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Faute de Mieux: Recognizing and Accepting Whole Woman's Health for Its Strengths and Weaknesses

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— Note —

*FAUTE DE MIEUX*¹:
 RECOGNIZING AND ACCEPTING
 WHOLE WOMAN’S HEALTH FOR ITS
 STRENGTHS AND WEAKNESSES

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1. Merriam-Webster.com reported a 495,000 percent increase in searches for this French phrase, meaning “for lack of something better,” on June 27, 2016. *Faute de mieux*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/news-trend-watch/faute-de-mieux-2016-06-27> [<https://perma.cc/GLP7-4CWJ>] (last visited Jan. 22, 2019). That morning, the Supreme Court announced its 5-3 decision in *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). In her concurring opinion, Justice Ruth Bader Ginsburg used the phrase in reference to the desperate and risky measures that women resort to when restrictions that limit access to safe and legal abortion present them with no other options. *Id.* at 2321.

Although this Note focuses on Justice Breyer’s majority opinion, it is worth noting that Justice Ginsburg’s concurrence, in and of itself, seems to acknowledge the compromises and ambiguities of the majority opinion. Perhaps in anticipation of attempts to find ways around the decision, her concurrence supplements the majority’s analysis with strong statements regarding the safety of abortion, supported by the findings of numerous studies, and rejects the idea that Targeted Regulation of Abortion Providers (“TRAP”) laws could ever pass constitutional muster under the undue-burden standard. *See id.* at 2320–21.

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INTRODUCTION

Already a mother of two, Valerie Peterson wanted another child but had been “told [for years that she] couldn’t have any more children.”² Then, in 2015, Peterson received some shocking news: she was pregnant. Unfortunately, her happiness turned to devastation when her sixteen-week sonogram revealed that the fetus’s brain and spinal cord had not developed properly. Peterson decided to terminate her pregnancy, rather than wait to miscarry or deliver a stillborn fetus.³ However, after the Texas legislature passed numerous onerous abortion regulations in 2013 through House Bill 2 (“H.B. 2”),⁴ more than half of the state’s abortion clinics were forced to close, and Peterson’s doctor struggled to find her a timely appointment at a nearby facility.⁵ As a result, Peterson decided to travel to Florida, a state with less restrictive abortion laws, where she was able to promptly receive the care she needed. The combined cost of the procedure and the trip was “close to \$5,000,” a price that Peterson realized many women could not afford.⁶

2. Valerie Peterson, *How Did I Get an Abortion in Texas? I Didn't.*, N.Y. TIMES (June 15, 2016), https://www.nytimes.com/2016/06/15/opinion/how-did-i-get-an-abortion-in-texas-i-didnt.html?_r=0 [https://perma.cc/QU94-3RJ3].

3. Peterson, *supra* note 2.

4. H.B. 2, 83rd Leg., 2d Called Sess. (Tex. 2013).

5. Peterson, *supra* note 2.

6. *Id.*

Less than a year later, the Supreme Court struck down two of H.B. 2's provisions in *Whole Woman's Health v. Hellerstedt*,⁷ after finding that "neither . . . confers medical benefits sufficient to justify the burdens upon [abortion] access that each imposes."⁸ The "admitting-privileges requirement," which had forced the closure of nineteen of the state's forty-one clinics,⁹ required "[a] physician performing or inducing an abortion . . . [to], on the date the abortion is performed or induced, have active admitting privileges at a hospital that . . . is located not further than 30 miles from the location at which the abortion is performed or induced."¹⁰ The "surgical-center requirement," which threatened to close fourteen to fifteen more clinics if allowed to go into effect,¹¹ required abortion clinics to meet "the minimum standards adopted under [the Texas Health and Safety Code] for ambulatory surgical centers."¹² After carefully analyzing relevant data and studies and weighing the restrictions' benefits and burdens, the Court held that both provisions unconstitutionally imposed an undue burden on the right to abortion.¹³

Reproductive rights advocates celebrated the victory, and many deemed the majority's careful consideration of public health and medical evidence a "win" for "science."¹⁴ Some commentators have even

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7. 136 S. Ct. 2292 (2016).
 8. *Id.* at 2300 (striking down Texas's admitting-privileges requirement and surgical-center requirement).
 9. Daniel Grossman et al., *Change in Abortion Services After Implementation of a Restrictive Law in Texas*, 90 *CONTRACEPTION* 496, 498 (2014); *see also Whole Woman's Health*, 136 S. Ct. at 2312. After H.B. 2 was enacted but before any of its provisions went into effect, "[e]ight clinics closed or stopped providing abortions." On the day that the first three provisions went into effect, "11 [more] clinics closed or stopped providing abortions, leaving 22 open facilities." Grossman et al., *supra*, at 498. The *Whole Woman's Health* majority accepted the district court's factual finding that the admitting-privileges provision caused these closures, based on "direct testimony as well as plausible inferences to be drawn from the timing of the clinic closures." 136 S. Ct. at 2313.
 10. *Whole Woman's Health*, 136 S. Ct. at 2300 (quoting TEX. HEALTH & SAFETY CODE ANN. § 171.0031(a) (West 2015)).
 11. *Id.* at 2316 (noting that the parties stipulated to these numbers).
 12. *Id.* at 2300 (quoting TEX. HEALTH & SAFETY CODE ANN. § 245.010(a)).
 13. *Id.* at 2311–13, 2318.
 14. *See, e.g.*, Alex DiBranco, *Whole Woman's Health's Unexpected Win for Science*, *THE PUBLIC EYE*, Fall 2016, at 17, http://www.politicalresearch.org/wp-content/uploads/2016/10/PE_Fall16_DiBranco.pdf [<https://perma.cc/Y59J-FGQD>]; BIXBY CENTER FOR GLOBAL REPRODUCTIVE HEALTH, *A Victory for the Role of Evidence in Reproductive Health Care*, <https://bixbycenter.ucsf.edu/news/victory-role-evidence-reproductive-health-care> [<https://perma.cc/F3LA-TQYR>] (last visited Dec. 13, 2018); *see also* Linda Greenhouse & Reva B. Siegel, *The Difference a Whole Woman Makes: Protection for the Abortion Right After Whole Woman's*

suggested that this decision will greatly limit states' ability to restrict abortion access without the support of scientific or other empirical evidence going forward.¹⁵ Others hailed Justice Breyer's majority opinion for breathing life back into the standard of review applied to abortion restrictions, which had seemingly devolved into little more than rational-basis review.¹⁶

Despite this high praise, many questions remain about the impact the *Whole Woman's Health* decision will ultimately have on future challenges to anti-abortion laws, including those purportedly enacted in the interest of protecting women's¹⁷ health ("woman-protective abortion restrictions"),¹⁸ and those that purport to advance the government's interest in protecting fetal life ("fetal-protective restrictions").¹⁹ While recognizing the aspects of the decision that

Health, 126 YALE L.J. FORUM 149, 159–61 (2016) (discussing future applications of the *Whole Woman's Health* majority's careful scrutiny of scientific evidence to other purportedly health-related abortion restrictions).

15. See, e.g., Greenhouse & Siegel, *supra* note 14, at 157–58; DiBranco, *supra* note 14, at 19; Imani Gandy, *After 'Whole Woman's Health' Decision, Advocates Should Fight Ultrasound Laws With Science*, REWIRE (July 29, 2016, 2:41 PM), <https://rewire.news/article/2016/07/29/whole-womans-health-ultrasound-laws-science/> [<https://perma.cc/77YN-9FGX>].
16. See generally *Fourteenth Amendment—Due Process Clause—Undue Burden: Whole Woman's Health v. Hellerstedt*, 130 HARV. L. REV. 397 (2016).
17. Although the word "women" and female pronouns are used throughout this Note—reflecting the language used by courts in abortion-related decisions—the author acknowledges that these terms can have the effect of erasing the experiences of transgender and non-binary individuals, who are often left out of conversations about abortion rights. Transgender and non-binary people have abortions and are harmed by abortion restrictions. See, e.g., *Key Facts on Abortion*, AMNESTY INT'L, <https://www.amnesty.org/en/what-we-do/sexual-and-reproductive-rights/abortion-facts/> [<https://perma.cc/38NL-W7HK>] (last visited Dec. 16, 2018). Furthermore, clinics that perform abortions often also provide transgender health services, and their closure can have serious consequences outside of abortion access for those relying on these services. See, e.g., Chanel Dubofsky, *Why Trans and Non-Binary People Must Be Included in the Abortion Conversation*, HELLOFLO (Feb. 23, 2018), <http://helloflo.com/trans-and-non-binary-folks-must-be-part-of-conversations-about-abortion/> [<https://perma.cc/CLL5-TNV3>].
18. Reva Siegal coined the term "woman-protective abortion restrictions" in her 2007 article about these restrictions. Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991 (2007). To be clear, the use of this term throughout this Note in no way implies an assumption that the restrictions actually have the purpose or effect of benefiting women.
19. See, e.g., Mary Ziegler, *Substantial Uncertainty: Whole Woman's Health v. Hellerstedt and the Future of Abortion Law*, 2016 SUP. CT. REV. 77, 78 (2017) (noting that "*Whole Woman's Health* set the stage for fact-

seemingly fortified the constitutional right to abortion access, this Note demonstrates how ambiguities in the majority opinion have made the decision incredibly vulnerable to manipulation by unsympathetic lower courts. This Note also identifies potential pitfalls that advocates will need to address in future challenges, and it suggests ways of dealing with some of those pitfalls through a careful reading of *Whole Woman's Health*.

