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After Life: Governmental Interests and the New Antiabortion Incrementalism

Mary Ziegler
Florida State University College of Law.

After Life: Governmental Interests and the New Antiabortion Incrementalism

MARY ZIEGLER*

In the aftermath of the Supreme Court's decision in Whole Woman's Health v. Hellerstedt*, commentators have focused on the effect of antiabortion restrictions. But as this Article shows,* Whole Woman's Health *is part of the story of an equally important tactic used by those chipping away at abortion rights: the recognition of new governmental interests justifying abortion regulations. Using original archival research, this Article traces the rise of this strategy and documents its influence on Supreme Court doctrine, making sense of what seem to be contradictory rulings on abortion.*

How should courts deal with novel legislative purposes or broader interpretations of existing ones? The Court's recent decision in Whole Woman's Health *clarified that courts must weigh the degree to which a statute delivers on the benefits it promises, but the Court raised as many questions as it answered. To better ground judicial analysis of governmental interests, this Article proposes a two-step approach. As an initial matter, states should have to articulate a claimed purpose with enough specificity that would enable courts to measure whether a law is succeeding. Then, in evaluating whether a law advances its stated goal, a court should consider: (1) whether a law addresses a measurable problem; (2) whether the law improves on the results achieved by previous policies; and (3) whether the law has some quantifiable (if not numerically specific) benefit. Creating a framework with which to analyze any new purposes proposed by states to justify abortion regulations will provide more consistency, clarity, and coherence for*

* Mary Ziegler is the Stearns Weaver Miller Professor at Florida State University College of Law. She would like to thank Albertina Antognini, Aziza Ahmed, Courtney Cahill, April Cherry, Meredith Harbach, Kim Mutcherson, Noya Rimalt, and Kara Swanson for their willingness to help with this piece.

legislatures and lower courts. The approach suggested in this Article will help ensure that the Court preserves the balance crafted by Planned Parenthood of Southeastern Pennsylvania v. Casey *and* Whole Woman's Health.

INTRODUCTION

Those studying the abortion wars have focused on the effect of antiabortion restrictions.[1] However, as this Article shows, the Court's recent decision in *Whole Woman's Health v. Hellerstedt*[2] is part of the story of an equally important tactic used by those chipping away at abortion rights: creating new governmental interests to

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[1] *See, e.g.*, Andrea D. Friedman, *Bad Medicine: Abortion and the Battle Over Who Speaks for Women's Health*, 20 WM. & MARY J. WOMEN & L. 51–52 (2013); Dawn Johnsen, *"TRAP"ing* Roe *in Indiana and a Common-Ground Alternative*, 118 YALE L.J. 1356, 1359 (2009); Mary Ziegler, *Substantial Uncertainty:* Whole Woman's Health v. Hellerstedt *and the Future of Abortion Law*, 2016 SUP. CT. REV. 77, 85–90 (2016).

[2] 136 S. Ct. 2292 (2016).

justify abortion regulations and expanding those interests that the Court has already dignified. Using original archival research, this Article traces the rise of this strategy and documents its influence on Supreme Court doctrine, making sense of what seem to be contradictory rulings on abortion. Major cases in this area often turn at least partly on whether the Court will dignify a new governmental justification for restricting abortion.[3]

How should courts deal with novel legislative purposes or broader interpretations of existing ones? The Court's recent decision in *Whole Woman's Health* clarified that courts must weigh the degree to which a statute delivers on the benefits it promises, but the Court raised as many questions as it answered.[4] To better ground judicial analysis of governmental interests, this Article proposes a two-step approach. As an initial matter, states should have to articulate a claimed purpose with enough specificity that courts can measure whether a law succeeds in meeting its stated purpose. Abstract, obscure goals, such as enhancing respect for fetal dignity, should give way to concrete, tangible benefits. Next, in evaluating whether a law advances its stated goal, a court should consider: (1) whether a law addresses a measurable problem; (2) whether the law improves on the results achieved by previous policies; and (3) whether the law has some quantifiable (if not numerically specific) benefit. Analyzing abortion regulations under this framework will provide more consistency, clarity, and coherence for legislatures and lower courts. The approach suggested here will help to ensure that the Court maintains the balance that *Planned Parenthood of Southeastern Pennsylvania v. Casey*[5] and *Whole Woman's Health*[6] crafted.

This Article proceeds in six parts. Part I surveys some of the major antiabortion legislation premised on the recognition of new governmental interests in regulating abortion. Part II begins to place these laws in historical context, tracing the origins of antiabortion efforts to move beyond a governmental interest in protecting life

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[3] *See, e.g.*, *id.*; Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (plurality opinion); City of Akron v. Akron Ctr. For Reprod. Health (*Akron I*), 462 U.S. 416 (1983).

[4] *See Whole Woman's Health*, 136 S. Ct. at 2309–10.

[5] *Casey*, 505 U.S. at 833.

[6] *Whole Woman's Health*, 136 S. Ct. at 2309–10.

from the moment of conception. This Part focuses on the campaigns for the recognition of two interests: (1) the protection of women and (2) the protection of the family. As this Part shows, this effort shaped the Court's decisions from *City of Akron v. Akron Center for Reproductive Health (Akron I)*[7] to *Casey*. Part III examines pro-life efforts to frame governmental interests in fetal life that go beyond the prevention of fetal killing, showing how this campaign influenced the Court's decision in *Gonzales v. Carhart*.[8] Part IV begins by analyzing what *Whole Woman's Health* does and does not clarify about how courts should evaluate the claimed purpose of antiabortion legislation. Drawing on the history collected and analyzed in this Article, Part V proposes a clearer approach for courts dealing with new governmental interests supporting abortion regulations.

I. BEYOND LIFE: NEW GOVERNMENTAL INTERESTS

In the fall of 2017, the House of Representatives passed a ban on abortions after the twentieth week of pregnancy.[9] This proposal appeared doomed in the Senate.[10] However, seventeen states currently have such a ban in place.[11] Proponents of a twenty-week ban, including the National Right to Life Committee ("NRLC") and Americans United for Life ("AUL"), contend that such laws prevent fetal pain. NRLC's fact sheet on the Pain-Capable Unborn Child Act, model legislation on the subject, stresses that there is "[e]xtensive evidence that unborn children have the capacity to experience

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[7] 462 U.S. 416 (1983).

[8] 550 U.S. 124 (2007).

[9] Jessie Hellmann, *House Passes 20-Week Abortion Ban*, HILL (Oct. 3, 2017), http://thehill.com/policy/healthcare/353709-house-passes-20-week-abortion-ban; *see also* Anna North, *The House Just Passed a Twenty Week Abortion Ban. Opponents Say It's "Basically Relying on Junk Science,"* VOX (Jan. 29, 2018), https://www.vox.com/identities/2017/10/3/16401826/abortion-ban-pain-capable-unborn-child-protection-act.

[10] *See, e.g.*, Ed Kilgore, *House Passes Twenty-Week Abortion Ban on Near-Perfect Party Line Vote*, N.Y. MAG. (Oct. 3, 2017), http://nymag.com/daily/intelligencer/2017/10/house-passes-20-week-abortion-ban-on-party-vote.html.

[11] *See, e.g.*, *State Policies on Later Abortion*, GUTTMACHER INST., https://www.guttmacher.org/state-policy/explore/state-policies-later-abortions (last updated Oct. 1, 2018).

pain, at least by 20 weeks fetal age."[12] AUL has also championed a model law, the Women's Health Defense Act, that bans abortion at the same point.[13] The organization justifies the ban because "there is substantial and well-documented medical evidence that an unborn child by at least 20 weeks gestation has the capacity to feel pain during an abortion" and because there are "documented risks to women's health."[14]

Twenty-week bans have captured the imagination of abortion opponents partly because some polls indicate that a majority of voters would support such a law.[15] However, twenty-week bans also form part of a larger twist on antiabortion strategy: an effort to erode abortion rights by convincing the courts to recognize new compelling interests justifying government intervention.

This approach represents a different take on antiabortion incrementalism, a strategy that first fell in place in the decade after *Roe v. Wade*.[16] This Part begins by briefly discussing the rise of pro-life incrementalism. Next, this Part examines the new focus on identifying governmental interests in regulating abortion, exploring some of the most significant new antiabortion proposals.

A. *The Rise of Incrementalism*

Opposition to legal abortion reaches back to the 1930s and 1940s, when the Catholic Church connected hostility to abortion to

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[12] *Key Points on Pain-Capable Unborn Child Protection Act*, NAT'L RIGHT TO LIFE COMMITTEE, INC. (Sept. 25, 2017), http://www.nrlc.org/uploads/ fetalpain/KeyPointsOnPCUPA.pdf.

[13] AM. UNITED FOR LIFE, DEFENDING LIFE 2012: BUILDING A CULTURE OF LIFE, EXPOSING AND CONFRONTING THE ABORTION INDUSTRY 235 (2012), http://www.aul.org/wp-content/uploads/2012/04/model-womens-health-defense-act.pdf [hereinafter DEFENDING LIFE 2012] (publishing the Women's Health Defense Acts as "AUL Model Legislation").

[14] *Id.*

[15] *See, e.g.*, Matt Hadro, *Marist Poll: 6 in 10 Americans Support a 20-Week Abortion Ban*, WASH. TIMES (Jan. 24, 2017), http://www.washingtontimes.com/news/2017/jan/24/marist-poll-6-in-10-americans-favor-20-week-aborti/; Eugene Scott, *Most GOP Lawmakers Support Banning Late-Term Abortions, and So Do a Lot of Women*, WASH. POST (Oct. 4, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/10/04/most-gop-lawmakers-support-banning-late-term-abortions-and-so-do-a-lot-of-women/?utm_term=.00bd572721a8.

[16] 410 U.S. 113 (1973).

contraception.[17] But over the next several decades, as efforts to reform or repeal abortion laws took hold, an organized pro-life movement took shape.[18] These pro-life groups took no official position on birth control.[19] Although NRLC received support from the Catholic Church, pro-life groups emphasized secular arguments, often pointing to right-to-life language in the Declaration of Independence.[20] The movement also had a constitutional agenda.[21] Pro-life attorneys argued that protection for the unborn child could be found in the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[22]

Roe v. Wade rejected what abortion foes viewed as many of their strongest arguments. First, the Court addressed the question of fetal personhood.[23] *Roe* treated this mostly as a textual matter, focusing on how the word "person" was used throughout the Constitution.[24] Since the text seemed to apply the term only postnatally, the Court concluded that the fetus could not be a person within the meaning of the Fourteenth Amendment.[25] Next, the Court considered whether the government had a compelling interest in protecting life from the moment of conception.[26] Here, the Court focused on the divergence of religious, medical, and ideological opinions as to when life begins.[27] If experts could not agree on when life begins, as the Court reasoned, the state could not impose one conclusive view of the subject on everyone else.[28]

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[17] *See, e.g.*, DANIEL K. WILLIAMS, DEFENDERS OF THE UNBORN 3–12 (2016).

[18] On the emergence of the pro-life movement, see, for example, *id.*; MARY ZIEGLER, AFTER *ROE*: THE LOST HISTORY OF THE ABORTION DEBATE 38–51 (2015) [hereinafter ZIEGLER, AFTER *ROE*].

[19] *See, e.g.*, WILLIAMS, *supra* note 17, at 58–62, 91–95.

[20] *See, e.g.*, *id.* at 90–119; ZIEGLER, AFTER *ROE*, *supra* note 18, at 39–40.

[21] On the pro-life movement's constitutional agenda in the period, see Mary Ziegler, *Originalism Talk: A Legal History*, 2014 BYU L. REV. 869, 870–71, 884 (2014).

[22] *See, e.g.*, *id.* at 884.

[23] *See* Roe v. Wade, 410 U.S. 113, 156–157 (1973).

[24] *See id.* at 157–58.

[25] *See id.* at 158.

[26] *See id.* at 159.

[27] *See id.* at 160–62.

[28] *See id.* at 162.

Roe did not immediately discourage pro-lifers from prioritizing a constitutional right to life.[29] Indeed, within months of the Supreme Court's decision, several members of Congress put forth constitutional proposals that would undo *Roe*.[30] Two such examples of constitutional proposals are the amendment proposed by Representative Lawrence Hogan (R-MD) that would protect a right to life "from the moment of conception,"[31] and the alternative amendment proposed by Senator James Buckley (Conservative-NY), which stated: "With respect to the right to life, the word 'person' . . . applies to all human beings, including their unborn offspring at every stage of their biological development."[32] However, from the very beginning of abortion opposition, there has been a dispute among pro-life attorneys who wanted to chip away at *Roe* incrementally by emphasizing laws that would only *limit* access to abortion, and pro-life lawmakers who fought for an absolute ban of abortion by passing a constitutional amendmentt.[33]

Pro-life lawyers experimented with different litigation techniques. Rather than asking the Court to recognize a fundamental right to life, pro-life lawyers argued that courts could uphold some abortion regulations without overruling *Roe*.[34] In *Planned Parenthood of Central Missouri v. Danforth*,[35] for example, AUL argued that *Roe* permitted informed-consent restrictions.[36] *Danforth* seemingly vindicated AUL's new approach.[37] Although the Court struck down several parts of the challenged Missouri law, the Court upheld an informed-consent regulation and explained that "[t]he decision to abort, indeed, is an important, and often a stressful one, and

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[29] *See, e.g.*, ZIEGLER, AFTER *ROE*, *supra* note 18, at 38–45.

[30] *See* NAT'L COMMITTEE FOR A HUMAN LIFE AMEND., HUMAN LIFE AMENDMENT: MAJOR TEXTS (2004), https://www.humanlifeaction.org/sites/default/files/HLAmajortexts.pdf.

[31] *Id.* at 3.

[32] *Id.* at 1.

[33] *See, e.g.*, ZIEGLER, AFTER *ROE*, *supra* note 18, at 77–78.

[34] *See* Motion and Brief, Amicus Curiae of Dr. Eugene Diamond and Americans United for Life, Inc. at 43–52, in Support of Appellees in 74-1151 and Appellants in 74-1419 at 43–52, Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976) (Nos. 74-1151, 74-1419) [hereinafter AUL Brief].

[35] 428 U.S. 52 (1976).

[36] AUL Brief, *supra* note 34, at 86–88.

[37] *See Danforth*, 428 U.S. at 65–67.

it is desirable and imperative that it be made with full knowledge of its nature and consequences."[38]

Following *Danforth*, the pro-life movement had reason to expand its incremental approach beyond the courts. The same year that the Court issued a decision in *Danforth*, Congress passed the Hyde Amendment, a rider to an appropriations bill that outlawed Medicaid reimbursement for abortion.[39] When it passed, the Hyde Amendment struck many in the pro-life movement as an unprecedented success. As early as 1974, Ray White, the new executive director of NRLC, insisted that cutting federal funding for abortion would stop 270,000 abortions a year.[40] The amendment seemed even more strategically significant after the Supreme Court issued a series of decisions on abortion funding, including *Maher v. Roe*[41] and *Harris v. McRae*.[42]

Maher upheld a Connecticut statute outlawing most Medicaid funding for abortions by applying the constitutional "undue burden" standard.[43] "[W]e have held that a requirement for a lawful abortion 'is not unconstitutional unless it unduly burdens the right to seek an abortion,'" the *Maher* court stated.[44] But a law could not be unduly burdensome if it "place[d] no obstacles—absolute or otherwise—in the pregnant woman's path to an abortion."[45] Because the government did not create poverty, *Maher* concluded that there was no

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[38] *Id.* at 67.

[39] On the passage of the Hyde Amendment and its significance, see NICOLE MELLOW, THE STATE OF DISUNION 138–145 (2008); LAURENCE TRIBE, ABORTION: THE CLASH OF ABSOLUTES 153 (1992).

[40] On White's estimate, see Ray White, Exec. Dir., Nat'l Right to Life Comm., to Bd. of Dir., Nat'l Right to Life Comm. (Nov. 1974) (The American Citizens Concerned for Life Papers, Box 8, 1974 NRLC Folder 1). For more on the movement's interest in funding, see Nat'l Right to Life Comm., Senate Votes to Prohibit Federal Funding for Abortion (Oct. 1974) (The American Citizens Concerned for Life Papers, Box 8, 1974 NRLC Folder 1). On the relative abortion rates of Medicaid-eligible and Medicaid-ineligible women, see Jacqueline Darroch Forest, Christopher Tietze & Ellen Sullivan, *Abortion in the United States, 1976–1977*, 10 FAM. PLAN. PERSP. 270, 274–75 (1978).

