Background

In April 2013, the people of the United States finally, sadly, began to learn—despite the media’s best attempts to avoid the story—about Dr. Kermit Gosnell and his “house of horrors.” Dr. Gosnell is the Philadelphia abortionist whose clinic preyed on poor women and featured, among other atrocities: “Infant beheadings. Severed baby feet in jars. A child screaming after it was delivered alive during an abortion procedure.” Dr. Gosnell is currently serving life in prison without the possibility of parole for numerous crimes, among them the manslaughter of a female patient and three counts of first-degree murder that included “the murder of a baby born alive in a botched abortion, who prosecutors said would have survived if the doctor had not ‘snipped’ its neck with scissors.”

Texas, “spurred by the case of Kermit Gosnell,” swiftly passed legislation to protect both babies and their mothers by heightening the health and safety requirements for abortion providers. The legislation was signed into law in July 2013 by Governor Rick Perry.

A group of abortion providers (Whole Woman’s Health and others) filed a lawsuit against Texas state officials (the commissioner of the Texas Department of State Health Services, John Hellerstedt, and others), claiming that the Texas abortion law was unconstitutional. The district court ruled in favor of the abortion providers, blocking the law from being fully implemented. The court of appeals disagreed with the district-court’s decision, and largely upheld the law. The abortion providers appealed to the Supreme Court. That appeal is Whole Woman’s Health v. Hellerstedt.

Decision

On June 27, 2016, the Supreme Court delivered its decision in Whole Woman’s Health v. Hellerstedt, striking down the two provisions of the Texas law in question. The first provision was an “admitting-privileges requirement”: doctors who performed abortions in Texas were required to hold admitting privileges at a hospital near where the abortion was performed. The second provision was a “surgical-center requirement”: clinics that performed abortions in Texas were required to meet the same standards as ambulatory surgical centers.

Justice Stephen Breyer wrote the majority opinion, which was joined by Justices Anthony Kennedy, Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan. Justice Breyer concluded: “Neither of [the aforementioned] provisions offers medical benefits sufficient to justify the burdens upon access that each imposes. Each places a substantial obstacle in the path of women seeking a pre-viability abortion, each constitutes
an undue burden on abortion access, and each violates the . . . Constitution.”

Justice Samuel Alito wrote a dissenting opinion, which was joined by Chief Justice John Roberts and Justice Clarence Thomas. Justice Alito “accused the majority of going out of its way to strike down provisions in the Texas law,” arguing: “Federal courts have no authority to carpet bomb state laws, knocking out provisions that are perfectly consistent with federal law.”

In addition to joining Justice Alito’s dissenting opinion, Justice Thomas also added a dissenting opinion of his own. Justice Thomas’s dissent has been described as “something of a paean to the late Justice Scalia,” as it is bookended with citations to Justice Scalia, giving voice to Justice Scalia’s arguments in his absence.

Implications

The decision in Whole Woman’s Health v. Hellerstedt is “the [Supreme Court’s] most sweeping statement on abortion since Planned Parenthood v. Casey in 1992, which reaffirmed the constitutional right to abortion established in 1973 in Roe v. Wade.” “It means that similar requirements in other states are most likely also unconstitutional, and . . . imperils many other kinds of restrictions on abortion.”

This is a matter of great importance to Alabama, because life is a matter of great importance in Alabama. A law with similar provisions, the Women’s Health and Safety Act, was enacted in Alabama in 2013, only to be invalidated by a federal court in 2014. With the decision in Whole Woman’s Health—where members of Alabama’s federal delegation and state officials, including the governor, the lieutenant governor, the attorney general, and state legislators, submitted briefs in support of Texas—the hope that Alabama’s law could be revived has now been extinguished.

The implications are more significant than the constitutionality of these particular laws, however. From this point forward, all regulations that affect pre-viability abortions—abortions occurring before the unborn child is capable of living outside the womb—will be nearly impossible to survive as state law. This has to do with the concept that the Supreme Court uses to determine whether a law regulating abortion is constitutional or unconstitutional: “undue burden.” Justice Antonin Scalia rightly described the “standard” of “undue burden” as being, in fact, “standardless”—and “inherently manipulable.” That is, “undue burden” means whatever the justices want it to mean. The meaning that “undue burden” now has been given by Justice Breyer essentially ensures that states will not be able to prove, to the Supreme Court’s satisfaction, that any regulation of pre-viability abortions is anything other than an “undue burden”—that is, unconstitutional.

In short, after Whole Woman’s Health v. Hellerstedt, “laws that are enacted with the explicit (or unstated) purpose of protecting fetal life prior to viability will be difficult to sustain.” Consequently, human life—the lives of unborn children—will be more difficult to protect.

GUIDE TO THE ISSUES

3 Powers, supra note 1.  
8 See id. at 676–77.  
9 See Whole Woman’s Health v. Cole, 790 F.3d 563, 567 (5th Cir. 2015).  
10 See Petition for Writ of Certiorari, Whole Woman’s Health v. Cole, 135 S. Ct. 2923 (No. 15-274).  
12 Id. at 1–2.  
13 See id.  
14 See id. at 2.  
15 Id. at 1.  
16 Id. at 2 (citations omitted).  
17 Id. at 1 (opinion of Alito, J., dissenting).  
19 Whole Woman’s Health, slip op. at 40 (opinion of Alito, J., dissenting).  
20 Liptak, supra note 6.  
21 Whole Woman’s Health, slip op. at 19 (opinion of Alito, J., dissenting) (footnote omitted).  
22 Id. at 1 (opinion of Thomas, J., dissenting).  
24 Whole Woman’s Health, slip op. at 1 (opinion of Thomas, J., dissenting) (quoting Steinberg v. Carhart, 530 U.S. 914, 954 (2000) (Scalia, J., dissenting)).  
25 Liptak, supra note 6.  
26 Id.  
27 See, e.g., "Religious Landscape Study: Views About Abortion by State," Pew Research Center (2014), http://www.pewforum.org/religious-landscape-study/comparing-views-about-abortion/by/state/ [http://perma.cc/G697-JNLN] (reporting that, in Alabama, 58% of adults say that abortion should be "illegal" in all or most cases and 37% of adults say that abortion should be “legal” in all or most cases).  
31 See Adler, supra note 23.  
32 This “standard” was first set forth, in the context of laws regulating abortion, in Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992). Cf. Roe v. Wade, 410 U. S. 113 (1973) (setting forth the earlier test that Casey replaced, “‘trimmer analysis,’ in which the state’s ability to restrict abortion increased after each trimester of pregnancy).  
33 Casey, 505 U.S. at 896, 987 (Scalia, J., dissenting).  
34 See Adler, supra note 23.  
35 Id.