Part I of this Note provides an overview of the evolution of abortion jurisprudence in the United States. Part II critically evaluates the *Whole Woman's Health* majority's analysis of the "benefits prong" of the undue-burden balancing test. Part III engages in a similar analysis of the "burdens prong." Part IV dissects some of the decision's ambiguities, which raise questions regarding the correct application of the standard of review in future challenges of abortion restrictions.

I. EVOLUTION OF ABORTION JURISPRUDENCE: FROM *ROE* TO *WHOLE WOMAN'S HEALTH*

A. Recognizing a Constitutional Right to Abortion and Adopting the Trimester Framework

In *Roe v. Wade*,²⁰ the Supreme Court held that the substantive due process right to privacy encompasses a woman's right to choose to terminate her pregnancy. However, the Court determined that this right is not unlimited, recognizing as valid state interests in protecting women's health and potential human life.²¹ Citing medical evidence demonstrating that first trimester abortions are safer than childbirth, the Court determined that states could regulate abortion for the purpose of protecting women's health only *after* the first trimester.²² The Court held that states' interest in potential life became compelling after the point of fetal viability,²³ which medical evidence suggested could occur as early as twenty-four weeks into a pregnancy.²⁴ Accordingly, the Court held that states could regulate or ban abortion for the purpose of protecting fetal life during the third trimester,

intensive litigation about the benefits and burdens of measures restricting access to abortion," and "could provide far less reliable protection for abortion rights than might appear"); R. Alta Charo, *Whole Women's Victory—or Not?*, 375 NEW ENG. J. MED. 809 (2016).

20. 410 U.S. 113 (1973).

21. *Id.* at 162–63.

22. *Id.* at 163.

23. *Id.*

24. *Id.* at 160.

“except when it is necessary to preserve the life or health of the mother.”²⁵

Justice Blackmun’s opinion outlined some of the potential negative impacts of forced pregnancy and forced motherhood, including tolls on a woman’s mental and physical health, economic burdens, and stigma.²⁶ However, the opinion has been criticized for failing to “identif[y] the ways in which laws restricting abortion are inherently discriminatory [against women].”²⁷

Roe has also been criticized for relying almost entirely on empirical evidence to support drawing a line at viability, while failing to analyze “the *constitutional principles* that directed the choice of the particular line drawn.”²⁸ Without a constitutional justification, commentators

25. *Id.* at 163–64.

26. Justice Blackmun asserted:

Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.

Id. at 153.

Interestingly, while the opinion contained ample citations to medical evidence and scientific studies, Blackmun did not cite any social science or other evidence in support these particular conclusions. In fact, “neither the Supreme Court nor the district court made any references to social science literature in any of the opinions written for *Roe v. Wade*.” ROSEMARY J. ERICKSON & RITA J. SIMON, *THE USE OF SOCIAL SCIENCE DATA IN SUPREME COURT DECISIONS* 43 (1998). However, “considerable social science material was brought before the Court in the combined cases of *Roe* and *Doe*” through briefs. *Id.* at 44. Blackmun also may have come across evidence of these harms in his independent research.

27. Erwin Chemerinsky & Michele Goodwin, *Abortion: A Woman’s Private Choice*, 95 *TEX. L. REV.* 1189, 1211–12 (2017). Chemerinsky and Goodwin argue that *Roe* would have been a stronger decision if it had included the description of abortion restrictions’ discriminatory assumptions and impact that Blackmun wrote almost twenty years later in his *Casey* concurrence. *Id.* (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 928–29 (1992) (Blackmun, J., concurring in part)).

28. Steven R. Schlesinger & Janet Nesse, *Justice Harry Blackmun and Empirical Jurisprudence*, 29 *AM. U. L. REV.* 405, 427 (1980) (emphasis added); see also Nancy K. Rhoden, *Trimesters and Technology: Revamping Roe v. Wade*, 95 *YALE L.J.* 639, 643 (1986) (“The abortion framework in *Roe* had . . . important underpinnings that were not articulated explicitly—mainly, the assumption that a viable fetus was one that was substantially developed and had reached ‘late’ gestation, and the ethical precept that late in gestation a fetus is so like a baby that elective abortion can be forbidden.”).

have long expressed concern that a woman's right to choose will erode with advances in medical technology that push the point of viability earlier and earlier.²⁹

B. Undoing Roe's Trimester Framework

Following *Roe*, the Court struck down numerous abortion restrictions under the trimester framework. In *City of Akron v. Akron Center for Reproductive Health (Akron I)*,³⁰ for example, the Court struck down multiple provisions of an Akron, Ohio, ordinance, including, among others, a requirement that abortions be performed in hospitals after the first trimester, "informed-consent" requirements, and a mandatory twenty-four-hour waiting period after signing a consent form.³¹ Some of these regulations represented an organized effort by the anti-abortion movement to pass abortion restrictions justified by largely unsubstantiated claims regarding the risks abortion posed to women's mental and physical health.³² The informed-consent provision challenged in *Akron I* required physicians to tell their patients that:

[A]bortion is a major surgical procedure which can result in serious complications, including hemorrhage, perforated uterus, infection, menstrual disturbances, sterility and miscarriage and prematurity in subsequent pregnancies; and . . . abortion may leave essentially unaffected or may worsen any existing psychological problems [a woman] may have, and can result in severe emotional disturbances.³³

Reproductive rights advocates provided evidence "refut[ing] the factual arguments supporting the ordinance," including psychological studies that found no connection between abortion and adverse psychological outcomes.³⁴

In striking down the ordinance, the Court rejected the medical and psychological claims made in support of the restrictions and noted that "the safety of second-trimester abortions ha[d] increased dramatically" since the Court decided *Roe v. Wade*.³⁵ Justice O'Connor dissented,

29. See, e.g., Schlesinger & Nesse, *supra* note 28, at 427 ("[E]ach time medical science advances the point of viability, the state's compelling interest in protection of fetal life will encroach further upon the woman's rights to privacy and reproductive autonomy.").

30. 462 U.S. 416 (1983), *overruled by* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 882 (1992).

31. *Id.* at 422–24, 426, 452.

32. Ziegler, *supra* note 19, at 83–84.

33. *Akron I*, 462 U.S. at 423 n.5 (quoting AKRON ORDINANCE NO. 60-1978 § 1870.06).

34. Ziegler, *supra* note 19, at 85.

35. *Akron I*, 462 U.S. at 435–36, 444–45.

criticizing the trimester framework and the limitations it placed on the government's ability to advance its interest in protecting fetal life, and raising the idea of a more deferential "undue burden" analysis.³⁶

Undeterred by *Akron I*, abortion opponents continued their efforts to disseminate the idea that abortion has negative psychological consequences and began to strategically manufacture an evidentiary basis for this claim.³⁷ These efforts eventually paid off.

A shift in the make-up of the Court called the future of *Roe* and the constitutional right to abortion into question. In *Webster v. Reproductive Health Services*,³⁸ the Court upheld a Missouri statute prohibiting abortion and related research in public facilities,³⁹ defining the beginning of life at the point of conception, and requiring physicians to test for fetal viability before performing an abortion twenty weeks or later into a woman's pregnancy. Notably, Chief Justice Rehnquist argued in his plurality opinion, which was joined by Justices White and

36. *Id.* at 459–66 (O'Connor, J., dissenting).

