TIERED BALANCING AND THE FATE OF *ROE V. WADE*: HOW THE NEW SUPREME COURT MAJORITY COULD TURN THE UNDUE-BURDEN STANDARD INTO A DEFERENTIAL *PIKE* TEST

*By Brendan T. Beery**

In one of the more noteworthy uses of his much-ballyhooed "swing vote"[1] on the U.S. Supreme Court, Justice Anthony Kennedy sided with Justices Breyer, Ginsburg, Sotomayor, and Kagan in striking down two Texas laws that restricted access to reproductive-healthcare facilities. The laws did so by imposing toilsome admitting privileges and surgical-facility standards that clinics had difficulty abiding. [2]

The proposition that a woman has an unenumerated constitutional right to terminate a pregnancy, at least before the point of fetal viability, won the day in 1973.[3] But, as 2018 fades into 2019, no judicial precedent is more endangered than the one that has evolved in a triumvirate of cases: *Roe v. Wade*,[4] *Planned Parenthood v. Casey*,[5] and *Whole Woman's Health v. Hellerstedt*,[6] save perhaps the principle

* Professor of Law, Western Michigan University Thomas M. Cooley Law School; B.A., Bradley University, 1995; J.D., *summa cum laude*, Thomas M. Cooley Law School, 1998. The author wishes to thank his friend and colleague, Professor Daniel R. Ray, for his assistance in conceptualizing this essay. The author also thanks the editors and staff of the *Kansas Journal of Law & Public Policy* for their incisive feedback, professionalism, and hard work.

[1] *See* Caitlin E. Borgmann, *Abortion, the Undue Burden Standard, and the Evisceration of Women's Privacy*, 16 WM. & MARY J. WOMEN & L. 291, 292 (2010).

[2] *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2300 (2016).

[3] *See* Roe v. Wade, 410 U.S. 113 (1973).

[4] *Id*.

[5] *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992).

[6] *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2300 (2016).

that LGBT persons are entitled to the equal protection of the law.[7] As one scholar noted in the immediate wake of the *Hellerstedt* decision,

> [T]he future of abortion regulation . . . will be affected by the makeup of the Court. . . . Assuming that Justice[s] Ginsb[u]rg, Breyer, Kagan, and Sotomayor remain for the foreseeable future, the power of *Hellerstedt* will depend on Justice Kennedy remaining on the Court.[8]

Justice Kennedy, of course, is now gone.[9]

The question has arisen, then, whether *Roe* and its progeny will be overruled outright; and some commentators tend to doubt it.[10] Overruling the central holding of *Roe* might actually cause what the late Justice Antonin Scalia once called "a massive disruption of the current social order."[11] The more likely path for a Court "hostile to freewheeling notions of individual autonomy in matters relating to family, marriage, or reproductive and sexual practices"[12] is the gradual, but palpable, erosion of reproductive rights until this substantive-due process doctrine has "nothing left [to it] but some [stray] ligaments on an otherwise dried-up bone."[13]

In *Hellerstedt*, the Court provided a way for its next iteration, one with social conservatives as the new majority, to take that path. That is because in *Hellerstedt*, as Part I of this article explains, the Court

---

[7] Brendan Beery, *Rational Basis Loses Its Bite: Justice Kennedy's Retirement Removes the Most Lethal Quill from LGBT Advocates' Equal-Protection Quiver*, 69 SYRACUSE L. REV. (forthcoming Spring 2019).

[8] John A. Robertson, *Whole Woman's Health v. Hellerstedt and the Future of Abortion Regulation*, 7 U.C. IRVINE L. REV. 623, 643–44 (2017).

[9] S*ee* Ariane de Vogue, *Justice Kennedy to Retire from Supreme Court*, CNN (June 27, 2018), https://www.cnn.com/2018/06/27/politics/anthony-kennedy-retires/index.html, [https://perma.cc/F2XK-ZZFV].

[10] *See* Katie Reilly, *Here's What Could Happen to Roe v. Wade and Abortion Rights After Justice Kennedy's Retirement*, TIME (June 28, 2018), http://time.com/5325124/justice-anthony-kennedy-supreme-court-roe-v-wade-overturned/ [https://perma.cc/R4EX-3VG].

[11] The phrase was admittedly used in a different context. Lawrence v. Texas, 539 U.S. 558, 591 (2003) (Scalia, J., dissenting).

[12] *See* Brendan Beery, *How to Argue Liberty Cases in a Post-Kennedy World: It's Not About Individual Rights, but State Power and the Social Compact*, *75* NAT'L LAW. GUILD REV. 1, 1 (2018) (citing Brenda Cossman, *Contesting Conservatisms, Family Feuds and the Privatization of Dependency*, 13 AM. U. J. GENDER SOC. POL'Y & L. 415 (2005) (explaining the socially conservative approaches to marriage, family, gender roles, and economic policy)).

[13] *Id.*

reformulated the undue-burden standard announced in *Casey* as a balancing test requiring that the burden a law places on a woman's right to terminate a pregnancy be weighed against any benefit engendered by the law; meaning, it would seem, any benefit as to health outcomes.[14]

Part II shows that balancing is a strange species of legal test. It is both ductile and malleable, and although commentators have rarely explicitly recognized as much, balancing tests are, like their better-known cousins, the means-ends standards of review known as strict scrutiny, intermediate scrutiny, and rational-basis review[15], tiered. Means-ends tests are designed to "smoke out" improper purposes or interests,[16] whereas balancing tests, in the sense that I use the term here, are designed to measure competing interests against one another: "Balancing is more like grocer's work (or Justice's)—the judge's job is to place competing rights and interests on a scale and weigh them against each other."[17] As to means-ends tests, on the other hand, "the Court speaks not only of the comparative weight of individual rights and government ends, but also of the fit of the means to the ends; more the vocabulary of the tailor than the grocer. To the extent fit analysis is used to smoke out impermissible motives, it is more akin to categorical analysis than balancing."[18]

Although means-ends tests are commonly characterized as tiered, scholars, lawyers, and judges rarely characterize balancing tests as tiered as well. But like the best-known means-ends tests, strict scrutiny, intermediate scrutiny, and rational-basis review, balancing tests run along a spectrum of potency from the perspective of whatever governmental entity is being challenged. Some balancing tests are neutral, where the stronger interest or argument wins, plain and simple; but in some other cases, the Court has applied what I call asymmetric balancing by putting a thumb on one side of the scale. I

---

[14] *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2309 (2016).

[15] *See generally* Brendan Beery, *supra* note 12 (explaining the differences between different standards of review in equal-protection cases). *See also* Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 358 ("[T]he whole regime of varying the tiers of scrutiny is itself but one of the techniques by which the modern Court gives differential protection to constitutional norms.").

[16] *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989).

[17] Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 293–94 (1992).

[18] *Id.* at 295.

call these asymmetric balancing tests incursive when they are searching, skeptical, and hostile to the government's law or policy and deferential when they weight the balance in favor of the government. To oversimplify a bit, but for ease of reference, here are the three tiers of constitutional balancing tests:

TEST	WEIGHTING
INCURSIVE	Favors Individual Right or Constitutional Interest
NEUTRAL	Favors Neither Party or Interest
DEFERENTIAL	Favors State's Interest in Overcoming Claim of Individual Right or Constitutional Interest

In Part III, the article posits that the Court was altogether unclear in *Hellerstedt* as to which kind of balancing test it was suggesting: incursive, neutral, or deferential. That leaves the new Court majority free, without overruling *Hellerstedt*, simply to stray over to the deferential side of the spectrum, where it may fashion something akin to the *Pike*[19] test it applies to even-handed state laws that, although they incidentally affect interstate commerce, do not have the purpose or effect of discriminating against out-of-state interests. Under *Pike*, such a law is upheld under a deferential balancing test: the law stands unless the burden it places on interstate commerce is *clearly excessive* in relation to the putative local benefit.[20]

One can see the Supreme Court, with Justice Brett Kavanaugh on board, taking this tack: an undue burden is one that is clearly excessive in relation to any benefit; and since that benefit will now be characterized as preserving potential human life,[21] it will be difficult to conceive of any burden that would fail under this standard, save for, perhaps, the complete abrogation of the abortion right.

