

## What Constitutes a “Due” Burden on Women’s Access to Abortion: A Cultural Discourse Analysis of *Whole Woman's Health v. Hellerstedt*

Gao Xueying, National University of Singapore

### Abstract

We can find numerous international treaties and legal documents that support women’s choice for safe and legal abortion. However, there are constant different, incompatible and even opposing discourses around abortion globally. This paper examines a 2016 legal case (*Whole Women’s Health v. Hellerstedt*) to explore how anti-abortion discourse in the U.S. has found its way into the legal text. I begin by addressing women’s right to abortion as a human rights issue and then I investigate how U.S. abortion law entangles with social and cultural reality in the country; I then offer a close reading of the Supreme Court’s judgement and discuss the implications of such a legal text. Public opinions on reproductive rights in the U.S. are closely related to the dynamics between religious culture and feminist activism, and political manipulation leads to divided opinions over the issue. A close reading of the case shows that the court’s constant emphasis on “right to privacy” sets the stage for the current fragility of the reproductive rights in the U.S. cultural and political context. First, it opens a gate for anti-abortion groups to burden women with moral responsibility; second, under TRAP laws it becomes difficult for the abortion providers to justify their stand. I further argue that the undue burden test, which was central to winning this case, is not a strong test for future lawsuits over abortion rights.

*Keywords:* abortion law, human right, law and culture, reproductive right, undue burden

## Introduction

According to the Center for Reproductive Rights (2011), “International legal support for a woman’s right to safe abortion are found in numerous international treaties and other instruments” (p.1). However, there are constant different, incompatible, and even opposing discourses around abortion globally (Pierson & Bloomer 2017; Stettner, Ackerman, Burnett, & Hay, 2017; Macleod, Sigcau, & Luwaca, 2011; Stephens, Jordens, Kerridge, & Ankeny, 2010). Anti-abortion discourse in the United States has found its way into the legal text (Ferree et al., 2002). Since abortion became legalized in 1973 in the U.S., over a thousand state abortion restrictions have been enacted, with more than one third enacted since 2010 (Guttmacher, 2018). Many of those restrictions are “TRAP” (Targeted Regulations of Abortion Provisions) laws targeted at the abortion providers by imposing on them burdensome and unnecessary requirements, in order to block women from having access to abortion (Center for Reproductive Rights, 2015). While upholding women’s right to choose, the U.S. legal system, with its particular approach toward abortion, has invited more and more restrictions on abortion providers in the last few decades, resulting in substantial obstacles for women seeking abortion services. Such an unfavorable legal environment for abortion embodies the deep cultural divide and reflects political manipulation of the issue.

In 2013, the Texas legislator enacted House Bill 2 (H.B.2), a bill containing several unfavorable requirements for the abortion clinics in the state: (1) “the admitting-privileges requirement”, requiring a doctor who performs abortion surgeries to “have admitting-privileges at a hospital that is located no more than 30 miles from the location at which the abortion is performed or induced” (H.B.2, 2013, p. 2); and (2) “the surgical-center requirement”, which requires that “the minimum standards for an abortion facility must be equivalent to the minimum standards for ambulatory surgical centers” (p. 12). Such provisions significantly affect women’s access to abortion within Texas. Endeavors to prevent the provisions from taking effect failed at the state level. After the admitting privileges requirement took effect in November 2013, the number of abortion clinics in the state dropped from 42 to 19. After that, a group of abortion providers (*Whole Women’s Health etc.*) sued the Texas state in an attempt to shut down the provisions, and finally this case made it to the U.S. Supreme Court. In 2016, the Supreme Court held 5 to 3 in *Whole Woman’s Health v. Hellerstedt* (2016) that the above-mentioned provisions of H.B.2 were unconstitutional since they burdened women’s access to abortions.

*Whole Women’s Health v. Hellerstedt* (*Hellerstedt*) is allegedly the most important U.S. Supreme Court decision on abortion since *Planned Parenthood of Pennsylvania v. Casey* (1992) – the 1992 landmark abortion case that crafted the “undue burden” standard (Robinson, 2016). *Hellerstedt* reasserts women’s right to abortion but at the same time reflects the hostile social and political environment that women are facing in accessing safe abortions. I want to use this case to examine how the legal efforts against abortion in the public sphere are mixed with discourses that intrude upon women’s autonomous private choices, and the implications behind such reality. In the first section, I begin by addressing the human rights at stake here, and offer a common ground for the discussion on this case; subsequently, I try to contextualize this case in the socio-political environment in the U.S. throughout recent history to better understand how abortion discourse is formed in U.S. legal texts; next, I turn to the social and cultural perception of abortion in the U.S., and the socio-cultural reality faced by women seeking abortion there; in the last section, I offer a close reading of the Supreme Court’s judgments and the abortion discourse created by similar legal texts. Overall, I want to offer a reading of *Hellerstedt* as a “victorious” case that yet exposes the disputes and uncertainty of American women’s right to abortion in the current social and political context.