37. See Aziza Ahmed, *Medical Evidence and Expertise in Abortion Jurisprudence*, 41 AM. J.L. & MED. 85, 97–98 (2015); Ziegler, *supra* note 19, at 89–90. Mary Ziegler provides an insightful discussion of the inception of this strategy:

Movement leaders argued for the creation of research organizations that could collect proof that abortion hurt women and convince key decision makers, particularly politicians, that legal abortion did more harm than good. Victor Rosenblum and Thomas Marzen of [Americans United for Life] claimed that the movement might have more success promoting laws that supposedly benefited women if pro-lifers could popularize enough "[f]avorable statistical data." As the two explained:

"Accepted medical practices" must change before barriers to reversal can be broken down; whether or not abortion is "acceptable" is determined by the view and customary practices of the very people who perform abortions. They are unwilling to increase the state's authority to regulate abortion. A possible long-term approach to meeting this dilemma is the development of new sources for abortion data.

Creating new research organizations would allow abortion opponents to more confidently make claims about the facts. As importantly, even if the courts did not buy the movement's factual claims, abortion opponents could work through politics to create enough scientific uncertainty about what "accepted medical practices" should involve.

Ziegler, *supra* note 19, at 90.

38. 492 U.S. 490 (1989).

39. *Id.* at 509. This prohibition included a health exception. *Id.* at 501.

Kennedy, that *Roe*'s trimester framework had "proved 'unsound in principle and unworkable in practice.'"⁴⁰

Although after *Webster* it appeared that the Court would overturn *Roe*, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,⁴¹ the Supreme Court surprisingly reaffirmed *Roe*'s "central holding" that "the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure."⁴² The controlling plurality decision, however, replaced *Roe*'s trimester framework with a new "undue burden" standard.⁴³ Under this standard, states are permitted to pass pre-viability abortion restrictions that promote their recognized interests in protecting the health of the mother or protecting potential life, so long as the restrictions do not impose an "undue burden" on a woman's decision to terminate her pregnancy. However, "a statute which, while furthering [a] valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends."⁴⁴ The Court further explained that "[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right."⁴⁵

Applying this new standard, the plurality upheld all but one of the challenged abortion restrictions. Citing numerous studies and expert testimony on domestic abuse, the plurality struck down Pennsylvania's spousal-notice requirement.⁴⁶ In response to the state's contention that the requirement "imposes almost no burden at all for the vast majority of women seeking abortions," the Court advised that "[t]he analysis does not end with the one percent of women upon whom the statute operates; it begins there."⁴⁷ Based on the empirical evidence in the record, the plurality held that the requirement was an undue burden because "in a large fraction of the cases in which [the requirement] is relevant, it will operate as a substantial obstacle to a woman's choice

40. *Id.* at 518 (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985)).

41. 505 U.S. 833 (1992).

42. *Id.* at 845–46.

43. *Id.* at 873, 876.

44. *Id.* at 877.

45. *Id.* at 878.

46. *Id.* at 888–94.

47. *Id.* at 894. The Court further specified that the restriction's "real target is narrower even than the class of women seeking abortions identified by the State: it is married women seeking abortions who do not wish to notify their husbands of their intentions and who do not qualify for one of the statutory exceptions to the notice requirement." *Id.* at 895.

to undergo an abortion.”⁴⁸ This language was subsequently interpreted as an articulation of the correct test for determining whether the facial invalidation of a challenged abortion restriction is proper.⁴⁹

In contrast, the Court upheld a parental-notice requirement, clinic-reporting requirements, and an informed consent requirement similar to the one it struck down in *Akron I* that required women to receive information about abortion’s supposed mental health risks at least twenty-four hours before they underwent the procedure, overruling this aspect of the *Akron I* decision.⁵⁰ Amici briefs submitted in support of the Pennsylvania restrictions “presented the *very possibility* of postabortion trauma as a justification for abortion restrictions” and “suggested that the questions remained too open to expose women to the risk of harm.”⁵¹ The trial court found that the testimony presented in support of these claims lacked credibility.⁵² However, in holding that the restrictions furthered Pennsylvania’s woman-protective interests, the Supreme Court ignored both the trial court’s assessment and the empirical evidence presented by the challengers and amici showing a lack of causal connection between abortion and mental health problems:

It cannot be questioned that psychological well-being is a facet of health. Nor can it be doubted that most women considering an abortion would deem the impact on the fetus relevant, if not dispositive, to the decision. In attempting to ensure that a woman apprehend the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed. If the information the State requires to be made available to the woman is truthful and not misleading, the requirement may be permissible.⁵³

The Court cited no evidence in support of these supposedly indisputable assumptions.

The district court had found that the twenty-four-hour waiting period requirement would likely delay a woman’s ability to obtain an abortion by forcing her to make two separate visits to an abortion provider. The resulting increase in travel distance, time, and cost would be particularly burdensome on “those women who have the fewest financial resources, those who must travel long distances, and those who

48. *Id.* at 895, 925.

49. *See infra* notes 81–84 and accompanying text.

50. *Casey*, 505 U.S. 833, at 881–87.

51. Ziegler, *supra* note 19, at 96 (emphasis added).

52. *Id.* at 97.

53. *Casey*, 505 U.S. at 882.

have difficulty explaining their whereabouts to husbands, employers, or others.”⁵⁴ The *Casey* plurality accepted these findings but held that these burdens did not rise to the level of a constitutional violation under the new undue-burden standard.⁵⁵ According to the Court, “[n]ot all burdens on the right to decide whether to terminate a pregnancy will be undue.”⁵⁶

C. Stenberg and Gonzales

In *Stenberg v. Carhart*,⁵⁷ the Court struck down a Nebraska law banning so-called “partial birth abortions” (commonly referred to as dilation and extraction, or “D&X” abortions, by medical professionals) for two independent reasons.⁵⁸ The Court held that the ban placed an undue burden on the substantive due process right to abortion because the statutory language was broad enough to also encompass the most common method of abortion after the first trimester (called dilation and evacuation, or “D&E”).⁵⁹ The Court also held that the law was unconstitutional due to its lack of a health exception.⁶⁰ Although the Court was presented with contrary testimony regarding the existence of situations in which D&X would be safer than D&E, the Court found that “the division of medical opinion about the matter at most means uncertainty, a factor that signals the presence of risk, not its absence.”⁶¹

In response to the *Stenberg* decision, Congress passed a federal “partial birth abortion” ban, which used more specific language to describe the banned procedure but still omitted a health exception.⁶² The Supreme Court upheld this law in *Gonzales v. Carhart*.⁶³ Despite its contrary holding in *Stenberg*, the Court declined to invalidate the statute on its face for lacking a health exception, but left open the possibility of an as-applied challenge. The Court differentiated the federal law from the one it struck down in *Stenberg*, finding that the

54. *Id.* at 885–86 (citing *Planned Parenthood of Se. Pa. v. Casey*, 744 F. Supp. 1323, 1352 (E.D. Pa. 1990)).

55. *Id.* at 886. The Court noted that the district court invalidated the waiting period requirement after applying strict scrutiny, and “did not conclude that the increased costs and potential delays amount[ed] to substantial obstacles.” *Id.* Of course, the district court could not have been expected to apply a standard that the Court had not yet articulated.

56. *Id.* at 876.

57. 530 U.S. 914 (2000).

58. *Id.* at 927, 930.

59. *Id.* at 938–39, 945–46.

60. *Id.* at 937–38.

61. *Id.* at 937.

