Undoing *Hellerstedt*

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Leah Litman, *Unduly Burdening Women's Health: How Lower Courts are Undermining* Whole Women's Health v. Hellerstedt, 116 **Mich. L. Rev. Online** 50 (2017).

The Supreme Court's 2016 decision in *Whole Women's Health v. Hellerstedt*[1] has been widely heralded as a victory for reproductive rights. There, a 5-3 majority of the Court struck down two provisions of H.B. 2, the abortion bill that then-Senator Wendy Davis famously tried to filibuster in 2013. One of the challenged provisions required abortion providers to have admitting privileges at local hospitals, while the other required abortion clinics to be outfitted as ambulatory surgical centers. According to H.B. 2's proponents, both measures were designed to protect women's health. Opponents of the bill countered that the two measures would effectively shutter the majority of abortion clinics in Texas, which has roughly 5.4 million women of reproductive age.[2]

In the end, *Hellerstedt* did not prevent the closure of the clinics. Indeed, when the admitting privileges provision went into effect, it caused more than half of the clinics in the state to close.[3] Instead, *Hellerstedt* is seen as a victory because the Court affirmed a woman's constitutional right to choose an abortion, and in so doing, provided more guidance for determining whether and how that right has been unconstitutionally infringed. Under the undue burden standard announced in 1992's *Planned Parenthood v. Casey*,[4] lawmakers bear the burden of showing that a challenged abortion regulation does not unduly burden the right to abortion by placing a substantial obstacle in the path of women seeking to terminate their pregnancies. As the Court explained in *Casey*, "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."[5]

As Professor Leah Litman notes in her recent article, *Unduly Burdening Women's Health: How Lower Courts are Undermining* Whole Woman's Health v. Hellerstedt, for years, lower courts have struggled to apply the undue burden test, questioning whether––or how deeply––it requires judges to delve beyond the stated purposes of a law to assess its actual impact on women seeking abortions. Indeed, the Fifth Circuit, the intermediate appellate court that reviewed the *Hellerstedt* case before it proceeded to the Supreme Court, adopted a more deferential posture, accepting without further scrutiny the legislature's claims that the regulations were intended to secure women's health and dismissing concerns that the regulations unduly limited abortion access without actually delivering improved health outcomes.[6]

Hellerstedt, however, attempted to resolve these issues, providing much-needed clarity as to the appropriate standard. According to the Court, reviewing courts must consider "the burdens a law imposes on abortion access together with the benefits" when determining if an abortion restriction imposes an undue burden. As importantly, the Court made clear that the standard requires reviewing courts to independently assess whether an abortion restriction furthers a valid purpose rather than blindly deferring to any justification that the state claims is reasonable.

Abortion rights advocates praised *Hellerstedt* for settling, once and for all, a contentious debate about the appropriate level of scrutiny and judicial review for abortion regulations.[7] However, "states and the federal courts of appeals do not seem to have gotten the message." (P. 51.) As Litman explains in her timely article, states and courts of appeals have relied on various approaches, including recycling

arguments the Court rejected in *Hellerstedt*, to limit the decision's force. Specifically, state legislatures have defended new abortion restrictions on the ground that the new laws aim to protect fetal life, as opposed to maternal health. *Hellerstedt*, they argue, applies only to abortion restrictions legislated in the interest of protecting women's health. Abortion restrictions that are premised on other grounds, they maintain, are outside of *Hellerstedt*'s ambit. This narrow interpretation of *Hellerstedt*, Litman notes, is utterly inconsistent with both *Hellerstedt* and *Casey*. After all, *Casey* applied the undue burden standard to invalidate a range of abortion restrictions, including restrictions that purported to promote fetal life as well as those that were aimed at promoting maternal health and safety. (Pp. 51-53.)