## **Abortion as Human Right**

The case here appears to be about the economic rights of some medical clinics, since the immediate consequence is the closure of the abortion clinics. However, in reality, what lies behind it is women's right to abortion in general. By forcing abortion facilities to close down, H.B.2 significantly blocks women's access to safe and legal abortion. Various reasons push a woman to seek abortion: financial or social hardship, pregnancy that arises from rape or incest, malformation or disease condition of the fetus, her own unhealthy mental state, or risk of maternity death, along with many other personal reasons. When affordable abortion is legally unavailable and requisite services are not provided, women may resort to unsafe abortions to terminate unwanted pregnancy in illegal clinics or through self-inducing abortions. Such procedures can lead to life-threatening complications and cause serious social issues. The right to abortion is closely related to many fundamental human rights of women, such as right to life, right to health, right to gender equality and non-discrimination. Legal restrictions on women's abortion right or reproductive right leave other rights at risk, too. Therefore, it is necessary and legitimate for national institutions to protect a woman's right to safe and legal abortion.

Overall, women's right to safe and legal abortion is becoming recognized as a fundamental human right in different parts of the world, mostly for health concerns. Human rights treaties constantly emphasize the link between maternal death and unsafe abortions (CESCR, 2012; CEDAW, 2014). Article 14(2)(c) of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (2003) prompts State Parties to "protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus." The Protocol explicitly states women's right to abortion.

However, women's right to abortion is not just a health issue; it also relates to women's right to gender equality and non-discrimination. The Human Rights Committee (2000) further linked women's reproductive rights to equality of rights between men and women. CEDAW (2014) also emphasizes that "it is discriminatory for a State Party to refuse to provide legally for the performance of certain reproductive health services for women". HRC's decision in *K.L. v. Peru* (2003) is a formal application of human rights treaties to a woman's reproductive right. The Committee finds that in "compelling a minor, who was pregnant with an anencephalic fetus to carry the pregnancy to term", Peru had violated her rights under "Article 2 (right to an effective remedy), 7 (right to be free from cruel, inhuman, or degrading treatment), 17 (right to privacy) and 24 (right to special protection as a minor) of ICCPR".

## **Socio-legal Context of the Case**

Internationally, current laws pertaining to abortion are very diverse due to various religious, moral, and cultural factors. With the help of human rights advocacy, in recent history we have seen progress in the enforcement of abortion right. According to the Center for Reproductive Rights (2019), by 2019, abortion is permitted in at least some cases across 133 countries. Among them, 59 permit abortion to protect women's life and health; 13 permit abortion for socio-economic reasons; and 61 (primarily located in the Global North with the U.S. included) have the most liberal abortion laws. In Chile, where abortion used to be criminalized without exception, legislation permitting abortion under limited circumstances was approved in 2017 in respect to the human rights prodding of the United Nations (UN), CESCR, CEDAW and United Nations Human Rights Council (UNHRC). However, despite the global trend of

liberalizing abortion laws, the world still constantly witnesses a receding trend as well. Europe, which used to have the most liberal abortion laws, is now seeing a countermovement (Zampas & Gher, 2008).

In the United States, the current status of women's abortion right is shaped by two historical conjunctures. The first one is the U.S. Supreme Court's decision on *Roe v. Wade* in 1973, which affirmed the constitutionality of abortions conducted within the first two trimesters of pregnancy based on women's right to privacy. Before *Roe*, abortion was mostly banned across the states, keeping it an unspeakable discourse between doctors and countless women who would not talk about it in public (Hendel 2012). The illegal status of abortion jeopardized women's life and put them in endless despair. *Roe's* "triumph" of abortion right happened largely because of a series of abortion reform movements from 1960s to 1970s. The newly emerging feminist grassroots groups of the time, as well as the early Democratic involvement in the abortion rights movement (Hendel, 2012) constitute the context for legalization of abortion in the U.S. However, since that court decision was made, abortion has become more and more politicized in the United States, leading to a clamor for a reversing of the case.

The second historical conjuncture is in the 1990s, when the U.S. abortion law started to target abortion providers with the help of the undue burden test brought in by two Supreme Court cases: *Webster v. Reproductive Health Services* (1989) and *Casey* (1992). *Webster* first introduced the undue burden test into the legal discourse saying that restrictions on abortion should not create "an undue burden" on a pregnant woman. *Casey* further confirmed this test by weighing on whether the state interest is creating an undue burden on women's right to abortion.

The test brought an ambiguous standard into the abortion discourse, implying that there are some restrictions "due" to be placed on women if the state has a larger interest to pursue. Hence, since these two cases, state legislators in the U.S. are constantly challenging the boundary of an "undue burden", adopting more and more restrictive abortion laws targeted at women's abortion access. This reflects the hostile environment for abortion in the present-day U.S.

