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Litigating Reproductive Rights: The Evolving Support Structure in the United States

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Litigating Reproductive Rights: The Evolving Support Structure in the United States

Introduction

The Supreme Court of the United States functions as the highest judicial body in the country, with its decisions having the capability to reverberate change across the nation. Understanding why they make certain decisions has long been a point of scholarship, with multiple theories emerging as to what exactly influences their rulings. One such theory is the support structure, proposed by Charles Epp in *The Rights Revolution* (1998), which is a theory exploring how social movements influence litigation and the establishment of certain rights. This theory states that legal mobilization at the Supreme Court rests “on resources, and resources for rights litigation depend on a support structure of rights-advocacy lawyers, rights-advocacy organizations, and sources of financing” (Epp, 1998 p. 18). Essentially, Epp is proposing that support from the legal field, rights-advocacy organizations, and financing play a critical role in the mobilization of lawyers at the Supreme Court, and thus play a role in determining what information the Court receives on a case (and how they rule on it as a consequence).

Abortion rights is one of the most hotly contested areas of civil rights and liberties protections under the Constitution. *Roe v. Wade* was the start of a major shift in abortion jurisprudence, where the Court made the decision that abortion was a right afforded to women, one that could in part be regulated but not wholly stripped away. *Planned Parenthood v. Casey* stepped up as one of the next major challengers in this area, with regulations being dissected to determine whether their existence was constitutional. Some states have turned to the implementation of TRAP laws (Targeted Regulation of Abortion Providers) to work around the ruling in *Casey* to preserve constitutionality while still implementing abortion restrictions.

Abortion jurisprudence is a matter still playing out before the Court, with a decision in *Dobbs v. Jackson Women's Health* looming that could potentially overturn prior Court holdings.

The goal of this study is to apply Epp's theory to an unexamined area of rights-advocacy: reproductive rights legislation. Specifically, this thesis will examine two cases, first to determine whether or not a support structure was present, then to look at how this support structure evolved over time. This study seeks to add to our understanding of the support structure theory by applying it to a specific subset of rights-advocacy cases, one which is still being debated by the Court. This project asks how the support structure has evolved over time by examining the legal support and rights-advocacy organizations in *Casey v. Planned Parenthood* and *Whole Woman's Health v. Hellerstedt* under the lens of the support structure theory.

Literature Framework

Factors outside of the law itself matter when it comes to the fight to advance individual rights. In his book *The Rights Revolution*, Charles Epp advances the theory of a support structure as a necessary factor when individual rights are in a position to progress. Through analyzing various rights revolutions in the history of the United States, such as the civil rights movement and fight for women's rights, Epp proposes that external factors play a critical part in the success of these movements (Epp, 1998). These include: the support of the legal field, presence of rights advocacy groups, and financing sources (Epp 1998). In addition to applying the support structure theory to the United States, Epp tests how it holds up in other countries, such as India, the United Kingdom, and Canada. Epp's theory sheds light on why some movements succeed, while others fail. His work has been applied by a variety of scholars to their areas of study.

Walter Baber and Robert Bartlett ask what kind of support structure is necessary for environmental rights and solidify the importance of litigation organizations in the process of

getting these cases to the court. The scholars examine a variety of organizations that have contributed to the rise in attention towards environmental issues in the court. They explore what would happen if environmental rights were treated as a bundle of accessible rights, rather than individual pieces, and in doing so look at what support structure would be necessary for this to happen (Baber and Bartlett, 2020). They focus primarily on rights involving access to information and decision-making processes, ensuring access to food and water, and providing environmental security to all. This work shows how Epp's support structure theory can be applied to the environmental rights movement in the United States and lends support for his emphasis on organizational presence.

Social movements seek to build the support structure to produce their desired rights-protective results. In her book *Ideas with Consequences: The Federalist Society and the Conservative Counterrevolution*, Amanda Hollis-Brusky explores the creation and implementation of the Federalist Society in law schools, and what affects its creation has had on shaping the mindset of those entering the legal field. This research looks at the part of Epp's support structure that involves the cultivating of certain ideologies within the legal field, and examines what lawyers are exposed to before even entering law. These ideas affect their contributions to the support structure and what rights they may want to advance. While the Federalist Society is only an organization in law school, Hollis-Brusky found that through being a member, individuals are connected broadly across all areas of the support structure, which may lead to an advantage in organizing around certain causes (Hollis-Brusky, 2015). Hollis-Brusky confirms that creating advocacy organizations and the development of the legal field can play a critical role in influencing decisions of the Court.

Other scholars have focused on the successes of the conservative legal movement in growing a support structure, with Teles and Southworth highlighting how the American conservative legal movement is creating a support structure of their own. Hollis-Brusky looks at how these pieces build upon Epp's support structure, and show how "serious constitutional change requires not only the right cast of characters on the court, but also a strong support structure" (Hollis-Brusky, 2011, p 516). In addition, Southworth provides a brief summary of Epp's theory, showing how it continues to persist in academic writing (Hollis-Brusky, 2011, p 516).