I. "UNDUE BURDEN" BECOMES A BALANCING TEST

[19] *See* Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).
[20] *See id.* at 142.
[21] *See* Garza v. Hargan, 874 F.3d 735, 752 (D.C. Cir. 2017) (Henderson, J., dissenting).

The outcome in a constitutional case typically depends on the kind of test to be applied and the burden that test places on the respective parties. A lawyer involved in constitutional litigation needs to know how a court will analyze a case, and, more importantly, which side will need to persuade the court that it should win. It is crucial, therefore, that the standard in abortion cases has undergone a metamorphosis from a more categorical test to a bilateral balancing test.[22]

A. The Nature of Bilateral Balancing, Generally

Many legal tests are either categorical, "Don't do *x*", or elemental, "You're liable if you did A + B + C". And then there is constitutional law, where rigid formulations go to die. This is as one would probably expect. Constitutional cases involve the interpretation of vague and general terms like *liberty*[23] and *due process*[24] and *privileges and immunities*.[25] The interpretation of such terms ultimately falls, of course, to the highest court in the land,[26] which must make sense of them with an eye toward their applications in future cases. And although justices often pretend not to have agendas or axes to grind, that claim is belied by the audacity of so many of their extra-judicial rants.[27] So there is always a heavy overlay in constitutional cases of politics, and it cannot be gainsaid that the Court moves American culture, sometimes toward greater promise,[28] and sometimes toward a moral abyss. [29]

In any event, since the Court largely fashions tests for its own use in cases yet to come and even yet to be imagined; it seems

---

[22] *See infra* notes 24–66 and accompanying text.
[23] *See* U.S. CONST. amend. V; U.S. CONST. amend. XIV.
[24] *Id.*
[25] *See* U.S. CONST. art. IV, § 2.; U.S. CONST. amend. XIV.
[26] *See generally* Cooper v. Aaron, 358 U.S. 1 (1958) (explaining that the United States Supreme Court is the ultimate arbiter in federal-question cases, and that all state actors are bound by a Supreme Court decision on a federal issue).
[27] *See*, *e.g.*, Lawrence v. Texas, 539 U.S. 558, 602–05 (2003) (Scalia, J., dissenting); *See also* Beery, *supra* note 12; *See generally Brendan Beery, When Originalism Attacks: How Justice Scalia's Resort to Original Expected Application in Crawford v. Washington Came Back to Bite Him in Michigan v. Bryant,* 59 DRAKE L. REV. 1047 (2011).
[28] *See*, *e.g.*, Brown v. Bd. Of Educ., 347 U.S. 483 (1954); Lawrence v. Texas, 539 U.S. 558 (2013); Romer v. Evans, 517 U.S. 620 (1996).
[29] *See*, *e.g.*, Korematsu v. United States, 323 U.S. 214 (1944); Plessy v. Ferguson, 163 U.S. 537 (1896); Bowers v. Hardwick, 478 U.S. 186 (1986).

unremarkable that in any case before it, the Court would be disinclined to cabin itself, doctrinally, under a constrictive exoskeleton. Thus, there is a species of analytical models in constitutional cases with some give and some plasticity: factors tests, means-ends tests, and balancing tests.[30]

Whereas an element is "a component of a legal test that must be proved in order to establish a legal claim as a whole,"[31] factors are "areas of inquiry a court must consider in determining whether a particular legal conclusion can be reached . . . ."[32] Means-ends tests, especially heightened scrutiny tests that require a close fit between the means and some important or compelling governmental interest, are typically used to smoke out bad motives when a law or policy is, on its face, suspicious.[33]

And then there are balancing tests, which typically are employed in constitutional cases when a court faces competing, often bilateral, policy interests, frequently involving social or cultural matters—and seeks, simply put, to give the win to the side with the better argument.[34]

In constitutional cases, the two competing interests are often, generally speaking, 1) the individual's right to be free from governmental intrusions and 2) some policy choice made by governmental actors that requires, in the government's view, that the exercise of the individual's claimed right yield to the public good.[35] So courts often find themselves weighing 1) the burden a law imposes on the individual against 2) the public-policy benefit derived from the application of the government's law or policy. Professor Aleinikoff provided the following definition and explanation:

> Balancing: The metaphoric term generally used in the law to describe

[30] *See generally* Brendan T. Beery and Daniel R. Ray, *Five Different Species of Legal Tests—And What They All Have in Common*, 37 QUINNIPIAC L. REV. (forthcoming 2019).
[31] Michael R. Smith, *Elements v. Factors*, 39 WYO. LAW. 46 (Apr. 2016).
[32] *Id.*
[33] *See* Beery & Ray, *supra* note 30, at 11–12 (citing Brendan Beery, *Rational Basis Loses Its Bite: Justice Kennedy's Retirement Removes the Most Lethal Quill from LGBT Advocates' Equal-Protection Quiver*, 69 SYRACUSE L. REV. (forthcoming 2019) (citations omitted)).
[34] *See* Beery & Ray, *supra* note 30, at 8.
[35] T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 946–47 (1987).

> an exceedingly important conceptual operation. In almost all conflicts, especially those that make their way into a legal system, there is something to be said in favor of two or more outcomes. Whatever result is chosen, someone will be advantaged and someone will be disadvantaged; some policy will be promoted at the expense of some other. Hence it is often said that a "balancing operation"' must be undertaken, with the "correct"' decision seen as the one yielding the greatest net benefit.[36]

Consider, for example, a relatively recent Fourth-Amendment case that illustrates balancing well. In *Riley v. California*,[37] the Court considered whether police were permitted to search the contents of an arrestee's cell phone without a warrant as a search incident to arrest.[38] Noting that cell-phone technology could not even have been imagined by the founding generation, the Court sought a flexible standard for gauging the application of constitutional language to the ever-changing realities of the American experience of life. Eschewing a rigid or formalistic approach to the question presented, the Court opted instead to "assess[], on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests."[39] This is the classic formulation of what I call a bilateral balancing test in an effort to differentiate between balancing tests and factors tests: a test that sets up two interests that are not just considered in relation to one another, but also weighed *against* one another in an effort to discern which party has the weightier interest at stake. This is what separates a bilateral balancing test from a factors test; factors tests, although they involve considerations that are, in some sense, weighed, don't necessarily require that those considerations be weighed *in opposition* to one another. To be precise, then, there is a species of constitutional test that might fairly be called a bilateral, oppositional balancing test.

B. The Application of Bilateral, Oppositional Balancing to Reproductive Rights

The Court has struggled mightily to formulate a cogent analytical framework for resolving reproductive-rights cases. This is likely

[36] *Id.* at 943 (citation omitted).
[37] *See generally* Riley v. California, 134 S. Ct. 2473, 2480 (2014).
[38] *See id*.
[39] *Id.* at 2484 (quoting Wyoming v. Houghton, 526 U.S. 295, 300 (1999)).

because, unlike in the typical constitutional case pitting two interests against each other in a bilateral construct, the Court has perceived the possible existence of three interests, not two, in pregnancy-termination cases: the interest of the woman seeking to terminate a pregnancy; the interest of the state in regulating any medical procedure to ensure better health outcomes; and the interest of the unborn, presumably an interest at odds with the woman seeking to terminate the pregnancy.[40] Most constitutional tests are simply not designed to accommodate a trilateral or multilateral and oppositional posture among more than two competing parties and their interests.