In the following, *Hellerstedt* is discussed in the above context. It has been referred to as the most significant case on abortion rights before the Supreme Court since *Casey*. Like the former cases, the court reemphasized women's right to abortion based on the "right to privacy". Once again, the Court adopted the "undue burden test", and reinterpreted it as a benefits-burden balancing test – asking whether the burdens created for women can be justified by the benefits the law confers. Some believe that *Hellerstedt* brings doctrinal clarity to the undue burden analysis (e.g. Robinson, 2016). By drawing abundant evidence from social scientific research, the court ruled that state benefits through such restrictions cannot be balanced with the burden placed on women; therefore, it nullified the state law. It seems that at this point, women's right to abortion is fully recognized in the U.S. legal system. However, the playing field has also shifted to the accessibility and availability of abortion care.

### **Cultural Disputes over Life and Choice**

Because the idea of abortion touches a fundamental cultural issue concerning the starting point of human life (whether it begins at conception, birth, or at some point in between), it has been highly contentious in the United States both culturally and politically. *Roe* ruled that abortion during the third trimester of pregnancy is illegal unless the woman's health is at risk, due to "the state's interest in protecting potential life". By calling the late-term fetus "potential life",

the Court is conveying a positive attitude toward seeing the fetus as a human person. This reveals the core cultural dispute on abortion right: whether to consider the unborn fetus a human being or not? Calling the unborn fetus “potential life” implies that women who go through abortion and the abortion practitioners who help them are “taking away” potential life. In the U.S., anti-abortion groups usually see themselves as “pro-life”, arguing that a human fetus is a human person with a right to live. In the meantime, abortion rights groups describe themselves as “pro-choice”, supporting women’s right to choose whether or not to have a baby. While upholding women’s right to abortion in general, the terminology that *Casey* adopted shows the changing position of the Court regarding abortion.

The other terms the Court has been using include “viable fetus”, and “partial-birth abortion”. While the former is a relatively neutral medical term, the latter is an intentionally chosen word to stress that the abortion procedure is almost like “giving birth”. “Partial-birth abortion” refers to intact dilation and extraction; it is a term coined by pro-life advocates (Hoffer & Hull, 2001). The surgery is outlawed in most cases in the U.S. by the Partial-Birth Abortion Ban Act (2007). Pro-choice activists argue that the term is consciously chosen by the pro-life lawmakers while it is not even an accepted medical term.

Undoubtedly, religious traditions are one of the most important cultural factors that affects people’s attitude toward abortion globally. Therefore, it is not surprising to find that many of the religions in the United States are unfavorably inclined toward abortion rights. Generally, the more fundamentalist and evangelical religious traditions are usually highly opposed to abortions, and increasingly inclined to call on the state to enforce their moral code of seeing the fetus as a human life (Ferree, Gamson, Gerhards, & Rucht, 2002). Scholars find that the Roman Catholic and conservative Protestant churches have significant influence on state abortion statutes and public opinion toward abortion (O’Connor & Berkman, 1995). In Texas where H.B.2 was enacted, 77% of the population are Christians and only 4% of the population have non-Christian faiths (Pew Research Center, 2019). The conservative religious groups constantly compete with pro-choice citizen groups to influence abortion policies. Recent research has shown that these conservative religious traditions are not only opposed to elective abortions, but even more opposed to traumatic abortions (Hoffmann & Johnson, 2005). Under the pressure of current human rights discourse on women, the pro-life religious speakers are now mainly articulating their voices through organizations like the National Right to Life committees and other grassroots anti-abortion groups that are not affiliated to any religious groups. They have also learned to circle around the discourse by relating abortion to women’s conscience, and by arousing shame and guilt among those who went through abortion surgeries.

However, religious groups do not share a consensus on seeing a fetus as a person (Ferree et al., 2002). Even within one religious tradition, people’s opinions over abortion are diverse. Pro-choice individuals may emphasize certain aspects of their religion that advocate tolerance of different faith, and equality of men and women (2002).

At the time when *Roe* was ruled, abortion was more of a medical and a social problem. But in the last few decades, the abortion issue is being highly politicized in the United States because of its strong affiliation with religious beliefs makes it easy to be utilized by politicians to win public support. The Republican and Democratic Parties now hold polarizing positions on the abortion issue. Generally, pro-life religious groups have become more attached to the Republican Party (Wilcox, 1995), while the Democratic Party has endorsed legal abortions and women’s right to choose (Goggin, 1993; Stimson, 2004).