Beyond the conservative legal movement broadly, the conservative Christian legal movement built a support structure around Christian ideas in legal practice. Training lawyers to think a certain way may lead to lawyers sharing similar mindsets that bleed over into how they practice the law. Hollis-Brusky's work pops up again in the literature surrounding the support structure theory, in an article that was co-authored with Joshua Wilson. Continuing from Hollis-Brusky's work on the conservative legal movement, "Higher Law: Can Christian Conservatives Transform Law through Legal Education?" examines the investment Christian rights leaders are making into law schools, in order to control the training of lawyers in a way that what they are taught reflects the ideals of the Christian Rights movement (Wilson and Hollis-Brusky, 2018). Their research found that the lens through which a legal education is framed can influence how a lawyer practices in the future, meaning that controlling education is a viable means of controlling how lawyers practice and what they support (Wilson and Hollis-Brusky, 2018). This explores the legal ideas component of Epp's support structure. It builds a theory around just the support structure element of the legal field, through discussing infiltration of teachings into the academic field.

A support structure for litigation can persist over time, at least in regards to campaign finance. In “The Support Structure for Campaign Finance Litigation in the Roberts Court: A Research Agenda,” Ann Southworth explores how Epp’s support structure theory applies to *Citizens United v. FEC* (2010) and *McCutcheon v. FEC* (2014). In applying the support structure theory, Southworth focuses in on three areas: exploring the resources and alignment of organizations active in these cases; investigating the characteristics of lawyers active in campaign finance litigation and what their advocacy networks looks like; and studying the role of organizations and advocates in promoting the ideas adopted by the court (Southworth, 2018). Southworth embraces the entirety of the support structure theory by emphasizing the importance of it in regards to two key court cases surrounding campaign finance, and shows how the categories often interact with each other to provide maximum support to a cause.

A support structure can work both for and against rights revolutions. Applying the support structure to the judicial landscape of the United States in the 1950s and 1960s, Sarah Staszak explores the efforts made to scale back access to the courts by certain actors (Staszak, 2010). Not only can the support structure be tied to movements to advance rights, it can be tied to movements to take rights away. Staszak explores the motivation of these actors, in addition to examining their professional backgrounds and positions they held where they could attempt “retrenchment.” Staszak’s research ties into multiple components of Epp’s support structure theory, in that the legal field, organizations, and financing worked together to aid the actors in their objective.

Not all academics have applied Epp’s ideas to support structures in the United States, with some applying his theory abroad. In “Institutional Reform and Rights Revolutions in Latin America,” Bruce Wilson analyzes rights revolutions in Costa Rica and Columbia, and the

conditions necessary for these revolutions to occur. While focusing more on the judicial system than an external support structure, Wilson does acknowledge and support Epp's support structure theory, and states that the judicial frameworks in Latin America lead to an increased reliance on the judiciary in fueling rights revolutions (Wilson, 2009). Epp's book focused exclusively on areas outside of Latin America, so while this research seemed to weaken the support structure theory, it actually further solidified the fact that the support structure must exist alongside certain conditions to be a productive mechanism for advancing change.

Other comparative work has found that the support structure is not sufficient on its own for bringing about legal change. In "Do Bills of Rights Matter?" Donald Songer, Susan Johnson, and Jennifer Bowie look at the rights revolution in Canada, and explore whether it can be attributed to Epp's support structure or to the strength of the Charter of Rights. The authors test how well the support structure theory holds up against opposing theories that sought to provide an explanation for the rights revolution. In their research, they found that the support structure worked alongside the Charter of Rights, which aligns with what Epp advances in his book (Songer, et. al., 2013). A support structure on its own means little if there is not a driving force utilizing it, and the example presented in "Do Bills of Rights Matter" shows how Epp's support structure has further support from Canadian rights revolutions.

Despite all of the research that has been done, the reproductive rights movement has not been explored in relation to Epp's support structure. Additionally, with the exception of campaign finance scholarship (Southworth 2018), applying the support structure to case studies does not look at how it evolves over time. This paper aims to analyze two prominent cases in the reproductive rights revolution – *Planned Parenthood v. Casey* (1992) and *Whole Woman's Health v. Hellerstedt* (2016) – and examine outcomes under the support structure theory. This

paper will explore how, if at all, the support structure has evolved in abortion jurisprudence over time.

Methodology

This study examines *Planned Parenthood v. Casey* (1992) and *Whole Woman's Health v. Hellerstedt* (2016) under Epp's support structure theory. These two cases were chosen due to the similarity in content at the core of the debate, i.e. whether regulations could/should be imposed on women's reproductive rights. Both are constitutional challenges to state restrictions on the right to access abortion. Each case represents a separate period in time. I selected cases spanning decades apart, as these cases can provide insight into how the support structure surrounding reproductive rights cases evolved over time. *Roe v. Wade* was decided in 1973, twenty years later the Court decided *Planned Parenthood v. Casey* (1992), and almost twenty-five years after that, *Whole Woman's Health v. Hellerstedt* (2016).

This article examines two cases to study change over time. To examine this in depth, I focus on just two elements of Epp's support structure: how representation and advocacy support in abortion rights litigation changed over time. Epp's support structure involves three main components: support from the legal field, support from rights-advocacy organizations, and sources of funding. However, funding is not completely disregarded in the research as both support structure elements involve the element of funding. By examining representation, I also account for which lawyers were hired, by whom, and what organizations did to support their cause.

My analysis focuses on the appellate argument at the Supreme Court. Since decisions at the Supreme Court level trickle down to lower courts, I wanted to narrow the research on the highest level to see where there would be the most participation, as the decisions were the most

binding for the parties involved. This analysis was consistently applied to both cases to see if the same tactics were used across the two cases at the same level. Further research could look at how the support structure evolved at the trial and appellate level.