[41] 432 U.S. 453 (1977).

[42] 448 U.S. 297, 300–01 (1980).

[43] *Maher*, 432 U.S. at 473–74.

[44] *Id.* at 473 (quoting Bellotti v. Baird, 428 U.S. 132, 147 (1976)).

[45] *Id.* at 474.

constitutional violation.[46] *McRae* upheld the federal Hyde Amendment for similar reasons.[47]

Maher and *McRae* strengthened the pro-life interest in an alternative to the constitutional approach, one that would allow abortion foes to slowly chip away at legal abortion and reduce abortion rates.[48] Incrementalism, as its proponents called it, gained support because the constitutional strategy had stalled.[49] Between 1974 and 1977, no fetal-personhood amendment received a vote.[50]

Following the election of President Ronald Reagan, who strongly opposed abortion, abortion foes controlled Congress and the White House and it seemed possible that a constitutional amendment would pass.[51] Senator Jesse Helms (R-NC) introduced the so-called Human Life Bill in January 1981.[52] The federal statute that Helms proposed would have gutted abortion rights by defining the fetus as a person from the moment of conception.[53] At the same time, Senator Orrin Hatch (R-UT) proposed a constitutional amendment that would allow the states and Congress to ban abortion.[54] Thus, by the summer of 1981, Congress had two clear paths to undermining *Roe*.[55]

Internal divisions soon doomed both the Hatch Amendment and the Human Life Bill. Absolutists denounced the Hatch Amendment as a betrayal of the movement's principles, a proposal that would not recognize a right to life and would allow Congress to claim to be pro-life without outlawing a single abortion.[56] Pragmatists, in contrast, thought that the Human Life Bill and other more ambitious

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[46] *Id.* at 469.

[47] *McRae*, 448 U.S. at 315.

[48] On pro-life incrementalism, see ZIEGLER, AFTER *ROE*, *supra* note 18, at 58–61.

[49] *See id.* at 59

[50] *Id.* at 51.

[51] *See id.* at 83.

[52] *See, e.g.*, Joan Beck, *Pro-Life Groups Turn to Congress on Abortion*, CHI. TRIB., Jan. 23, 1981, at B2; *see also* ZIEGLER, AFTER *ROE*, *supra* note 18, at 84.

[53] *See, e.g.*, Beck, *supra* note 52.

[54] On the Hatch Amendment, see ZIEGLER, AFTER *ROE*, *supra* note 18 at 86–88; *Anti-Abortion Group Backs Hatch Proposal*, N.Y. TIMES (Dec. 13, 1981), https://www.nytimes.com/1981/12/13/us/anti-abortion-group-backs-hatch-proposal.html.

[55] *See* ZIEGLER, AFTER *ROE*, *supra* note 18, at 86–88.

[56] *Id.*

proposals would not pass or would be struck down in the courts.[57] Following the failure of Hatch's and Helms' proposals, Hatch and his allies made a last-ditch attempt to pass an amendment.[58] Hatch joined Senator Thomas Eagleton (D-MO) in proposing a modified version of Hatch's original Amendment, which was named the "Hatch-Eagleton Amendment" and was slated for a full Senate vote in June 1983.[59] Behind the scenes, almost everyone had given up, and with reason: the Senate defeated the Hatch-Eagleton Amendment by a vote of 49 to 50.[60]

The failure of the Hatch-Eagleton Amendment, together with the success of the Hyde Amendment, strengthened the hand of pro-life incrementalists. Incrementalism prioritized limits on access to abortion.[61] By winning concrete victories, the pro-life movement hoped to energize its members, convince donors to back the movement, and persuade politicians that pro-life voters could swing some elections.[62] Incrementalism, its proponents hoped, would set the stage for overruling *Roe*.[63] Convincing the Court to uphold some abortion regulations would shake the foundation of abortion rights, making abortion doctrine seem incoherent and ultimately convincing the Justices that there was nothing left of *Roe* to uphold.[64] Finally, incrementalism could lower the abortion rate before a more complete constitutional solution could be put in place.[65]

As this Article shows, a new wave of antiabortion legislation reflects a different take on pro-life incrementalism, which was centered on the recognition of new justifications for regulating abortion. This Part canvasses some of the most important examples of new antiabortion legislation, exploring why and how abortion foes have proposed new legislative rationales for abortion restrictions or expanded on existing ones.

In 2016, in *Whole Woman's Health*, the Supreme Court devastated abortion opponents who expected a decision equating the

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57 *See, e.g.*, *id.*
58 *See id.* at 88–89.
59 *See id.*
60 *See id.* at 89.
61 *See id.* at 88–89.
62 *See id.* at 90.
63 *See id.* at 88.
64 *See id.*
65 *See id.* at 85.

undue burden standard with rational basis review.[66] However, *Whole Woman's Health* did little to change the kind of legislation pro-lifers aggressively backed. This Part focuses on new legislative interests shaping major legal campaigns pursued by the antiabortion movement.

B. *Fetal Pain, Fetal Dignity, and Other Interests*

NRLC first pointed to fetal pain as a reason for legislative intervention during debate about the federal Partial-Birth Abortion Ban Act,[67] a law outlawing dilation and extraction abortions ("D&X"), a procedure whereby a provider removes a fetus intact.[68] NRLC relied on the testimony of Dr. Kanwaljeet Anand, suggesting that "[m]ultiple lines of scientific evidence converge to support the conclusion that the fetus can experience pain from 20 weeks of gestation."[69] Anand's testimony initially served NRLC's claim that partial-birth abortion—which was often performed later in pregnancy—should be banned as a way of preventing fetal pain.[70] In 2011, NRLC started promoting the Pain-Capable Unborn Child Act, a twenty-week abortion ban, as an independent piece of legislation.[71] Nebraska and Kansas became the first and second states, respectively, to pass such a law, and others quickly followed.[72]

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[66] *See* Mary Ziegler, *Liberty and the Politics of Balance: The Undue burden Test After* Casey/Hellerstedt, 52 HARV. C.R.-C.L. L. REV. 421, 454 (2017) [hereinafter Ziegler, *Liberty and the Politics of Balance*].

[67] S. Res. 3, 108th Cong., 117 Stat. 1201 (2003).

[68] *See, e.g.*, Expert Report of Kanwaljeet S. Anand, M.B.B.S., D.Phil., Carhart v. Ashcroft, 331 F. Supp. 2d 805 (D. Neb. 2004), *aff'd sub nom.* Carhart v. Gonzales, 413 F.3d 791 (8th Cir. 2005), *rev'd*, 550 U.S. 124 (2007) (No. 4:03CV3385), http://www.nrlc.org/uploads/fetalpain/AnandPainReport.pdf [hereinafter Expert Report]; Letter from Douglas Johnson, Legislative Dir., Nat'l. Right to Life Comm., to Sci. and Med. Editors/Reporters (Jan. 2, 1996), http://www.nrlc.org/uploads/fetalpain/Anesthesia%20Myth%20Memo.pdf [hereinafter Letter from Douglas Johnson].

[69] Expert Report, *supra* note 68, at 5.

[70] *See id.*

[71] On the original push for such legislation, see Press Release, Nat'l. Right to Life Comm., Carhart Move Demonstrates Need for Protective Legislation (Nov. 18, 2010), http://www.nrlc.org/communications/releases/2010/release111810 [hereinafter Carhart].

[72] H.B. 2218, 2011 Sess. (Kan. 2011) (codified at KAN. STAT. ANN. § 65-6724 (2012). On the Kansas law, see Press Release, Nat'l. Right to Life Comm., Brownback Signs Pain-Capable Unborn Child Protection Act (Apr. 12, 2011),

NRLC and AUL have also promoted a model law outlawing dilation and evacuation abortions ("D&E"), a procedure whereby a provider removes a fetus in several parts.[73] Starting in 2015, NRLC began pushing laws that banned most D&Es.[74] Eight states passed a version of this model law, although courts have enjoined enforcement of most of them.[75] Pro-life groups advocate for these laws by pointing to governmental interests beyond the protection of fetal life.[76] NRLC claims that bans on D&E prevent fetal pain,[77] but also defends these laws by pointing to a "separate and independent compelling interest in fostering respect for life" or "protecting the integrity of the medical profession with passage of this law."[78]

AUL and NRLC invoked similar legislative interests in defending a new wave of laws governing the disposal of fetal remains. In 2016 alone, nine states passed laws like Texas' SB8, which requires health-care facilities to bury or cremate fetal or embryonic remains.[79] An earlier generation of similar laws has been in place for decades, but the new laws more clearly rely on a governmental

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http://www.nrlc.org/communications/releases/2011/release041211 [hereinafter Brownback]. For other states that passed such a law see, for example, ALA. CODE § 26-23B (2017); IDAHO CODE § 18-505 (2018); OKLA. STAT. 63 § 1-745.5 (2017).

[73] OBOS Abortion Contributors, *Dilation and Evacuation Abortion*, OUR-BODIESOURSELVES (Apr. 2, 2014), https://www.ourbodiesourselves.org/ book-excerpts/health-article/dilation-and-evacuation-abortion/.

[74] *See* NAT'L RIGHT TO LIFE COMM., DISMEMBERMENT ABORTION BANS 1 (2018), http://www.nrlc.org/uploads/stateleg/StateLawsDismembermentAbortionBans.pdf.

[75] *See id.* at 2.

[76] NAT'L RIGHT TO LIFE COMM., TALKING POINTS: UNBORN CHILD PROTECTION FROM DISMEMBERMENT ABORTION ACT 4 (2015), https://www.nrlc .org/uploads/stateleg/DismembermentFAQJan15.pdf [hereinafter TALKING POINTS].

[77] *See id.* at 2.

[78] *Id.* at 4.

[79] S.B. 8, 2017 Leg., 85th Sess. (Tex. 2017). On the spread of these laws, see, for example, Brian Fraga, *Pro-Life Movement Looks to Build in 2016*, NAT. CATH. REG. (Jan. 4, 2016), http://www.ncregister.com/site/article/pro-life-movement-looks-to-build-in-2016; Rebecca Grant, *The Latest Anti-Abortion Trend? Mandatory Funerals for Fetuses*, NATION (Oct. 11, 2016), https://www.thenation.com/article/the-latest-anti-abortion-trend-mandatory-funerals-for-fetuses; Anna Paprocki, *Why the Abortion Industry Wants to Ban Funerals for Miscarried Babies*, FEDERALIST (Nov. 11, 2016), http://thefederalist.com/2016/11/14/abortion-industry-wants-ban-funerals-miscarried-babies/.

interest in fetal dignity.[80] In 2015, AUL began promoting a model law of this kind, the Unborn Infants' Dignity Act ("UIDA").[81] The UIDA would require women to be given a choice to bury or cremate fetuses that have reached a certain stage of development provided that a miscarriage or abortion takes place at a health-care institution.[82] Women who do not choose to make these arrangements must consent to whatever disposition a healthcare provider elects.[83]

The rationale for the UIDA goes beyond the conventional interest in protecting fetal life. Like fetal-pain laws, the UIDA does nothing (at least in theory) to prevent abortion.[84] Instead, as Anna Paprocki of AUL has explained, those passing the law claim an interest not in restricting abortion but in ensuring that "human beings [are] treated with dignity and respect at death."[85]

AUL and NRLC have also refined arguments involving laws designed to protect women. As Part II shows, the protection of women represented one of the first alternative governmental purposes championed by pro-lifers. At first, abortion foes focused primarily on the psychological harm that women could face.[86] More recently, targeted regulation of abortion providers ("TRAP laws"), like the law struck down by the Court in *Whole Woman's Health*, have zeroed in on purported threats to women's physical health.[87] The new woman-protective laws have a different focus, claiming to protect women from domestic violence or medical abortion, a method using pills

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[80] *See, e.g.*, City of Akron v. Akron Ctr. For Reprod. Health, 462 U.S. 416, 451 (1983); Planned Parenthood of Minn. v. Minnesota, 910 F.2d 479, 481 (8th Cir. 1990); Planned Parenthood Ass'n. of Cinn. v. City of Cinn., 635 F. Supp. 469, 470 (S.D. Ohio 1987).

[81] AM. UNITED FOR LIFE, UNBORN INFANTS DIGNITY ACT 2 (2015), http://www.aul.org/wp-content/uploads/2015/08/AUL-Unborn-Infants-Dignity-Act-2016-LG-FINAL-8-05-16.pdf [hereinafter UNBORN INFANTS DIGNITY ACT].

[82] *Id.* at 4.

[83] *Id.* at 8.

[84] *See, e.g.*, Paprocki, *supra* note 79.

[85] *Id.*

[86] *See infra* Part II.

[87] *See Targeted Regulation of Abortion Providers*, GUTTMACHER INST. (Aug. 1, 2018), http://www.aul.org/wp-content/uploads/2015/08/AUL-Unborn-Infants-Dignity-Act-2016-LG-FINAL-8-05-16.pdf [hereinafter *Targeted Regulation of Abortion Providers*].

rather than surgical techniques to end pregnancy.[88] For example, AUL model legislation would make it a serious crime to coerce anyone to have an abortion and would require abortion clinics to post signs stating that no one can be forced into an abortion.[89] The law further identifies parties who must report any suspected coerced abortion, mandates that physicians privately counsel women about coerced abortion, and delay performing an abortion when coercion is reasonably suspected.[90] AUL also introduced laws requiring mandatory counseling for any woman seeking medical abortion[91] and strict regulations on the issuance and use of "abortion-inducing drugs."[92] The group claims that "medical evidence demonstrates that the current FDA-approved protocol carries significant risks and administering the drugs outside the current FDA protocol places women at even greater risk."[93]

Why have abortion foes invested so much in laws advancing interests beyond protecting fetal life? To be sure, as the Article shows in Part II, the answer is partly political. Starting in the late 1980s, when a clinic-blockade movement exploded onto the political scene, pro-life leaders argued that the public too often viewed abortion opponents as anti-woman extremists.[94] By focusing on laws that claim to help women, pro-lifers hope to challenge this negative image.[95] One might also argue that abortion foes have little choice but to focus on governmental interests beyond the protection of fetal life.

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[88] *See* AM. UNITED FOR LIFE, COERCIVE ABUSE AGAINST MOTHERS PREVENTION ACT 1, 3 (2015), http://www.aul.org/wp-content/uploads/2012/11 /Coercive-Abuse-Against-Mothers-Prevention-Act-2013-LG.pdf [hereinafter COERCIVE ABUSE AGAINST MOTHERS PREVENTION].

[89] *Id.* at 6–8.

[90] *Id.* at 8–9.

[91] AM. UNITED FOR LIFE, ABORTION PILL REVERSAL INFORMATION ACT 2 (2016), http://aul.org/downloads/2016-Legislative-Guides/WPP/Abortion_Pill_Reversal_Information_Act_-_LG_2016.pdf [hereinafter ABORTION PILL REVERSAL].

[92] AM. UNITED FOR LIFE, ABORTION-INDUCING DRUGS INFORMATION AND REPORTING ACT 2 (2016), http://www.aul.org/wp-content/uploads/2016/11/Abortion_Inducing_Drugs_Information_Act-Draft.pdf [hereinafter ABORTION-INDUCING DRUGS].

[93] *Id.*

[94] *See* Mary Ellen Jensen, How Public Opinion Should Guide Pro-Life Strategy 5 (1989) (on file with Schlesinger Library, Harvard University, in the Mildred F. Jefferson Papers, Box 13, Folder 8).

[95] *See infra* Part II.

After all, the *Roe* Court rejected the argument that the government had a compelling interest in protecting life from the moment of conception.[96] Pro-lifers might have every reason to repackage interests tied to fetal life as an interest in fetal dignity or fetal suffering.