Such polarized positions toward abortion have at times turned from public cultural debates to extreme violence. According to the National Abortion Federation (2017), there were 8812 incidents of violence against abortion providers from 1977 to 2017. The attacks include arson and bomb attacks of abortion clinics, and even the murder of abortion providers. Research has shown that “traditional fundamentalist religious culture is associated with such high rates of crimes” (Freilich & Pridemore, 2007, p.326). The protesters gather regularly outside abortion clinics abusing doctors and calling them “baby killers” and “murderers”. Those politically-motivated crimes cloud abortion providers and women seeking abortion across the nation. In Jason Reitman’s *Juno* (2007), one of the most famous American films on abortion, Juno’s final decision to keep the baby is indeed influenced by the protests of an anti-abortion activist outside the abortion clinic.

Abortions are often underrepresented or misrepresented in American films and television. The portrayals of the women’s final choice on abortion, abortion-related complications, and the mortality rate in films are much more frequent than in reality (Conti & Cahill, 2017). Besides, the media is concentrating on pre-Roe plotlines rather than post-Roe plotlines, as if the issue of abortion were just a problem of the past (Sisson & Kimport, 2014). Such exaggerated patterns of outcome and portrayals may lead to further social myths around abortions. In the films, the characters who obtained abortions are often white, young, and rich, while in reality, Latinas are roughly 2.5 times as likely and black women are more than 3 times as likely as white women to have an abortion (National Abortion Federation, 2003). Unlike in real-life, where reasons for abortion are usually financial hardship or other difficulties, the media portrayals centered more on the immaturity of the heroine and future opportunities that the abortion could provide.

### **A Shifted Playing Field: Case Analysis**

In the documentary film *Reversing Roe* (Stern & Sundberg, 2018), the major argument that feminists and pro-choicers are repeatedly making is still: “abortion is a woman’s free choice to make.” But a close reading of the legal text reveals how risky it is to defend women’s right to abortion solely by emphasizing women’s free choice. The truth is, pro-life lawmakers are no longer confronting this fundamental human right in legal language, but secretly moving away to a new playing field.

### **Is “Right to Privacy” Enough?**

In *Hellerstedt*, Justice Thomas expressed his dissenting opinion: “The court has erroneously allowed doctors and clinics to vicariously vindicate the putative constitutional right of women seeking abortion” (*Whole Woman’s Health v. Hellerstedt*, 2016, p. 2320). He argues that “the plaintiffs cannot file suits to vindicate the constitutional rights of others” (p. 2321). His dissenting opinion reveals the awkward jurisprudential status of this case and of the U.S. abortion law, that while the rights at stake are women’s rights, the direct impact is on the abortion providers.

How did the abortion provider become plaintiffs representing women? This can be explained from two perspectives. On the one hand, the accessibility of abortion providers is essential to women’s access toward safe abortion, women’s health, and their rights to health and health care. According to the World Health Organization (2019), it is estimated that more than 70,000 women globally die of unsafe abortions every year, and 5.3 million women suffer temporary or permanent disability due to unsafe abortion. Women’s right to abortion means little if they

cannot access safe abortion health care. On the other hand, this is the result of active pro-choice movements. Because individual women and small abortion clinics can hardly make their voices heard, feminist and human rights organizations are trying to use legal tools to protect women's right to safe and accessible abortions. Global legal advocacy organizations, like the Center for Reproductive Rights, are trying to provide legal support for women's abortion rights through abortion providers.

Despite the clear reasoning of why abortion providers are now representing women's right, it is hardly justifiable in the legal language. While abortion providers are forced to represent women to file lawsuits against the state legislators, the playing field of abortion law in the U.S. is also silently shifting from the rights to privacy to the field of public health. But ironically, in the legal system, the abortion providers have to defend their economic rights and women's right to abortion access in the private sphere – centering on an individual's right to choose. In some sense, not only the abortion providers, but all pro-choice activists are pushed into the private sphere to guard women's right to abortion – which is never just an issue of a single woman's self-determination. A woman's right to a safe abortion can only be realized where there are affordable and accessible abortion providers, as well as a friendly social environment free from constant violence and intimidation.

In *Hellerstedt*, the court upheld the *Roe* decision in defending women's right to abortion through the constitutional right to privacy. The court summarized this in its headnote in the following way: “Constitutional Law > Substantive Due Process > Privacy > Personal Decisions Healthcare Law > Treatment > End-of-Life Decisions > Abortion > Right to Privacy [HN1] There exists an undue burden on a woman's right to decide to have an abortion, and consequently a provision of law is constitutionally invalid, if the purpose or effect of the provision is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability” (*Whole Woman's Health v. Hellerstedt*, 2016, p. 2292).