62. Partial-Birth Abortion Plan Act of 2003, 18 U.S.C. § 1531 (2019).

63. 550 U.S. 124, 132–33 (2007).

statutory language adequately distinguished D&X from D&E and only proscribed the former method.⁶⁴

The Court accepted the purposes of the law that Congress set forth in the legislative findings, which the Court characterized as “express[ing] respect for the dignity of human life” and “protecting the integrity and ethics of the medical profession.”⁶⁵ The majority found that the D&X ban furthered these objectives by creating a “dialogue that better informs the political and legal systems, the medical profession, expectant mothers, and society as a whole of the consequences that follow from a decision to elect a late-term abortion.”⁶⁶ The Court then concluded that “it is a reasonable inference” that this “dialogue” could “encourage some women to carry the infant to full term, thus reducing the absolute number of late-term abortions” and may encourage “[t]he medical profession . . . [to] find different and less shocking methods to abort the fetus in the second trimester, thereby accommodating legislative demand.”⁶⁷ The Court rejected the argument that D&E could be considered equally or more “brutal” than D&X, finding that Congress was reasonable in singling out D&X because of similarities Congress saw between D&X and the “delivery process.”⁶⁸

The Court also recognized a “woman-protective” governmental interest in banning D&X. Citing an amicus brief recounting the personal experiences of individual women after having an abortion, Justice Kennedy asserted that “it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained,” potentially leading to “[s]evere depression and loss of esteem,” but Justice Kennedy admitted that the Court “f[ou]nd no reliable data to measure the phenomenon.”⁶⁹ The majority also found that most physicians did not describe the D&X procedure to their patients and declared that women would experience psychological harm if they learned about the procedure after it was performed.⁷⁰ In sum, it determined that the ban furthered the government’s “interest in ensuring so grave a choice is well informed.”⁷¹

64. *Id.* at 150–56.

65. *Id.* at 157.

66. *Id.* at 160.

67. *Id.*

68. *Id.*

69. *Id.* at 159 (citing Brief of Sandra Cano et al., as Amici Curiae Supporting Petitioner, *Gonzales*, 550 U.S. 124 (No. 05-380)).

70. *Id.* at 159–60. Once again, Justice Kennedy supported this claim with no evidence, declaring that this alleged harm was “self-evident.” *Id.* at 159.

71. *Id.* In a vigorous dissent, Justice Ginsburg criticized the majority’s unsupported assertion regarding the risk of psychological consequences, as well as the Court’s approval of a “solution” that “deprives women of the

When analyzing the burden imposed by the ban, the Court was faced with contradictory evidence regarding the relative safety of D&X in comparison to D&E, both generally and under specific circumstances.⁷² Rather than view this medical uncertainty as a reason to invalidate the law, as the Court had seven years earlier in *Stenberg*, the Court held that “medical uncertainty over whether the [law’s] prohibition creates significant health risks provides a sufficient basis to conclude in this facial attack that the Act does not impose an undue burden.”⁷³ Furthermore, in determining that the “facial attacks should not have been entertained,” the Court echoed the “large fraction” language used in *Casey*’s facial invalidation of the spousal-notice requirement.⁷⁴

D. Ambiguities and Circuit Splits in the Wake of Casey and Gonzales

The Court’s decisions in *Casey* and *Gonzales* inspired differing interpretations of the correct application of the undue-burden test.⁷⁵ The Seventh and Ninth Circuits, along with various district courts, applied a balancing test, “weigh[ing] the burdens against the state’s justification, [and] asking whether and to what extent the challenged regulation *actually advances* the state’s interests. If a burden significantly exceeds what is necessary to advance the state’s interests, it is ‘undue,’ which is to say unconstitutional.”⁷⁶ Courts applying this approach considered evidence outside of the legislative record in analyzing both the benefits of a challenged regulation in relation to the purported governmental interest in its passing, as well as the actual or anticipated burdens the regulation places on the exercise of the abortion right.⁷⁷

In contrast, the Fourth, Fifth, and Sixth Circuits declined to apply a balancing test, instead engaging in a more deferential two-part

right to make an autonomous choice, even at the expense of their safety.”
Id. at 183–34 (Ginsburg, J., dissenting).

72. *Id.* at 161–63.

73. *Id.* at 164.

74. *Id.* at 167–68 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 at 895 (1992)) (noting that the “respondents ha[d] not demonstrated that the Act would be unconstitutional in a large fraction of relevant cases”).

75. Gillian Metzger, *Symposium: Hanging in the Balance*, SCOTUSBLOG (Jan. 6, 2016, 9:23 AM), <http://www.scotusblog.com/2016/01/symposium-hanging-in-the-balance/> [<https://perma.cc/SN6E-FEY5>].

76. *Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908, 919–20 (7th Cir. 2015) (emphasis added) (citation omitted) (quoting *Planned Parenthood Ariz., Inc. v. Humble*, 753 F.3d 905, 913 (9th Cir. 2014)).

77. *See, e.g., id.*; *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 790–93 (7th Cir. 2013).

analysis.⁷⁸ When considering a challenge to an abortion restriction, these courts determined whether the restriction satisfied rational-basis review, and then determined whether the restriction had the purpose or effect of creating a substantial obstacle to obtaining an abortion.⁷⁹ Under this test, restrictions were upheld as long as they did not create a substantial obstacle and were rationally related to a legitimate government interest. Because “the rational basis test seeks only to determine whether any conceivable rationale [for enacting a regulation] exists,” these courts argued that it is not the judiciary’s role to independently evaluate the extent to which a regulation actually furthers a legitimate governmental interest.⁸⁰

Casey’s ambiguous “large fraction test” also proved difficult for courts to apply and has been interpreted inconsistently. Numerous courts have interpreted this language as imposing a distinct test for determining whether facial challenges to abortion regulations could be sustained, which requires plaintiffs to demonstrate that the regulation was unduly burdensome in a large fraction of relevant cases.⁸¹ Courts have struggled to define the appropriate numerator and denominator

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78. See *Whole Woman’s Health v. Lakey*, 769 F.3d 285, 297 (5th Cir. 2014) (citing *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott (Abbott II)*, 748 F.3d 583, 593–94, 597 (5th Cir. 2014)), *vacated in part*, 135 S. Ct. 399 (2014); *Planned Parenthood Sw. Ohio Region v. DeWine*, 696 F.3d 490, 506–07 (6th Cir. 2012); *Greenville Women’s Clinic v. Bryant*, 222 F.3d 157 (4th Cir. 2000); and *Women’s Health Ctr. of W. Cnty., Inc. v. Webster*, 871 F.2d 1377 (8th Cir. 1989)); see also Metzger, *supra* note 75.
79. *Lakey*, 769 F.3d at 297 (citing *Abbott II*, 748 F.3d at 593–94, 597). As Justice Thomas argues in his *Whole Woman’s Health* dissent, this interpretation stems from language used by the majority in *Gonzales v. Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2324 (2016) (Thomas, J., dissenting) (citing *Gonzales*, 550 U.S. 124, 158 (2007)). In upholding the federal ban on the D&X procedure, the *Gonzales* majority asserted that “[w]here [the legislature] has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn.” 550 U.S. at 158.
80. *Abbott II*, 748 F.3d at 594.
81. For example, in *Gonzales*, the majority acknowledged the existing confusion over the required showing for sustaining a facial challenge. The majority cited two possible tests: a facial challenge could be sustained by showing that “no set of circumstances exists under which the [challenged law] would be valid,” or a facial challenge could be sustained by demonstrating that the “statute would impose an undue burden ‘in a large fraction of the cases in which [it] is relevant.’” *Gonzales*, 550 U.S. at 167 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 895 (1992); also citing *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 514 (1990)). The Court did not see the need to resolve the issue because it found that the petitioners did not meet the latter standard. *Id.* at 167–68.

for this calculation, leading to widely ranging outcomes. The district court opinion in *Cincinnati Women's Services, Inc. v. Taft*⁸² provided an on-point summary of the difficult questions raised by the rule:

The “large fraction” standard enunciated in *Casey* by nature invites the courts and the parties to engage in a number-crunching exercise to assess the impact of an abortion regulation. . . . Nevertheless, stating that a “large fraction” constitutes a substantial obstacle is not the same thing as defining a “large fraction.” Because the Supreme Court instructs that the constitutional analysis should focus on only those women for whom the restriction is actually relevant, the argument devolves to which group of women is properly considered the numerator and which group of women is properly considered the denominator. Even if a court properly identifies the numerator and denominator, it still must decide whether the resulting fraction is “large.” Again, the *Casey* Court provides no real guidance.⁸³

These ambiguities allowed the test to be manipulated in order to reach a desired result, particularly by defining the denominator more narrowly or broadly.⁸⁴

Questions about the application of both of these tests, as well as other disputed interpretations of *Gonzales*, played a considerable role in *Whole Woman's Health*.

E. TRAP Laws and Whole Woman's Health

After the Supreme Court in *Casey* recognized a pre-viability governmental interest in regulating abortion to protect women's health, one of the major legislative strategies put forth by anti-abortion advocacy groups, including Americans United for Life (“AUL”), focused on undermining the constitutional right to abortion by “subjecting abortion to increasingly burdensome forms of regulation.”⁸⁵ These Targeted Regulation of Abortion Providers (“TRAP”) laws, as critics call them, impose regulations on abortion providers that are difficult and expensive to comply with, are unsupported by health and safety principles, and typically are not imposed on other healthcare procedures

82. 468 F.3d 361 (6th Cir. 2006).