But a close look at the new legislation that pro-lifers have backed shows that identifying new legislative interests has broader strategic importance. First, abortion foes hope to dislodge viability as the point at which states can fully ban abortion.[97] Under both *Roe* and *Casey*, the government cannot outlaw abortion outright until a fetus reaches viability: the point at which an unborn child can survive outside the womb.[98] By playing to public discomfort with late term abortions, NRLC and AUL hope to inch closer to the point at which lawmakers can outlaw abortion.[99] As important, the identification of new governmental interests would allow the Court to radically undercut the protections created by *Roe* and *Casey* without explicitly overruling either one.[100] As Mary Spaulding Balch of NRLC explains: "Recognizing a compelling state interest in the unborn child who is capable of experiencing pain would *not* require the Court to overturn, but only to supplement, its prior recognition of a compelling state interest in the unborn child after viability."[101] The capacity to feel pain, as Spaulding Balch reasons, can serve as a back-door strategy for establishing fetal personhood.[102] She argues,

> It is critically important to understand that the interest asserted here is not just one in diminishing or eliminating unborn children's pain. Rather, it is that the fact of the unborn child's having the capacity to experience pain is a significant developmental milepost making the unborn child at that point

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[96] *See* Roe v. Wade, 410 U.S. 113, 162–63 (1973).

[97] *See, e.g.*, Memorandum from Mary Spaulding Balch, Dir., State Legislation Dep't, on Constitutionality of the Unborn Child Protection from Dismemberment Abortion Act 2 (July 2013), https://www.nrlc.org/uploads/ stateleg/PCUCPAConstitutionality.pdf [hereinafter Memorandum from Mary Spaulding Balch]; TALKING POINTS, *supra* note 76, at 4.

[98] *See Roe*, 410 U.S. at 163–64; Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 883, 846 (1992) (plurality opinion).

[99] *See* Memorandum from Mary Spaulding Balch, *supra* note 97, at 1.

[100] *Id*.

[101] *Id.* at 2.

[102] *See id.* at 3.

> sufficiently akin to an infant or older child to trigger a compelling state interest.[103]

Moreover, if the evidence supporting fetal pain at twenty weeks is uncertain, Spaulding Balch argues that lawmakers are still free to act.[104] "States may make judgments based on substantial medical evidence even when there is medical dispute," Spaulding Balch emphasizes.[105] NRLC has offered a similar justification for promoting a new compelling interest in the context of dismemberment laws.[106] According to an NRLC factsheet,

> The states enacting the Unborn Child Protection from Dismemberment Abortion Act are *not* asking the Supreme Court to overturn or replace the 1973 *Roe v. Wade* holding that the state's interest in unborn human life becomes "compelling" at viability. Rather, the states are applying the interest the Court recognized in the 2007 *Gonzales* case, that states have a separate and independent compelling interest in fostering respect for life by protecting the unborn child from death by dismemberment abortion.[107]

By convincing the Court to recognize abstract, broad compelling governmental interests, antiabortion attorneys can justify far more sweeping regulations without asking the Court to recognize fetal personhood or repudiate *Roe* or *Casey*. Pro-life attorneys can also advocate for laws that do not seem to advance the state's interest in protecting life articulated in *Casey*, while creating an obstacle in the path of a woman seeking abortion. If the Court is willing to recognize interests in fetal dignity, preventing abortion coercion, or eliminating fetal suffering, pro-life attorneys can defend a far wider array of restrictions. These governmental interests could open the door for states to extensively restrict abortion earlier in pregnancy.

Where does the new purpose-centered incrementalism come from, and how, if at all, has it shaped the Supreme Court's abortion

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103 *Id.*
104 *Id.* at 1, 3–4.
105 *Id.* at 1.
106 *See* TALKING POINTS, *supra* note 76, at 4.
107 *Id.*

jurisprudence? Part II begins to develop an answer to these questions by tracing the roots of some of the incoherence plaguing the Court's abortion doctrine: a shifting willingness to recognize and redefine interests beyond the protection of fetal life.

II. OTHER PURPOSES: FROM *DANFORTH* TO *CASEY*

Convinced that the Supreme Court would not recognize a right to life in the near future, pro-life incrementalists began searching for alternative justifications for regulating abortion. Part II begins by exploring the first effort of this kind in the leadup to *Planned Parenthood of Central Missouri v. Danforth*, where abortion foes urged the Court to recognize an interest in protecting the husband-wife or parent-child relationship.[108] *Danforth* picked up on a different rationale for regulating abortion, one that is centered on the consequences of decisional autonomy for women.[109]

Part II next shows that after the Court upheld a mandated-counseling law, abortion foes began stressing the importance of the government's interest in protecting women's health. Although the Supreme Court rejected this argument in 1983,[110] the majority, which previously supported strong abortion rights, shrank as Presidents Reagan and George H.W. Bush nominated new members to the Court. Meanwhile, abortion opponents continued championing alternative governmental interests.[111] Together, *Danforth*, *Akron I*, and *Thornburgh v. American College of Obstetricians and Gynecologists*[112] sent a somewhat confusing message about the identification of new governmental interests. The Court suggested, but never formally held, that the government could not only regulate unsafe

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[108] 428 U.S. 52, 67 (1976).

[109] *Id.*

[110] City of Akron v. Akron Ctr. for Reprod. Health (*Akron I*), 462 U.S. 416, 448 (1983).

[111] *See* Linda Greenhouse, *Senate, 97 to 0, Confirms Kennedy to High Court*, N.Y. TIMES, Feb. 4, 1988, at A18; Paul Houston, *Lawmakers' Reaction to Bush Choice Favorable but Cautious Senate: Few Know Much About Souter's Record. However, Many See Rudman's Enthusiastic Endorsement as a Plus*, L.A. TIMES (July 24, 1990), at A14 [hereinafter *Lawmakers' Reaction to Bush*]; Al Kamen, *Kennedy Confirmed, 97-0; Senate Approves Supreme Court Nomination*, WASH. POST, Feb. 4, 1988, at A0.

[112] 476 U.S. 747 (1986).

procedures but could also protect women from unwise decisions.[113] At the same time, the Court sent conflicting signals about whether and to what degree the government had to show that an informed-consent law improved women's decision-making.[114]

The incoherence of the Court's jurisprudence only grew following the decision of *Thornburgh*.[115] After *Thornburgh*, the pro-life movement once again started emphasizing a compelling interest in protecting fetal life, believing that the Court would soon overrule *Roe*.[116] The Court's decision in *Webster v. Reproductive Health Services* only reinforced interest in this strategy.[117] However, some abortion opponents began stressing the political costs of so exclusively stressing an interest in fetal life. Members of AUL specifically insisted that this tactic portrayed the pro-life movement as anti-woman.[118] These activists urged their colleagues to stress an interest in protecting women.[119] This Part shows that *Casey* reflected this re-emerging effort to carve out a governmental interest in protecting women. The *Casey* decision reinvigorated efforts to identify multiple governmental interests that support abortion restrictions. If the Court was reluctant to overrule *Roe* directly, as pro-lifers concluded, it might be possible to erode abortion rights by convincing the Court to recognize more and more reasons that the government could regulate abortion.[120]

Casey also further muddied the Court's treatment of the government's interest in fetal life. Was the government limited to an interest in preventing fetal killing? Or did *Casey* also recognize related, but less tangible, interests like respect for fetal life? *Casey* had certainly held that the government's interest in protecting fetal life applied throughout pregnancy, but had the Court also suggested that an interest in protecting life was weightier than *Roe* suggested?[121] Without answering these questions (or overruling earlier precedents

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113 *See Danforth*, 428 U.S. at 65–67.

114 *See Akron I*, 462 U.S. at 448–49.

115 476 U.S. 747 (1986).

116 Ziegler, *Originalism Talk*, *supra* note 21, at 916–17.

117 492 U.S. 490 (1989).

118 *See* Jensen, *supra* note 94, at 5.

119 *Id*.

120 *See* Ziegler, *Liberty and the Politics of Balance*, *supra* note 66, at 447–48.

121 *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 878 (1992) (plurality opinion).

that treated them differently), *Casey* added another layer of inconsistency to the Court's abortion jurisprudence.[122]

A. *After* Roe*: Reasons for Restricting Abortion*

The Court's decision in *Roe* dashed the hopes of those who had believed that the justices would recognize a compelling governmental interest in protecting fetal life.[123] Pro-life groups initially responded by avoiding the courts, instead championing a constitutional amendment that would ban abortion and force the Court to uphold laws criminalizing the procedure.[124] At the same time, however, antiabortion attorneys recognized that championing an interest in protecting fetal life might not be enough to advance the movement's cause in Congress or the courts.[125]

Pro-lifers speculated that alternative justifications for banning abortion might appeal to a broader audience.[126] In the 1970s, to explore this possibility, pro-lifers argued that Congress and the states had a compelling interest in banning abortion to protect the nuclear family from the forces that threatened it.[127] Dennis Horan, a pro bono attorney for the AUL, maintained that *Roe* "provided one more wedge to separate, undermine and ultimately destroy the nuclear family."[128] Horan argued that *Roe* awarded unfair power to pregnant women, threatening their relationships with their husbands and undermining fathers' unions with their children.[129] Joseph Witherspoon, a University of Texas professor, made a similar argument. Witherspoon insisted that *Roe* ran counter to both the Thirteenth and

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[122] *See id.*

[123] On abortion opponents' shock and disappointment with *Roe*, see ZIEGLER, AFTER *ROE*, *supra* note 18, at 27.

[124] *See, e.g.*, Ziegler, *Originalism Talk*, *supra* note 21, at 899.

[125] *See, e.g.*, ZIEGLER, AFTER *ROE*, *supra* note 18, at 29–30.

[126] *See id.*

[127] *See, e.g.*, *Abortion Part IV: Hearings Before the Subcomm. on Constitutional Amendments of the S. Judiciary Comm.*, 94th Cong. 258 (1975) (statement of Dennis Horan, Partner, Hinshaw, Culbertson, Moelman, Horan, & Fuller) [hereinafter Horan Statement]; *Proposed Constitutional Amendments on Abortion Part I: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Judiciary Comm.*, 94th Cong. 1st Sess. (1976) 14 (Statement of Joseph Witherspoon, Professor, University of Texas School of Law) [hereinafter Witherspoon Statement].

[128] Horan Statement, *supra* note 127, at 258.

[129] *Id.*

Fourteenth Amendments.[130] As Witherspoon saw it, the Thirteenth and Fourteenth Amendments not only recognized an unborn child's right to life but also men's fundamental rights to have a paternal relationship with their unborn children.[131] The government, Witherspoon suggested, had a compelling interest in protecting men's rights as husbands and fathers.[132]

When the abortion issue returned to the Supreme Court, antiabortion attorneys hoped that the Court might pave the way for new regulations by recognizing a new governmental interest.[133] AUL took on this strategy in its amicus brief in *Danforth*, a case involving a multi-part Missouri restriction.[134] AUL repeated familiar arguments that the Constitution recognized a fundamental right to life and attacked *Roe* as constitutionally unsound.[135]

However, the group also contended that the Missouri statute was constitutional even under *Roe* because that decision had identified a number of interests that could justify abortion regulations.[136] AUL reasoned that,

> Although in the *Roe* decision this Court explicitly mentioned only three state interests, *i.e.,* maternal health, medical standards, and prenatal life, which could justify regulating the right of privacy in the context of the abortion decision, there are persuasive reasons to believe that those interests mentioned were never envisaged as exclusive.[137]

In addition to the government's interest in protecting fetal life, AUL stressed that the government had a compelling interest in protecting women's health.[138] AUL also advocated for a compelling state interest in protecting the family.[139] "The narrow issue, then,"

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130 Witherspoon Statement, *supra* note 127, at 11–12, 20.
131 *Id.* at 8, 20.
132 *Id.* at 20.
133 *See, e.g.*, ZIEGLER, AFTER *ROE*, *supra* note 18, at 29–33.
134 *See* Motion and Brief of Dr. Eugene Diamond and Americans United for Life, *supra* note 34, at 46–50.
135 *See id.* at 38.
136 *See id.* at 46–50.
137 *Id.* at 46.
138 *Id.* at 50, 53–54.
139 *Id.* at 52.

AUL asserted, "is whether allowing a wife to make a unilateral decision of the magnitude of the abortion decision could be destructive of the family entity."[140]

AUL also hoped that the Court would radically broaden already-recognized governmental interests. For example, the organization stressed the importance of protecting women's health when defending an informed-consent regulation.[141] AUL argued that *Roe* had "enumerated some of the factors, medical and psychological, concerning which the woman and her physician would necessarily consider in consultation prior to making the abortion decision."[142] If *Roe* had recognized that the abortion decision was "a stressful one at best," then the Court should recognize a compelling interest in women's mental health and let stand the mandatory-consent provision.[143]

Although *Danforth* struck down most of Missouri's law, the Court's decision did suggest that pro-lifers could make incremental progress by championing new governmental interests in restricting abortion and by expanding existing ones.[144] The Court reasoned that if the government could not veto a woman's abortion decision, Missouri could not delegate that power to a woman's spouse.[145] Moreover, the Court suggested that if a man and woman could not agree, the woman was more directly impacted by pregnancy and should have the ultimate say about abortion.[146] Nevertheless, as pro-lifers noted, the Court spoke favorably of the "deep and proper concern and interest that a devoted and protective husband has in his wife's pregnancy and in the growth and development of the fetus she is carrying."[147] Perhaps the problem with Missouri's law was that it was not narrowly tailored—allowing a man a complete veto—rather than requiring notification.

Danforth upheld the mandatory-consent provision, reinforcing pro-lifers' interest in redefining the government's interest in

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140 *Id.*
141 *See id.* at 85–87.
142 *Id.* at 86.
143 *Id.* at 87.
144 Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 71 (1976).
145 *Id.*
146 *Id.*
147 *Id.* at 69–70.

protecting women's health.[148] Those challenging the Missouri law had argued that it singled out abortion, requiring written consent for no other surgical procedures, and likely had a chilling effect on women, sending the message that abortion was wrong.[149] The Court disagreed, citing the government's interest in protecting women's health.[150] As Justice Harry Blackmun explained,

> The decision to abort, indeed, is an important, and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences. The woman is the one primarily concerned, and her awareness of the decision and its significance may be assured, constitutionally, by the State to the extent of requiring her prior written consent.[151]

While *Danforth* did not recognize new governmental justifications for restricting abortion, the Court did suggest that the interest in protecting women's health might be broader than many had imagined.[152] Whereas the *Roe* Court focused on the threat of physical complications following an abortion, *Danforth* suggested that the government might have a compelling interest in safeguarding women's mental health, and abortion opponents hoped to capitalize on this.[153]

B. *Redefining Women's Health*

In the aftermath of *Danforth*, abortion foes invested more in the identification or expansion of governmental interests in restricting abortion. The pro-life movement did so partly by promoting a model antiabortion law, first adopted in Akron, Ohio as Ordinance No. 160-1978, that showcased the effort to identify new justifications for

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148 *See id.* at 65–67.
149 *See id.* at 65–66.
150 *Id.* at 66–67.
151 *Id.* at 67.
152 *See id.*
153 *See* Roe v. Wade, 410 U.S. 113, 148–49 (1973); *Danforth*, 428 U.S. at 65–67.

regulating abortion.[154] The City of Akron ordinance built on *Danforth*. For example, the law included a narrower parental-involvement requirement and a broader informed-consent provision that demanded that women hear controversial information, including disputed statements about the risks of abortion.[155]

When the Supreme Court decided to hear a constitutional challenge to the City of Akron ordinance, pro-life attorneys went beyond the strategy laid out in *Danforth*, arguing that any laws that did not have the purpose of limiting access to abortion should not be subject to strict judicial scrutiny.[156] If a law had a different purpose, such as helping women, then a law was constitutional in "the first three months of pregnancy so long as such regulation does not 'unduly burden' a woman's constitutionally-protected right to have an abortion."[157]

Akron I picked up on language in some of the Court's earlier abortion opinions, including *Bellotti v. Baird* (*Bellotti I*) and *Maher*.[158] *Bellotti I*, a case about minors and abortion, reinforced the Court's finding in *Danforth* that an abortion regulation "is not unconstitutional unless it unduly burdens the right to seek an abortion."[159] However, in *Bellotti I* and *Bellotti v. Baird* (*Bellotti II*), the Court acknowledged that cases involving minors' rights were different—parents had constitutional rights that could come into play, and the government could more readily justify actions taken to protect minors from the consequences of unwise decisions.[160] Neither *Bellotti I* nor *Bellotti II* spelled out whether a similar analysis would apply to adults' abortion rights.[161] *Maher*, an abortion funding case, expanded on the idea of an unconstitutional undue burden.[162] *Maher*

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[154] On the significance of the City of Akron law, see ZIEGLER, AFTER *ROE*, *supra* note 18, at 76–80.