According to this headnote, the right to privacy is mainly interpreted in this case as a woman's right to decide to have an abortion. Nonetheless, this right is not clearly articulated nor discussed in the text. The legal text implies that the abortion right is inherent in the U.S. legal system, and it is a prerequisite for the court's elaborate discussion of “undue burden”. Therefore, the court naturally shifted the playing field to the public sphere, to compare the provisions' state interest with their burden on women's rights. By doing so, the court has neglected the risk of defending a women's right solely in the private sphere. Like the situation in this case, in the U.S. legal system, women's abortion rights are mainly situated in the rights of individual privacy and women's self-determination (Ferree et al., 2002). However, Justice Thomas' dissent indicates that simply upholding women's right to abortion is not enough to protect this right. To force abortion providers to file lawsuits on behalf of women is an indirect and weak approach to defend women's right to safe and legal abortion.

According to Qureshi (2012), there exists a fictional public/private divide in the human rights discourse in the domestic domain. Since in most societies, the public sphere is mainly occupied by men, and women are considered to belong to the domestic sphere of home and family where the state regulations can hardly reach, the position of women is rather vulnerable within the domestic sphere (Binion, 1995). But as women also rely on different forms of assistance in the public sphere, it seems impossible to think only within a framework of private choice here (Stettner et al. 2017). Based on this feminist critique of the public/private bifurcation, the following section will examine the U.S. abortion right law embodied in this case, and how this situation came into being.

The Court's constant emphasis on "right to privacy" actually sets a stage for the current fragility of the abortion discourse in the U.S. cultural and political context. First of all, it opens the door for anti-abortion groups to burden women with moral values. To cite Qureshi, "the private sphere is largely regulated by indigenous customs and cultural norms in pluralistic legal systems" (2012, p.44). As discussed above, the religious environment in the United States constitutes very unfavorable cultural norms for women seeking abortions. While the legal discourse endows women with the right to decide, this right is often interfered with by different cultural values. Certain religious worldviews may urge women to make a moral, ethical and religiously responsible decision regarding abortion. Under such circumstances, when the right to abortion is regulated solely by the constitutional "right to privacy", a woman's decision is turned into a moral responsibility. Those who choose to have an abortion may have to suffer from social pressure, and worst of all, feel guilty about "killing a potential life".

Secondly, a woman's autonomy in decision-making can easily be undermined by factors in the public sphere. Legal restrictions severely block women's access to safe abortion. In many cases, the abortion right is acknowledged by the government, but abortion services are not guaranteed. For example, in Nepal abortion became legal in September 2002, and the court claims that "the right to abortion is fundamental to women's equality, dignity, and self-determination" (Lakshmi Dhikta & Others v. Government of Nepal, 2009, p. 6). However, the abortion service only became available in March 2004, when a government clinic was finally opened. But according to later petitioners, its services were still unaffordable for many.

In *Hellerstedt* (2016), the restrictions are placed on medical facilities and personnel. The Court evaluated the two requirements of H.B.2, and further analyzed how these restrictions are standing in the way of women seeking abortion. The Court first evaluated the admitting privileges requirement through abundant scientific evidence. The requirement asks that a "physician performing or inducing an abortion . . . must, on the date the abortion is performed or induced, have active admitting privileges at a hospital that . . . is located not further than 30 miles from the location at which the abortion is performed or induced." (H. B. 2, 2013, p. 2). It is asserted that this requirement stems from the state's interest in protecting women in cases of complications from abortion. The Court cited evidence to prove that "there were low rates of abortion complications and that those complications rarely required hospital admissions and those that did happened days after the abortion and women would go to the nearest hospital" (Whole Woman's Health v. Hellerstedt, 2016, p.2302). A persuasive fact was that Texas admitted that there was no evidence that this requirement would guarantee better treatment. The Court cited the factual findings of the District Court that "as of the time the admitting-privileges requirement began to be enforced, the number of facilities providing abortions dropped in half, from about 40 to about 20", and "eight abortion clinics closed in the months leading up to the requirement's effective date. Eleven more closed on the day the admitting-privileges requirement took effect" (p. 2337).

Next, the Court turned to evaluate the surgical-center requirement. H.B.2 gives "detailed specifications relating to the size of the nursing staff, building dimensions, and other building requirements" (Whole Woman's Health, 2016, p. 2313). Based on the evidence, the majority holds that the new requirements are unnecessary as they do not benefit the patient at all. The Court contended that the current facilities are safe. And many surgical-center requirements do not apply to abortion procedures. For example, the Court mentioned that "the surgical center requirement contends that regulating air pressure, filtration, and humidity control can help reduce infection where doctors conduct procedures that penetrate the skin" (p.2315). But in fact, "abortions typically involve either the administration of medicines or procedures

performed through the natural opening of the birth canal, which is itself not sterile” (p. 2315). The Court also agreed with the District Court’s finding that the costs for upgrading existing abortion facilities to meet the surgical-center requirement is quite considerable. Therefore, the high cost may force more facilities to close. Thus, the quality of the abortion services may be reduced due to lack of available facilities.