But it is not just that lower courts have narrowly interpreted *Hellerstedt*'s mandate to apply only to those measures aimed at promoting maternal health; lower courts have also interpreted the decision to require courts to engage in extensive—and quite specific—fact-finding before invalidating—or even enjoining—a challenged restriction. Litman cites a recent decision, *Planned Parenthood of Arkansas & Eastern Oklahoma v. Jegley*, as an example of this impulse. (Pp. 53-55.) There, the Arkansas legislature passed a law requiring medication-abortion providers to have a contract with a physician with hospital admitting privileges. Days before the provision was to take effect, Planned Parenthood filed suit seeking to enjoin enforcement of the law. Focusing, as the *Hellerstedt* Court had, on the restriction's likely impact on access to and availability of abortion services, the federal district court below issued a preliminary injunction preventing the state from enforcing the restriction. The district court noted that, like Texas admitting the privileges requirement invalidated in *Hellerstedt*, the Arkansas restriction, if it were to take effect, would result in the shuttering of abortion clinics in that state. As Litman notes, the district court found "little evidence of the requirement's benefits but considerable evidence of the extent of its burdens" on abortion access.

Nevertheless, on appeal, the Eighth Circuit vacated the preliminary injunction on the ground that the district court "did not define or estimate the number of women who would be unduly burdened" by the requirement because it "did not determine how many women would face increased travel distances." Further, the district court failed to "estimate the number of women who would forgo abortions" or "estimate the number of women who would postpone their abortions" because of the restriction. As Litman explains, the *Hellerstedt* Court did not undertake—nor did it require—such detailed and extensive fact-finding, relying instead on evidence of "the number of abortions that were performed in the state, the number of clinics that would be left in the state to perform them, and the location of the clinics" in order to determine that the challenged provisions posed an undue burden. (P. 54.)

In addition to employing interpretive tactics designed to limit *Hellerstedt*'s reach, Litman notes, some lower courts have been more upfront about their opposition to *Hellerstedt*. Recently, she writes, the Eighth Circuit invalidated a law that would have prohibited physicians from performing abortions when the physician could detect a fetal heartbeat.[8] Although the court acknowledged that "controlling Supreme Court precedent dictate[d] the outcome," it nonetheless expressed its strong reservations, urging the Supreme Court to "reevaluate" its abortion jurisprudence. (P. 58.)

The landscape that Litman sketches is discomfiting, but not entirely unsurprising. Supreme Court decisions recognizing rights in contested fields often prompt some degree of pushback—or even confusion—from lower courts charged with following new precedents. The aftermath of *Lawrence v. Texas* is instructive on this point. There, the Court struck down a Texas statute criminalizing same-sex sodomy. In doing so, the Court gestured toward a broader commitment to LGBT equality and civil rights—a commitment that LGBT rights advocates then used to challenge other laws that discriminated on the basis of sexual orientation. In reviewing these challenges, many state and lower courts sought to limit *Lawrence*'s reach. To do so, they relied on many of the same interpretive techniques that Litman documents in her assessment of the post-*Hellerstedt* landscape. They insisted that *Lawrence* was strictly limited to anti-sodomy prohibitions and only protected private sexual activity between

consenting adults. As such, it could not be applied to protect gays and lesbians seeking to adopt or to foster children,[9] nor did it preclude state regulation of "obscene material" being sold in a commercial setting.[10] And even as the Supreme Court built upon *Lawrence* to extend the right to marry to same-sex couples in *Obergefell v. Hodges*, this development was also marked by an effort to limit that decision's reach. While lower courts acknowledged that *Obergefell* legalized same-sex marriage, they expressed doubt that the decision went so far as to guarantee married same-sex couples access to public benefits and parental recognition.[11] Like the multi-headed hydra of myth, from each victory springs a new effort to restrict these gains. For example, In June 2017, Texas Governor Greg Abbott, signed into law S.B. 8, which bans the dilation and evacuation abortion procedure ("D & E"), the safest and most common method of abortion after approximately 15 weeks of pregnancy, with no exception for rape or incest.[12] S.B. 8 also bans fetal tissue donation, and requires that all tissue obtained during an abortion be buried or cremated.[13]