83. *Id.* at 377–78 (Rogers, J., concurring) (quoting *Cincinnati Women's Servs., Inc. v. Taft*, 466 F. Supp. 2d 934, 939 (S.D. Ohio 2005)) (internal citation omitted).

84. *See id.* at 376–77.

85. Cary Franklin, *Whole Woman's Health v. Hellerstedt and What It Means to Protect Women*, REPRODUCTIVE RIGHTS AND JUSTICE STORIES (forthcoming 2019) (manuscript at 3) (available at <https://ssrn.com/abstract=3206983>).

with comparable or greater risks.⁸⁶ These laws increase costs for abortion providers and can lead to widespread clinic closures.⁸⁷ While the purpose of model TRAP laws written by organizations like AUL is to undermine *Roe* and decrease abortion access, the carefully constructed legislative messaging alleges that the primary goal of the regulations is to “*safeguard maternal health*—to protect pregnant women from dangerous providers and to ensure that abortion is performed in safe environments.”⁸⁸ Advocates of this strategy “argued that legislators ought to be given wide latitude” to enact regulations that purport to further that goal.⁸⁹

The efforts to restrict abortion access through strategic regulation picked up speed following the 2010 midterm elections, as “scores of Tea Party and other conservative candidates for whom ending abortion was a key priority” entered office.⁹⁰ Texas’s passage of H.B. 2 in 2013 reflected these national trends.⁹¹

The constitutionality of H.B. 2’s admitting-privileges requirement was first challenged by several abortion clinics and providers, who sought a facial invalidation of the requirement in *Planned Parenthood of Greater Texas Surgical Health Services v. Abbott*.⁹² The district court preliminarily enjoined the requirement, but the Fifth Circuit vacated this injunction, allowing the requirement to go into effect.⁹³ After the issue was tried in full, the district court permanently enjoined the admitting-privileges provision, holding that it unduly burdened Texas women seeking an abortion.⁹⁴ The Fifth Circuit reversed the lower court’s decision as to the admitting-privileges requirement, upholding it as constitutional, in part because it found the plaintiffs did not sufficiently “show that abortion practitioners will likely be unable to comply with the privileges requirement.”⁹⁵

86. *Id.* (manuscript at 4).

87. *See id.*

88. *Id.* (manuscript at 3–4) (emphasis in original).

89. *Id.* (manuscript at 4).

90. *Id.* (manuscript at 5).

91. *Id.*

92. 951 F. Supp. 2d 891, 901 (W.D. Tex. 2013).

93. *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott (Abbott I)*, 734 F.3d 406, 419 (5th Cir. 2013). The plaintiffs also challenged H.B. 2’s restrictions on medication abortions. *Id.* at 409.

94. *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 951 F. Supp. 2d 891, 909 (W.D. Tex. 2013), *aff’d in part, rev’d in part, and remanded, Abbot II*, 748 F.3d 583 (5th Cir. 2014).

95. *Abbott II*, 748 F.3d at 592, 598. The plaintiffs did not file a petition for certiorari. Some of the plaintiffs, however, joined a separate challenge brought shortly after this decision was announced. *See infra* note 97 and accompanying text.

In the time between the Fifth Circuit's decision vacating the injunction and its decision upholding the restriction, nineteen of Texas's abortion clinics had closed: eight in anticipation of the admitting-privileges requirement taking effect and eleven more on the day that requirement officially took effect.⁹⁶ Soon after the Fifth Circuit published its decision, another group of abortion clinics and providers—including some of the plaintiffs from *Abbott I*—challenged H.B. 2's admitting-privileges requirement as it applied to two Texas clinics in McAllen and El Paso. They also brought a facial challenge of the constitutionality of the ambulatory-surgical-center (“ASC”) requirement.⁹⁷ After a four-day bench trial, the district court found that the two provisions had the combined effect of shuttering most of the abortion clinics in Texas.⁹⁸ The district court permanently enjoined the enforcement of both challenged restrictions, holding that “the over-all effect of the provisions is to create an impermissible obstacle as applied to all women seeking a previability abortion.”⁹⁹

Once again, the Fifth Circuit reversed the district court's decision.¹⁰⁰ Applying the two-step, rational basis/substantial obstacle analysis, the court held that the challenged restrictions were constitutional, except as applied to the McAllen clinic.¹⁰¹ The court determined that both of the challenged requirements “were rationally related to a legitimate state interest” in raising “the standard and quality of care for women seeking abortions and . . . protect[ing] the health and welfare of women seeking abortions.”¹⁰² The decision took issue with the district court's independent analysis of the plaintiffs' evidence regarding the lack of purported health benefits, declaring that “the district court erred by substituting its own judgment [as to the provisions' effects] for that of the legislature, albeit . . . in the name of the undue burden inquiry.”¹⁰³

96. See Grossman et al., *supra* note 9, at 498.

97. *Whole Woman's Health v. Lakey*, 46 F. Supp. 3d 673, 678 (W.D. Tex. 2014).

98. *Id.* at 687.

99. *Id.*

100. *Whole Woman's Health v. Cole*, 790 F.3d 563, 567 (5th Cir. 2015), *modified*, 790 F.3d 598, 599 (5th Cir. 2015), *rev'd and remanded sub nom.* *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

101. *Id.* at 576, 594. The Fifth Circuit also overturned the lower court's facial invalidation of the challenged provisions on procedural grounds, *id.* at 580–83, but the Supreme Court reversed the Fifth Circuit's procedural rulings in *Whole Woman's Health v. Hellerstedt*. 136 S. Ct. 2292 at 2304–09. A more detailed discussion of the procedural aspects of this case falls outside of the scope of this Note.

102. *Id.* at 584.

103. *Id.* at 587 (citing *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007)).

The Fifth Circuit also found that the district court erred in its determination that the remaining clinics would not have the capacity to meet statewide demand for abortion care if the restrictions were upheld.¹⁰⁴ Furthermore, the court concluded that the district court had erred in facially invalidating the challenged restrictions because the plaintiffs had not demonstrated that either restriction “imposes an undue burden on a large fraction of women.”¹⁰⁵

The Supreme Court granted certiorari, and a 5-3 majority reversed the Fifth Circuit’s ruling.¹⁰⁶ After determining that the challenge was not precluded on procedural grounds, the Court provided clarification in regard to the correct application of the standard of review in substantive due process challenges to abortion regulations. The Court concluded that the Fifth Circuit’s application of the undue-burden standard was incorrect, because courts must “consider the burdens a law imposes on abortion access together with the benefits those laws confer.”¹⁰⁷ The majority rejected outright the implication that a “district court should not consider the existence or nonexistence of medical benefits when considering whether a regulation of abortion constitutes an undue burden.”¹⁰⁸ The Court also rejected the appellate court’s contention that “legislatures, and not courts, must resolve questions of medical uncertainty.”¹⁰⁹

The majority opinion, written by Justice Breyer, went on to analyze the restrictions’ medical benefits and the burden that they placed on Texas women’s right to choose to have an abortion, relying heavily on scientific evidence, public health studies, and demographic data. Ultimately, the Court held that the restrictions constituted undue burdens after weighing what the court determined to be a “virtual absence of any health benefit” against the cumulative impact of the restrictions’ various burdens.¹¹⁰

Finally, the Court disposed of several of Texas’s remaining arguments, including those regarding H.B. 2’s severability clause and purportedly contrary Supreme Court precedent.¹¹¹ Perhaps most

104. *Id.* at 589–90.

105. *Id.* at 576, 590.

106. *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2309–10 (2016).

107. *Id.* at 2309 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 887–98 (1992)).

108. *Id.*

109. *Id.* at 2310.

110. *Id.* at 2313.

111. *Id.* at 2318–20.

critically, the Court rejected the Fifth Circuit's application of the large-fraction test, which Texas had urged the Court to apply.¹¹²

II. ANALYZING THE PURPORTED AND ACTUAL BENEFITS OF ABORTION RESTRICTIONS AFTER *WHOLE WOMAN'S HEALTH*

Rather than deferring to Texas's claims regarding the need to safeguard women's health by imposing the challenged regulations on abortion providers, the *Whole Woman's Health* majority independently analyzed the benefits of the H.B. 2 provisions, referring to scientific evidence, public health data, and medical expert testimony. This approach reversed a trend in abortion jurisprudence of deference to woman-protective arguments, which began in *Casey*.