Defending abortion right solely through the “right to privacy” conveys the idea that abortion rights are only a matter of personal decision. Therefore, the anti-abortion discourse found its way into the public sphere via abortion facilities. With the guide of maximizing the patient’s safety as a state interest (despite the fact that it is a very safe procedure), the pro-life lawmakers target at the abortion providers. The two provisions discussed in this case are typical TRAP laws. The subtext of these laws is that pro-life advocates, unable to overturn a legal framework they find morally abhorrent, instead attempt to lessen the number of abortions by making them more difficult to secure. These restrictions greatly endanger women’s rights to health and health care.

### A “Due” Burden?

*Hellerstedt* is allegedly the most important Supreme Court decision on abortion since *Casey*. The Court reframed the notable undue burden test in *Casey* into a benefit-burden balancing analysis. It seems that this makes it easier for the abortion practitioners and women who seek abortion care to challenge the state statutes.

However, I find this “undue burden test” linguistically problematic. To begin with, the prefix of the word “undue” implies that there exists a “due” burden. And the benefit-burden balancing test introduced in the case also indicates that there is a “benefit” to balance with the “burden”, leading up to the questions: “Is there a burden that is due to be placed on women seeking abortions? If so, where is the balancing point between “due” burden and “undue” burden?”

First, let’s trace the historical context and original meaning of “undue burden” in the legal text on abortion. The Court cites mainly *Casey*’s definition of “undue burden”. In *Casey*, it says: “To protect the central right recognized by *Roe* while at the same time accommodating the state’s profound interest in potential life...the undue burden standard should be employed” (*Planned Parenthood v. Casey*, 1992, p. 837). And it further explains: “An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place substantial obstacles in the path of a woman seeking an abortion before the fetus attains viability.” In *Casey*, “undue burden” is mainly used together with two different noun phrases: “an undue burden on a woman’s abortion right” and “an undue burden on a woman’s choice”. Second, it is necessary to look into the current case’s usage of “undue burden” to see if its meaning has shifted across time and space. In *Hellerstedt*, the term “undue burden” is used in the following ways: “undue burden on a woman’s right (to decide...)” and “undue burden to abortion access”.

From the above expressions we can see that, in *Casey*, the phrase “undue burden” was used consistently, since the meaning of “abortion right”, or “a woman’s right to decide whether or not to have abortion” is equivalent with “a woman’s choice (to have abortion or not)”. Both noun phrases refer to a woman’s right to choose. However, in *Hellerstedt*, the meaning of undue burden becomes ambiguous. Sometimes, it corresponds with *Casey*; and sometimes, it refers to a woman’s physical accessibility to abortion services rather than her subjective intention.

Then the question of whether there exists a due burden should be discussed based on the two different usages of the term: 1) undue burden on a woman's right to choose, and 2) undue burden on a woman's access to abortion services. For the former usage – undue burden on a woman's right to choose, as discussed in the beginning, a woman's right to abortion should be considered as an inseparable part of her basic human rights. It represents her right to freedom, her right to live with dignity and her right to personal liberty. Therefore, I contend that any burden placed on this right would be problematic. The articulation of "undue" falsely implies that there are burdens that are "due" to be enacted on women's right to choose, as long as the burden placed on women seeking abortion are not creating "substantial" obstacles. *Casey's* usage of the term "undue burden" allowed challengers and states to deliberately play with words to justify the "state's interest in abortion health care". As a result, the employment of the "undue burden" standard actually has invited and is still inviting more restrictions on the abortion providers in the legal system. For the latter usage – undue burden on a woman's access to abortion services – , according to the Court, it seems that burden on a woman's access to abortion services is measurable based on certain criteria like the distribution of facilities throughout the state, and the clinics' capacity. When addressing the issue of potential obstacles to abortion access, Justice Alito wrote: "Based on the Court's holding in *Planned Parenthood of Southeastern Pa v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674, it appears that the need to travel up to 150 miles is not an undue burden" (p. 2348). It seems a burden that is "not an undue burden" should be seen as a "due" burden. Therefore, for instance, "150 miles" may be considered as a balancing point to decide whether the distribution of facilities in the State is causing an undue burden to a woman's abortion access.

Although the Court employed both expressions discussed above (undue burden on a woman's right; undue burden on abortion access), its undue burden test was actually focused on the second one. In *Hellerstedt*, the Court advocated a benefit-burden analysis: to analyze the "benefit" a law confers, and the "burden" it places on a woman's access to abortion. The Court evaluated the benefit of admitting privilege requirement and the surgical center requirement, together with the burden these requirements have placed on women. Based on abundant factual findings, the Court decided that there is literally no benefit, but a lot of burden put on women seeking abortion. By weighing the benefits and burdens emplaced by the law, the Court has introduced an examination of the legislative purpose into the legal system. This reinterpretation brings more clarity to the undue burden test when compared to the wording in the *Casey* ruling. The significance and limitations of this test can then be examined below:

*Hellerstedt* has turned the undue burden test into a benefit-burden test. It enables the Court to balance the benefit of a state law with the burden that this law places on women. However, the Court may have ignored the fact that the test was workable in *Hellerstedt* mainly because the "benefit" and "burden" in this case is extremely unbalanced. H.B.2 was particularly poorly suited to go through a benefits-burden test. The Court found that these provisions offered no benefit to women's health, but placed tremendous burden on their abortion access by severely reducing the number of abortion facilities. That is why they can easily draw a conclusion based on the benefit-burden analysis.