I examine support from the legal field and rights advocacy organizations through analysis of the arguments and briefs presented in the case before the Supreme Court. The bulk of the research done on these two cases came directly from the case materials in the appellate briefs. Westlaw is a legal database provided to universities. This database allows for cases to be easily searched for and allows users to toggle between reading the decision and all briefs that were attached to the case before it was argued, giving insight into what materials the Justices' had on hand while making their decisions. Additionally, Oyez was utilized, largely to hear the oral arguments for the cases. Oyez is an unofficial online archive of the Supreme Court of the United States. It is compiled by Cornell Law School and the Legal Information Institute, and provides audio and transcripts of oral arguments before the Court. This site works to enable anyone to understand what the lawyers in the cases emphasized within their arguments, as well as how the Justices responded to it through questioning. This resource was utilized frequently throughout my research, to explore what lawyers were saying and listen in on other audio clues, such as tone, that may have been lost in just a transcript. I analyze support from rights-advocacy organizations through newspaper searches of media coverage of the cases. I limited the date range to a month on either side of the cases, and I used Lexis, a research database, for accessing newspaper articles discussing protests that may have been in direct relation to the cases. I learned information about specific actors from their website biography pages, as well as the summaries they gave of themselves in the briefs that they submitted.

Data

Planned Parenthood of Southeastern Pennsylvania v. Casey (1992)

To best answer the question of how the support structure changed over time on the concept of reproductive rights, this paper will examine two cases from varying times in the legal battle for reproductive rights, beginning with *Planned Parenthood v. Casey* (1992). This landmark case was a challenge to 1988 and 1989 amendments to the Pennsylvania Abortion Control Act, which placed a variety of requirements on women and doctors prior to the administration of an abortion. The following section will explore the support structure present in this case, highlight the contributions of those involved, and be used in a later section as a contrast to the second case to see how the support structure for reproductive rights cases evolved over time.

Casey protected the right to access abortion, while altering how courts would view legislation targeting that right. This case involved a challenge to the Pennsylvania Abortion Control Act, specifically five main provisions of this Act. These provisions required that a woman give informed consent, implemented a waiting period of 24 hours where materials on alternative options would be given, required a minor to receive the informed consent of one parent (with certain judicial exemptions), required women notify their husbands, and imposed certain reporting requirements on facilities providing abortion services. Planned Parenthood of Southeastern Pennsylvania challenge these provisions, arguing that they were unconstitutional under *Roe v. Wade* (1973), and brought the case against then Governor of Pennsylvania, Robert Casey. The main question before the court was whether a state could create such requirements without violating the rights to abortion as guaranteed by *Roe*. The Supreme Court held in a 5-4 decision that the undue burden test, rather than a trimester framework, should be used in

evaluating restrictions on access to abortion. The Court upheld the fundamental right at issue in *Roe v. Wade*, and struck down a spousal notification requirement while upholding the informed consent, mandatory waiting period, and parental notification requirements. (*Planned Parenthood of Southeastern Pennsylvania v. Casey*, 1992).

Planned Parenthood v. Casey is an important case to abortion law, as it was one of the first major abortion cases the Court had heard since *Roe*, and established an undue burden framework in evaluating restrictions that has been used since. This next section will analyze the support of the legal profession and presence of advocacy organizations on both sides of the litigation, with the goal of understanding the actors that played a part in the eventual decision. This section first examines the support of the legal field on either side, before moving on to the support of rights-advocacy organizations on either side.

Support of the Legal Field

For the party challenging the abortion restrictions

The legal representation on either side of the case is a critical aspect of the support structure to examine. For the sake of this research, legal representation has been narrowed to attorneys that directly contributed to the case, whether through oral arguments or briefs filed. Kathryn Kolbert (joined by Linda Wharton) presented the argument on behalf of Planned Parenthood of Southeastern Pennsylvania. A graduate of Temple University School of Law, Kolbert was working as the State Coordinating Counsel of the ACLU's Reproductive Freedom Project at the time of arguing this case before the Supreme Court (Kolbert, 2022). From 1992 to 1997, Kolbert lead domestic litigation and public policy programs for the Center for Reproductive Rights, and during the time of the case was also working as a staff attorney with both the Women's Law Project and Community Legal Services in Philadelphia (Panelist:

Kathryn Kolbert, 2017). As a staff attorney in the state of Pennsylvania, with a proven advocacy history on the topic of reproductive rights, Kolbert was asked by Planned Parenthood to serve as its primary representation in this case.

The majority of the Justices agreed with Kolbert on fundamental aspects of the abortion decision in their opinion, that abortion was a protected fundamental right. In her oral argument, she advocated for the protection of “rights of fundamental importance,” stating that “the government may not chip away at fundamental rights, nor make them selectively available only to the most privileged women.” (Oyez, *Planned Parenthood v. Casey*, 1992). In her oral argument, Kolbert stated that “millions of women continue to rely on the fundamental rights guaranteed in *Roe*.” Similarly, Kolbert used her brief to push that “the decision to terminate or continue a pregnancy must continue to be afforded fundamental constitutional protection” and that “the doctrine of stare decisis requires reaffirmation of *Roe*” (Supplemental Brief for Petitioners and Cross-Respondents, *Planned Parenthood v. Casey*, 1992).