A. Recognizing Abortion as a Safe Medical Procedure

In assessing the supposed health benefits of the challenged H.B. 2 provisions, the Court cited studies and data showing that abortion has extremely low serious complication and mortality rates, both in Texas and across the country, and it determined that "there was no significant health-related problem that the [restrictions] helped to cure."¹¹³ The Court's recognition of evidence demonstrating that abortion is a remarkably safe medical procedure interrupts the strategic narrative advanced by anti-abortion advocates that characterizes "pregnant women and fetuses alike as victims of a dangerous and greedy abortion industry" and reframes abortion restrictions as necessary to protect women from these dangers.¹¹⁴ Without a legitimate health-related problem to address, the benefits of woman-protective abortion restrictions are called into serious question.

Despite the Court's recognition that abortion is a safe medical procedure, government defendants are likely to continue arguing that challenged regulations are necessary to protect women's health. Going forward, however, defendants will need to provide evidence of specific health-related benefits to justify woman-protective abortion restrictions, rather than rely on general claims regarding the dangers associated with abortion.¹¹⁵ After all, future plaintiffs challenging woman-protective restrictions can easily counter such general claims by

112. *Id.* at 2320. For a more detailed discussion of this aspect of the *Whole Woman's Health* decision, see *infra* Section IV.B.

113. *Id.* at 2311, 2315.

114. Franklin, *supra* note 85 (manuscript at 6).

115. See, e.g., *Burns v. Cline*, 2016 OK 121, 387 P.3d 348 (Okla. 2016). In *Burns v. Cline*, the Supreme Court of Oklahoma rejected the State's contention that the challenged admitting privileges requirement "advance[d] and protect[ed] women's health," citing the "national scientific evidence presented in *Hellerstedt* [that] disputed such claims." *Id.* ¶ 18, 387 P.3d at 353.

demonstrating that the relevant state (or federal) abortion morbidity and complication rates are on par with the corresponding rates in Texas.

Following *Whole Woman's Health*, some courts have been more willing than others to entertain defendants' claims regarding health risks. When abortion providers in Missouri brought a challenge to the state's similar ASC and admitting-privileges requirements, the state argued that those regulations protect against the "physical risks of abortion procedures."¹¹⁶ In response to evidence showing low abortion-related complication rates presented by the plaintiffs, Missouri claimed that the plaintiffs—as well as abortion clinics across the country—under-report abortion-related complications.¹¹⁷ The U.S. District Court for the Western District of Missouri granted the plaintiffs' request for a preliminary injunction, declining to consider the "new material, copies of studies and expert opinions" presented by the state as evidence of the "dangerousness of abortions."¹¹⁸ The court noted that it would be "impermissible judicial practice" to "reappraise the abortion safety issue, after the very extensive advocacy on both sides in *Hellerstedt*."¹¹⁹

On appeal, the Eighth Circuit took issue with the lower court's refusal to consider the health- and safety-related evidence presented by Missouri.¹²⁰ The court claimed that the *Whole Woman's Health* majority's benefits analysis relied on findings regarding the safety of abortion in Texas specifically, and raised the possibility that a "unique problem" exists in Missouri that "may require a different response than what was needed in Texas."¹²¹ The Eighth Circuit vacated and remanded the decision granting the preliminary injunction, directing the district court to consider the evidence of the admitting-privilege requirement's purported health-related benefits and weigh those

116. *See, e.g.*, Brief of Appellants at 17–18, *Comprehensive Health of Planned Parenthood Great Plains v. Hawley*, 903 F.3d 750 (8th Cir. 2018) (No. 17-1996).

117. *See* The State Defendants' Post-Hearing Supplemental Brief in Opposition to Plaintiffs' Motion for Preliminary Injunction at 4–7, *Comprehensive Health of Planned Parenthood Great Plains v. Williams*, 263 F. Supp. 3d 729 (W.D. Mo. 2017) (No. 2:16-cv-04313). Texas raised similar arguments in *Whole Woman's Health v. Lakey*, 46 F. Supp. 3d 673, 684 (W.D. Tex. 2014). The district court gave "appropriate weight to the experts' conflicting testimony," and ultimately "conclude[d] that concerns over incomplete complication reporting and underestimated complication rates are largely unfounded and are without a reliable basis." *Id.*

118. *Comprehensive Health of Planned Parenthood Great Plains v. Williams*, 263 F. Supp. 3d 729, 733 (W.D. Mo. 2017).

119. *Id.*

120. *Comprehensive Health of Planned Parenthood Great Plains v. Hawley*, 903 F.3d 750, 758 (8th Cir. 2018).

121. *Id.* at 758–59.

benefits against the evidence of the requirement's burden.¹²² Although the district court subsequently declined to grant another preliminary injunction against the admitting privileges requirement, its decision focused on the sufficiency of the plaintiffs' evidence of burden, and the court acknowledged that Missouri's claims about the requirement's woman-protective benefits were "dubious."¹²³ Even if the district court had determined that there was sufficient evidence demonstrating that abortion is less safe in Missouri than it is in Texas, *Whole Woman's Health* would have required the court to determine whether the challenged abortion restriction actually addressed the purported safety issues in Missouri.¹²⁴

B. Critically Analyzing Evidence of Purported Benefits in the Abortion-Specific Context

After concluding that abortion was an incredibly safe procedure prior to the enactment of the challenged provisions, the *Whole Woman's Health* Court went on to analyze whether the challenged regulations actually provided any health benefit when imposed on abortion providers. The majority determined that the purported benefits of the ASC and admitting-privileges requirements were irrelevant in the abortion context.

The Court first considered whether the admitting-privilege requirement would actually improve health outcomes for abortion patients. The Court cited evidence demonstrating that on the rare occasions that abortion patients "suffer complications requiring hospitalization, most of these complications occur in the days after the abortion," and the patients "will likely seek medical attention at the hospital nearest [their] home[s]."¹²⁵ Thus, requiring abortion providers to obtain admitting privileges at a hospital within thirty miles of the clinic would not improve health outcomes for abortion patients who experience complications.¹²⁶ Furthermore, the Court concluded that the requirement "d[id] not serve any relevant credentialing function" after finding that providers were being denied admitting privileges for reasons unrelated to their competency, and the safety of abortion would

122. *Id.* at 758. To some extent, the evidentiary issues that arise in this case may result from the *Whole Woman's Health* Court's failure to explain who bears the burden of proof for each prong of the undue burden balancing test. A thorough explanation of evidentiary burdens in *Whole Woman's Health* and future challenges of abortion restrictions falls outside of the scope of this Note.

123. *Comprehensive Health of Planned Parenthood Great Plains v. Williams*, No. 2:16-cv-04313-BCW at 12 (W.D. Mo. Feb. 22, 2019).

124. *See* discussion *infra* Section II.B.

125. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2311 (2016).

126. *See id.* at 2310–11.

make it difficult for providers to meet the required number of hospital admissions.¹²⁷

Next, the Court assessed the benefits of requiring abortion clinics to comply with the ASC requirements. The Court determined that the surgical-center requirements designed to “reduce infection where doctors conduct procedures that penetrate the skin” were inapplicable to abortion facilities because medication abortion involves the administration of pills taken orally and surgical abortion is “performed through the natural opening of the birth canal, which is itself not sterile.”¹²⁸ Because abortion clinics “do not use general anesthesia or deep sedation,” the Court found the provisions aimed at “safeguard[ing] heavily sedated patients (unable to help themselves) during fire emergencies” completely unnecessary as well.¹²⁹

The majority also rejected the dissent’s contention that H.B. 2 might force the closure of unsafe clinics like the facility run by Kermit Gosnell in Pennsylvania.¹³⁰ The majority pointed out that “Gosnell’s deplorable crimes could escape detection only because his facility went uninspected for more than 15 years,” and “[p]re-existing Texas law already contained numerous detailed regulations covering abortion facilities, including a requirement that facilities be inspected at least annually.”¹³¹ In other words, “[d]etermined wrongdoers, already ignoring existing statutes and safety measures,” are unlikely to be deterred by the addition of more statutes and safety measures.¹³²

The Court’s analysis has several important implications for future challenges to abortion restrictions—particularly for TRAP laws that impose on abortion clinics the types of regulations typically reserved for facilities where much riskier procedures are performed. First, evidence that a regulation improves health outcomes in other medical contexts can be countered with evidence demonstrating why the regulations would not be beneficial when applied to abortion

127. *Id.* at 2312–13.