[155] *See* City of Akron v. Akron Ctr. for Reprod. Health (*Akron I*), 462 U.S. 416, 421–24 (1983).

[156] *See* Petition for Writ of Certiorari at 6–8, *Akron I*, 462 U.S. 416 (1983) (No. 81-746).

[157] *Id.* at 6.

[158] *See id.* at 7–9; Bellotti v. Baird (*Bellotti I*), 428 U.S. 132, 147 (1976); Maher v. Roe, 432 U.S. 464, 473 (1977).

[159] *Bellotti I*, 428 U.S. at 147.

[160] *See id.* at 148–150; Bellotti v. Baird (*Bellotti II*), 443 U.S. 622, 634–38 (1979).

[161] *See supra* note 160 and text accompanying.

[162] *See* Maher v. Roe, 432 U.S. 464, 472–74 (1977).

held that the abortion right protected women only from "unduly burdensome interference with her freedom to decide whether to terminate her pregnancy."[163] By extension, as the Court explained, the right "implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds."[164]

Relying upon these precedents, the City of Akron argued that some kind of undue burden analysis should apply to every abortion case, not just those involving abortion funding or minors.[165] If the Court applied the undue burden analysis, then the justices would "balance the woman's interest against the nature of the state's interference in exercising that right."[166] The City of Akron illustrated how this constitutional approach would work. When defending its informed-consent provision, the City stressed that the ordinance was not designed to obstruct abortion access but was "designed to protect the woman and ensure that her consent will be truly informed."[167] The City argued that as a result, the Court should balance women's interest in abortion against the government's proper interest in protecting women.[168]

In an amicus brief on behalf of Feminists for Life, AUL put a similar emphasis on new governmental interests in restricting abortion.[169] As AUL reasoned, the City of Akron's informed-consent regulation was not designed to limit access to abortion.[170] Instead, AUL emphasized that the law was "intended to insure the integrity of the woman's decision-making process prior to abortion."[171] If abortion hurt women, as AUL reasoned, then the state had a duty and compelling interest in regulating abortion.[172] "In addition to enabling the woman to make a meaningful choice, information on fetal

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163 *Id.* at 474.

164 *Id.*

165 *See* Petition for Writ of Certiorari, *supra* note 156, at 7.

166 *Id.* at 7.

167 *Id.* at 15.

168 *See id.* at 15–16.

169 *See* Brief Amicus Curiae of Feminists for Life in Support of Petitioner, 8–10, City of Akron v. Akron Ctr. of Reprod. Health, 462 U.S. 416 (1983) (No. 81-746) [hereinafter Brief for Feminists for Life, *Akron I*].

169 *Id.*

170 *See id.* at 10.

171 *See id.* at 5.

172 *See id.* at 2–4.

development may protect her from the trauma which she may later experience because of an improvident and uninformed decision in this regard," AUL stressed.[173]

Although a majority rejected the arguments made by the City of Akron and AUL, dissenters in *Akron I* suggested that the movement could make progress by identifying new governmental justifications for regulating abortion. While reiterating that the government had an interest in protecting women's mental health, the Court reined in states' power to pass informed-consent regulations.[174] The Court repeated that "certain regulations that have no significant impact on the woman's exercise of her right may be permissible where justified by important state health objectives."[175] Nevertheless, the Court suggested that states could not force women to consume inaccurate information designed to dissuade them from choosing abortion.[176] When it came to the City of Akron ordinance, the Court stressed that "much of the information required is designed not to inform the woman's consent but rather to persuade her to withhold it altogether."[177]

In some ways, *Akron I* seemed hard to reconcile with *Danforth*. In theory, *Akron I* recognized the same governmental interest identified by *Danforth*. However, the Court in *Akron I* expressed considerable skepticism about whether the government had a real interest in protecting women's mental health.[178] *Akron I* framed the difference between the ordinance discussed in the case and the Missouri statute discussed in *Danforth* as one involving the type of information detailed in the law.[179] As *Akron I* described it, the City of Akron required physicians to speculate or opine on when life began.[180] Likewise, the ordinance at issue in *Akron I* set out a parade of horribles that was somewhat less than accurate.[181]

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[173] *Id.* at 10–11.

[174] *See* City of Akron v. Akron Ctr. for Reprod. Health (*Akron I*), 462 U.S. 416, 444–50 (1983).

[175] *Id.* at 430.

[176] *See id.* at 443–45.

[177] *Id.* at 444.

[178] *See id.* at 443–45.

[179] *See id.* at 442–44.

[180] *See id.* at 444.

[181] *See id.* at 444–45.

However, the differences between the laws—and the governmental interests supporting them—were less pronounced than the Court suggested. Arguably, the law in *Danforth* was designed to discourage some women from terminating their pregnancies.[182] Moreover, as in *Akron I*, *Danforth* arguably involved "intrusion upon the discretion of the pregnant woman's physician."[183] The Court sent conflicting messages about whether the government could legitimately act to protect women's mental health without patronizing and insulting them.

Justice Sandra Day O'Connor, President Reagan's first Supreme Court nominee, wrote a dissent that sent yet another signal about the recognition of new governmental interests in regulating abortion.[184] O'Connor stressed that the Court had already expanded the government's interest in protecting women's health, but she went a step further: she also asserted that whatever governmental interests justified abortion regulations applied throughout pregnancy, not just in later trimesters.[185]

Justice O'Connor also adopted a version of the undue burden standard proposed by the City of Akron and AUL.[186] The City of Akron and AUL had focused partly on the purpose of a law, suggesting that the government should have more latitude to regulate abortion when the law was not intended to obstruct abortion access.[187] O'Connor, by contrast, emphasized the probable effect of an abortion restriction.[188] "The abortion cases demonstrate that an 'undue burden' has been found for the most part in situations involving absolute obstacles or severe limitations on the abortion decision," O'Connor wrote.[189] She reasoned that the Court had mostly struck down laws that completely eliminated abortion access or criminalized the procedure altogether.[190]

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[182] *See* Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 65–67 (1976).

[183] *Akron I*, 462 U.S. at 445.

[184] *See id.* at 455–57 (O'Connor, J., dissenting).

[185] *Id.* at 455–460.

[186] *See id.*

[187] *See* Petition for Writ of Certiorari, *Akron I*, *supra* note 156, at 6–7, 9; Brief for Feminists for Life, *Akron I*, *supra* note 169, at 2–4.

[188] *See Akron I*, 462 U.S. at 464 (O'Connor, J., dissenting).

[189] *Id.*

[190] *See id.*

C. *The Aftermath of* Akron I

Although Justice O'Connor dissented from the majority, her opinion did provide a new touchstone for pro-life incrementalists seeking to forge a post-*Roe* strategy.[191] However, because O'Connor did not focus on the purpose (beneficial or otherwise) of abortion regulations, groups like AUL temporarily emphasized different strategies.[192] One involved the shifting date of viability.[193] O'Connor had stressed that as medical technology evolved, viability would move earlier and earlier in pregnancy.[194] In 1984, at a conference on how to build on O'Connor's dissent, AUL and its allies agreed that the "most advantageous starting point" for a new strategy was "a critical examination of *Roe*'s reliance on the concept of viability."[195]

AUL asserted that by shaping the Court's understanding of viability, abortion opponents could argue "the state's interest in preserving that life must begin at a much earlier stage of development."[196] AUL conferees did discuss the government's interest in protecting women's health.[197] But rather than explaining ways to convince the Court to define health more broadly, conferees zeroed in on ways to narrow the supposed health-based justifications for abortion, including the benefits to women's health.[198]

The Supreme Court's next abortion case, *Thornburgh*, did nothing to change antiabortion attorneys' shift away from purpose arguments.[199] *Thornburgh* involved a model Pennsylvania law that included familiar provisions, such as an informed-consent measure, and viability-based restrictions.[200] Although *Thornburgh* struck down the disputed law, the majority in favor of abortion rights

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191 *See, e.g.*, Steven Baer, Report of the Education Division of Americans United for Life 1–3 (1984) (on file with Schlesinger Library, Harvard University, in the Mildred F. Jefferson Papers, Box 13, Folder 5).

192 *See* Richard S. Myers, *Prolife Litigation and the American Civil Liberties Tradition*, *in* ABORTION AND THE CONSTITUTION: REVERSING *ROE V. WADE* THROUGH THE COURTS 33 (Dennis J. Horan et al. eds., 1987).

193 *See id.*

194 *See Akron I*, 462 U.S. at 455–59.

195 Myers, *supra* note 192, at 33.

196 *Id.* at 33.

197 *Id.* at 33–35.

198 *See id.*

199 476 U.S. 747 (1986).

200 *Id.* at 759–765.

shrank to five.[201] Chief Justice Warren Burger, one of the justices who had joined the original majority in *Roe*, pointed to *Akron I* and *Thornburgh* as evidence that abortion jurisprudence had become hopelessly muddled.[202] Chief Justice Burger also suggested that the time might have come to reexamine *Roe*.[203] Justice Byron White penned a dissent insisting that the Court should "recognize that *Roe v. Wade* departs from a proper understanding of the Constitution and overrule it."[204]

Thornburgh made it seem possible that one new justice could become the deciding vote to overrule *Roe*. It would not take long for the Court's membership to change. In the summer of 1987, Justice Lewis F. Powell announced his retirement from the Court, and President Reagan nominated Judge Robert Bork of the United States Court of Appeals for the District of Columbia Circuit to replace him.[205] Bork's nomination failed, becoming one of the most controversial confirmation fights in history and setting the stage for the politicization of later nominees .[206] Nevertheless, President Reagan quickly found a replacement, choosing Judge Anthony Kennedy of the United States Court of Appeals for the Ninth Circuit.[207] Justice Kennedy's nomination sailed through Congress, and abortion foes

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201 *See id.* at 759–771.

202 *Id.* at 782 (Burger, C.J., dissenting).

203 *See id.* at 782–785.

204 *Id.* at 786 (White, J., dissenting).

205 *See, e.g.*, Mike Kaszuba & Kate Parry, *Powell's Retirement Turns Spotlight on Battle for Abortion*, STAR TRIB., June 27, 1987, at 8A**;** Walter V. Robinson, *Justice Powell Quits, Cites Ill Health Reagan Vows Quick Action on Successor*, BOS. GLOBE, June 27, 1987, at 1; Glen Elsasser, *Powell Quits Supreme Court Age, Health, Force Justice to End 15 Years on Bench*, CHI. TRIB., Jun. 27, 1987, at 1; Nina Totenburg, *Robert Bork's Supreme Court Nomination 'Changed Everything, Maybe Forever*,*'* NPR (Dec. 19, 2012), https://www.npr.org/sections/itsallpolitics/2012/12/19/167645600/robert-borks-supreme-court-nomination-changed-everything-maybe-forever.

206 On the significance of Bork's nomination and Reagan's effort to reshape the Court, see BRUCE A. ACKERMAN, WE THE PEOPLE 2: TRANSFORMATIONS 394–95 (1998); JAN CRAWFORD GREENBURG, SUPREME CONFLICT 85 (2007); THOMAS M. KECK, THE MOST ACTIVIST COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM 156–96 (2004); Totenburg, *supra* note 205.

207 On Kennedy's nomination, see Linda Greenhouse, *supra* note 111; Al Kamen, *supra* note 11; Al Kamen, *Kennedy Moves Court to the Right; Justice More Conservative than Expected*, WASH. POST, Apr. 11, 1989, at A01 [hereinafter *Kennedy Moves Court to the Right*].

celebrated.[208] "[T]he general assumption is that Kennedy will provide the swing vote determining whether the Court may begin to 'chip away' at the 1973 *Roe v. Wade* decision," argued *National Right to Life News*, NRLC's flagship newsletter.[209]

In *Webster v. Reproductive Health Services*,[210] a reconstituted Court seemed ready to fulfill the prediction made by *National Right to Life News*.[211] The *Webster* Court agreed to hear a challenge to three parts of a Missouri abortion law: (1) a preamble stating that life begins at conception; (2) a prohibition on the use of public funding, counseling, or facilities for abortion; and (3) a statutory definition of viability.[212] Pro-life groups focused not on promoting different governmental interests but on convincing the Court to apply a forgiving standard of review to abortion regulations.[213] In an amicus brief, for example, NRLC argued that the proper standard of review was rational basis—a standard that virtually any abortion regulation would survive.[214] NRLC insisted that if the Court did not adopt a suitably relaxed standard of scrutiny, abortion doctrine would continue to be contradictory and confusing.[215]

Webster energized those who hoped that the Court would soon overrule *Roe* outright. The Court upheld all of the challenged provisions, but the most telling part of the opinion came in the plurality's discussion of a viability-related measure.[216] The Missouri law required that after the twentieth week of pregnancy, physicians should perform certain tests to ensure that a fetus was not viable.[217] As

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[208] Greenhouse, *supra* note 111.

[209] Dave Andrusko, *Pro-Abortionists Unsure Whether to Appeal Decision Upholding Minnesota's Parental Notification Law*, NAT'L RIGHT TO LIFE NEWS, Aug. 28, 1988, at 5 (National Right to Life News Collection, Joseph Stanton Library, Sisters of Life Covent, Bronx, N.Y.).

[210] 492 U.S. 490 (1989).

[211] Andrusko, *supra* note 209, at 5.

[212] *See Webster*, 492 U.S. at 490, 504 (1989).

[213] *See, e.g.*, Brief Amici Curiae of Focus on the Family and Family Research Council of America in Support of Appellants at 2, *Webster*, 492 U.S. 490 (No. 88-605); Brief Amicus Curiae of the National Right to Life Committee, Inc. in Support of Appellants at 2–3, *Webster*, 492 U.S. 490 (No. 88-605) [hereinafter NRLC Amicus Brief, *Webster*].

[214] *See* NRLC Amicus Brief, *Webster*, *supra* note 213, at 17–20.

[215] *See id.*

[216] *See Webster*, 492 U.S. at 514–15.

[217] *Id.* at 515.

those challenging the law recognized, the provision was in tension with *Roe*, creating a presumption of viability in the second, rather than third, trimester.[218] But as the plurality saw it, any problem revealed by the Missouri law exposed flaws in the *Roe* decision, not the Missouri law.[219] *Webster* suggested that there was no constitutional foundation for *Roe*'s trimester framework.[220] Moreover, the plurality reasoned that there was no reason that the government's interest in protecting life should come into existence only in the third trimester.[221] While *Webster* did not overrule *Roe*, Justice Antonin Scalia demanded explicit reconsideration of the decision, and the stage seemed set for a more direct confrontation.[222]

Following *Webster*, abortion opponents picked up on another strategy outlined by AUL during the 1984 conference.[223] As conferees argued, *Roe* rested on the conclusion that women's interest in health outweighed the government's interest in protecting fetal life.[224] Pro-life attorneys believed that if the Court's composition changed, "the 'health claim' based solely on the psychological discomfort . . . [became] markedly vulnerable."[225] As the Court became more convinced by pro-life claims about fetal personhood, the conferees hoped to argue that the government's interest in fetal life outweighed the concerns of women who chose abortion for the wrong reasons.[226]

Following *Webster*, NRLC built on this strategy by putting out a model law that would outlaw abortion except in cases of rape,

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218 *See id.* at 516.

219 *Id.* at 517.

220 *Id.*at 518.

221 *See id.* at 519.

222 *See id.* at 532–35 (Scalia, J., dissenting).

223 *See, e.g.*, Baer, *supra* note 191, at 1–3.

224 *See, e.g.*, Victor G. Rosenblum & Thomas J. Marzen, *Strategies for Reversing* Roe v. Wade *Through the Courts*, *in* ABORTION AND THE CONSTITUTION: REVERSING *ROE V. WADE* THROUGH THE COURTS 198–201 (Dennis J. Horan et al. eds., 1987).

225 Myers, *supra* note 192, at 34; *see* Paul Houston, *Abortion Opponents to Press States to Legislate Wide-Ranging Curbs*, L.A. TIMES, Oct. 3, 1989, at 18 [hereinafter *Abortion Opponents*].