Although Litman does not advert directly to this recent history, it looms large as she identifies the implications of the current effort to cabin *Hellerstedt*'s reach. As she explains, "[e]ven if the current Supreme Court were to step in and correct the courts of appeals and states' resistance to *Hellerstedt*, there's no guarantee the harmful effects of these laws would be reversed." (P. 59.) When allowed to take effect, she argues, many of the restrictions upheld under narrow interpretations of *Hellerstedt* will "result in the closure of clinics, and when a clinic closes, there's the possibility that it will not reopen, even if the restriction that led to its closure is subsequently invalidated." (P. 59.) More ominously, "[s]everal of the judges on President Trump's list of potential nominees to the Supreme Court authored or joined the opinions that wrote off *Hellerstedt* as all but limited to its facts." (P. 60.) If elevated to the high court, these jurists will not only have the opportunity to cabin *Hellerstedt*'s reach—they will have the opportunity to overrule it altogether.

On this account, although *Hellerstedt* has been viewed as a monumental victory for reproductive rights, Litman warns us that the devil is in the details. In the hands of those resistant to the project of reproductive rights, *Hellerstedt* is a paper victory—and perhaps even a defeat.

1. 579 U.S. ___ (2016); 136 S. Ct. 2292 (2016).
2. Guttmacher Inst., State Facts About Abortion: Texas (2014), *available at* https://www.guttmacher.org/sites/default/files/pdfs/pubs/sfaa/pdf/texas.pdf.
3. Alexa Ura, et al., *Here Are the Texas Abortion Clinics That Have Closed Since 2013*, Texas Trib. (June 28, 2016), https://www.texastribune.org/2016/06/28/texas-abortion-clinics-have-closed-hb2-passed-2013/. At this writing, the number of abortion clinics in Texas stands at 21, down from 40 in 2013. *Where to Get An Abortion in Texas*, NARAL Pro-Choice Tex., http://needabortion.org/en/ (last visited Apr. 6, 2018).
4. 505 U.S. 833 (1992).
5. 505 U.S. 833, 877 (1992).
6. Whole Woman's Health v. Cole, 790 F.3d 563, 584-90 (5th Cir. 2015), *modified*, 790 F.3d 598 (5th Cir. 2015), *rev'd sub nom*. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016).
7. *See*, *e.g.*, *The Undue Burden Standard After* Whole Women's Health v. Hellerstedt, Ctr. For Reprod. Rights, https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/WWH-Undue-Burden-Report.pdf (last visited Apr. 6, 2018).
8. MKB Mgmt. Corp. v. Stenehjem, 795 F.3d 768, 755 (8th Cir. 2017).
9. *See*, *e.g.*, Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804, 816-17 (11th

Cir. 2004).

10. *See*, *e.g.*, Williams v. Attorney Gen. of Ala., 378 F.3d 1232 (11th Cir. 2004) (refusing to apply *Lawrence* to invalidate a criminal ban on sex toys).
11. *See* Pavan v. Smith, 137 S.Ct. 2075 (2017) (holding that Arkansas may not, consistent with *Obergefell v. Hodges*, deny married same-sex couples the opportunity to be listed as parents on a birth certificate); Turner v. Pidgeon, 538 S.W.3d 73 (Tex. 2017), cert. denied, 138 S. Ct. 505 (2017) (considering whether *Obergefell* answered the question of whether a municipality is required to provide employment benefits to same-sex couples).
12. This provision is currently being challenged in federal court. *See* Complaint, *Whole Women's Health v. Paxton*, 1:17-cv-00690 (June 20, 2017).
13. The fetal tissue cremation requirement was proposed only a few days after *Whole Women's Health v. Hellerstedt* was announced. A federal district court blocked the enforcement of the provision. *See* Order, *Whole Women's Health v. Hellerstedt*, 1:16-cv-01300-SS (Jan. 27, 2017).

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