For the party supporting the abortion restrictions

The main advocate for the restrictions had political aspirations within the Republican Party, being both a politician and advocate. Ernest Preate represented Pennsylvania and advocated to uphold the five challenged provisions to the Pennsylvania Abortion Control Act. Preate was elected the District Attorney of a county in Pennsylvania in 1977, and served as an active trial prosecutor specializing in homicide and drug cases before unsuccessfully running for Governor of Pennsylvania in 1994. In 1988, he was elected Attorney General of Pennsylvania, and was later re-elected in 1992. (Ernest D. Preate, Jr.). Prior to arguing in support of the Pennsylvania restrictions in *Planned Parenthood v. Casey*, he successfully represented the state in *Blystone v. Pennsylvania* (1990), a case which upheld Pennsylvania’s death-penalty statute,

which required the jury to sentence a defendant to death if it finds any aggravating circumstance (and no mitigating circumstance) present (After Supreme Court Denies Them Relief, 2018). As an individual with the Republican National Party (during his run for governor) and certain conservative causes (supporting the death penalty), Preate took on the task of defending Robert Casey, the defendant in this case.

Preate argued that the Pennsylvania Act was in line with *Roe*, and did not argue that *Roe* was unconstitutional. In his oral argument, Preate advocated for the Court to consider the question of whether the five sections of the Pennsylvania Abortion Control Act were constitutional. Preate stated that “each of the five provisions is constitutional under the analysis that was applied by (the Supreme Court) in *Webster*; that, further, *Roe v. Wade* need not be revisited by this Court except to reaffirm” key components which would prove the constitutionality of the amendments to the Pennsylvania Abortion Control Act. (Oyez, *Planned Parenthood v. Casey*). In his oral argument, Preate argued that this amendment followed the “undue burden standard for reviewing State abortion regulations” he said were set by *Roe*, so it need not be revisited, yet later presented within his argument that “if our statute cannot be upheld under the undue burden standard, *Roe*, being wrongly decided, should be overruled.” (*Planned Parenthood of Southeastern Pennsylvania v. Casey*, 1992).

The attorneys representing the Pennsylvania legislation did not agree on the fundamental stakes of the argument, with Solicitor General Ken Starr joining Preate in his oral argument and arguing that *Roe* should be revisited. Starr would later become known for his legal work exposing the depth of Clinton’s impeachment scandal (Worthen, 2021). As Solicitor General, Starr argued 25 cases before the Supreme Court, ranging from governmental regulations cases to constitutional issues of commercial importance (Solicitor General: Kenneth W. Starr, 2014).

Currently, Starr is still involved in providing counsel to former Presidents, joining the team for President Trump that aimed to prove fraud in the 2020 election.

Starr went further than Preate did in his oral argument, arguing that *Roe* and the fundamental rights it protected were unconstitutional. In his oral argument before the Court, Starr pointed to the standard set forth in *Roe*, and the confusion it created “in the law as to how legislatures, if they choose, can legislate, and how judges are to judge in this extraordinarily sensitive and divisive area” (*Oyez, Planned Parenthood v. Casey*, 1992). Starr emphasized the United States compelling interest in life throughout pregnancy. In his brief, Starr highlighted that previous court decisions found that a right deserved heightened protection “only if our Nation’s history and traditions have protected that interest from state restriction,” something which he pushed did not establish a fundamental right to abortion. (Brief for the United States, *Planned Parenthood v. Casey*, 1992).

Involvement of Legal Advocacy Organizations

For the party challenging the abortion restrictions

In this case, the most prominent organization backing the petitioner was Planned Parenthood, a national medical services group committed to providing reproductive health care for women across the country. While Planned Parenthood is a medical services provider, they often appear as a representative for a group of plaintiffs that seek to challenge what they view as unconstitutional reproductive rights legislation. Planned Parenthood had been involved with reproductive rights cases prior to *Casey*, with the group filing an amicus curiae brief in *Roe v. Wade* where they emphasized the importance of providing access to safe abortion by voluntarily listing statistics from their own clinics (Brief for the United States as Amicus Curiae Supporting Respondents, 1992).

Through combining their medical services and advocacy, they have been able to put forth compelling arguments on maintaining access to abortion. The group believes that laws requiring parental notification before an abortion can be performed on a minor are unconstitutional on privacy grounds, which is why they objected to the amendment to the Pennsylvania Abortion Control Act that required parental consent prior to an abortion being performed on a minor. (Demer, 2010). As the primary group representing and advocating for the plaintiffs in this case, Planned Parenthood helped in obtaining legal representation, and worked in conjunction with the Women Law Project to provide the necessary resources to Kolbert for her argument. Although this case was specifically brought by the Planned Parenthood of Southeastern Pennsylvania, this local chapter of Planned Parenthood had backing from the much larger national organization in advocating and lobbying for the case.

Wanting to garner attention for the issue came naturally for Planned Parenthood, whose experience in organizing protests made it easy to mobilize for its cause. On April 5, 1992, just days prior to when the Court began to hear arguments on the case, Planned Parenthood coordinated “tens of thousands of supporters, staff and clients from across the country” to converge in Washington D.C. and protest for a woman’s right to choose. (Thousands, 1992). They urged participants of this protest to participate in lobbying while in the city, to show elected officials grassroots support, and the Planned Parenthood Philadelphia affiliate specifically got involved with this event, raising more than \$1,000 from local businesses to cover travel costs for those marching (Thousands, 1992). This action garnered support and awareness of the issue prior to the case being heard, so that news outlets would already be tuned into the subject for further coverage. Holding the protest prior to the case being argued allowed Planned

Parenthood to demonstrate the level of support for their side, framing the issue by showing all those in support.