Thus, in *Roe*, the Court fashioned a new framework that was designed to accommodate multiple interests: the "trimester framework."[41] In the process of creating the trimester framework, which is not itself a balancing test, the Court did indulge some balancing of competing interests. Indeed, the Court stated, "It is with [certain] interests, and the weight to be attached to them, that this case is concerned."[42] This was not, however, the kind of *ad hoc* balancing usually associated with bilateral balancing tests applied in constitutional cases. Professor Aleinikoff explained,

> Commentators have occasionally distinguished balancing that establishes a substantive constitutional principle of general application, labeled "definitional" balancing, from balancing that itself is the constitutional principle (so-called "ad hoc"' balancing). *New York v. Ferber* is an example of definitional balancing. *Ferber*'s holding, that the distribution of child pornography is not protected by the First Amendment, may be applied in subsequent cases without additional balancing. Ad hoc balancing is illustrated by the Court's approach in procedural due process cases. Under *Mathews v. Eldridge*, the process that the Constitution requires is determined by balancing the governmental and private interests at stake in the particular case.
>
> The Court's choice of balancing methodology may influence results; certain interests may count more or less when considered on a global or case-by-case basis. Furthermore, ad hoc balancing may undermine

[40] *See* Roe v. Wade, 410 U.S. 113, 150 (1970).
[41] *See generally* Randy Beck, *Self-Conscious Dicta: The Origins of* Roe v. Wade*'s Trimester Framework*, 51 AM. J. LEGAL HIST. 505 (2011) (examining the question whether the trimester framework created in *Roe* was part of the Court's core holding, or merely dicta).
[42] *Roe*, 410 U.S. at 152.

> the development of stable, knowable principles of law.[43]

As a definitional matter, the Court in *Roe* concluded that during the first trimester of a pregnancy, a woman's right to terminate a pregnancy outweighed the state's interest in restricting access to abortion procedures because those procedures, when performed early in a pregnancy, were less risky than carrying a pregnancy to term.[44] The Court also concluded, as a definitional matter that, after the second trimester of pregnancy, the state's interest in protecting prenatal life outweighed the woman's right to terminate a pregnancy because a fetus was generally understood to be viable during the last trimester of a pregnancy.[45]

But the trimester framework, although it might have resulted from definitional balancing, is not itself a balancing test. In fact, it's hard to see how it belongs to any species of constitutional test, such as elements, factors, balancing, or means-ends tests, for example. The rule is more categorical[46] than anything: the state may regulate and restrict pregnancy-terminating medical procedures to protect the health of the woman seeking to terminate a pregnancy during the second and third trimesters,[47] and it may ban such procedures altogether during the third trimester as long as it provides an exception making such procedures available when necessary to protect the health of a woman.[48] The framework's somewhat patchwork structure, consisting of a definitional balancing approach yielding a categorical test with vague language and exceptions built in, may be one reason the reproductive-rights cases are so often maligned by right-leaning jurists as indicia of "judicial activism."[49]

Obviously, the *Roe* Court's assumptions about fetal viability and the risks associated with medical procedures were based on norms prevailing in 1973. As Justice O'Connor once noted, "The *Roe*

---

[43] Aleinikoff, *supra* note 35, at 948 (citations and footnotes omitted).
[44] *See Roe*, 410 U.S. at 163.
[45] *See id.* at 163–64.
[46] *See* Beery & Ray, *supra* note 30, at 12.
[47] *See Roe*, 410 U.S. at 164.
[48] *See id.* at 164–65.
[49] *See* Mary Ziegler, *Grassroots Originalism: Judicial Activism Arguments, the Abortion Debate, and the Politics of Judicial Philosophy*, 51 U. LOUISVILLE L. REV. 201, 202 (2013).

framework … is clearly on a collision course with itself."[50] Justice O'Connor explained, "[I]mprovements in medical technology inevitably will move *forward* the point at which the state may regulate for reasons of maternal health, [while] different technological improvements will move *backward* the point of viability at which the state may proscribe abortions …."[51] So it came to pass that the Court would eventually discard the trimester framework.[52] In *Planned Parenthood of Southeastern Pennsylvania v. Casey,* the Court "abandon[ed] the trimester framework as a rigid prohibition on all previability regulation aimed at the protection of fetal life."[53] The Court instead adopted an "undue burden" standard under which a restriction on a woman's right to terminate a pregnancy would be upheld unless substantially onerous or burdensome.[54] *Casey* "discarded the trimester framework, apart from the viability rule, and diminished the level of scrutiny applied to previability regulations."[55]

A standard like "undue burden" brings to mind the elusive, slippery "reasonable person"; he who "looks where he is going, and is careful to examine the immediate foreground before he executes a leap or a bound, who neither star-gazes nor is lost in meditation when approaching trapdoors or the margin of a dock . . . who never mounts a moving omnibus and does not alight from any car while the train is in motion . . . ."[56] The Court did not help much by defining an undue burden as a "substantial obstacle,"[57] a clumsy tautology. The best that can be gleaned from this standard is that a state may not tread *too much* on a woman's right to terminate a pregnancy during pre-viability.

So it was that the Court finally announced that the undue burden standard, not in any sense formally realizable without further explication, was in fact a bilateral, oppositional balancing test:[58] In

---

[50] *See* Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 458 (1983) (O'Connor, J., dissenting).
[51] *Id.* at 456–57 (emphases in original).
[52] *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 872 (1992).
[53] Beck, *supra* note 41, at 506
[54] *See id.*
[55] *Id.*
[56] A.P. HERBERT, THE UNCOMMON LAW 12–16 (1930).
[57] *Casey*, 505 U.S. at 877.
[58] Some scholars saw this coming. One scholar argued in a 2015 law review article that *Casey* itself required a certain kind of "reasonableness balancing." *See, e.g.*, R. Randall Kelso, *The Structure of* Planned Parenthood v. Casey *Abortion Rights*

Hellerstedt,[59] the Court explained that the burden an abortion restriction places on women seeking reproductive health services should be weighed against the benefits, particularly the medical benefits, accruing from the application of the restrictive law.[60] Settling on a bilateral balancing test signaled a real shift in the Court's attitude: if we are to weigh the burden on a woman's interest in obtaining reproductive health services against the state's interest in improving health outcomes, then we have pared three interests down to two, and the interest left out is the putative interest of the unborn. To be sure, since the rules differ as between pre-viability and post-viability restrictions, prenatal life remains in the broader equation. However, in approaching the question of what *undue burden* means, the Court denotes only two relevant considerations, focusing on only the interests of the state and the individual claimant and no other.

Applying this bilateral, oppositional balancing test, the Court invalidated a Texas law that required that a physician performing or inducing an abortion have admitting privileges at a hospital within 30 miles of the place where the abortion was being performed or induced.[61] The Court found that the law provided few if any benefits as to health outcomes, but nonetheless placed a heavy burden on the right to terminate a pre-viable pregnancy, and in fact made such medical services completely unavailable throughout large swaths of Texas.[62] The Court also invalidated a second Texas law that required that a clinic performing medical procedures resulting in the termination of pregnancies have emergency-room-grade surgical facilities on site.[63] Because many abortion procedures involve only the administration of a pill to be taken by a woman at home, the law created a burden that heavily outweighed any benefit.[64]

Because the burdens the Court considered in *Hellerstedt* so grossly outweighed any benefit, lending the Court's opinion a distinct air of

Law: Strict Scrutiny for Substantial Obstacles on Abortion Choice and Otherwise Reasonableness Balancing, 34 QUINNIPIAC L. REV. 75, 78 (2015); *see also* Curtis E. Harris, *An Undue Burden: Balancing in an Age of Relativism*, 18 OKLA. CITY U. L. REV. 363, 424–34 (1994) (explicitly likening *Casey's* undue-burden standard to the dormant-commerce *Pike* test).

