

AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 11: The Contemporary Era—Individual Rights/Personal Freedom and Public Morality

Whole Woman’s Health v. Hellerstedt, No. A-16-CA-1300-SS (U.S. DC W. Dist. TX, 2017)

In 2016 in a suit filed by the abortion services provider Whole Woman’s Health, the U.S. Supreme Court struck down two abortion regulations that had been adopted by the Texas state legislature. The Texas Department of State Health Services (DSHS), under the leadership of John Hellerstedt, immediately drafted a new regulation affecting Whole Woman’s Health. The proposed regulation singled out fetal tissue resulting from abortions and miscarriages gathered in a medical facility and required that they be disposed of differently than other medical waste and human tissue. In particular, the new regulations required cremation or burial to enhance “the health and safety of the public” and “to afford the level of protection and dignity to unborn children.” Whole Woman’s Health filed suit in federal district court asking for an injunction to block implementation of the fetal burial regulation. After a hearing, the court granted a preliminary injunction.

JUDGE SPARKS.

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The Court may issue such relief only if the movant establishes “(1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest.” . . .

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“The Fourteenth Amendment’s guarantee of Due Process proscribes laws so vague that persons of common intelligence must necessarily guess at [their] meaning and differ as to [their] application.” A law is unconstitutionally vague if it (1) fails to provide those targeted by the statute a reasonable opportunity to know what conduct is prohibited, or (2) is so indefinite that it allows arbitrary and discriminatory enforcement. . . .

Here, the Court finds the Amendments are likely unconstitutionally vague because they are so indefinite they allow arbitrary and discriminatory enforcement. For example, DSHS’s own attorney could not articulate what types of tissue fell within the definition of fetal tissue as set forth in the Amendments. If DSHS’s attorney, presumably working in conjunction with DSHS, cannot articulate the parameters of the term fetal tissue, then how can Plaintiffs know when the special disposal methods for fetal tissue are triggered? . . .

. . . Thus, the Court finds Plaintiffs have met their burden in demonstrating a substantial likelihood of success on their claim the Amendments are unconstitutionally vague.

In addition to prohibiting vagueness, the Due Process Clause of the Fourteenth Amendment extends protection “to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.” *Obergefell v. Hodges* (2015). Put another way, the connection between personal identity, belief, and liberty drives the Constitution’s protection of certain personal choices. . . .

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On that basis, for more than forty years it has been settled constitutional law that the Fourteenth Amendment protects a woman's basic right to choose an abortion. Although a state may regulate a woman's right to an abortion in a manner "consistent with that state's interest in protecting potential life and the health of the mother[,]" it may not impose an "undue burden" on that right. If a statute has "the effect of placing a substantial obstacle in the path of a woman's choice[,]" then it "cannot be considered a permissible means of serv[ice]" even if it furthers a valid state interest.

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Here, the Court begins its analysis by examining whether DSHS has a legitimate interest in "afford[ing] the level of protection and dignity to the unborn children as state law afford to adults and children," or alternatively respecting "life and dignity of the unborn." . . . While the Supreme Court has acknowledged the State has an "important and legitimate interest[] . . . in protecting the potentiality of human life[,]" *Casey v. Planned Parenthood* (1992), the Amendments do not further such a legitimate state interest. The Amendments regulate activities after a miscarriage, ectopic pregnancy, or abortion activities that occur when there is no potential life to protect.

In addition, by seeking to respect life and the dignity of the unborn regardless of gestational age, DSHS appears to be inferentially establishing the beginning of human life as conception, potentially undermining the constitutional protection afforded to personal beliefs and central to the liberty protected by the Fourteenth Amendment. . . .

There is also evidence DSHS's stated interest is a pretext for its true purpose, restricting abortions. For example, how DSHS analyzed the potential impact of the Amendments before adopting them indicates the department's true intention. . . . The combination of the scope of DSHS's analysis, the Amendments' initial publication on the heels of the Supreme Court's decision in *Whole Woman's Health*, and DSHS's failure to incorporate the Amendments into the rest of Texas's statutory scheme suggests the actual purpose of the Amendments is to limit abortion access in Texas. . . .

To summarize, at this time the Court is not persuaded DSHS's alleged interest in protecting the dignity of the unborn is a legitimate state interest. Alternatively, even assuming DSHS is acting upon a legitimate interest, the record contains evidence the burdens on abortion access substantially outweigh the benefits.

The Court first examines the benefits of the Amendments, and DSHS recognizes the sole benefit the Amendments provide is conferring dignity on the unborn, conceding there is no public health benefit. Yet, DSHS itself undercuts the strength of the asserted benefit. For instance, while insisting the Amendments confer dignity on the unborn, DSHS recommends healthcare providers place fetal tissue in a single container, commingle fetal tissue from various procedures together, and freeze the tissue until disposal can be secured or the merits of this lawsuit decided. DSHS has not explained how this better protects the dignity of the unborn. Similarly, the Amendments create a special exception for women outside of a healthcare facility, imposing no restriction on how women at home dispose of fetal tissue. DSHS does not offer any reason why fetal tissue must be treated differently at home compared to in a doctor's office. Such inconsistency reduces the strength of the asserted benefit.

Turning to the alleged burdens imposed by the Amendments, the limited record contains evidence indicating restricting disposal of fetal tissue to methods consistent with the disposal of human remains will impose burdens on abortion access. While it is undisputed the Amendments will increase costs for healthcare providers, at least incrementally, the true impact of the Amendments is unknown. . . .

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Consequently, there may be only one facility, a vendor identified by Plaintiffs, in the entire State of Texas both willing and currently able to handle the disposal of fetal tissue as required by the Amendments. Just as the Supreme Court previously affirmed the district court's view that the proposition seven or eight abortion providers could meet the demand of the entire state stretched

credulity, this Court similarly finds the idea that one vendor could obtain and dispose of all the state's fetal tissue, potentially commingled with other pathological waste, exhausts credulity.

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Weighing the asserted benefit of the Amendments against the alleged burdens on abortion access and on the constitutional right of women to have an abortion in light of the limited evidentiary record, the Court finds the burdens likely substantially outweigh any claimed benefit. It is reasonable to conclude the burdens on abortion exceed any benefit. On one side of the equation DSHS has placed its weak purported benefit of protecting the dignity of the unborn, and on the other side Plaintiffs have placed evidence the Amendments increase costs for healthcare providers, enhance the stigma on women associated with miscarriage and abortion care, and create potentially devastating logistical challenges for abortion providers throughout Texas. Thus, the Court finds the Plaintiffs satisfied their burden of establishing a likelihood of success on their claim the Amendments place an undue burden on women's right to an abortion in violation of the Fourteenth Amendment.

In sum, the Court holds Plaintiffs have established a high likelihood of success on the merits by providing evidence the Amendments likely are unconstitutionally vague and impose an undue burden on the right to an abortion.

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... In light of Plaintiffs' likelihood of success on the merits, the magnitude of the likely irreparable injury alleged by Plaintiffs, and the balance of harms, the grant of an injunction in this case will not disserve the public interest.

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