Limiting abortion access is most consequential for poor communities, which widened the alliance of groups in support. Another notable group that filed in support of Planned Parenthood in this case was the NAACP Legal Defense and Educational Fund, who submitted an amicus brief in conjunction with twenty-three other organizations in support of Planned Parenthood of Southeastern Pennsylvania. The NAACP (National Association for the Advancement of Colored People) is a national advocacy group working to “ensure the political, educational, social, and economic equality of rights of all persons and to eliminate racial hatred and racial discrimination.” (We’re on a Mission, 2022). The amicus curiae brief stated that “the brief is filed on behalf of twenty-four organizations that share a deep concern for the health and life chances of poor women, and particularly, poor women of color.” (Brief of Amici Curiae of the NAACP Legal Defense and Educational Fund, 1992). The reason that the NAACP (alongside the other groups) saw the need to file in support was due to their belief that “poor women lack access to the quality health care services that more affluent Americans take for granted,” including reasonable access to reproductive healthcare. (Brief of Amici Curiae of the NAACP Legal Defense and Educational Fund).

For the party supporting the abortion restriction

Many organizations filed briefs in support of Governor Casey and the Pennsylvania Abortion Control Act. One such organization was National Right to Life, the nation’s “oldest and largest pro-life organization.” (National Right to Life Mission Statement, 2022). With over 3,000 local chapters, this organization works through education and legislation to “restore legal

protection to the most defenseless members of our society who are threatened by abortion.”
(National Right to Life Mission Statement, 2022).

Right to Life had a fundamental issue with *Roe* being used as backing for an argument, as they thought it was wrongly decided to begin with. In their brief, they called *Roe v. Wade* “unworkable,” and pointed toward it having “no proper constitutional foundation” as a reason for its support “eroding.” (Brief Amicus Curiae of National Right to Life, Inc. Supporting Respondents/Cross-Petitioners, 1992). Agreeing with the argument advanced by Starr, National Right to Life pushed that the courts erred in failing to recognize the compelling state interests of protecting life. As the largest pro-life organization in the country, they were able to reach out to thousands across the nation and ensure that they knew what was happening in the courts and utilized their grass-roots advocacy network to demonstrate what they thought was unacceptable. Despite being on the losing side of the argument, their idea of *Roe* having no proper constitutional foundation was echoed by some of the Concurring/Dissenting opinions in the case. Justices Steven, Rehnquist, and Scalia argued that the Court had no legal backing for being in the area of abortion rights to begin with (*Planned Parenthood of Southeastern Pennsylvania v. Casey*).

Faith-based organizations got involved in the debate at hand, with multiple coming out in support of the restrictions. A brief filed by Catholics United for Life and fifteen other religious based groups worked to convince the Court of the religious values at stake in this debate. Catholics United for Life is a pro-life subsidiary of the Catholic Church, created to promote “sidewalk counseling, a technique [it] developed for saving babies from abortion.” (Brief of Catholics United for Life, *Planned Parenthood v. Casey*). These counselors work to save what they perceive as babies threatened by abortion through a mixture of prayer, persuasion, and

distribution of materials covering alternatives to abortion. All of the religious groups that joined Catholics United for Life in this brief were faith-based organizations with similar goals, on educating women on options outside of abortion and advocating for what they consider babies in the womb.

These organizations believed that the principles *Roe* stood on were unconstitutional, and that revisiting these principles in *Casey* gave the Court an opportunity to do away with the concept of women having a right to abortion. They argued that not only did the Fourteenth Amendment secure a right to life, but also earlier amendments, such as the Fifth Amendment, guaranteed a right to life that “apply to all living human beings by virtue of their humanity.” (Brief of Catholics United for Life, *Planned Parenthood v. Casey*). These groups pushed the idea that there was no valid basis for excluding “human beings conceived but not yet born” from the protections given to a person in the Constitution, and their work centered around being an advocate for what they felt were unborn humans.

Whole Woman’s Health v. Hellerstedt

Whole Woman’s Health v. Hellerstedt (2016) is a more recent case in the evolution of reproductive rights cases heard by the Court. Originally brought in Texas, the plaintiffs in this case were challenging a Texas Legislature House Bill which required that any physician performing an abortion have admitting privileges at a hospital within thirty miles of where the abortion was performed, and a provision that all abortion clinics comply with standards for ambulatory surgical centers. (*Whole Woman’s Health v. Hellerstedt*, 2016). If implemented, the effect of the Act would be that the “number of facilities providing abortions dropped in half,” and “the number (of women) living more than 200 miles away (would increase) by about 2,800%.” (*Whole Woman’s Health v. Hellerstedt*, 2016). A group of abortion providers sued the

state, and the Court found in a 5-3 decision that Texas could not place such extensive restrictions on the delivery of abortion services that creates an undue burden on those seeking an abortion.

In deciding this case, the Court applied the undue burden standard created by *Casey* to reach the conclusion that the admitting privileges and surgical-center requirements were unconstitutional. The Court determined that “the dramatic drop in the number of clinics means fewer doctors, longer waiting times, and increased crowding,” which, when coupled with increased driving times, support the holding that this restriction places an undue burden on women’s health. (*Whole Woman’s Health v. Hellerstedt*, 2016). In the majority opinion, Breyer wrote that “neither of these provisions offers medical benefits sufficient to justify the burdens upon access that each imposes,” and specifically referenced the undue burden standard from *Casey* in explaining this fact. (Breyer, *Whole Woman’s Health v. Hellerstedt*).

Support of the Legal Field

For the parties challenging the abortion restriction

The main advocate against the Texas restrictions was a lawyer with an extensive background in reproductive rights. Representing Whole Woman’s Health was Stephanie Toti, the current Senior Counsel and Project Director at The Lawyering Project. A graduate of New York University, Toti was asked by Whole Woman’s Health to represent them in this case at the Supreme Court while she was working at the Center for Reproductive Rights, a global human rights organization. (Stephanie Toti About Us, 2021). Having argued cases across the state and federal courts on this subject, Toti was selected due to her experience and track record advocating for reproductive rights.