226 *See, e.g.*, *id.*; *see also* Barbara Brotman, *Mixed Emotions, Jumbled Laws*, CHI. TRIB. (Jan. 14, 1990), http://www.chicagotribune.com/news/ct-xpm-1990-01-14-9001040721-story.html.

incest, fetal abnormality, or threats to a woman's life or health.[227] In promoting these laws, NRLC lawyers compared conventional governmental interests—those related to fetal life—to a woman's reasons for selecting abortion.[228] Women who terminated pregnancy as a means "of birth control" or for purposes of convenience, as NRLC argued, would lose when the government invoked an interest in fetal life.[229] In 1990, Idaho's legislature became the first to pass such a law before Governor Cecil Andrus vetoed it.[230] Louisiana considered a similar law in July.[231] Although Louisiana Republican Governor Buddy Roemer vetoed the Louisiana bill, it seemed even more likely that the Court would overrule after Justice William Brennan, a consistent vote for abortion rights, announced his retirement the same month.[232] President George H.W. Bush chose David Souter, a New Hampshire Supreme Court judge, to replace Brennan.[233] Likely hoping that Souter and Kennedy would vote to overturn *Roe*, NRLC attorneys continued pressing bans like the failed effort in Idaho.[234] In January 1991, the effort paid off when Utah passed the strictest antiabortion law in the nation, outlawing abortion except in cases of rape, incest, "grave" fetal defect, or certain limited threats to a woman's health.[235] The following July, Justice Thurgood

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[227] *See Abortion Opponents*, *supra* note 225, at A3; Brotman, *supra* note 204.

[228] *See, e.g.*, *Abortion Opponents*, *supra* note 225, at A3.

[229] *See id.*

[230] *See Idaho Abortion Bill Is Vetoed*, CHI. TRIB., Mar. 31, 1990, at 1; Timothy Egan, *Idaho Governor Vetoes Measure Intended to Test Abortion Ruling*, N.Y. TIMES, Mar. 31, 1990, at 1, 8.

[231] *See La. Governor Vetoes Abortion Bill*, L.A. TIMES, July 27, 1990, at 1; Maralee Schwartz, *Louisiana Governor Vetoes Second Antiabortion Bill*, WASH. POST, July 28, 1990, at A01.

[232] *See* Schwartz, *supra* note 231, at 1; *La. Governor Vetoes Abortion Bill*, *supra* note 231, at A01. On the veto, see *supra* note 231 and text accompanying. On Brennan's retirement, see, for example, Jack Nelson, *Bush May Avoid Bitter Confirmation Struggle Senate*, L.A. TIMES, July 24, 1990, at 1; *Lawmakers' Reaction to Bush*, *supra* note 111, at A14; Maureen Dowd, *A Swift Nomination*, N.Y. TIMES, July 24, 1990, at A1, A19.

[233] On the Souter nomination, see Dowd, *supra* note 232; *Lawmakers' Reaction to Bush*, *supra* note 111, at A14; Nelson, *supra* note 232, at 1.

[234] *See* Dowd, *supra* note 232, at A1; *Lawmakers' Reaction to Bush*, *supra* note 111, at A14; Nelson, *supra* note 210, at A1.

[235] *See* Tamar Lewin, *Harsh Loophole in Utah Abortion Law*, N.Y. TIMES, Mar. 9, 1991, at 8 [hereinafter Lewin, *Harsh Loophole in Utah Abortion Law*]; Tamar Lewin, *Strict Anti-Abortion Law Signed in Utah*, N.Y. TIMES, Jan. 26,

Marshall, another supporter of abortion rights, retired, and as his replacement, President George H.W. Bush nominated Judge Clarence Thomas of the DC Circuit Court of Appeals.[236] Since Justice Thomas was expected to vote to overrule *Roe*, it seemed to be only a matter of time before the Court held that *Roe* was no longer good law.

When the Supreme Court agreed to hear a challenge to a multi-restriction Pennsylvania law in *Casey*, most abortion opponents focused on the flaws in the *Roe* decision, the reasons for undoing the 1973 decision, and the weak reasons that some women terminated their pregnancies.[237] However, some pro-lifers focused on the strength of the governmental interests in regulating or banning abortion.[238] In a brief submitted on behalf of the American Association of Pro-Life Obstetricians and Gynecologists ("AAPLOG"), for example, veteran pro-life attorneys William Bentley Ball and Maura Quinlan stressed that *Roe* erred by too narrowly describing the government's interest in women's health and fetal life and by limiting its application to later in pregnancy.[239] Emphasizing that the government had an interest in protecting life, not potential life, Ball and Quinlan urged the Court to recognize a compelling interest in protecting fetal life throughout pregnancy.[240] Similarly, citing incidents

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1991, at A10 [hereinafter *Strict Anti-Abortion Law Signed in Utah*]; *Suit by ACLU Challenges New Utah Anti-Abortion Law*, N.Y. TIMES, Apr. 7, 1991, at 21.

[236] *See, e.g.*, Terry Atlas, *Bush Chooses Conservative for Supreme Court*, CHI. TRIB., July 2, 1991, at 1; Jack Nelson, *A Conservative Black Picked for High Court*, L.A. TIMES, July 2, 1991, at A1 [hereinafter *A Conservative Black Picked for High Court*].

[237] *See, e.g.*, Brief Amicus Curiae for the National Right to Life Committee, Inc. Supporting Respondents/Cross-Petitioners at 2–3, *Casey*, 505 U.S. 833 (No. 91-744, 91-902) [hereinafter NRLC Amicus Brief, *Casey*]; Brief Amicus Curiae of Hon. Henry Hyde et al. in Support of Respondents at 1–3, *Casey*, 505 U.S. 833 (No. 91-744, 91-902) [hereinafter Hon. Henry Hyde Amicus Brief]; Brief of Catholics United for Life et al. as Amici Curiae Supporting Respondents and Cross-Petitioners at 20, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (No. 91-744, 91-902) [hereinafter Catholics United for Life Amicus Brief].

[238] *See infra* notes 239, 242 and accompanying text.

[239] *See* Brief of the American Association of Pro-Life Obstetricians and Gynecologists and American Association of Pro-Life Pediatricians as Amici Curiae in Support of Respondents at 12–16, *Casey*, 505 U.S. 833 (No. 91-744, 91-902) [hereinafter American Association of Pro-Life Obstetricians and Gynecologists Amicus Brief].

[240] *See id.* at 5–16.

of sub-standard abortion care, the AAPLOG brief maintained that there was a compelling interest in protecting women's health throughout pregnancy.[241]

In a brief submitted on behalf of Feminists for Life and several crisis pregnancy centers, Pat Buchanan's American Center for Law and Justice returned to a tactic developed in *Akron I*.[242] The brief insisted that *Roe* had too narrowly described the government's interest in protecting women's health.[243] "A woman's right to determine her own medical treatment, guaranteed by both common and constitutional law, is illusory when the only information provider is an entity with a financial interest in a particular outcome of her decisional process, and who supports only one option," the brief argued.[244] The brief reasoned that if the Court properly understood the government's compelling interests, then the justices would uphold the Pennsylvania law.[245]

Casey dealt in complicated ways with social-movement debate about when the government had a compelling interest in regulating abortion. The Court began by reaffirming *Roe*'s essential holding—that the Constitution protects a right to abortion.[246] Interestingly, the Court also retained viability as the point at which states could ban most therapeutic abortions.[247] While acknowledging that the time of viability could change because of technological developments, the Court concluded that these factual shifts in no way undermined the soundness of viability as a constitutional marker.[248] As the Court explained, viability was the most workable endpoint that the courts could identify.[249] Additionally, because viability came late in pregnancy, the plurality reasoned that it was fair to ask women who

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241 *See id.*

242 *See* Brief of Feminists for Life of America et al. as Amici Curiae in Support of Respondents and Cross Petitioners, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (No. 91-744, 91-902) [hereinafter Feminists for Life of America Amicus Brief].

243 *See id.* at 8–12.

244 *Id.* at 10.

245 *See id.* at 26–29.

246 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992).

247 *See id.* at 860–61.

248 *See id.*

249 *See id.*

waited until after viability to subordinate their interests to those of the state.[250]

But, for the *Casey* plurality, the trimester framework was flawed both because it neglected, or defined too narrowly, the government's interests and because it allowed the government to advance these interests only later in pregnancy.[251] *Casey* concluded that there was no reason that the government could not ensure throughout pregnancy that a woman's "choice is thoughtful and informed."[252] The Court further stated that "[i]t follows that States are free to enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning."[253] The government had an interest in protecting women's mental and physical health, as *Casey* reasoned.[254] Moreover, the government could act to advance its interest in "protecting the life of the unborn" by "expressing a preference for normal childbirth."[255]

According to *Casey*, the government could justifiably act to protect life as long as the law was not designed specifically to undermine women's rights.[256] As the Court explained, "[t]he 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."[257] Regulations were only problematic if they deprived women of the right to make the ultimate decision.[258] Importantly, the government's interest in protecting women's mental health and the life of the unborn mattered throughout pregnancy.[259]

As an alternative to the trimester framework, the Court adopted a version of the undue burden standard.[260] "A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of

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250 *See id.*
251 *See id.* at 870–72.
252 *Id.* at 872.
253 *Id.* at 873.
254 *See id.* at 871–72.
255 *Id.* at 872–73.
256 *See id*. at 872.
257 *Id.* at 874.
258 *See id.*
259 *See id.*
260 *See id.* at 877.

a woman seeking an abortion of a nonviable fetus," *Casey* explained.[261] What would it mean for a law to have an impermissible purpose? First, *Casey* explained that the government could not primarily intend to obstruct a woman from receiving an abortion because "the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it."[262] The Court further suggested that the government had interests beyond protecting fetal life or women's health.[263] *Casey* reiterated that if a law severely limited abortion, it might be unconstitutional even if the law was "furthering the interest in potential life or *some other valid* state interest."[264]

What counted as examples of valid state interests? The Court certainly went beyond the interest in protecting fetal life.[265] The government could regulate abortion in such a way not only to prevent fetal killing but also to "express profound respect for the life of the unborn."[266] *Casey* did not illuminate the boundaries of this state interest.[267] Did all abortion regulations express respect for the life of the unborn? Was this interest stronger later in pregnancy rather than earlier? How could courts tell the difference between a law designed to obstruct women and a law expressing respect for the life of the unborn? *Casey* raised these questions but answered none of them.[268]

Nevertheless, *Casey* did clarify that the government could act to protect women's health or to persuade women to choose childbirth over abortion.[269] However, there was still some ambiguity in how *Casey* described these interests. Could the government protect women's emotional or psychological health, or was this interest narrower? Did laws designed to encourage a woman to carry a pregnancy to term have to expressly state such a goal—as an informed-consent regulation might?

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261 *Id.*
262 *Id.*
263 *See id.* at 870–77.
264 *Id.* (emphasis added).
265 *See id.* at 877–78.
266 *Id.* at 877.
267 *See id.* at 877–78.
268 *See id.* at 870–77.
269 *See id.* at 872.

Casey did shed some light on these questions in its treatment of the disputed Pennsylvania regulations.[270] Consider *Casey*'s analysis of the informed-consent restriction. Those challenging the law had questioned whether it benefitted women's health.[271] After all, the law required women to receive information about fetal development that had no direct bearing on women's health.[272] *Casey* first suggested that the government could impose such a regulation even if doing so did not advance an interest in women's health.[273] As *Casey* explained, an informed-consent regulation could advance the government's interest in expressing respect for life.[274] However, *Casey* also held that the mandatory-consent regulation protected women's health.[275] "It cannot be questioned that psychological well-being is a facet of health," *Casey* reasoned.[276] "In attempting to ensure that a woman apprehend the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed."[277] The Court further upheld parental-involvement and record-keeping provisions.[278]

When the Court struck down a spousal-notification provision, *Casey* focused on the women who would be most affected—those who faced potential domestic violence if they had to notify their husbands before terminating a pregnancy.[279] The Court hinted at how purpose analysis would work in its approach to the spousal-notification law.[280] While the government had highlighted husbands' interest in the life of the children their wives were carrying,[281] the Court nevertheless implied that laws designed to force women to consult with their spouses might have no rational basis.[282]

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270 *See id.* at 880–84.
271 *See id.*
272 *See id.*
273 *See id.*
274 *Id.* at 882.
275 *See id.* at 883–84.
276 *Id.* at 882.
277 *Id.*
278 *Id.* at 899–901.
279 *See id.* at 887–93.
280 *See id.* at 895.
281 *See id.*
282 *See id.*

As *Casey* reasoned, the law treated marriage as a relationship between equals who could make decisions of their own.[283] "A State may not give to a man the kind of dominion over his wife that parents exercise over their children," *Casey* stated.[284] The Court did not suggest that Pennsylvania had sought nothing more than to obstruct women seeking abortion. The government's interest in men's rights was problematic in its own right.[285] *Casey* thus suggested both that the government could identify new justifications for regulating abortion and that some of those proposed interests could be constitutionally out of bounds.[286]

In the aftermath of *Casey*, it was not clear whether the Court's analysis of a statute's purpose would help the supporters or the opponents of abortion rights. Could abortion-rights supporters readily prove that a claimed government interest was pretextual? Would abortion opponents be able to use *Casey* to identify a wide variety of new interests and expand the government's power to restrict abortion? Part III examines the Court's answers to these questions.

III. FROM *CASEY* TO *GONZALES*: RECOGNITION OF NEW PURPOSES

In the aftermath of *Casey*, those on both sides did not know what the courts would make of *Casey*'s purpose prong.[287] Would the purpose prong allow abortion-rights supporters to more effectively attack new regulations? How easily could abortion foes convince the Court to recognize new justifications for limiting abortion? This Part begins by exploring the first major decision to discuss *Casey*'s purpose prong, *Mazurek v. Armstrong*.[288] Next, this Part looks at prolifers' response to *Casey* and *Mazurek*, especially the expansion of the government's interest in protecting women. Finally, this Part examines how the fight against what pro-lifers called partial-birth abortion encouraged the antiabortion movement to focus more on the recognition of abstract new governmental purposes. This

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283 *See id.*

284 *Id.* at 898.

285 *See id.*

286 *See id.*

287 *See generally* Ziegler, *Liberty and the Politics of Balance*, *supra* note 66, at 457 (describing the ambiguities in construing the purpose or effect of a law following the *Casey* decision).

288 520 U.S. 968 (1997).

initiative contributed to the Court's decision in *Gonzales v. Carhart*,[289] a decision that energized those who saw the recognition of new governmental interests as a strategy for undermining abortion rights.