[59] Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2309 (2016).

[60] *See id.*

[61] *See id.* at 2311–12.

[62] *See id.*

[63] *See id*. at 2314–15.

[64] *See id.* at 2315.

skepticism as to the honesty of the state's seemingly pretextual arguments, the Court did not even grapple with, never mind resolve, the question of what kind of bilateral balancing test it had announced. As discussed in Part II, there are at least three tiers of bilateral balancing tests. However, since the Court did not say which one applies, the new Court majority, much more hostile to the notion of an unenumerated right to terminate a pregnancy, will likely fill that gap with its own preference: a balancing test that is highly deferential to the state.

II. THE (AT LEAST) THREE TIERS OF BALANCING

Not all balancing tests are equal, or more precisely, in equilibrium. One scholar has discerned and identified discrete balancing tests in an essay about the First Amendment:

> Scholars and jurists have, over the years, disputed which one of four fundamental approaches to unlawful advocacy regulation provides the proper foundation for determining the level of First Amendment protection to be given unlawful advocacy: (1) "definitional absolutism," which unwaveringly protects all activity that is found to be included within the definition of "speech," as opposed to non-expressive conduct; (2) "categorical balancing," which balances competing interests in an a priori manner, . . .; (3) "deferential balancing," under which a reviewing court will generally defer to legislative or executive determinations . . .; and (4) "speech-protective balancing," which . . . seeks to balance competing interests in maintaining free and open expression on the one hand and in assuring security and preventing violence on the other hand, but . . . does so with a strong presumption in favor of the constitutional protection of speech.[65]

So balancing tests come in many varieties, depending on the contexts in which they are deployed. One might argue whether "definitional absolutism" is really a balancing test; [readers,] [legal observers/scholars/players] should take care not to identify balancing tests too narrowly, [or] [and] in too limited a context.

In any event, a quick survey of the constitutional legal landscape betrays at least three different approaches to bilateral balancing. The first is neutral balancing, where the Court does not put its proverbial

[65] Martin H. Redish, *Unlawful Advocacy and Free Speech Theory: Rethinking the Lessons of the McCarthy Era*, 73 CIN. L. REV. 9, 17 (2004) (citation omitted).

thumb on either side of the scale. The other two are asymmetric. In oppositional-bilateral-interests cases where sacrosanct constitutional rights are at stake, courts tend to employ what the author calls incursive balancing:[66] a balancing approach that is more searching, more skeptical, and more onerous for the state in that it is weighted in favor of the state's challenger. In competing-bilateral-interests cases where a law seems neutral on its face as to sacrosanct constitutional principles, and where there appears no evidence of mischief or pretext, courts tend to apply what the author and others, though not always in precisely the same context,[67] call deferential balancing: a balancing approach that is weighted in favor of the state. Justice Brennan has suggested that this approach is also appropriate "when 'constitutionally protected interests lie on both sides of the legal equation . . . .'"[68]

The evolution of different tiers of balancing tests, although rarely explicitly described, is likely in some sense an outgrowth of the late Justice Antonin Scalia's gripe with balancing tests generally; courts are often trying to discern, Justice Scalia said, "whether a particular line is longer than a particular rock is heavy."[69] That being so, sometimes courts have had to decide which should get more attention: how heavy the rock or how long the line.

A. Neutral Balancing

Sometimes balancing tests involve the simple question of which party has the stronger policy argument; that party wins. Consider, for example, *Timmons v. Twin City Area New Party*,[70] in which the Supreme Court considered whether a Minnesota "anti-fusion" law, which prohibited any candidate for office from appearing on a ballot

---

[66] This is a corollary to a term I have used to describe an aggressive means-ends test sometimes applied in equal-protection cases, commonly referred to as "rational basis with a bite." *See* Brendan T. Beery, *Rational Basis Loses Its Bite: Justice Kennedy's Retirement Removes the Most Lethal Quill from LGBT Advocates' Equal-Protection Quiver*, 69 SYRACUSE L. REV. (forthcoming 2019).

[67] *See, e.g.*, Siegel, *supra* note 15, at 365.

[68] Eugene Volokh, *Freedom of Speech and Speech About Political Candidates: The Unintended Consequences of Three Proposals*, 24 HARV. J.L. & PUB. POL'Y 47, 52 (2000) (citation omitted).

[69] Bendix Autolite Corp. v. Midwesco Enter., Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring).

[70] *See generally* Timmons v. Twin Cities Area New Party, 520 U.S. 351, 353–54 (1997).

as the candidate for more than one political party, was constitutionally permissible.[71] The Court recognized some First-Amendment protections for the choices and activities of political parties,[72] but avoided suggesting that speech or association in their purest forms were implicated by Minnesota's law. After brushing past a number of First-Amendment precedents, the Court immediately pivoted: "On the other hand, it is also clear that States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder."[73] One sees here the typical posture a court takes as to neutral balancing: both sides have a point, and no principle seems to require that either side enjoy the benefit of a judicial thumb on its side of the scale.

As Professor Richard Fallon explained, *Timmons* is a helpful illustration of balancing in constitutional cases:

> A concrete example [of a paradigmatic balancing test] is the test applied by the Supreme Court . . . in *Timmons* . . . . Writing for the majority, Chief Justice Rehnquist concluded that the state's interest in maintaining the "integrity, fairness, and efficiency" of its ballots by preventing their use as "billboard[s] for political advertising" was "sufficiently weighty" to justify the prohibition against fusion candidacies. The majority also found that the state had a legitimate interest in "the stability of [its] political system[ ]," which it was entitled to support by "enact[ing] reasonable election regulations that [tend to] favor the traditional two-party system."[74]

The Court did not find that one side's argument *clearly* outweighed the other's, nor did it suggest that either side's argument would need to. The Court's "sufficiently weighty" formulation signaled nothing more than neutral balancing.[75]

In Fourth-Amendment cases involving the question whether a search or seizure is reasonable, courts often apply a similar kind of neutral bilateral balancing, only this time of the *ad hoc* (case by case)

---

[71] *Id.*
[72] *Id.* at 357–58.
[73] *Id.* at 358.
[74] Richard H. Fallon, *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 56, 68–69 (1997) (citations omitted).
[75] The author notes here that this seems more definitional than *ad hoc* balancing: there is no need in future cases to decide whether the state's interest outweighs the interest in a political party in fusion ballots. The matter has been decided.

variety.[76] "One balancing case was *Riley v. California*, where the Supreme Court invalidated the warrantless search of a cell phone incident to an arrest."[77] As discussed above, *Riley* requires '"assessing, on the one hand, the degree to which [the search] intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests."[78] This is neutral balancing; there is no suggestion that a court need give either interest more careful consideration than the other.