128. *Id.* at 2315–16.

129. *Id.* at 2316.

130. *Id.* at 2313. The Court explained that:

Gosnell, a physician in Pennsylvania, was convicted of first-degree murder and manslaughter. He staffed his facility with unlicensed and indifferent workers, and then let them practice medicine unsupervised and had [d]irty facilities; unsanitary instruments; an absence of functioning monitoring and resuscitation equipment; the use of cheap, but dangerous, drugs; illegal procedures; and inadequate emergency access for when things inevitably went wrong.

Id. (internal quotations omitted).

131. *Id.* at 2314.

132. *Id.* at 2313–14.

specifically. Second, even if the government presents reliable evidence of an existing problem or health risk specific to abortion, the majority opinion in *Whole Woman's Health* calls for courts to analyze the *fit* between the problem and the challenged restriction.

C. The Role of Junk Science and Substantial Uncertainty After Whole Woman's Health

Many abortion restrictions—including ASC and admitting-privileges requirements like those struck down in *Whole Woman's Health*—are premised on scientifically unfounded assertions.¹³³ States have passed counseling requirements that force providers to tell patients that abortion can cause mental health problems, infertility, and breast cancer, despite large bodies of evidence refuting all of these claims.¹³⁴ Legislative attempts to either ban abortion before viability or require physicians to perform additional risky and unnecessary procedures before terminating a pregnancy often rely on disproven “pseudoscience” regarding the point during a pregnancy when a fetus becomes capable of feeling pain.¹³⁵ Although numerous peer-reviewed studies have contradicted abortion opponents’ claims regarding the negative psychological impact of abortion, states continue to pass laws that purport to protect women from post-abortion trauma.¹³⁶ The list goes on and on.

Despite numerous commentators declaring that *Whole Woman's Health* marked the end of abortion restrictions justified by “junk science,” this conclusion is likely overstated. The Court restored heightened scrutiny to the undue-burden standard by calling for the independent judicial evaluation of evidence to determine whether abortion regulations yield their purported benefits. However, the Court did not change the applicable rules of evidence, and the majority opinion’s deference to the district court’s findings of fact leaves trial courts with a great deal of latitude when evaluating and weighing the evidence of abortion restrictions’ benefits and burdens in the future.¹³⁷

Judges typically receive empirical evidence through expert testimony and *amicus curiae* briefs.¹³⁸ There are no “formal tests” dictating what material can or cannot be included in *amicus curiae*

133. Rachel Benson Gold & Elizabeth Nash, *Flouting the Facts: State Abortion Restrictions Flying in the Face of Science*, 20 GUTTMACHER POL’Y REV. 53, 53–54 (2017).

134. *Id.* at 56.

135. *Id.* at 56–57.

136. See Susan A. Cohen, *Still True: Abortion Does Not Increase Women’s Risk of Mental Health Problems*, 16 GUTTMACHER POL’Y REV. 13, 14–16 (2013).

137. See Zeigler, *supra* note 19, at 114.

138. ERICKSON & SIMON, *supra* note 26, at 19.

briefs; all kinds of “extralegal” materials may be entered into the record.¹³⁹ As Justice Breyer explained in his majority opinion, the admissibility of expert testimony is determined under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*¹⁴⁰ While *Daubert* calls for trial court judges to analyze the reliability of expert evidence, judges’ effectiveness in determining reliability and their ability to truly understand and assess empirical research is a matter of debate.¹⁴¹ Critics point out that “judges have little empirical training”¹⁴² and “courts are ill equipped to assess social science research critically.”¹⁴³

The Supreme Court’s use of empirical evidence has not escaped criticism, particularly when deciding constitutional questions.¹⁴⁴ Some commentators assert that the Court has ignored or distorted valid empirical evidence that seemingly contradicts a desired conclusion in specific cases.¹⁴⁵ This critique is highly relevant to the Court’s abortion jurisprudence.

139. *Id.* at 32.

140. *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2317 (2016) (citing *Daubert*, 509 U.S. 579, 589 (1993) (“[U]nder the Rules the trial judge must ensure that any and all [expert] evidence admitted is not only relevant, but reliable”)); see also ERICKSON & SIMON, *supra* note 26, at 23–31.

141. See, e.g., Ben K. Grunwald, Comment, *Suboptimal Social Science and Judicial Precedent*, 161 U. PA. L. REV. 1409, 1412–13, 1439–40 (2013).

142. *Id.* at 1439.

143. *Id.* at 1413.

144. See, e.g., ERICKSON & SIMON, *supra* note 26; WALLACE D. LOH, *SOCIAL RESEARCH IN THE JUDICIAL PROCESS* (1984); Paul S. Appelbaum, *The Empirical Jurisprudence of the United States Supreme Court*, 13 AM. J.L. & MED. 335 (1987); Lee Epstein, Barry Friedman & Geoffrey R. Stone, *Foreword: Testing the Constitution*, 90 N.Y.U. L. REV. 1001 (2015); David L. Faigman, “Normative Constitutional Fact-Finding”: *Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541 (1991); Grunwald, *supra* note 141; Dean M. Hashimoto, *Science as Mythology in Constitutional Law*, 76 OR. L. REV. 111 (1997); John Monahan & Laurens Walker, *Judicial Use of Social Science Research*, 15 LAW & HUMAN BEHAV. 571, 572 (1991) (citing *Muller v. Oregon*, 208 U.S. 412 (1908)); Niels Petersen, *Avoiding the Common-Wisdom Fallacy: The Role of Social Sciences in Constitutional Adjudication*, 11 INT’L J. CONST. L. 294 (2013); Rachael N. Pine, *Speculation and Reality: The Role of Facts in Judicial Protection of Fundamental Rights*, 136 U. PA. L. REV. 655 (1988); Amy Rublin, *The Role of Social Science in Judicial Decision Making: How Gay Rights Advocates Can Learn from Integration and Capital Punishment Case Law*, 19 DUKE J. GENDER L. & POL’Y 179 (2011).

145. See, e.g., Faigman, *supra* note 144, at 505. Faigman, however, argues that the Court is still restrained to an extent by available empirical evidence because “persistent misapplication of empirical data undermines the Court’s legitimacy.” *Id.* at 604.

In both *Casey* and *Gonzales*, the Court upheld abortion restrictions after finding that they advanced the state's interest in protecting women's psychological health, ignoring substantial bodies of reliable evidence to the contrary.¹⁴⁶ The plurality opinion in *Casey* drew conclusions about abortion's psychological impact on women without citing supporting evidence from either side.¹⁴⁷ The majority in *Gonzales* admitted that its assumption was unsupported by empirical evidence, citing instead to an amicus brief containing anecdotal stories from individual women who regretted having an abortion.¹⁴⁸ Neither opinion acknowledged that the Court had been presented with peer-reviewed empirical studies that demonstrated a *lack* of correlation between abortion and negative psychological outcomes.¹⁴⁹

Anti-abortion activists' strategic efforts to manufacture scientific uncertainty likely played a role in the outcomes of those cases.¹⁵⁰ Beginning in the 1980s, abortion opponents began funding research and gathering "scientific" evidence for the purpose of introducing "uncertainty" in relation to the safety of abortion and established medical practices, the impact on women's psychological and physical health, and fetal pain.¹⁵¹ Although the purpose of gathering this evidence was to justify the need for various abortion restrictions, the goal was not to "establish convincing proof," but "to show a lack of certainty."¹⁵² The anti-abortion strategists believed that if they could convince courts that abortion *might* harm women or cause fetal pain, judges would uphold regulations purportedly addressing these potential harms, regardless of evidence to the contrary.¹⁵³ Abortion opponents supplemented their pseudoscience with anecdotal testimonials, "contend[ing] that even if the risks of abortion could not be conclusively proven, women's personal experiences made abortion restrictions a

146. *See, e.g.,* *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007) ("While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained."); *see also* Ahmed, *supra* note 37, at 98 (discussing the Court's rejection of evidence that abortion does not have a detrimental psychological impact on women in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992)).

147. *Casey*, 505 U.S. at 882; *see also supra* notes 50–53 and accompanying text.