A. *Interpreting* Casey

Immediately after *Casey*, those on both sides contested the meaning of the undue burden standard.[290] In *Mazurek*, the Court seemed poised to clarify the meaning of the test. That case involved a 1995 Montana regulation prohibiting physician assistants from performing abortions, requiring all second-trimester abortions to be performed in a hospital, and banning advertisements for abortion.[291] A group of plaintiffs challenged the constitutionality of the law and sought a preliminary injunction.[292] The district court had enjoined the provisions requiring abortions to be in hospitals and banning solicitation of abortion services, but concluded that the physician-only requirement did not create an undue burden.[293] The Ninth Circuit reversed, enjoining the physician-only requirement and holding that respondents had shown a fair chance of success on the merits of their claim, and thus had met the threshold requirement for preliminary injunctive relief.[294]

When the Supreme Court took the case, the justices addressed whether the plaintiffs had a fair chance of success in showing that the physician-only requirement created an undue burden. Lawyers working with the Center for Reproductive Law and Policy (now the Center for Reproductive Rights) stressed that Montana was a rural state with few physicians.[295] The Center argued that as a result, eliminating access to physician assistants would force women in the state seeking abortions to drive to a single abortion clinic in Bozeman, Montana, to be treated by a female provider.[296] Much of the Center's argument centered on *Casey*'s purpose prong.[297] Montana

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289 550 U.S. 124 (2007).
290 *See* Ziegler, *Liberty and the Politics of Balance*, *supra* note 66, at 444–45.
291 *Mazurek*, 520 U.S. at 978.
292 *See id.* at 969.
293 Armstrong v. Mazurek, 906 F. Supp. 561, 561 (D. Mont. 1995).
294 Armstrong v. Mazurek, 94 F.3d 566, 568 (9th Cir. 1996).
295 *See* Brief of Appellants at 4–5, *Mazurek*, 94 F.3d 566 (No. 96-1104).
296 *See id.* at 15.
297 *Id.* at 19–20.

claimed that the law was designed to protect women's health.[298] The Center contended that this was pretext.[299]

What proof was there of pretext? First, the Center emphasized that there was no problem that the law had solved—all the available evidence suggested that physician assistants safely performed abortions.[300] Second, Montana had singled out abortion for additional regulation allowing physician assistants to perform what were unquestionably riskier procedures.[301] Moreover, evidence suggested that the lawmakers backing the bill acted on behalf of Montana Right to Life, a group that openly aimed to end all abortions.[302]

Mazurek rejected these arguments, seemingly undercutting *Casey*'s purpose prong.[303] According to the Court's interpretation, the Ninth Circuit held that the law was problematic solely because of its purpose, not its effect.[304] *Mazurek* called into question whether courts could ever justifiably strike down a law only on the basis of having an impermissible purpose.[305] But even if *Casey* authorized such a result, the Court held that Montana's law would pass muster under *Casey*'s purpose prong.[306] The Court first suggested that lawmakers had significant latitude in requiring professionals to do a job even if objective evidence suggested that this requirement had no benefit.[307] Nor did the fact that a pro-life group had drafted the law sway the Court.[308]

Mazurek suggested that the purpose prong of *Casey* might help pro-lifers more than supporters of abortion rights.[309] Indeed, *Mazurek* introduced more confusion into the Court's analysis of the purpose of antiabortion legislation. First, *Casey* had sent contradictory signals about how many legitimate interests the government could identify in restricting abortion and how readily abortion-rights

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298 *See id.* at 7–9.
299 *See id.* at 8.
300 *See id*.
301 *See id.* at 5.
302 *See id.* at 7.
303 *See* Mazurek v Armstrong, 520 U.S. 968, 972 (1997).
304 *Id*. at 972–74.
305 *See id*. at 972.
306 *Id*.
307 *See id.* at 973
308 *See id.*
309 *See id.* at 973–74.

supporters could smoke out an insidious goal.[310] Then, *Mazurek* suggested that it would be practically impossible to challenge the purpose of a law.[311]

Antiabortion groups responded by seeking to define more broadly the interests that the Court had already recognized. In particular, for both political and constitutional reasons, groups like AUL sought to convince the Court to adopt a broad understanding of the government's interest in protecting women's health.[312] As early as 1987, pro-life activist David Reardon wrote C. Everett Koop, then the Surgeon General, arguing that a focus on women's health might "launch [the] nation into a new era of debate about abortion, one based not on fetus vs. woman rhetoric, but rather on the facts about what abortion does to women alone."[313] As Reva Siegel has shown, abortion opponents in the late 1980s and early 1990s faced a perfect storm: the election of pro-choice President Bill Clinton, the radicalization of the clinic-blockade movement, and the murder of abortion providers and clinic staff.[314] These circumstances convinced abortion opponents to change their argumentative strategy.[315] At an AUL conference for state legislators, Laurie Ann Ramsey summarized the results of market research on the image of the antiabortion movement: "[W]e are also viewed as extremists, hypercritical, violent, intolerant and unconcerned about women, poverty and homelessness."[316] "The [movement's] focus on concern for the unborn child neglects mention of the mother of that child," Mary Ellen Jensen, a public-relations specialist at AUL explained at

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310 *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 898 (1992).

311 *See Mazurek*, 520 U.S. at 972–74.

312 *See generally* Ziegler, *Liberty and the Politics of Balance*, *supra* note 66, at 445–49.

313 Letter from David Reardon to C. Everett Koop, U.S. Surgeon Gen. (Sept. 14, 1987) (on file with author) [hereinafter Letter to C. Everett Koop].

314 *See* Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under* Casey/Carhart, 117 YALE L.J. 1694, 1714 (2008).

315 *Id.* at 1715.

316 Laurie Anne Ramsey, How Public Opinion Polls Should Guide Pro-Life Strategy, Speech at the Americans United for Life Legislators Educ. Conference (Aug. 2–4, 1991), at 4 (on file with Schlesinger Library, Harvard University, in the Mildred F. Jefferson Papers, Box 13, Folder 8).

the time.[317] "Communicating greater concern for the women . . . must be a key objective of any pro-life communication strategy."[318]

After *Casey*, AUL prioritized what pro-lifers called "right to know" laws, informed-consent mandates that would sway women to carry pregnancies to term and would position the debate in broader terms.[319] In defending these laws, AUL and NRLC would expand on the government's interest in protecting women's mental health—a governmental purpose hinted at in *Casey* itself.[320]

B. *Partial-Birth Abortion and New Purposes*

In the leadup to the Supreme Court's next case, *Gonzales v. Carhart*, pro-lifers experimented with a more ambitious agenda, convincing the Court to recognize new governmental interests instead of just expanding existing ones. The years leading up to *Gonzales* turned on discussion of what pro-lifers called partial-birth abortion, a procedure whereby a provider removed a fetus intact from a woman's uterus.[321] The procedure first came to NRLC's attention after Dr. Martin Haskell gave a paper on the procedure at the annual conference of the National Abortion Federation ("NAF").[322] Minnesota abortion opponents got a copy of the paper and created a sketch of the abortion procedure that Haskell described, using this material in an advertisement opposing the Freedom of Choice Act, a proposed federal bill that would have codified abortion rights.[323] By 1995, when Republicans took control of the House of Representatives for the first time in decades, NRLC emphasized a federal bill

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317 Jensen, *supra* note 94, at 5.

318 *Id.*

319 Ziegler, *Liberty and the Politics of Balance*, *supra* note 66, at 450.

320 *See, e.g.*, *id.* at 451; *see also* Am. United for Life, Minutes of Board Meeting 4 (Apr. 24, 1993) (on file with Schlesinger Library, Harvard University, in the Mildred F. Jefferson Papers, Box 13, Folder 5) [hereinafter Minutes of Board Meeting].

321 On the importance of the partial-birth abortion debate, see, for example, SARA DUBOW, OURSELVES UNBORN 153–93 (2011); JOHANNA SCHOEN, ABORTION AFTER ROE 219–30 (2015).

322 *See, e.g.*, SCHOEN, *supra* note 321, at 221.

323 *See id.*; *see also* Diane M. Gianelli, *Shock-Tactic Ads Target Late Term Abortion Procedure*, AM. MED. NEWS (July 5, 1993), http://www.nrlc.org/ archive/abortion/pba/AmericanMedicalNews1993.pdf.

banning the procedure.[324] First drafted in 1995, the federal Partial Birth Abortion Ban Act ("PBABA") outlawed "an abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery."[325]

How did abortion opponents describe the purpose of the law? After all, outlawing one abortion procedure did not seem to protect fetal life.[326] The proposal left available any other abortion method.[327] So why had Congress singled out one procedure? Strategically, the emphasis on partial birth abortion had a clear payoff. Douglas Johnson of NRLC labeled the law "an educational exercise."[328] "Many Americans wrongly believe that abortion is not available after 13 weeks of pregnancy," Johnson said.[329] "We want people to be aware that abortions are being performed on unborn human beings, 20 weeks and beyond, when they look like babies and have a capacity to feel pain."[330]

In fighting for the PBABA, pro-lifers and their allies in Congress built on Johnson's suggestion about fetal pain, suggesting that the government had an interest in preventing fetal suffering or

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[324] On NRLC's initial push for the bill, see, for example *Partial-Birth Abortion: The Truth, Joint Hearing Before the S. Comm. on the Judiciary and the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. 53, 108 (1997) (testimony of Douglas Johnson, representing the National Right to Life Committee); Douglas Johnson, *Partial-Birth Abortions: A Closer Look*, NAT'L RIGHT TO LIFE COMMITTEE (Sept. 11, 1996), http://www.nrlc.org/abortion/pba/pbafact/; NAT'L RIGHT TO LIFE COMM., PARTIAL BIRTH ABORTION: MISINFORMATION AND REBUTTAL (June 21, 1995), http://www.nrlc.org/archive/ abortion/pba/NRLC_factsheet_PBA_June_1995.pdf.

[325] Partial Birth Abortion Ban Act, H.R. 1833, 104th Cong. (1995).

[326] *See* Gonzales v. Carhart, 550 U.S. 124, 181 (Ginsburg, J., dissenting) ("The law saves not a single fetus from destruction, for it targets only a *method* of performing abortion").

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

[328] Tamar Lewin, *Method to End 20-Week Pregnancies Stirs Corner of Abortion Debate*, N.Y. TIMES (July 5, 1995) https://www.nytimes.com/1995/07/05/us/method-to-end-20-week-pregnancies-stirs-a-corner-of-the-abortion-debate.html.

[329] *Id.*

[330] *Id.*; *see also* Eliza Newlin Carney, *Choosing New Sides*, 30 NAT. J. 1806, 1806–11 (1998); Michael Gerson, *For Key Abortion Foes, A Sudden Pragmatism*, U.S. NEWS & WORLD REP., June 1, 1998, at 25, 25–26.

gratuitous insults to fetal dignity.[331] Pro-lifers pushed similar laws in the states and, in 2000, the Supreme Court agreed to hear a challenge to one of them in *Stenberg v. Carhart*.[332]

That case addressed the constitutionality of a Nebraska law outlawing "an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery."[333] Noting the wording of the statute, those challenging the Nebraska law argued that it would ban not only D&X but also D&E, the most widely used second-trimester abortion procedure.[334] Those challenging the law further contended that it created an undue burden even if it covered only D&X because the law lacked a health exception.[335] By depriving women of what would be the safest abortion procedure under certain circumstances, as the challengers reasoned, the law unduly burdened women's rights.[336] Nebraska responded that the law covered only D&X and that there was inadequate evidence that D&X was safer for women than available alternatives.[337]

The majority sided with those challenging the law, concluding that Nebraska had banned D&X and unduly burdened women.[338] Justice Anthony Kennedy's dissent sent a different signal to the antiabortion movement.[339] Because of the message sent by Justice Kennedy's dissent, the Court's decision in *Stenberg* sharpened

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[331] *See, e.g.*, Henry J. Hyde, *Consideration of the Veto Message on HR 1112, Partial Birth Abortion Ban Act*, 24 HUM. LIFE REV. 95, 95–98 (1998); Barbara Vobejda & David Brown, *Harsh Details Shift Tenor of Abortion Fight*, WASH. POST (Sep. 17, 1996), https://www.washingtonpost.com/archive/ politics/1996/09/17/harsh-details-shift-tenor-of-abortion-fight/c65611f7-0ae2-4ef7-821d-2e5149f701e4/?utm_term=.0bab63f97eec.

[332] 530 U.S. 914 (2000). By 1998, twenty-two states had passed such laws. *See* James Bopp, Jr. & Curtis R. Cook, *Partial-Birth Abortion: The Final Frontier of Abortion Jurisprudence*, 14 ISSUES L. & MED., Summer 1998, at 3, 4 n.2.

[333] NEB. REV. STAT. § 28-326(9) (1997).

[334] *See, e.g.*, Brief of Respondent at 20–29, *Stenberg*, 530 U.S. 914 (No. 99-830).

[335] *See, e.g.*, *id.* at 35–48.

[336] *See id.*

[337] *See* Brief for Petitioners, 11–20, 29–44, *Stenberg*, 530 U.S. 914 (No. 99-830).

[338] *See Stenberg*, 530 U.S. at 930.

[339] *See id.* at 956–62 (Kennedy, J., dissenting).

abortion foes' interest in promoting more legislative justifications for abortion regulations.

Justice Kennedy highlighted the legitimacy of what he saw as the interests underlying Nebraska's ban.[340] To be sure, as Kennedy reasoned, the law might advance an interest in protecting fetal life.[341] But Kennedy went further, stating: "States also have an interest in forbidding medical procedures which, in the State's reasonable determination, might cause the medical profession or society as a whole to become insensitive, even disdainful, to life, including life in the human fetus."[342] Kennedy suggested that there was something about D&X that would undermine the image that many held of physicians as healers.[343]

What was it about the procedure that would arguably have this effect? "D & X's stronger resemblance to infanticide means Nebraska could conclude the procedure presents a greater risk of disrespect for life and a consequent greater risk to the profession and society, which depend for their sustenance upon reciprocal recognition of dignity and respect," Kennedy reasoned.[344]

Because of the appearance of D&X, the procedure undermined respect for fetal life—an interest that went beyond an interest in preventing fetal killing.[345] Equally important, as Kennedy saw it, prohibiting this one method of abortion would send a message about the dignity of human life.[346] As Kennedy stated,

> Nebraska instructs all participants in the abortion process, including the mother, of its moral judgment that all life, including the life of the unborn, is to be respected . . . The differentiation between the procedures is itself a moral statement, serving to promote respect for human life; and if the woman and her physician in contemplating the moral consequences of the prohibited procedure conclude that grave moral consequences pertain to the permitted abortion

340 *See id.* at 960.
341 *See id.* at 982.
342 *Id.* at 961.
343 *See id.* at 962.
344 *Id.* at 963.
345 *See id.*
346 *See id.* at 964.

> process as well, the choice to elect or not to elect abortion is more informed; and the policy of promoting respect for life is advanced.[347]

Congress had twice passed a federal partial-birth-abortion ban, but President Clinton had vetoed it.[348] Starting in 2002, notwithstanding the Court's decision in *Stenberg*, pro-lifers again called for a federal ban.[349] Kennedy's *Stenberg* dissent later provided a roadmap for those demanding such a ban: Congress would have to make extensive findings on both the purpose of the law and the need for a health exception.[350] The version of the PBABA ultimately passed in 2003 first defined the prohibited procedure more narrowly, arguably excluding D&E procedures.[351] Congress also made findings supporting both the need for the law and justification for eliminating a health exception.[352]

When it came to the purpose of the law, Congress deliberately went beyond justifications related to the prevention of fetal killing.[353] One interest involved attitudes toward fetal life: banning a procedure that many found gruesome would improve the odds that people would view fetal life with respect or reverence.[354] As

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[347] *Id.*

[348] On Congress's votes and Clinton's veto, see, for example, James Bennet, *Clinton Again Vetoes Measure to Ban a Method of Abortion*, N.Y. TIMES (Oct. 11, 1997), https://www. nytimes.com/1997/10/11/us/clinton-again-vetoes-measure-to-ban-a-method-of-abortion.html; Ann Devroy, *Late-Term Abortion Ban Vetoed*, WASH. POST (Apr. 11, 1996), https://www.washingtonpost.com/archive/politics/1996/04/11/late-term-abortion-ban-vetoed/857678df-deea-40b8-9abe-d1d5ee4f0a1c/?utm_term=.8f 347a943ff2; Todd S. Purdum, *President Vetoes Measure Banning Type of Abortion*, N.Y. TIMES (Apr. 11, 1996), https://www.nytimes.com/1996/04 /11/us/president-vetoes-measure-banning-type-of-abortion.html; Alissa J. Rubin, *Bill to Ban Abortion Method Vetoed*, L.A. TIMES (Oct. 11, 1997), http://articles.latimes.com/1997/oct/11/news /mn-41748.

[349] On the 2002 initiative, see, for example, Press Release, Nat'l Right to Life, U.S. House Passes Ban on Partial-Birth Abortion, 274–151; Will the Senate's Democratic Leaders Kill the Ban? (Aug. 6, 2002), https://www.nrlc.org /site/communications/releases/2002/release080802/.

[350] *See Stenberg*, 530 U.S. at 972 (Kennedy, J., dissenting).

[351] *See* 18 U.S.C. § 1531(b) (2012).

[352] *See* 18 U.S.C. § 1531 (Supp. 2003).