As one final example of neutral balancing, this time in a case that seems somewhat definitional and also somewhat *ad hoc*, consider the case of *United States v. Nixon*.[79] In *Nixon*, the Court considered whether a claim of executive privilege overcame a grand-jury subpoena demanding the production of certain records and recordings in the possession of President Nixon or others closely associated with him.[80] The Court refused to abide any "absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances," opting instead to balance, in a neutral way, the grave interests on both sides: on the president's side, the need to maintain confidentiality to ensure frank and honest advice and protect national security, and on the other side the need to obtain information so that those defending themselves in criminal proceedings might maintain their very freedom and liberty.[81] The Court was careful to note that procedures were available to ensure that this balance could be struck in judicial proceedings without the public disclosure of sensitive information, particularly through the use of *in camera* proceedings.[82] While the Court recognized the president's interest in preserving the confidentiality of communications as "a very important interest,"[83] it was careful to suggest that the interest was not overwhelming in its gravity, *i.e.*, that there would be no need to give it more weight than

[76] *See* Mark S. Kende, *The Unmasking of Balancing and Proportionality Review in U.S. Constitutional Law*, 25 CARDOZO J. INT'L & COMP. L. 417, 430 (2017).
[77] *Id.*
[78] Riley v. California, 134 S. Ct. 2473, 2484 (2014) (quoting Wyoming v. Houghton, 526 U.S. 295, 300 (1999)).
[79] *See generally* United States v. Nixon, 418 U.S. 683 (1974) (explaining that the interests of a defendant in a criminal case outweigh the president's interest in maintaining secrecy and confidentiality).
[80] *Id.* at 687–90.
[81] *Id.* at 706.
[82] *Id.*
[83] *Id.*

any other important interest. And indeed, when it came to identifying a countervailing interest, the Court explained that it was essential to the justice system, particularly in the criminal context, that verdicts be based on complete rather than partial factual development, and that the failure to provide complete and reliable factual bases for judgments in such cases would erode the public's confidence in courts.[84] Given the gravity of these interests, and notwithstanding the gravity of the president's countervailing interests, the Court held that the balance cut in favor of disclosure of the information sought and against the president's claim of executive privilege:[85]

> We conclude that, when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.[86]

This is a definitional formulation in that it holds that a mere "generalized interest in confidentiality"[87] must always yield to the interest in disclosure in a criminal case; but it also invites an *ad hoc* determination whether, in any case where a president invokes privilege, he or she is merely asserting such a generalized interest, and whether the case in which the privilege is invoked is a criminal case of the sort involved in *Nixon*.

B. Asymmetric Balancing

Some cases involve policy arguments on both sides, at least as to the practical burdens and benefits under a law—but also involve, on one side, fundamental or sacrosanct interests grounded in constitutional doctrine: either, on the individual's side, some constitutional right like the First Amendment, or on the government's side, some constitutionally delegated authority like the police power devolved to the states under the Tenth Amendment.

1. Incursive Balancing

[84] *See id*.
[85] See *id.* at 709.
[86] *Id.* at 713.
[87] *Id.*

In the *Timmons* case discussed above, the Court noted—in passing—that the First Amendment applied, but did not express any concern about First-Amendment rights in their most fundamental expression.[88] Such was not the case in *Marsh v. Alabama*,[89] where the Court addressed whether a company-owned town, being a private actor, might conduct itself without concern for sacrosanct First-Amendment rights.[90] After discussing the importance of free speech in the marketplace of ideas and describing the value of speech in fostering a well-informed and knowledgeable population,[91] the Court stated as follows:

> When we *balance* the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, *we remain mindful of the fact that the latter occupy a preferred position*. As we have stated before, the right to exercise the liberties safeguarded by the First Amendment 'lies at the foundation of free government by free men' and we must in all cases 'weigh the circumstances and appraise . . . the reasons . . . in support of the regulation of (those) rights.' In our view the circumstance that the property rights to the premises where the deprivation of liberty, here involved, took place, were held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such restraint by the application of a State statute. Insofar as the State has attempted to impose criminal punishment on [a Jehovah's Witness] for undertaking to distribute religious literature in a company town, its action cannot stand.[92]

This approach is consistent with the Supreme Court's general view of speech rights during that time period: "[The] Justices . . . employed a balancing analysis in a *rights-protecting* manner, by acknowledging the 'preferred position' of First Amendment rights."[93] And the Court could not have been more explicit about the incursive nature of this balancing test: its thumb was on the scale, adding weight to the

---

[88] *See* Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997).
[89] *See generally* Marsh v. Alabama, 326 U.S. 501 (1946) (applying a balancing approach to decide whether a company-owned town was permitted to restrict First Amendment activities in the town).
[90] *Id.* at 508–09.
[91] *See id*. at 508.
[92] *Id.* at 508–09.
[93] Judd Matthews & Alec Stone Sweet, *All Things in Proportion? American Rights Review and the Problem of Balancing*, 60 EMORY L.J. 797, 827 (2011) (citing *Marsh*, 326 U.S. at 508–09) (emphasis added).

challenger's side of the argument. The Court might have said, had it played off of Justice Scalia's metaphor, "[t]he rock is more important than the line; if the rock is heavy and the line is long, the rock wins."[94]

2. Deferential Balancing

Even with regard to sacrosanct constitutional rights, the Court has sometimes strayed over to the deferential approach: "Attitudes . . . have fluctuated over time. Balancing got a bad name with liberals from the speech and association cases of the McCarthy era, where it was thought to allow the scales to tip too easily toward the state."[95] Typically, however, deferential balancing is in evidence in contexts other than those involving the exercise of some fundamental right like free speech or the free exercise of religion.[96] And even if constitutional rights are somehow in play, courts may find that they are, for countervailing policy reasons, not as weighty as other constitutional considerations. For example, one commentator has noted the prevalence of what she calls deferential balancing in the context of Supreme Court decisions about presidential authority in wartime:

> Under the deferential balancing model, the Supreme Court defers to the President's determination that his policies strike the proper balance between defending national security and protecting civil liberties during wartime. Constitutional rights normally provided during peacetime are outweighed by the President's need to conduct the war effort. Scholars who defend the deferential balancing model argue that the Court's defense of constitutional rights during wartime will unduly burden the President's protection of national security. However, critics of the model argue that the Court should review the reasonableness of the President's actions without such deference to determine whether the cost of infringing citizens' rights outweighs national security objectives.[97]

But individual rights are not always involved in deferential balancing cases. Perhaps the best-known exemplar of deferential

---

[94] *See* Bendix Autolite Corp. v. Midwesco Enter., Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring).

[95] Sullivan, *supra* note 17, at 294.

[96] *See, e.g.,* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (applying a deferential balancing approach to a case involving interstate commerce).

[97] Pooya Safarzadeh, *The Supreme Court and the President: Toward a Balancing Test with Bite*, 10 CHAP. L. REV. 501, 506–07 (2006).

balancing is the *Pike* test.[98] The Court has repeatedly considered what standard to apply to state laws that seems not to target out-of-staters or engender protectionism, but nonetheless cause some disruption of interstate commerce. In *Pike*, the Court stated that when a state law only incidentally affects interstate commerce, when it is not, in other words, intended to discriminate against interstate commerce by stopping the movement of commerce among states or indulging protectionist impulses that would disadvantage out-of-state business interests, the state's law will be upheld "unless the burden imposed on such commerce is *clearly excessive in relation to* the putative local benefits."[99] The Court suggested that the amount of tolerable state interference in interstate commerce should be a function of the nature and importance of the interest the state seeks to advance.[100]

In *Pike*, although it recognized that a serious question of the balance between federal and state power was involved, the Court saw nothing about an even-handed law that would invite suspicion. Under such circumstances, the Court stated that it would defer to the state, placing a thumb on the state's side of the scale.[101]

C. A Helpful Grid

Here are the tiers of constitutional balancing tests as they exist in practical application with slightly more detail than the table in the Introduction:

TIER OF BILATERAL BALANCING TEST	INTEREST ONE	INTEREST TWO	WEIGHTED IN FAVOR OF:
INCURSIVE	Individual's Exercise of Constitutional Right, or Some Other Constitutionally	State's Interest in Limiting or Obviating Individual Right or Other Constitutionally	The Individual Challenger (or Proponent of the Constitutionally

