values of liberty, and especially liberty against the state. . . . On the one hand, we have an Old World in which it seems fundamentally important not to lose public face; on the other, a New World in which it seems fundamentally important to preserve the home as a citadel of individual sovereignty.") (internal citations omitted).

[112] See Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

[113] 539 U.S. 306 (2003).

[114] 136 S. Ct. 2198 (2016) (Fisher II).

[115] Grutter, 539 U.S. at 328 ("The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer.").

in the context of strict scrutiny because, as Justice Thomas's dissent pointed out, "under strict scrutiny, the Law School's assessment of the benefits of racial discrimination and devotion to the admissions status quo are not entitled to any sort of deference."[116] And ironically, Justice Kennedy's dissent in *Grutter* echoed that of Justice Thomas, warning, "If strict scrutiny is abandoned or manipulated to distort its real and accepted meaning, the Court lacks authority to approve the use of race even in this modest, limited way. . . . The Court, however, does not apply strict scrutiny. By trying to say otherwise, it undermines both the test and its own controlling precedents."[117]

In Justice Kennedy's majority opinion in *Fisher II*, however, he apparently changed his mind, reiterating *Grutter*'s deference to diversity as a "compelling" educational mission for a public university, and additionally deferring to the university's claim that there were no more "narrowly tailored" means by which to achieve this mission. Indeed, the *Fisher II* majority appeared to place the burden of proof on the plaintiff to prove that there were alternative methods by which the University of Texas could have achieved its mission of "diversity," stating, "none of petitioner's suggested alternatives—or other proposals considered or discussed in the course of this litigation—have been shown to be 'available' and 'workable' means through which the University could have met its educational goals, as it understood and defined them."[118] It then concluded, in an apparent inconsistency, that the university had met its burden of establishing narrow tailoring.

Justice Thomas again dissented, stating that the *Fisher II* majority's opinion "is irreconcilable with strict scrutiny."[119] Likewise, Justice Alito's dissent asserted that the University of Texas had not met its burden of proof to satisfy strict scrutiny: "The University has still not identified with any degree of specificity the interests that its use of race and ethnicity is supposed to serve. Its primary argument is that merely invoking 'the educational benefits of diversity' is sufficient and that it need not identify any metric that would allow a court to determine whether its plan is needed to serve, or is actually serving,

[116] *Id.* at 362 (Thomas, J., dissenting).

[117] *Id.* at 387 (Kennedy, J., dissenting).

[118] Fisher II, 136 S. Ct. at 2214.

[119] *Id.* at 2215 (Thomas, J., dissenting).

those interests. This is nothing less than the plea for deference that we emphatically rejected in our prior decision."[120]

The use of deference in strict scrutiny is unheard of outside the *sui generis* context of affirmative action. Likewise, judicial inquiry into legislative motives is unheard of in rational basis review, except for the *sui generis* context of laws addressing homosexuals as a class. What this suggests, rightly or wrongly, is that when these particular issues are involved, there is presently a majority of the Supreme Court willing to manipulate or jettison traditional standards of judicial review to achieve desired results.[121] What additional issues may qualify for these nontraditional analytical methods is not yet clear.

Conclusion

The Supreme Court's recent constitutional jurisprudence is an ever-shifting kaleidoscope that threatens its institutional illegitimacy. Starting with *Carolene Products*, the Court's standards of judicial review for assessing the constitutionality of laws have been not merely unmoored from constitutional text—all standards of review will suffer from that particular sin—but worse: The Court has been generally inconsistent with the history behind the constitutional text. The Court's decision to elevate certain constitutional rights above others, by scrutinizing laws infringing such "preferred" rights more rigorously, is not a legal choice but a policy choice poorly disguised as law. The Court's increasingly incoherent abortion jurisprudence illustrates well how standards of review no longer provide a consistent, stable mechanism for judicial analysis of a law's constitutionality, but have become a malleable weapon in the Court's larger ideological war. This war is not merely about the outcome of divisive issues but about the rule of law itself, or more precisely whom in our constitutional republic—judges or the people—should have the ultimate, default power to provide the "last word" on these issues when the constitutional text (and its historical context) do not provide answers.

[120] *Id.* (Alito, J., dissenting).

[121] Justice Thomas put it this way: "If our recent cases illustrate anything, it is how easily the Court tinkers with levels of scrutiny to achieve its desired result." Whole Woman's Health, 136 S. Ct. at 2327 (Thomas, J., dissenting).

A Court that cannot articulate and consistently apply standards of review—whatever they may be—in constitutional cases will breed the impression that the Supreme Court is just another political branch, nine politicians dressed in black robes, who see their job as implementing their own ideological vision of what the Constitution ought to be, rather than what it is. Americans may come to view the Supreme Court—if they do not already—as the destroyer rather than the defender of the Constitution. If this day comes, the rule of law will be at an end, as will the country.