[353] *See id.*

[354] *See id.*

Congress explained: "Implicitly approving such a brutal and inhumane procedure by choosing not to prohibit it will further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life, making it increasingly difficult to protect such life."[355] President George W. Bush signed the federal ban into law in 2003,[356] and when the Supreme Court agreed to hear a challenge to the law, pro-lifers again sought to carve out new justifications for regulating abortion. A brief submitted on behalf of a group of women who claimed to have suffered post-abortion trauma argued that the federal PBABA was intended to protect women's mental health.[357] Congress, as the brief argued, acted to ban partial birth abortion in the belief that the procedure "poses serious risks to the long-term health of women and in some circumstances, their lives."[358] Other briefs foregrounded an interest in preserving the integrity of the medical profession.[359]

C. *Interpreting* Gonzales

Gonzales vindicated those who believed that the recognition of new governmental interests would erode abortion rights.[360] The Court began by rejecting arguments that the challenged law was unconstitutionally vague or outlawed both D&E and D&X.[361] The majority turned then to the application of the undue burden standard.[362] Justice Kennedy's majority canvassed the purposes underlying the act.[363]

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355 *Id.* at § 1531(14)(N).

356 Richard W. Stevenson, *Bush Signs Ban on a Procedure for Abortions*, N.Y. TIMES (Nov. 6, 2003) http://www.nytimes.com/2003/11/06/us/ bush-signs-ban-on-a-procedure-for-abortions.html.

357 *See* Brief of Sandra Cano, the Former "Mary Doe" of *Doe v. Bolton*, and 180 Women Injured by Abortion as Amici Curiae in Support of Petitioner at 6–26, Gonzalez v. Carhart, 550 U.S. 124 (2007) (No. 05-380).

358 *Id.* at 13 (citation and quotation omitted).

359 *See, e.g.*, Brief for Amici Curiae Jill Stanek and the Ass'n. of Pro-Life Physicians in Support of Petitioner at 4–14, *Gonzales*, 550 U.S. 124 (No. 05-1382); *see also* Brief of Amici Curiae Hadley Arkes and the Claremont Institute Center for Constitutional Jurisprudence in Support of Petitioner at 10, *Gonzales*, 550 U.S. 124 (No. 05-380).

360 *See Gonzales*, 550 U.S. at 146–66.

361 *See id.* at 148.

362 *See id.* at 150.

363 *See id.* at 156–61.

First, *Gonzales* recognized a justification in expressing "respect for the dignity of human life."[364] What did this entail? In part, as the Court reasoned, Congress could act to reinforce a distinction between infanticide and abortion.[365] Kennedy also suggested that Congress could seek to protect women from post-abortion regret.[366] "Respect for human life finds an ultimate expression in the bond of love the mother has for her child . . . Whether to have an abortion requires a difficult and painful moral decision[,]" Kennedy explained.[367] "While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained."[368] *Gonzales* further held that the law was constitutional notwithstanding the law's lack of a health exception.[369] The Court reasoned that if a matter was scientifically uncertain, Congress had the power to intervene.[370]

Notably, *Gonzales* stood in tension with earlier decisions addressing the government's interest in fetal life or women's health. When it came to fetal life, the Court previously focused on the protection of fetal life as opposed to fetal dignity or the quality of fetal life.[371] Was the idea of respect for life articulated in *Gonzales* a new state interest? Had the Court redefined fetal personhood—a concept rejected by *Roe*? The Court provided little guidance on these matters.[372] What about the government's interest in protecting women's mental health? The Court had cast doubt on the validity of this interest in *Akron I* and *Thornburgh*.[373] Although *Casey* partly

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364 *Id.* at 157.

365 *See id.* at 158–59.

366 *See id.* at 159.

367 *Id.*

368 *Id.*

369 *See id.* at 166–67.

370 *See id.* at 164.

371 *See, e.g.*, Roe v. Wade, 410 U.S. 113, 157–60 (1973) (analyzing the government's interest in fetal life); Webster v. Reproductive Health Services, 492 U.S. 490, 519 (1989) (same); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 870–77 (1992) (plurality opinion) (same).

372 *See Gonzales*, 550 U.S. at 157–60.

373 *See* City of Akron v. Akron Ctr. For Reprod. Health (*Akron I*), 462 U.S. 416, 442–46 (1983); Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 759–65 (1986).

overruled these decisions,[374] *Gonzales* suggested that the government's interest in protecting women was far broader than *Casey* implied: an interest that came into play even when abortion-related counseling was not at issue.[375] How broad was this interest? Would any abortion restriction protect women by lowering the chances of abortion regret?

Gonzales also encouraged AUL and NRLC to identify new compelling interests underlying abortion regulation. By doing so, abortion opponents hoped to replace viability with an earlier time when abortion could be banned.[376] However, some pro-lifers had a more ambitious plan.[377] *Gonzales* gave legislators so much room to regulate that some abortion opponents believed that the undue burden standard had become rational basis review by another name.[378] When the Supreme Court agreed to hear a challenge to Texas's H.B. 2, antiabortion lawyers tried to formalize that the undue burden test provided little protection for abortion rights.[379] *Whole Woman's Health* represented a setback for pro-life lawyers, reinvigorating the purpose prong of *Casey*.[380] However, as Part IV shows, the Court's most recent decision left uncertain what it would mean for a statute to have a legitimate purpose under *Casey*.

IV. A MEANINGFUL PURPOSE ANALYSIS: *WHOLE WOMAN'S HEALTH*

In 2016, the Supreme Court agreed to hear its first abortion case in more than a decade.[381] *Whole Woman's Health v. Hellerstedt*

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374 *See Casey*, 505 U.S. at 881–86.

375 *See Gonzales*, 550 U.S. at 157–60 (affirming that the "government may use its voice and its regulatory authority to show its profound respect for the life within the woman" in the absence of a requirement that the woman receive mandatory abortion-related counseling); *contra Casey*, 505 U.S. at 881–86 (upholding abortion-related counseling provision as not unduly burdensome).

376 *See supra* Part I.

377 *See, e.g.*, Ziegler, *Liberty and the Politics of Balance*, *supra* note 66, at 440–67.

378 *See* Brief for Respondents at 20, Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016) (No. 15-274).

379 *See, e.g.*, Brief of Amicus Curiae National Right to Life Committee Supporting Respondents at 3, *Whole Woman's Health*, 136 S. Ct. 2292 (No. 15-274) [hereinafter NRLC Amicus Brief, *Whole Woman's Health*].

380 *See Whole Woman's Health*, 136 S. Ct. at 2309–10.

381 *See id.* at 2300.

involved two parts of Texas' H.B. 2.[382] One required abortion doctors to have admitting privileges at a hospital within thirty miles.[383] A second mandated that abortion clinics comply with state regulations governing ambulatory surgical centers ("ASC").[384] This Part begins by exploring the strategic stakes of the case for both opposing social movements. Pro-lifers set aside a focus on the purpose of a law, arguing instead that the undue burden standard was so deferential that no analysis of a statute's purpose was required. As this Part shows next, the Court rejected this argument, weaving analysis of a statute's purpose into a balancing analysis. But as this Part concludes, *Whole Woman's Health* left open crucial questions about how courts should approach new justifications for abortion regulations.

A. *The Stakes of* Whole Woman's Health

AUL predicted that *Whole Woman's Health* would be "the most significant abortion case before the Supreme Court in decades."[385] Why did the case command so much attention? In Texas, the impact of H.B. 2 seemed likely to be profound. Most providers did not have and likely could not get admitting privileges because, among other reasons, not enough women went to the hospital after an abortion to meet threshold admitting requirements.[386] For many clinics, the ASC requirements would be prohibitively expensive, especially those demanding the overhaul of clinic facilities.[387] Data suggested that it would cost clinics $1 million to comply with the ASC regulations; it would be three times more to build a new facility.[388] If the Court upheld Texas' law, other states with antiabortion laws already on the books would be able to pass laws similar to H.B. 2.

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382 TEX. HEALTH & SAFETY CODE ANN. §§ 171.0031(a), 245.010 (West 2018).

383 § 171.0031(a)(1)(A).

384 § 245.010(a).

385 *AUL Represents State Legislators in Historic Supreme Court Case, Fights to Protect Health and Safety Standards for Women Vulnerable to Abortion Industry Abuses*, AM. UNITED FOR LIFE (Feb. 3, 2016), http://www.aul.org/blog/ aul-represents-state-legislators-in-historic-supreme-court-case-fights-to-protect-health-and-safety-standards-for-women-vulnerable-to-abortion-industry-abuses/.

386 *See* Brief for Petitioners at 31–32, *Whole Woman's Health*, 136 S. Ct. 2292 (No. 15-274).

387 *See id.* at 7, 25.

388 *See id.* at 7.

Pro-life lawyers hoped to establish that the undue burden standard required courts to uphold almost all abortion regulations.[389] Ever since *Casey* came down, opposing activists had contested the meaning of the standard.[390] Following *Gonzales*, abortion foes hoped that the Court would clarify that the standard was deferential and toothless.[391] When the Court agreed to hear a challenge to H.B. 2, it seemed that the time had come to establish what the undue burden standard really required.[392]

Abortion providers first challenged only the admitting-privileges law.[393] While the district court held that the requirement created an undue burden, the Fifth Circuit reversed.[394] Not long after the Fifth Circuit's decision, abortion providers returned to court, this time challenging the ASC regulation and arguing that the admitting-privileges mandate was unconstitutional as applied to clinics in McAllen and El Paso.[395] Although the district court again sided with Whole Woman's Health,[396] the Fifth Circuit reversed a second time.[397] In part, the court relied on the doctrine of *res judicata*, emphasizing that providers could have raised the same challenges during their original lawsuit.[398] The court further offered its perspective on what the undue burden standard required.[399] "Following *Carhart* and *Casey*," the court explained, "our circuit conducts a two-step approach, first applying a rational basis test, then independently determining if the burden on a woman's choice is undue."[400]

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[389] *See* Ziegler, *Liberty and the Politics of Balance*, *supra* note 66, at 442; NRLC Amicus Brief, *Whole Woman's Health*, *supra* note 379, at 1–3.

[390] *See* Ziegler, *Liberty and the Politics of Balance*, *supra* note 66, at 445.

[391] *See id.* at 460.

[392] *See, e.g.*, *id.* 460–64.

[393] *See* Planned Parenthood of Greater Tex. Surgical Health Serv. v. Abbott, 951 F. Supp. 2d 891, 895–96 (W.D. Tex. 2013), *rev'd in part*, 748 F.3d 583 (5th Cir. 2014).

[394] *See id.*at 909; Planned Parenthood of Greater Tex. Surgical Health Serv. v. Abbott, 748 F.3d 583, 605 (5th Cir. 2014).

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

[396] *See id.* at 673–74.

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

[398] *See id.* at 581.

[399] *See* Whole Woman's Health v. Lakey, 769 F. 3d 285, 273 (5th Cir. 2014).

[400] *Id*. at 293.

When the Supreme Court took the case, those on both sides disputed what the undue burden standard required.[401] Representing Whole Woman's Health, the Center for Reproductive Rights insisted that "[t]he undue burden standard strikes a careful balance between a woman's liberty to make decisions about childbearing . . . with the State's profound interest in potential life."[402] What did this balancing require? The Center argued that the courts had to weigh "the severity of the obstacle relative to the strength of the state's interest in imposing it."[403] To determine the purpose of the law, the Center argued, the Court should not blindly accept the legislators' account of what they were doing.[404] Instead, the Court sould evaluate whether a law reasonably advanced its stated end.[405]

What about the effect of the law? The Center argued that the decrease in abortion access would have an impermissible effect, "increasing the wait time for appointments at abortion facilities and the distances that many women would have to travel to reach those facilities."[406] Insisting that these effects had to be weighed against the health benefits (or lack thereof) created by the Texas law, the Center argued that H.B. 2 unduly burdened women's rights.[407]

Texas read the undue burden standard quite differently.[408] Texas argued that, rather than evaluating the strength of the government's purpose, the Court should recognize that "[c]onstitutional analysis of a statute's purpose is highly deferential."[409] The fact that lawmakers knew or should know that H.B. 2 would close clinics did not change the analysis.[410] "In any industry, businesses that do not meet governing regulations may not be able to operate, and a legislature may be well aware of that fact[,]" Texas reasoned.[411] "But that does not prove a legislative purpose to produce whatever effects may

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401 *See* Brief for Petitioners, *Whole Woman's Health*, *supra* note 386, at 30–32; Brief for Respondents, *Whole Woman's Health*, *supra* note 378, at 20.

402 Brief for Petitioners*, Whole Woman's Health*, *supra* note 386, at 44 (internal quotations and citations omitted).

403 *Id.* at 45.

404 *Id.* at 37.

405 *See id.* at 30–31.

406 *Id.* at 49.

407 *See id.*

408 *See* Brief for Respondents, *Whole Woman's Health*, *supra* note 378, at 20.

409 *Id.* at 31.

410 *See id.* at 42.

411 *Id.*

flow from closing a business, rather than to achieve the public-welfare benefits of the regulations."[412] When it came to the law's effects, Texas argued that most women would still live near metropolitan areas with an abortion clinic.[413]

B. *Purpose Under* Whole Woman's Health

In June 2016, a short-handed Court handed down a five-to-three decision adopting a balancing analysis similar to the one proposed by the Center.[414] Holding that *res judicata* did not bar the petitioners' challenge, the Court addressed the meaning of the undue burden standard.[415] The Court first established that under *Casey*, "courts consider the burdens a law imposes on abortion access together with the benefits those laws confer."[416] The Court pointed to two provisions analyzed by *Casey* as an example of how the test should apply: the parental-involvement law upheld in that case and the spousal-notification measure struck down by the Court.[417] In both of these cases, as *Whole Woman's Health* explained, the Court performed a "balancing."[418]

The Court further clarified what kind of evidence courts would use in performing this balancing.[419] Texas had argued that under *Gonzales v. Carhart*, the Court's earlier decision upholding the federal Partial Birth Abortion Ban Act, courts should defer to lawmakers' assessments of contested scientific evidence.[420] Because lawmakers believed that H.B. 2 was needed to protect women's health, as Texas asserted, the Court should defer to the legislatures' reasoning.[421] *Whole Woman's Health* held instead that courts should independently assess the purpose and effect of a law,[422] placing the most

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412 *Id.* at 45–46.
413 *See id.*
414 *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2300 (2016).
415 *See id.* at 2309–12.
416 *Id.*
417 *See id.*
418 *Id.*
419 *See id.* at 2310.
420 *See* Brief for Respondents, *Whole Woman's Health*, *supra* note 350, at 15.
421 *See id.* at 31.
422 *Whole Woman's Health*, 136 S. Ct. at 2309.

"weight upon evidence and argument presented in judicial proceedings."[423]

It was obvious that *Whole Woman's Health* treated the undue burden standard as something quite different from rational basis, and the Court viewed the purpose of a law as constitutionally meaningful and deserving of some scrutiny.[424] But how exacting was purpose analysis, and what precisely did *Whole Woman's Health* require as part of the purpose analysis? The Court's analysis of H.B. 2 offered some clues. When it came to the admitting-privileges provision, Texas claimed that the requirement would "ensure that women have easy access to a hospital should complications arise during an abortion procedure."[425] In evaluating the admitting-privileges requirement, the Court first emphasized the safety of abortion procedures: most procedures came early in pregnancy, and even in later trimesters, the rate of complications was exceedingly low.[426] Lawmakers had a less compelling purpose because "there was no significant health-related problem that the new law helped to cure."[427]

The Court next examined evidence about the benefit conferred by the admitting-privilege requirement as compared to the law previously in place.[428] Stressing that the rare complications that did arise emerged after a woman left an abortion clinic, the Court reasoned that there was no evidence that the requirement helped any women.[429] Against this lack of benefit, the Court weighed the burden created by the law.[430] The Court noted that the number of clinics in Texas fell by half after the government implemented the requirement.[431] The Court found enough evidence that H.B. 2 caused the clinic closures: most clinics could not meet admitting-privilege requirements because, among other reasons, abortion was safe enough that hospital admissions were rare.[432] Clinic closures, in turn, meant longer travel distances, "fewer doctors, longer waiting times, and

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423 *Id.* at 2310.
424 *See id.* at 2310–19.
425 *Id.* at 2298.
426 *See id.* at 2311–12.
427 *Id.* at 2311.
428 *See id.* at 2310.
429 *See id.* at 2311–12.
430 *See id.* at 2313.
431 *See id.* at 2312–13.
432 *See id.* at 2312.

increased crowding."[433] These burdens, weighed against the lack of a benefit created by the requirement, led the Court to hold the admitting-privilege requirement unconstitutional.[434]

The Court applied a similar analysis to the ASC provision. Because many women received abortion via medication or procedures performed through the birth canal, the Court reasoned that many of the ASC requirements would not benefit women.[435] Even in the case of surgical abortions, most of the ASC requirements were irrelevant.[436] Emphasizing the safety of abortion, the Court concluded that the ASC provision conferred no benefit compared to the regulations that Texas had previously put in place.[437]

What can we glean about purpose analysis from *Whole Woman's Health*? To be sure, the membership of the Court is in flux, and the Court's vision of the undue burden standard could easily change again. Moreover, *Whole Woman's Health* did not answer many of the crucial questions surrounding purpose analysis in the abortion context. Before the Court's decision, those in opposing movements clashed about how many interests were legitimate in the abortion context.[438] Should lawmakers limit themselves to the interests recognized in *Casey* and *Gonzales*? Or, were there a potentially limitless list of governmental interests that could justify abortion regulations? Some key pro-life initiatives depended on the Court's recognition of more governmental interests.[439] *Whole Woman's Health* left uncertain the fate of this effort.[440]

And how would courts determine if a law addressed a real problem? It seemed straightforward when lawmakers claimed that a law had a tangible, quantifiable benefit, like reducing post-abortion complications or more effectively addressing them.[441] But how would the Court resolve a law like the federal PBABA? What procedure would the Court use to evaluate if there was a problem with

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433 *Id.* at 2313.
434 *See id.*
435 *See id.* at 2316.
436 *See id.*
437 *See id.*
438 *See* Ziegler, *Liberty and the Politics of Balance*, *supra* note 66, at 456–60.
439 *See id.*
440 *See id.* at 462–63.
441 *See Whole Woman's Health*, 136 S. Ct. at 2310–12.

public respect for human life? Or a lack of dignity assigned to fetal life?