[98] *See generally* Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) (striking down an Arizona law that imposed an unacceptable burden on Arizona cantaloupe growers in light if the meager state interest at stake).
[99] *Id.* at 142 (citation omitted) (emphasis added).
[100] *See id.*
[101] *See id.*

	Protected Interest (like State Neutrality as to Commerce)	Protected Interest	Protected Interest)
NEUTRAL	Individual's Exercise of Constitutional Right, or Some Other Constitutionally Protected Interest (like State Neutrality as to Commerce)	State's Interest in Limiting or Obviating Individual Right or Other Constitutionally Protected Interest	Neither Party or Interest
DEFERENTIAL	Individual's Exercise of Constitutional Right, or Some Other Constitutionally Protected Interest (like State Neutrality as to Commerce)	State's Interest in Limiting or Obviating Individual Right or Other Constitutionally Protected Interest	State's Interest in Limiting or Obviating Individual Right or Other Constitutionally Protected Interest

III. WHICH BALANCING TEST WILL THE NEW MAJORITY CHOOSE FOR REPRODUCTIVE RIGHTS CASES?

In the brief survey above, it is clearly not enough to say about *Hellerstedt* or any other constitutional case that it merely creates a balancing test. The question remains, *What kind of balancing test?* Is it the incursive type, the deferential type, or the neutral type?

A. Hellerstedt *Left the Question Open*

To restate, here was the Court's formulation in *Hellertedt*: "The rule . . . requires that courts consider the burdens a law imposes on

abortion access together with the benefits those laws confer."[102] But using what formula?

The Court spent considerable time discussing what weight a court should give certain *evidence*, namely legislative findings,[103] but no time discussing the relative weights to be applied to the state's *interest* in regulating reproductive medical procedures and a woman's *right* to terminate a pregnancy. In the evidentiary context, the Court did suggest that it was inappropriate to afford "[u]ncritical deference to [a legislature's] *factual findings*,"[104] but again, this says nothing of what deference must be given to the government's non-pretextual *interests*. As to any burden a law places on a woman's right to terminate a pregnancy, how much of a benefit would be required to overcome it? As to the real interests being weighed against one another, the burden on the right and the benefit to the state, the question is this: which must outweigh the other, and by how much? That is a different question than how much a court should defer to a stated, but potentially bogus, finding of fact. Once past the question of whether the government's interest is *real*, what standard applies? The Court did not squarely address that question because it did not have to.

The Court's provision of a balancing test under the undue-burden formulation seems to have been intended, frankly, to make it easier for the challenger of a restrictive law to win. No longer must the challenger aim for some ethereal stratum of *substantiality* or *undueness*; instead, the challenger wins when her interest outweighs the medical benefits. But, because *Hellerstedt* involved laws that provided no benefits at all, the Court never addressed with any real interest what kind of balancing test it was applying; when a state's asserted interests are baldly pretextual and lacking, then any burden on the woman's right is going to be out of balance. It is no wonder, therefore, that the Court declined to address the relative weights it would require in *Hellerstedt*. Its failure to do so, however, left an opening that the Court's new majority will surely march on through; bugles blaring and drums beating.

Whereas Justice Breyer could have expressly said in *Hellerstedt* that the test the Court was adopting was an incursive or neutral bilateral balancing test, he and the Court in fact said no such thing.

---

[102] Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2309 (2016) (emphasis added).
[103] *Id*. at 2310.
[104] *Id.*

The new majority, then, will likely characterize the *Hellerstedt* balancing test as a deferential bilateral balancing test under which a restrictive law stands unless the burdens it creates are clearly excessive in relation to a woman's (limited) right to terminate a pregnancy. *Hellerstedt*, meet *Pike*.[105]

B. Justice Kavanaugh's Views Point the Way

There is no need to guess how a jurist like Justice Kavanaugh will weight either pan of this scale. He has spoken publicly about the abortion right, and has also addressed the right in a recent dissenting opinion while sitting on the D.C. Circuit.[106]

Before proceeding further, consider that, to summarize the preceding analysis, the keys to determining what kind of balancing test applies appear to be the jurist's view of 1) the individual's interest in exercising some right, *i.e.*, whether the right is in some sense fundamental, and 2) the government's interest in curtailing or burdening the exercise of the claimed right.

1. Justice Kavanaugh's View of the Right to Terminate a Pregnancy

Whereas the Court typically esteems enumerated rights as fundamental, and typically holds that such traditional arrangements as opposite-sex marriage[107] and the unitary family[108] also implicate

[105] One scholar suggested, before *Hellerstedt* was even decided, that the *Pike* test was essentially adopted by the Court in *Casey*. *See* Harris, *supra* note 58, at 426–27 (stating about Justice O'Connor, the author of *Casey*, "While her formulation of the standard has not been consistent from case to case, she has persistently attempted to modify past precedents using a balancing approach. Her handling of the issue of abortion followed this pattern. Casting about in an attempt to rid the Court of the albatross of abortion. Justice O'Connor seems to have stumbled onto the dormant Commerce Clause's "undue burden" standard set forth in *Pike v. Bruce Church, Inc*.") Although the Court did not explicitly adopt a balancing test in *Casey*, the groundwork may have been laid there for the future application of a deferential balancing test akin to *Pike*. In this sense, one might have said, as Dr. Harris prophetically did, "Pike's *Past*, Casey's *Future*." *Id.* at 424.

[106] *See generally* Garza v. Hargan, 874 F.3d 735 (D.C. Cir. 2017).

[107] *See*, *e.g.*, Loving v. Virginia, 388 U.S. 1 (1967) (recognizing the right to marry for persons of different ethnic backgrounds); Zablocki v. Redhail, 434 U.S. 374 (1978) (explaining that strict scrutiny applies to any substantial state interference with the right to marry).

[108] *See*, *e.g.*, Michael H. v. Gerald D., 491 U.S. 110 (1989) (explaining that the protected family unit for constitutional purposes was the traditional unitary family and not mere biological relationships).

fundamental unenumerated rights, a debate has raged about reproductive rights, particularly with regard to contraception[109] and a woman's decision to terminate a pregnancy. There is little doubt that the new Court majority will find that the unenumerated right to terminate a pregnancy, if it is to be recognized at all, is of a far lesser constitutional rank than any enumerated right or any right deeply rooted in history and tradition.[110]

With Justice Brett Kavanaugh replacing Justice Kennedy after the latter's retirement,[111] the five-to-four *Hellerstedt* decision is obviously imperiled. In his dissenting opinion in that case, Justice Thomas wrote,

> Ultimately, this case shows why the Court never should have bent the rules for favored rights in the first place. Our law is now so riddled with special exceptions for special rights that our decisions deliver neither predictability nor the promise of a judiciary bound by the rule of law.[112]

Justice Kavanaugh's thinking seems in accord with this view; speaking before he was a nominee for Supreme Court justice about Justice Rehnquist's dissent in *Roe v. Wade*,[113] Justice Kavanaugh once said,

> [Chief Justice] Rehnquist's dissenting opinion did not suggest that the Constitution protected no rights other than those enumerated in the text of the Bill of Rights. But he stated that under the Court's precedents, any such unenumerated right had to be rooted in the traditions in conscience of our people. Given the prevalence of abortion regulations both historically and at the time, Rehnquist said he could not reach such a conclusion about abortion. He explained that a law prohibiting an abortion, even where the mother's life was in jeopardy, would violate the Constitution, but otherwise he stated the states had the power to legislate with regard to this matter.

---

[109] *See* Griswold v. Connecticut, 381 U.S. 479 (1965) (recognizing the right to access to contraceptives for married couples); *See also* Eisenstadt v. Baird, 405 U.S. 438 (1972) (recognizing the right to access to contraceptives for unmarried persons).