In her oral argument, Toti relied on the undue burden standard created by *Casey*, highlighting how it would prohibit the Texas statues. Toti started her argument by stating that

these restrictions were “unnecessary health regulations that create substantial obstacles to abortion access” that “undermine the careful balance struck in *Casey* between States’ legitimate interests in regulating abortion and women’s fundamental liberty to make personal decisions about their pregnancies.” (Oyez, *Whole Woman’s Health v. Hellerstedt*). Additionally, the brief filed by the petitioners began by pointing out how this case could be resolved if the standard of undue burden from *Casey* was applied and understood to contradict the Texas regulations, as it “guarantees every woman the ability to make personal decisions about family and childbearing.” (Brief for Petitioners, *Whole Woman’s Health v. Hellerstedt*). The Court’s majority opinion echoed these arguments and cited to how these requirements went against the standard set by *Casey*.

Outside of arguing the case in the Court, Toti took to various news outlets to further share the argument she was making. In one interview, published in Glamour Magazine, before the decision of the Court was released she pushed the idea that “the case will have an immediate impact on the 5.4 million women of reproductive age living in Texas,” but will “also have an impact on women in all of those other states.” (Mahaney, 2016). Speaking with a widely published magazine oriented towards women, Toti ensured that this case would be known by women across the country, so that they could be ready to engage with elected officials if the ruling came out the other way.

With a major decision at stake, the federal government joined Toti in her argument before the Court. Donald Verrilli, former Solicitor General of the United States under President Obama, had argued more than fifty cases before the Supreme Court, including cases on the Affordable Care Act and marriage equality. (Donald B. Verrilli, Jr, 2022). In his argument before the Court, he pushed the idea that, while certain provisions of the act were not in violation of any part of

Casey, the whole Act should nonetheless be held unconstitutional due to the fact that it would “actually operate in practice to increase health risks to women and not decrease.” (Oyez, *Whole Woman’s Health v. Hellerstedt*, 2016). Additionally, he further advanced multiple points made by Toti, providing reinforcement for the argument that the Act led to the immediate closure of eleven clinics in the state, which severely impaired a woman’s ability to access an abortion provider.

For the first time in abortion jurisprudence, women impacted by the ban joined the support structure in *Whole Woman’s Health*. A brief filed in favor of the petitioners was signed by 113 women, all lawyers who had exercised their rights to an abortion. As members of the legal community themselves, these women viewed it necessary to submit a brief detailing why they thought abortion should remain a right and discussed how it has helped them maintain their careers as lawyers. These women, who shared that they “are partners, counsel, and associates at private law firms; they are government attorneys, a former state legislator,” and many more types of legal professionals, aimed to show that Court that the restriction “would have the very real effect of preventing numerous women, including many current and future attorneys, from effectively planning their family and professional lives.” (Brief of Janice Macavoy, et al., *Whole Woman’s Health v. Hellerstedt*, 2016).

Women in the legal profession rallied together to submit this brief and present a compelling argument to the Court, showing how the petitioners’ argument had support from others in the the legal community. This brief was intended to “inform the Court of the impact of the right this Court has recognized in *Roe*.” (Brief of Janice Macavoy, et al., *Whole Woman’s Health v. Hellerstedt*). In this brief, these women argued that “they would not have been able to achieve the personal or professional successes they have achieved were it not for their ability to

obtain safe and legal abortions.” (Brief of Janice Macavoy, et al., *Whole Woman’s Health v. Hellerstedt*). While the Court didn’t specifically reference this brief in its opinion this brief showed that some members of the legal profession felt that they had access to the profession given their right to abortion as guaranteed by *Roe*.

This brief was not only seen by the Court, but also by news outlets picking up the story of these lawyers coming forward. *The Atlantic* called the brief “remarkable” for representing “the perspectives of people who are trained in the law, but who are also personally familiar with what it means to get an abortion.” (Green, 2016). *The Atlantic* dissects the brief, and highlights that while the women in the brief have dissonance over what they viewed their the abortion as, they all advocate that abortion is not a moral issue, it is “a health issue, and a lifestyle issue, and a career issue.” (Green, 2016). By coming forward with their stories, these lawyers made sure their stories were heard by many, and thus showed how the impacts of this case would reverberate around the country and affect varying professions.

For the party supporting the abortion restriction

Representing John Hellerstedt, Commissioner of the Texas Department of State Health Services, and those that hoped to uphold this regulation was Scott Keller. At the time of arguing this case, Keller was the Solicitor General of Texas, and acted as the State’s chief appellate litigator. Beginning his legal career as a law clerk for Justice Kennedy, Keller had a deep understanding of how the court worked, and is currently the only practicing lawyer to have argued 12 cases before both the US Supreme Court and the Texas Supreme Court (Scott A. Keller, 2021). With a specialization in representing clients where public communications strategy is crucial, he worked not only to advocate the case in the courts but in the public eye, to garner support from others for the case.

Emphasizing the existing legality and accessibility of abortion in Texas was a crucial part of Keller's strategy. In his oral argument, Keller pointed out that, despite clinics closing, "all the Texas metropolitan areas that have abortion clinics today will have open clinics" if the Court allowed the restriction to exist. (Oyez, *Whole Woman's Health v. Hellerstedt*, 2016).