On the one hand, the balancing test thus resolves a problem inherent in the undue burden test. It helps to examine the intent behind a state's restrictions. If such a law creates even modest burdens, but has no corresponding benefits, then it can be struck down. This test frees courts from engaging in laborious and difficult assessment of legislative intent. On the other hand, the balancing point is still very difficult to define. If a situation is more complex than H.B.2, its application will depend more upon the personal beliefs of judges and Justices. Moreover,

this balancing test is heavily dependent on factual findings. It is easy to predict that in the future, if a petitioner wanted to challenge an abortion law based on this test, he/she will have to do laborious work to collect necessary evidence. Another limitation of the test is that it only examines the burden on “abortion access” – which may lead to women’s rights to abortion related health care. Apparently, it will not apply to potential future lawsuits concerning other abortion related rights, such as the right to dignity, or the right to personal liberty.

## Conclusion

The cultural and political struggle between the pro-life and the pro-choice groups in the U.S. is fully displayed in the nation’s legal text. The Supreme Court discarded the trimester framework of *Roe* and employed the term “viability” instead of “potential life”, and it seems that the Court is making gradual efforts to prioritize women’s rights. However, a later adoption of the term “partial-birth abortion” (which is not a medical term) has strong implications for viewing late-term abortions as “killing a potential life”. The ruling of *Hellerstedt* reveals that, at a time when women’s fundamental rights to choose are widely accepted in society, the anti-abortion discourse has shifted from the private sphere to public health care. A discourse analysis of the legal text indicates that the Court’s undue burden test would only apply to abortion access. Many other human rights related to abortion cannot be defended by this test. This false benefit-burden balancing test is burying the pro-choice activists with laborious works of peripheral evidence-gathering to justify their stance.

It is time for the pro-choice and feminist organizations to build on their triumph in advocating women’s right to choose and move on to guarding women’s access to safe and legal abortion in every aspect in the public sphere. For a start, instead of passively defending their ground in the private sphere, they should work on a more extensive protection of women’s right to abortion access in health care laws. By doing so, those endless state restrictions on abortion providers can be eradicated. Moreover, the subject of abortion is still misrepresented in mainstream films and on television. They can collaborate with film makers and producers to promote more objective and in-depth media depiction of abortion, to reveal the stories of unprivileged women seeking abortions and the difficult choices that they are facing in reality. More realistic depictions of abortions can expand public understanding and acceptance of the difficult choices with which women are faced. Lastly, as extreme pro-life activists are imposing their worldview and pushing their violent rhetoric in cyberspace; to counter their presence, the abortion advocates should also expand their own influence in cyberspace.