Whole Woman's Health also shed little light on how important the purpose prong was in relation to the effect that a law would have on abortion access.[442] If a law advanced a compelling interest, however a court defined it, would that justify significant burdens on the abortion decision? Is the purpose prong more important than the effect prong or vice versa?

These are significant ambiguities. The future of many of the most important antiabortion proposals turns partly on how the Court answers open questions about the purpose analysis under *Casey*.[443] In promoting twenty-week bans and dismemberment prohibitions, abortion opponents hope that the Court will replace viability with an earlier biological marker: the point at which unborn children can theoretically experience pain.[444] *Whole Woman's Health* does not illuminate how or when the courts should acknowledge new governmental interests, especially when the government's justification relates to fetal life rather than women's health.[445] Pro-lifers also champion scientifically contested or abstract justifications for laws involving matters like D&E, the disposal of fetal remains, and the prohibition of later abortions.[446] When it comes to abstract governmental interests, like the preservation of fetal dignity, the Court's most recent decision offers little guidance to lower courts.[447] By contrast, when the purpose for a law depends on disputed evidence, *Whole Woman's Health* offers only a few clues about how courts should resolve these battles or how to read *Gonzales*' deference on this subject.

How should the Court resolve these ambiguities? Part V develops a doctrinal approach that will clarify the application of *Whole Woman's Health*, offering more guidance to legislators and protecting the delicate balance struck by *Casey* and its progeny.

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442 *See* Ziegler, *Liberty and the Politics of Balance*, *supra* note 66, at 462–63.

443 *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 837 (1992) (plurality opinion).

444 *See supra* notes 101, 105 and text accompanying.

445 *See Whole Woman's Health*, 136 S. Ct. at 2326.

446 *See supra* Part I.

447 *See Whole Woman's Health*, 136 S. Ct. at 2309–11.

V. HOW TO MEASURE PURPOSE: A CLARIFICATION

Whole Woman's Health provides a useful starting point for courts seeking to develop a more coherent purpose analysis. This Part proposes a doctrinal clarification that courts should use in understanding the purpose prong of *Casey* and *Whole Woman's Health*. Next, this Part explores how this analysis would apply to some of the antiabortion legislation now under consideration.

Whole Woman's Health, like *Casey* and *Gonzales*, held open the possibility that legislators could identify new justifications for regulating abortion. The question, however, is how courts should approach both new justifications for abortion regulations and familiar ones. Lawmakers introducing new abortion legislation should first have to articulate a legislative goal with adequate specificity. Instead of stating that a law protects fetal dignity, for example, legislators should have to define fetal dignity and explain *how* a law preserves it. Similarly, when lawmakers claim to protect women's health, legislators should explain the precise benefit that a law will achieve.

This requirement is reconcilable with the Court's past decisions. In *Gonzales*, for example, Congress did not clearly define fetal dignity.[448] Nonetheless, as the Court noted, Congress did explain why a ban on dilation and extraction—as opposed to any other abortion procedure—raised special concern about fetal dignity.[449] Similarly, in *Whole Woman's Health*, the Court defined the relevant government interests with specificity: rather than examining an abstract interest in women's health, for example, the Court considered whether an admitting-privilege requirement would make it easier for women to receive appropriate hospital care.[450]

Next, courts should apply a three-part test to gauge the strength of a statute's purpose, examining: (1) whether a law addresses an identifiable problem; (2) whether the law improves on the results achieved by previous policies; and (3) whether the law has some quantifiable (if not numerically specific) benefit. These requirements crystallize analysis already at work in *Casey* and its progeny.[451] How might they apply in practice?

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448 *See* Gonzales v. Carhart, 550 U.S. 124, 145–47 (2007).

449 *See id.*

450 *See Whole Woman's Health*, 136 S. Ct. at 2311–13.

451 *See* Ziegler, *Liberty and the Politics of Balance*, *supra* note 66, at 463–467.

First consider the requirement of an identifiable problem. In some cases, application of this requirement will be straightforward. When lawmakers claim that a law protects women from the psychological consequences of abortion, for example, the frequency and severity of post-abortion psychological sequelae should be measurable. In other instances, when lawmakers claim a more abstract interest, such as protecting fetal dignity, it might be harder to document the problem that lawmakers set out to solve. As an initial matter, lawmakers should explain how fetal dignity has been disrespected beyond the fact that abortion—which the Court still treats as a protected liberty—is legal. Lawmakers should also provide examples of when and how members of the public, physicians, or other relevant constituencies have demonstrated disrespect for fetal life. Requiring legislators to identify a problem will help courts distinguish laws with a legitimate purpose from those prohibited by *Casey*.[452]

Next, courts should examine whether a law improves on the result achieved by previously-implemented policies. Any abortion regulation could arguably enhance respect for fetal dignity. But *Casey* and *Whole Woman's Health* emphasize a balance between women's protected liberty and the government's interest in fetal life.[453] Allowing states to justify any abortion regulation by pointing to an interest in fetal dignity would eviscerate this balance. By contrast, mandating that the government explain how a law adds value, compared to previously implemented abortion regulations, will help courts distinguish laws that effectively advance a valid purpose.

Take, as an example, a ban on D&E or dismemberment abortion. D&E may be considered as gruesome as D&X.[454] Abortion opponents claim that such a law advances an interest in fetal dignity because D&E is especially gruesome.[455] But lawmakers and abortion opponents have not explained how D&E is especially likely, compared to other abortion procedures, to undermine respect for fetal

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[452] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992) (plurality opinion).

[453] *See id.* at 870–71; *Whole Woman's Health*, 136 S. Ct. at 2309–11.

[454] *See* Gonzales v. Carhart, 550 U.S. 124, 182 (2007) (Ginsburg, J., dissenting) ("Nonintact D & E could equally be characterized as 'brutal' [as D&X,] involving as it does "tear[ing] [a fetus] apart" and "ripp[ing] off" its limbs.").

[455] *See* TALKING POINTS, *supra* note 76, at 2.

life or affect attitudes toward fetal life.[456] By contrast, in *Gonzales*, the Court emphasized details about partial-birth abortion that made it resemble normal delivery.[457] For this reason, D&X raised special concerns not associated with other abortions.[458] No similar argument seems to apply to bans on D&E.[459]

Finally, courts should demand proof that a law has some quantifiable benefit. This benefit need not be a specific number of people benefitted by a law, but lawmakers should have the burden of demonstrating a concrete benefit. If a benefit is too abstract for courts to meaningfully measure, the balance commanded by *Casey* will almost certainly be at risk.[460]

How could the government quantify the benefit that a statute delivers? Consider one of the latest mandatory-counseling laws, requiring women to receive information about the possibility of reversing medication abortion.[461] Those backing these laws emphasize that they protect women who regret having an abortion after taking part of a two-drug protocol often required for medication abortion.[462] To quantify the benefit provided by such a law, lawmakers should bring forth evidence that medication abortion is reversible. Legislators should also have some evidence—ideally peer-reviewed studies—indicating that a reasonable number of women regret choosing medication abortion and would benefit from a reversal procedure if an effective one existed. If no such evidence exists, as some researchers suggest, then such a law has no legitimate purpose.[463]

What about more abstract goals, like enhancing respect for fetal life? It may be impossible to document that a law has a positive effect on attitudes about fetal dignity. How would lawmakers know if

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[456] *See* Ziegler, *Liberty and the Politics of Balance*, *supra* note 66, at 465.

[457] *See Gonzale*s, 550 U.S. at 157–63.

[458] *See id.* at 160 (distinguishing D&X from D&E).

[459] *See id.*

[460] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992) (plurality opinion).

[461] ABORTION PILL REVERSAL, *supra* note 91.

[462] *See, e.g.*, ABORTION PILL REVERSAL, *supra* note 91; *see also* Ruth Graham, *A New Front in the War Over Reproductive Rights: 'Abortion Pill Reversal*,*'* N.Y. TIMES (July 18, 2017), https://www.nytimes.com/2017/07/18/magazine/a-new-front-in-the-war-over-reproductive-rights-abortion-pill-reversal.html.

[463] *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2300 (2016); Graham, *supra* note 462.

prior to the enactment of a law, people viewed fetal life with disrespect? And how could legislators demonstrate that a statute reshaped anyone's views? It may be possible for lawmakers to explain more precisely what respect for fetal life means and how it could be evaluated. If so, requiring some quantification of a benefit would ensure that legislators do not simply claim an abstract goal to cover up an impermissible purpose, such as discrimination against women or a desire to obstruct abortion access. If lawmakers cannot find a way to measure the benefit of a law when it comes to respect for life, then courts should factor the lack of a proven benefit into the balancing that *Casey* commands.[464]

We can get a better sense of this analysis of *Casey*'s purpose prong by applying it to current legislation. Those promoting twenty-week bans claim that such laws prevent fetal pain and thereby enhance respect for fetal life.[465] Courts would begin by asking lawmakers to define their purported interest with as much specificity as possible; rather than referring to hard-to-pin-down ideas about dignity, legislators would claim an interest in preventing fetal pain.

Next, a court would determine whether twenty-week bans solve a documentable problem. Evidence on the existence of fetal pain at or before the twentieth week of pregnancy is contested.[466] Pain receptors are present at this point in pregnancy, and as a result, some researchers argue that fetal pain is possible by the twentieth week.[467] Most published studies argue that other requirements for the experience of fetal pain do not develop until later in pregnancy, and the American College of Obstetricians and Gynecologists has concluded that fetal pain is not possible as early as twenty weeks' gestation.[468] At best, the evidence regarding the possibility of fetal pain

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[464] *Casey*, 505 U.S. at 846.

[465] *See, e.g.*, *supra* notes 12, 13 and text accompanying.

[466] *See* Pam Belluck, *Complex Science at Issue in Politics of Fetal Pain*, N.Y. TIMES (Sept. 16, 2013), https://www.nytimes.com/2013/09/17/health/complex-science-at-issue-in-politics-of-fetal-pain.html?_r=0,%20archived%20; Glenn Cohen, *The Flawed Basis Behind Fetal-Pain Laws*, WASH. POST (Aug. 1, 2012), https://www.washingtonpost.com/opinions/the-flawed-basis-behind-fetal-pain-abortion-laws/2012/08/01/gJQAS0w8PX_story.html.

[467] *See, e.g.*, Expert Report, *supra* note 68, at 8.

[468] For an overview of the research up until 2005, see Susan J. Lee et al., *Fetal Pain: A Systematic Multidisciplinary Review of the Evidence*, 294 J. AM. MED. ASS'N 947, 952 (2005). For ACOG's position, see Press Release, Am. Coll. of Obstetricians and Gynecologists, Facts Are Important: Fetal Pain (July 2013),

is disputed, and so courts would regard the problem supposedly solved by twenty-week bans as questionable.

Even if such a law did address a real problem, courts would ask whether a twenty-week ban improved on the result achieved by previously implemented laws and whether such a law had a quantifiable benefit. Many states ban or heavily regulate abortions later in pregnancy, at or near the time of viability, when fetal pain is more likely.[469] Other states, like Utah, require fetal anesthesia.[470] Given the weak evidence supporting fetal pain at twenty weeks, it is not clear that twenty-week bans add significant value compared to existing regulations of later abortions.[471]

After applying this analysis of a law's purpose, a court would consider the effect of a law under *Casey*. Only slightly more than one percent of women have abortions after the twentieth week.[472] But as *Casey* and *Whole Woman's Health* reason, the question is how a law impacts the women most directly affected by a law.[473] For these women, a twenty-week ban would eliminate access to abortion altogether before viability—the endpoint recognized by *Casey*.[474] Given a state's relatively weak interest in preventing pain and the severe effect such a law would have on the women directly affected by a twenty-week ban, a court would likely strike down a fetal-pain law.

Laws regulating the disposal of fetal remains would present a closer case.[475] On one hand, it would be hard for lawmakers to explain with adequate specificity what the purpose of such a law would be or to provide concrete evidence that such a law would advance

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https://www.acog.org/-/media/Departments/Government-Relations-and-Outreach/FactAreImportFetalPain.pdf.

[469] *See State Policies on Later Abortion*, GUTTMACHER INST. (Aug. 1, 2018), https://www.guttmacher.org/state-policy/explore/state-policies-later-abortions.

[470] *See, e.g.*, Ashley Fantz, *Utah Passes "Fetal Pain" Abortion Law Requiring Anesthesia*, CNN (Mar. 29, 2016, 3:24 PM), http://www.cnn.com/2016/03/29/health/137utt-abortion-law-fetal-pain/index.html.

[471] *See* Belluck, *supra* note 466; Cohen, *supra* note 466.

[472] *See, e.g.*, *Later Abortion*, GUTTMACHER INST. (Jan. 20, 2017), https://www.guttmacher.org/evidence-you-can-use/later-abortion.

[473] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 894 (1992) (plurality opinion); Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2320 (2016).

[474] *See Casey*, 505 U.S. at 846.

[475] *See* Grant, *supra* note 79.

that interest. On the other hand, lawmakers could argue that mandating the burial or cremation of fetal remains would improve on what the law previously allowed—the treatment of fetal remains as medical waste.[476] In *Gonzales*, the Court recognized an interest in protecting respect for life partly because dilation and extraction seemed more likely to coarsen attitudes toward fetal life than comparable alternatives that did not resemble ordinary childbirth.[477] Lawmakers might similarly be able to explain how the treatment of fetal remains as medical waste is especially problematic. Much will depend on whether lawmakers can define an interest clearly enough and provide some proof that a change in the law will enhance respect for fetal life. Those challenging such laws have argued that they raise the cost of an abortion by requiring abortion clinics to undertake costly burial or cremation procedures.[478] If the government cannot adequately describe the benefit provided by such a law, it might be unconstitutional as well.[479]

CONCLUSION

Some of the inconsistency defining the Court's abortion jurisprudence stems from the shifting treatment of the justification for abortion regulations. The Court has wavered in its willingness to recognize new rationales for restricting abortion and its tendency to broaden existing interests. This incoherence has real stakes for rights involved in the abortion conflict. Pro-life incrementalists have championed new legislative interests to allow lawmakers to ban abortion earlier in pregnancy, to covertly reshape the Court's view of fetal personhood, and to allow for a wider range of regulations.

Whole Women's Health does not fully explain how courts should evaluate the purpose of abortion regulations. To clarify how judges should measure the claimed benefit of a law, the Court should demand more precision when it comes to the problem and solution that lawmakers have identified. Anything less will undermine the careful balance *Casey* demands.

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476 *See id.*

477 *See* Gonzales v. Carhart, 550 U.S. 124, 157–63 (2007).

478 *See* Grant, *supra* note 79.

479 *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2310 (2016).