Additionally, he argued that the restriction was to raise the admitting standard for Texas, and that the "substantial obstacle inquiry examines whether there is the ability to make the ultimate decision," which those further away from clinics in Texas will be able to do in clinics outside of Texas, such as in New Mexico. (Oyez, *Whole Woman's Health v. Hellerstedt*, 2016).

Distinguishing this case from *Casey*, Keller argued that "in *Casey*, (increased travel times) was not a facial substantial obstacle" that the Court examined under their undue burden standard, which is why the 24 hour waiting period requirement was allowed to hold. (Oyez, *Whole Woman's Health v. Hellerstedt*, 2016).

Members of the legal community stepped up in support of the respondents in this case, with multiple groups filing briefs of support. One of the larger briefs came from the Conservative Legal Defense and Education Fund, a group which publishes conservative legal thought and advocates for the protection of "the true rule of law" (<http://cldef.org/wordpress/about-us/>, 2021). In their brief, joined by the US Justice Foundation and the Institute on the Constitution, they agreed with Texas' argument that the requirements imposed by the law "do not impose an undue burden on a woman's access to abortion under *Planned Parenthood v. Casey*" and said that if the Court decides that "Texas laws do not pass that test" they should instead "consider whether *Casey*, decided in the aftermath of *Roe v. Wade*, is still good law." (Brief Amicus Curiae of Conservative Legal Defense, *Whole Woman's Health v. Hellerstedt*, 2016).

Involvement of Advocacy Organizations

For the party challenging the abortion restriction

Despite not being the petitioner in this case, Planned Parenthood did file a brief in favor of the petitioner's position. Specifically, this brief came from the Planned Parenthood of Greater Texas Surgical Health Services, a subset of the national Planned Parenthood organization that specifically caters services to women in the state of Texas and "provides a full range of reproductive health care services, including family planning services, testing and treatment for sexually transmitted infections," among other services throughout eight counties in Texas (Brief of Amici Curiae Planned Parenthood Federation of America, Planned Parenthood of Greater Texas Surgical Health Services, *Whole Woman's Health v Hellerstedt*, 2016). Throughout the brief, they argue that the Texas law "will do nothing to further the health of women in Texas," rather, there will be "dire consequences" (Brief of Amici Curiae Planned Parenthood Federation of America, Planned Parenthood of Greater Texas Surgical Health Services, *Whole Woman's Health v Hellerstedt*, 2016). They used the brief to warn that "the consequences of the Court's ruling in this case will reverberate far beyond Texas," as the Court ruling in favor of the respondents may lead to similar laws being permitted in more states. (Brief of Amici Curiae Planned Parenthood Federation of America, Planned Parenthood of Greater Texas Surgical Health Services, *Whole Woman's Health v Hellerstedt*, 2016). In this way, Planned Parenthood was asking the Court to recognize the national consequences of a single states legislation, and show that similar laws would be struck down across the nation.

For the party supporting the abortion restriction

For this case, one organization that came out in support of the respondents was a group who, similar to Planned Parenthood, filed in support of the respondents in *Casey*. The National Right to Life Committee pointed to provisions in *Roe* that were inconsistent with arguments

made by the majority in *Roe* and *Casey*. The National Right to Life Committee emphasized how “initially, *Roe* disavowed on-demand abortion and said states could regulate medical aspects of abortion,” which would be consistent with what the Texas law was aiming to regulate. (Brief of Amicus Curiae National Right to Life Committee, *Whole Woman’s Health v. Hellerstedt*, 2016). Additionally, *Casey* implemented the standard of undue burden in regard to regulation, so the consideration of maternal morbidity should not be taken into account when deciding on this case. Rather than argue against providing abortions, the National Right to Life Committee argued that previous holdings had set a precedent for this case that should be adhered to, resulting in a ruling for the respondents.

Analysis

Shifts in arguments against restrictions

Looking first at *Planned Parenthood v. Casey*, it is apparent that the support structure was active and influential. In the opinion of this case, the Justices emphasized the majority’s desire to uphold *Roe* and just modify the standard under which restrictions were viewed to an undue burden standard. This demonstrates the potential effectiveness of Kolbert’s specific approach and argument to the case. In *Casey*, Kolbert and Wharton worked together in their oral argument to advance this idea. What exactly persuaded the Justices in their argument would rely on archival material outside the scope of this paper. However, because the legal representation’s theory of the case matched how the Justices ultimately decided it means that counsel was able to use their time at oral argument as effectively as they could have.

For those arguing against the restrictions, the structure of representation did not change, however the more recent case included a media campaign for the lawyers. While exploring how the legal field changed tactics when arguing against the restriction in *Whole Woman’s Health v.*

Hellerstedt, some things remained constant, most noticeably in that those arguing against the restrictions stuck with the tactic of two advocates arguing the case. Similar to the argument made by Kolbert and Wharton in *Casey*, Toti and Verrilli in *Hellerstedt* emphasized that tightening restrictions leads to disparate impacts for those women with less privileges. They did this by highlighting how many clinics would close under an implementation of the restriction. One noticeable shift in the way legal advocates in *Hellerstedt* handled arguing against the restrictions was in their willingness to communicate their position to not only the Court but varying news outlets around the country. This push to be heard at a national level may indicate more of a cultural shift in how acceptable public conversations around abortions are.