[110] *See* Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997).

[111] *See* Amy Howe, *Kavanaugh Confirmed as 114th Justice (Updated)*, SCOTUSblog (Oct. 6, 2018), http://www.scotusblog.com/2018/10/kavanaugh-confirmed-as-114th-justice/ [https://perma.cc/DX4T-DEPN] (explaining that Justice Kavanaugh has replaced Justice Kennedy on the Supreme Court).

[112] Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2321 (2016) (Thomas, J., dissenting).

[113] Roe v. Wade, 410 U.S. 113, 171–78 (1973).

> In later cases, Rehnquist reiterated his view that unenumerated rights could be recognized by the courts only if the asserted right was rooted in the nation's history and tradition. The 1997 case of *Washington vs. Glucksberg* involved an asserted right to assisted suicide. For a five-to-four majority this time, Rehnquist wrote the opinion for the Court saying that the rights and liberties protected by the due process clause are those rights that are deeply rooted in the nation's history and tradition. And he rejected the claim that assisted suicide qualified as such a fundamental right.
>
> Of course, even a first-year law student could tell you that *Glucksberg*'s approach to unenumerated rights was not consistent with the approach of the abortion cases such as *Roe vs. Wade* in 1973, as well as the 1992 decision reaffirming *Roe*, known as *Planned Parenthood vs. Casey*.
>
> What to make of that? In this context, it's fair to say that Justice Rehnquist was not successful in convincing a majority of the justices in the context of abortion either on *Roe* itself or in the later cases such as *Casey*, in the latter case perhaps because of *stare decisis*. But he was successful in stemming the general tide of free[-wheeling] judicial creation of unenumerated rights that were not rooted in the nation's history and tradition. The *Glucksberg* case stands to this day as an important precedent, limiting the Court's role in the realm of social policy and helping to ensure that the Court operates more as a court of law and less as an institution of social policy.[114]

This is typical "textualist" verbiage:

> You can often recognize the textualist brand by high-sounding pronouncements like these . . . :
>
> We begin, as we must, with a careful examination of the [textual] language.
>
> Ascertaining the plain/ordinary meaning of [some word or phrase] is of critical importance to our analysis.
>
> The proper role of the judiciary is to apply, not amend, the work of the People's representatives. We begin, as we must, with a careful examination of the [textual] language.[115]

---

[114] *See* Brendan Beery, *How to Argue Liberty Cases in a Post-Kennedy World: It's Not About Individual Rights, But State Power and the Social Compact*, 75 NAT'L L. GUILD REV. 1, 2 n.12 (2018) (citing Dylan Matthews, *Brett Kavanaugh likely gives the Supreme Court the votes to overturn Roe. Here's how they'd do it.*, VOX (Oct. 5, 2018), https://www.vox.com/policy-and-politics/2018/7/10/17551644/brett-kavanaugh-roe-wade-abortion-trump [https://perma.cc/YZK7-4M2H].

[115] Joseph Kimble, *Ideological Judging: The Record of Textualism*, THE NATIONAL LAW JOURNAL (July 31, 2018), https://www.law.com/nationallawjournal/2018/07/31/ideological-judging-the-record-of-textualism/ [https://perma.cc/K3G5-4ARM].

So there is nothing unusual about Justice Kavanaugh's fretting over the Supreme Court, with its "free-wheeling" notions of liberty, acting more as an "institution of social policy" than a neutral arbiter of constitutional meaning. It seems clear enough that he is of a mind to dismiss the right to terminate a pregnancy as an improvident hiccup along the Court's frolic and detour into social engineering; a course correction is, no doubt, in the works.

In *Garza v. Hargan*,[116] the United States Court of Appeals for the D.C. Circuit, of which Justice Kavanaugh was then a member, considered the case of a 17-year-old in U.S. custody who wished to terminate her pregnancy without being made to wait until she had either left the custody of the U.S. Department of Health and Human Services or acquired a sponsor to be available to guide her in her decision-making.[117] In concurring in the court's decision to allow the detainee, whom the court referred to as J.D., access to abortion services without delay, Judge Millett cautioned, "[r]emember, we are talking about a child here."[118] Judge Millett further emphasized that J.D. was "alone in a foreign land" and that, after she was detained by authorities in the United States in her quest for a more secure future, she "made a considered decision, presumably in light of her dire circumstances, to terminate that pregnancy."[119] Judge Millett pointed out that J.D.'s "capacity to make the decision about what is in her best interests by herself was approved by a Texas court consistent with state law. She did everything that Texas law requires to obtain an abortion."[120]

Then-Judge Kavanaugh took a decidedly different tone as he dissented from the majority's finding that J.D. was entitled to terminate her pregnancy without delay; he accused the court of inventing "a constitutional principle as novel as it is wrong: a new right for unlawful immigrant minors in U.S. Government detention to obtain immediate abortion on demand . . . ."[121] And he lamented that the court had intervened in the government's "efforts to expeditiously

[116] Garza v. Hargan, 874 F.3d 735 (D.C. Cir. 2017).
[117] *See id.* at 737 (Millett, J., concurring).
[118] *Id*. at 736.
[119] *Id.*
[120] *Id.* at 736–37.
[121] *Id.* at 752 (Kavanaugh, J., dissenting).

transfer the minors to their immigration sponsors before they make that momentous life decision."[122]

In how many ways did Justice Kavanaugh "other" J.D. in such a short space? Instead of being, as Judge Millett put it, "a child in a foreign land",[123] J.D., as Justice Kavanaugh would have it, was an "unlawful immigrant minor[] in U.S. Government detention . . . ."[124] It is, unfortunately, a common phenomenon in the law and in society to dehumanize disfavored groups or individuals in this way. Whether the context is the insult of one's agency over his or her own self or the state's deprivation of the ultimate constitutional interest, one's life, the method is the same:

> To succeed, . . . [a lawyer] must demonize, dehumanize, and 'other' the [disfavored individual]. This becomes easier when [he or she] is of a different race, class, or sexual orientation . . . . The . . . task is also greatly enhanced when a [the individual] belongs to a class stigmatized in society as abnormal, deviant, and pathological.[125]

Justice Kavanaugh "othered" J.D. in three different ways without getting past three words ("unlawful immigrant minor"): she was an immigrant (other than American); she was a lawbreaker (other than an upstanding and law-abiding citizen); and she was, even though 17, a minor (other than a person entitled to agency over her own life). And she was a detainee, to boot—again, lacking agency over herself.

While it seems fair enough that both Judge Millett and then-Judge Kavanaugh recognized that J.D. had not reached the age of 18, it also seems odd that any jurist would discuss the decision-making faculties of a person *almost* 18 as though they were as underdeveloped as a toddler's. But if a judge is of a mind to make a person's choice for her, then infantilizing her in this way makes sense:

> [L]egal scholars pair infantilization with dehumanization, treating them as separable constructs, while the psychological literature views infantilization as a component of dehumanization. For instance, some

---

[122] *Id.*

[123] And even that rings of paternalism, although Judge Millett also paid respect to J.D.'s "considered decision" and "capacity to make the decision about what is in her best interest." *Id*. at 736–37 (Millett, J., concurring).

[124] *Id*. at 752 (Kavanaugh, J., dissenting).

[125] Joey L. Mogul, *The Dykier, the Butcher, the Better: The State's Use of Homophobia and Sexism to Execute Females in the United States*, 8 N.Y. CITY L. REV. 473, 478 (2005) (citations omitted).