## References

- Center for Reproductive Rights. (2011). *Safe and legal abortion is a woman's human right*. Retrieved from [https://reproductiverights.org/sites/default/files/documents/pub\\_fac\\_safeab\\_10.11.pdf](https://reproductiverights.org/sites/default/files/documents/pub_fac_safeab_10.11.pdf)
- Center for Reproductive Rights. (2015). *Targeted regulation of abortion providers (TRAP)*. Retrieved from <https://www.reproductiverights.org/project/targeted-regulation-of-abortion-providers-trap>
- Conti, J. A., & Cahill, E. (2017). Abortion in the media. *Current opinion in obstetrics and gynecology*, 29(6), 427–430. <https://doi.org/10.1097/GCO.0000000000000412>
- Ferree, M. M., Gamson, W. A., Gerhards, J., & Rucht, D. (2002). *Shaping abortion discourse: Democracy and the public sphere in Germany and the United States*. Cambridge: Cambridge University Press. <https://doi.org/10.1017/CBO9780511613685>
- Freilich, J. D., & Pridemore, W. A. (2007). Politics, culture, and political crime: Covariates of abortion clinic attacks in the United States. *Journal of Criminal Justice*, 35(3), 323–336. <https://doi.org/10.1016/j.jcrimjus.2007.03.008>
- Guttmacher Institute. (2018). *Policy trends in the states, 2017*. Retrieved from <https://www.guttmacher.org/article/2018/01/policy-trends-states-2017>
- H. B. 2, 83d Leg., 2d Spec. Sess. (Tex. 2013).
- Hendel, R. S. (2012). Historical context. *The book of genesis: Composition, reception, and interpretation*, (152), 51–81. <https://doi.org/10.1016/B978-0-12-405865-1.00001-7>
- Hoffer, P. C., & Hull, N. E. H. (2001). Roe v. Wade: The abortion rights controversy in American history (p. 60). University Press of Kansas.
- K.L. v. Peru CCPR/C/85/D/1153 (2003).
- Macleod, C., Sigcau, N., & Luwaca, P. (2011). Culture as a discursive resource opposing legal abortion. *Critical Public Health*, 21(2), 237–245. <https://doi.org/10.1080/09581596.2010.492211>
- National Abortion Federation. (2003). *Developing cultural competence in reproductive health care: Understanding every woman*. Retrieved from [https://5aa1b2xfmfh2e2mk03kk8rsx-wpengine.netdna-ssl.com/wp-content/uploads/developing\\_cultural\\_competence.pdf](https://5aa1b2xfmfh2e2mk03kk8rsx-wpengine.netdna-ssl.com/wp-content/uploads/developing_cultural_competence.pdf).
- National Abortion Federation. (2017). *Violence and disruption statistics: Reports continue to demonstrate an escalation in picketing, trespassing, obstruction, clinic blockades, invasions, and threats of harm*. Retrieved from <https://prochoice.org/wp-content/uploads/2017-NAF-Violence-and-Disruption-Statistics.pdf>.
- O'Connor, R. E., & Berkman, M. B. (1995). Religious reterminants of state abortion policy. *Social Science Quarterly*, 76(2), 447–459.
- Partial-Birth Abortion Ban Act. 18 USC § 1531, (2007).
- Pew Research Center. (2019). *Religious composition of adults in Texas*. Retrieved from <https://www.pewforum.org/religious-landscape-study/state/texas/>

- Pierson, C., & Bloomer, F. (2017). Macro- and micro-political vernacularizations of rights: Human rights and abortion discourses in Northern Ireland. *Health and Human Rights*, 19(1), 173–185.
- Planned Parenthood v. Casey 505 U.S. 833 (1992).
- Protocol to the African Charter on Human and People's Rights on the Right of Women in Africa, 2nd Ordinary Sess., Assembly of the Union, (2003).
- Qureshi, S. (2012). Feminist analysis of human rights Law. *Journal of Political Studies*, 19(2), 41–55.
- Robinson, R. (2016). Benefits and burdens: The Supreme Court's decision in *Whole Woman's Health v. Hellerstedt* (2016). *Justice System Journal*, 37(4), 387–392. <https://doi.org/10.1080/0098261X.2016.1217132>
- Roe v. Wade 410 U.S. 113 (1973).
- Sisson, G., & Kimport, K. (2014). Telling stories about abortion: Abortion-related plots in American film and television, 1916-2013. *Contraception*, 89(5), 413–418. <https://doi.org/10.1016/j.contraception.2013.12.015>
- Stephens, M., Jordens, C. F. C., Kerridge, I. H., & Ankeny, R. A. (2010). Religious perspectives on abortion and a secular response. *Journal of Religion and Health*, 49(4), 513–535. <https://doi.org/10.1007/s10943-009-9273-7>
- Stern, R., & Sundberg, A. (Directors). (2018). *Reversing Roe* [Motion Picture].
- Stettner, S., Ackerman, K., Burnett, K., & Hay, T. (2017). Transcending borders: Abortion in the past and present. *Transcending borders: Abortion in the past and present*, 1–344. <https://doi.org/10.1007/978-3-319-48399-3>
- United Nations Committee on Economic, Social and Cultural Rights. Report of the Committee on Economic, Social and Cultural Rights (46th Sess., 2011; 47th Sess., 2011), UN Doc. E/2012/22 (2011).
- United Nations Committee on the Elimination of Discrimination against Women. Report of the Committee on the Elimination of Discrimination against Women (55<sup>th</sup> Sess., 2013; 56th Sess., 2013; 57th Sess., 2014), UN Doc. A/69/38 (2014).
- United Nations Human Rights Committee, General Comment No. 28: Equality of Rights between Men and Women (Art.3) (68th Sess., 2000), para. 10, UN Doc. CCPR/C/21/Rev/1/Add.10 (2000).
- Whole Woman's Health v. Hellerstedt, 579 U.S. (2016).
- World Health Organization. (2019). *Preventing Unsafe Abortion*. Retrieved from <https://www.who.int/news-room/fact-sheets/detail/preventing-unsafe-abortion>.
- Zampas, C., & Gher, J. M. (2008). Abortion as a human right - International and regional standards. *Human Rights Law Review*, 8(2), 249–294. <https://doi.org/10.1093/hrlr/ngn008>

**Corresponding author:** Gao Xueying  
**Contact email:** [gaoxueying@u.nus.edu](mailto:gaoxueying@u.nus.edu)