An important distinction in the support structures between *Casey* and *Hellerstedt* is that in *Hellerstedt* a brief was filed by members of the legal community against the restrictions, who were personally affected by the choice to obtain an abortion. Through coming forward with their stories, and being willing to share their names, 113 women within the legal field shifted the focus on abortion access from being a moral issue to it being a health and career decision. This lends credence to the idea that conversations around abortion were more acceptable in society in 2016 instead of 1992. This willingness to share stories was not seen in *Casey*, and provides a glimpse into how the support structure evolved throughout various arguments against abortion restrictions.

Advocacy organizations also evolved in how they pushed their agendas in these cases, with a prime example being Planned Parenthood's involvement in both of the cases. In *Casey*, Planned Parenthood served not only as the plaintiff in the case but filed briefs in favor of its argument, providing statistics on who the restrictions would hurt if they were implemented. Additionally, they organized protests to garner national attention for the issue, showing their

willingness to make their ideas heard. In their brief in *Hellerstedt*, they moved from pointing out statistics regarding the case to warning that a decision to uphold abortion restrictions would reverberate across the country. Its argument moved from asking the Court to agree with its idea to becoming an advocate itself of the idea, showing Planned Parenthood advancing its argument over time to appeal to the political nature of the Court.

Shifts in arguments supporting restrictions

A consolidation of arguments and shift in what they were arguing for the Court to decide was the most noticeable shift for those supporting the restrictions. While not the winning side of the case in *Casey*, Preate and Starr had some impact in their arguments, particularly for the various “concurring in part and dissenting in part” opinions on this case. Particularly, in Justice Rehnquist, Justice White, and Justice Scalia’s opinion, they advocated that *Roe* was wrongly decided, and that the Court should remove itself entirely from deciding on the constitutionality of abortion, as they are doing the country no good by remaining in the discussion (*Planned Parenthood v. Casey*, 1992, Scalia, J. dissenting). This is in line with the arguments advanced by Preate and Starr, in that the only reason the Court should involve itself with this case is to overturn the essential holding in *Roe* that found a right to privacy. Preate and Starr (*Casey*) were disjointed in their arguments, a noticeable difference from Wharton and Kolbert (*Casey*), with each arguing for separate ideas as opposed to working together to advance the same position. This disfunction may have weakened the overall argument, potentially making the other side seem stronger to the Court.

Shifting from the argument approach in *Casey*, those supporting the abortion restrictions in *Hellerstedt* utilized just one advocate to argue their case before the Court. As opposed to arguing that the Court should remove itself from the debate altogether (such as in *Casey*), Keller

emphasized in *Hellerstedt* that restrictions could exist under the standards set in *Roe* without violating a woman's access to abortion. This appears to be a noticeable difference in the core argument advanced in the two cases, as it seems parties aiming to restrict abortion were moving away from tearing down *Roe* to increasing what they could do under the precedent it created.

While Keller's *Hellerstedt* argument did not sway the majority opinion in this case, there seemed to be fragments of his argument adopted in dissenting opinions, particularly by Justice Alito. In his dissent, he seemed to work along the point that Keller was making, in that the restrictions did not create an undue burden and pushed that the standard the Court was applying looked "far more like the strict-scrutiny standard that *Casey* rejected" (*Whole Woman's Health v. Hellerstedt*, 2016, Alito, J. dissenting p 2326). Justice Alito believed that the majority in this case was changing the standard that was applied based upon the desired outcome that they wanted. Additionally, Justice Alito pushed that "the constitutionality of laws regulating abortion is one of the most controversial issues in American law," with there being no strong foundation for these rights to have been identified in the first place. (Alito, *Whole Woman's Health v Hellerstedt*, 2016, Alito, J. dissenting p 2330).

The brief filed by the National Right to Life Committee reinforces this shift, with the group advocating that restrictions were constitutional under *Roe*, and that the Court should uphold this ability in *Hellerstedt*. This seems to go directly against Right to Life's position in *Casey*, where it called *Roe* unworkable and lacking in constitutional foundation. This argument evolution is present in both the positions of the legal profession and the advocacy organizations on this side of the cases, pointing towards a restructuring in how pro-life advocates decided to argue for upholding restrictions.

Overall, a few noticeable shifts in the support structure become apparent through an analysis of these two cases. The legal field seems to have become more willing to share their viewpoints on this case, as shown by the growth in legal professionals doing interviews on *Hellerstedt* and the filing of briefs against the restrictions. Additionally, those arguing for the restrictions seem to be working together more to unify their argument, so that a single strong opinion can be expressed as opposed to multiple ones that can reduce the impact of the overall argument. As for advocacy organizations, it is important to note that the same groups came out for both cases, even though they were over 20 years apart, showing how entrenched certain organizations are in the abortion rights debate. By remaining consistently involved, and utilizing their grassroots advocacy networks, these organizations were able to unite people around their causes, and impress upon the Court their commitment to having their arguments heard. However, Planned Parenthood remained consistent in its argument, while National Right to Life showed a shift in argument in line with the legal profession in the case.

Conclusion

Epp's support structure is seen at work throughout both of these cases, showing the versatility of the theory over time. A shift in support was seen, with the reproductive rights argument evolving on either side to best match what had worked in the past while meeting the demands of the present. While the finance section of his theory was not explored in this research, further research could look into how it may have played a role in the strength/quality of arguments made by both sides. Additionally, an examination of potential shift in cultural norms regarding abortion discussions in mainstream media may provide more insight into how arguments were framed in *Hellerstedt*. As shown through those arguing for abortion restrictions in these cases, there is a divide in how the abortion debate is framed, with there being a presence

of both “abortion with restrictions” and “no abortions at all” arguments, a split which could provide justification for research.

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