> psychological theories of social cognition separate agency (one's ability to initiate one's own behavior) and experience (one's phenomenology), and situate infantilization within the experience dimension.[126]

Commentators have noted the difficulty is tackling issues around sex, sexual behavior, and sexuality under a paradigm where anyone under 18, even if close to 18, is classed among infants and toddlers: "[d]ifficulty ensues when the age of consent determines childhood, which . . . in many jurisdictions can be as high as eighteen . . . . This blanket response . . . is to prolong childhood and to infantilize young men and women, especially those between the ages of fifteen and seventeen."[127]

So it should not be overlooked that the word *minor*, when applied to a 17-year-old person who found herself making an important decision about her own life and future, was as calculated as the words *unlawful* and *immigrant* to take away (or at least suspend in abeyance) her agency over herself. Words matter, and the words "unlawful immigrant minor," strung together and repeated over and over again, pack a rhetorical punch that leaves little doubt where the speaker stands on the issue—and where he is coming from.

More substantively, then-Judge Kavanaugh explained his view of the case this way:

> The majority seems to think that the United States has no good reason to want to transfer an unlawful immigrant minor to an immigration sponsor before the minor has an abortion. But consider the circumstances here. The minor is alone and without family or friends. She is in a U.S. Government detention facility in a country that, for her, is foreign. She is 17 years old. She is pregnant and has to make a major life decision. Is it really absurd for the United States to think that the minor should be transferred to her immigration sponsor—ordinarily a family member, relative, or friend—before she makes that decision? And keep in mind that the Government is not forcing the minor to talk to the sponsor about the decision, or to obtain consent. It is merely seeking to place the minor in a better place when deciding whether to have an abortion. I suppose people can debate as a matter of policy whether this is always a good idea. But unconstitutional? That is far-fetched. After all, the Supreme Court has repeatedly said that the Government has permissible interests in favoring fetal life,

[126] Lasana T. Harris, *Dignity Takings and Dehumanization: A Social Neuroscience Perspective*, 92 CHICAGO-KENT L. REV. 725, 726 (2017) (citation omitted).

[127] Belinda Carpenter et al., *Harm, Responsibility, Age, and Consent*, 17 NEW CRIM. L. REV. 23, 31 (2014).

> protecting the best interests of the minor, and not facilitating abortion, so long as the Government does not impose an undue burden on the abortion decision.
>
> It is important to stress, moreover, that this case involves a minor. We are not dealing with adults, although the majority's rhetoric speaks as if Jane Doe were an adult. The law does not always treat minors in the same way as adults, as the Supreme Court has repeatedly emphasized in the abortion context.
>
> The majority points out that, in States such as Texas, the minor will have received a judicial bypass. That is true, but is irrelevant to the current situation. The judicial bypass confirms that the minor is capable of making a decision. For most teenagers under 18, of course, they are living in the State in question and have a support network of friends and family to rely on, if they choose, to support them through the decision and its aftermath, even if the minor does not want to inform her parents or her parents do not consent. For a foreign minor in custody, there is no such support network. It surely seems reasonable for the United States to think that transfer to a sponsor would be better than forcing the minor to make the decision in an isolated detention camp with no support network available. Again, that may be debatable as a matter of policy. But unconstitutional? I do not think so.[128]

This is an interesting exposition of Justice Kavanaugh's view of both the individual's interest and the government's. He sees the individual's interest as largely subordinate to the government's. The individual is to be protected, and she must be supported after her decision engenders an "aftermath."[129]

Justice Kavanaugh does not see the right to terminate a pregnancy as a weighty interest, if he sees it as a constitutionally protected interest at all. The most that can be said is that he recognizes that, under now-existing Supreme Court precedents, the right exists. In *Garza*, he wrote, "All parties to this case recognize *Roe v. Wade* and *Planned Parenthood v. Casey* as precedents we must follow. All parties have assumed for purposes of this case, moreover, that Jane Doe has a right under Supreme Court precedent to obtain an abortion in the United States."[130] To say that all parties have *assumed it* is obviously not to say that a future Supreme Court will reaffirm it.

---

[128] Garza v. Hargan, 874 F.3d 735, 754–55 (D.C. Cir. 2017).
[129] *See id.*
[130] *Id.* at 753.

2. Justice Kavanaugh's View of the Government's Interest

In his dissent in *Garza*, then-Judge Kavanaugh cited favorably a prior district court opinion in the same case that, according to Justice Kavanaugh, "followed from the Supreme Court's many precedents holding that the Government has permissible interests in favoring fetal life, protecting the best interests of a minor, and refraining from facilitating abortion."[131]

Whereas there was much handwringing in Justice Kavanaugh's dissent about J.D.'s interest in obtaining abortion services promptly, identifying the government's interests came easily: the government has an interest in the life of the unborn; it has an interest in the expression of its own policy preferences; and it even has an interest in protecting the individual from herself.[132]

C. Casey *Implicitly Laid the Foundation for the Application of a Deferential* Pike *Standard in Future Cases*

Given the new Court majority's views of the right to terminate a pregnancy and the government's interest in restricting access to abortions, the Court will be looking for legal hooks on which to hang its proverbial hat. One scholar, Dr. Curtis E. Harris, argued that in *Casey* itself, the Court stumbled upon a sort of *Pike* balancing standard:

> A careful analysis of *Casey* illustrates that the "new" "undue burden" test of *Casey* is not novel, but rather, is nearly identical to the *Pike* standard . . . :
> (1) The standard is triggered when a statute "burdens" in some manner a plenary power. . . .
> (2) If the statute has the "purpose or effect" of "substantially" burdening the protected power, it is unconstitutional.
> (3) If the burden is "merely incidental" to a "substantial" state interest, then the statute *may be* upheld. . . .
> (4) The measure must be "reasonably related" to a "legitimate" state goal. . . .
> (5) Regulations or laws "unnecessary" to the legitimate goal, that could be written so as to impose a lesser burden on the power and still achieve the legitimate goal, *may* be struck as "undue."

---

[131] *Id.* at 752.

[132] As to this last interest, judges tend to apply it to adults as well, as when courts endorse a waiting period to enable a woman to reflect on the choice she is about to make. *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 885–87 (1992).

> . . .
> (6) The Court will weigh the "local benefit" (the state's interest) against the burden imposed.
> (7) The assessment will be "one of degree," where both qualitative and quantitative factors are considered.[133]

Notwithstanding all this, the Court in *Casey* did not announce a bilateral and oppositional balancing test, that came in *Hellerstedt*. Dr. Harris, however, laid a possible predicate for the new majority's coming turn. Now that the Court explicitly adopted a balancing approach, it may construe *Casey*, as tortured as such a construction might be, as being precedent for the proposition that the reproductive-rights balancing test is, *because it always was*, a deferential balancing test akin to *Pike*. What remains is for the Court to state the standard explicitly: no burden on a woman's right to terminate a pregnancy is invalid unless it is *clearly excessive* in relation to any benefit.

IV. CONCLUSION

If the new Court majority wishes to hollow out the core holding of *Roe*, *Casey*, and *Hellerstedt*, the holding that a woman has a fundamental unenumerated right to terminate a pregnancy during pre-viability, then it will likely do so without expressly overruling existing precedents, because the Court in *Hellerstedt*, likely without considering the coming ideological shift on the Court, fashioned a new balancing test without crossing all its t's or dotting all its i's. It neglected to state clearly what kind of balancing test should apply: incursive, neutral, or deferential.

So it is that the new Court might simply say, as it upholds more and more restrictions on a woman's choice to terminate a pregnancy, that it is merely operating under an existing framework: a kind of deferential *Pike* balancing test under which our evolving understanding of reproductive issues weighs more and more heavily in favor of the government.

Advocates for both sides will need to be aware of this coming jurisprudential drift, and both sides must be prepared to litigate within this framework.

---

[133] Harris, *supra* note 58, at 427–28 (citations omitted).