148. *Gonzales*, 550 U.S. at 159 (citing Brief of Sandra Cano et al., as Amici Curiae in Support of Petitioner, *Gonzales*, 550 U.S. 124 (No. 05-380)); *see also supra* notes 69–71 and accompanying text.

149. Ahmed, *supra* note 37, at 97–98, 107–08.

150. Zeigler, *supra* note 19, at 113–14.

151. *Id.* at 79, 90. *See also supra* note 37.

152. *Id.* at 93–94.

153. *Id.*

necessary precaution.”¹⁵⁴ As already discussed, these efforts were successful in both *Casey* and *Gonzales*.¹⁵⁵ *Gonzales*, in particular, represented a major victory for advocates of this strategy, as some lower courts, including the Fifth Circuit, read *Gonzales* as *requiring* judicial deference to legislative judgment when scientific or medical uncertainty underlies an abortion regulation.¹⁵⁶ The *Whole Woman’s Health* majority, however, unequivocally rejected this interpretation of *Gonzales*, and reaffirmed courts’ “independent constitutional duty to review factual findings where constitutional rights are at stake.”¹⁵⁷

The future impact of junk science and scientific uncertainty on abortion jurisprudence after *Whole Woman’s Health* is still not entirely clear. While the *Whole Woman’s Health* majority instructed lower courts “not [to] place dispositive weight” on legislative findings of fact,¹⁵⁸ pseudoscientific and anecdotal evidence may still be presented in judicial proceedings. Trial courts continue to bear the responsibility of assessing the reliability of expert evidence and determining how much weight to give contradictory evidence. Justice Breyer’s opinion did not overtly disclaim the *Gonzales* majority’s reliance on scientific uncertainty and anecdotal evidence, and unsympathetic lower courts may continue to rely on evidence establishing the mere possibility of a threat to women’s health or fetal-life interests, even when presented with contradictory empirical evidence.¹⁵⁹ However, the majority’s articulation of the undue-burden standard in *Whole Woman’s Health* should, in theory, provide plaintiffs with two potential strategies for confronting scientific uncertainty in future challenges. Plaintiffs may argue that concrete evidence of an abortion regulation’s burdens should

154. *Id.* at 95.

155. *See supra* notes 146–149 and accompanying text. Scientific or medical uncertainty has also played a role in the Court’s analyses of the burdens imposed by challenged regulations. In finding that the challenged D&X ban did not constitute an undue burden, the *Gonzales* majority relied on “medical uncertainty” over whether banning the D&X procedure presented significant health risks for women. *Gonzales v. Carhart*, 550 U.S. 124, 164 (2007); *see also supra* notes 72–74 and accompanying text.

156. *See, e.g.*, *Whole Woman’s Health v. Cole*, 790 F.3d 563, 567 (5th Cir. 2015) (citing *Gonzales*, 550 U.S. at 163–64, 166), *modified*, 790 F.3d 598, 599 (5th Cir. 2015), *rev’d and remanded sub nom.* *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

157. *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2310 (2016) (quoting *Gonzales*, 550 U.S. at 165) (emphasis omitted).

158. *Id.* (quotation marks omitted) (quoting *Gonzales*, 550 U.S. at 165).

159. Ziegler, *supra* note 19, at 109, 114. Mary Zeigler argues that if the “*Whole Woman’s Health* [opinion is taken] at face value, there is little stopping lower courts from upholding abortion restrictions whenever they can make factual findings that are not clearly erroneous and that support the conclusion that the balance of benefits and burdens supports the restriction.” *Id.* at 114.

outweigh evidence of an “uncertain” benefit. Moreover, plaintiffs should call on courts to scrutinize the “fit” between the challenged abortion restriction and the potential problem it purports to address.

III. ANALYZING THE BURDENS IMPOSED BY ABORTION RESTRICTIONS AFTER *WHOLE WOMAN’S HEALTH*

While the Court’s recognition in *Whole Woman’s Health* of the overall safety of abortion as a medical procedure should make it more difficult for states to justify abortion restrictions by claiming they protect women’s health, the Court’s undue-burden analysis did not stop after finding that the state had failed to provide any evidence of a health benefit. Rather, the Court engaged in a fact-specific analysis of the burdens imposed by the admitting-privileges and ASC requirements, relying heavily on demographic data and public health evidence developed by researchers who studied the impact of H.B. 2 after it went into effect.

A. Important Take-Aways from the Majority’s Burden Analysis

The *Whole Woman’s Health* majority’s pragmatic analysis of the burdens imposed by the ASC and admitting privileges requirements provided critical recognition of the real-world impact that TRAP laws have on abortion access. After finding sufficient evidence demonstrating that the challenged requirements caused widespread clinic closures, the *Whole Woman’s Health* majority highlighted a number of ways that clinic closures impacted abortion access in Texas. These burdens included increases in travel distance to the nearest abortion clinic, increases in wait times and crowding, and decreases in individualized patient care.¹⁶⁰ The majority rejected theoretical speculation that clinics could expand their capacity enough to meet the statewide need for abortion services, noting the difficulty of compliance with the challenged requirements.¹⁶¹ Ultimately, the majority determined that the cumulative impact of the challenged provisions’ various burdens amounted to a substantial obstacle to abortion access that outweighed the provisions’ nonexistent medical benefits.¹⁶²

1. Capacity Analysis

A significant portion of the majority’s burden analyses focused on the remaining clinics’ ability (or lack thereof) to sufficiently increase their capacity in the wake of the abrupt wave of clinic closures. The majority cited evidence gathered after the admitting privileges requirement went into effect, closing half of Texas’s abortion clinics.

160. *See Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2313, 2318 (2016).

161. *See* discussion *infra* Section III.A.3.

162. *Whole Woman’s Health*, 136 S. Ct. at 2318.

These closures resulted in “fewer doctors, longer waiting times, and increased crowding,” thus demonstrating that the remaining clinics “were not able to accommodate increased demand.”¹⁶³ The majority opinion also recited expert calculations of the total number of abortions performed annually in Texas, the average number of abortions that each clinic provides, and the average increase in the number of abortions that the remaining clinics would have to perform in order to meet the annual demand for abortion care.¹⁶⁴ The Court found a sufficient evidential basis for inferring that the seven or eight clinics that would remain open if the ASC requirement went into effect would not be capable of meeting the statewide demand for abortion services.¹⁶⁵ The majority opinion then went on to consider the cumulative impact of the various capacity-related burdens (including appointment-scheduling delays and decreased individualized patient attention) together with the burdens caused by the dramatic increases in travel distance to the nearest abortion clinic.¹⁶⁶

The capacity analysis articulated in *Whole Woman’s Health* has a wide range of potential applications. It provides a useful framework for analyzing the burdens caused by clinic closures in a smaller state, where increases in travel distance may not be nearly as drastic as they were in Texas.¹⁶⁷ The capacity analysis can also be applied to abortion regulations that decrease the number of individual providers able to perform abortions in a state, even if no clinics are forced to close.¹⁶⁸ Finally, it may provide a helpful way to articulate the burdens caused by regulations that require providers to perform additional or more time-consuming procedures, as such requirements would likely decrease the number of abortions that providers are able to perform.¹⁶⁹

163. *Id.* at 2313, 2318.

164. *See id.* at 2301–02, 2316–18.

165. *See id.* at 2316–18.

166. *Id.* at 2313, 2318.

167. However, future government defendants will likely try to distinguish *Whole Woman’s Health* by pointing to Texas’s sudden and dramatic decrease of abortion providers that would have required the remaining clinics to perform five times as many abortions. For further discussion, *see infra* Section III.B.2.

168. Examples of laws that may have this effect include admitting privilege requirements, licensing requirements, and physician-only requirements. *See supra* notes 9–12 and accompanying text; *see also An Overview of Abortion Laws*, GUTTMACHER INST. (Feb. 1, 2019), <https://www.guttmacher.org/state-policy/explore/overview-abortion-laws> [<https://perma.cc/LV42-LT8V>].

169. Such laws may include informed-consent laws that require physicians to provide the information in person, ultrasound requirements, and method bans that require physicians to induce fetal demise before performing a

2. Cumulative-Burden Analysis

The majority's consideration of the cumulative impact of multiple burdens seemingly opens the door for greater recognition of the real-world consequences of abortion restrictions in future challenges. Prior to *Whole Woman's Health*, the Court had dismissed concerns regarding the disparate impact of abortion regulations that merely inconvenienced some but were incredibly restrictive to others. The prime example of this is the Court's decision to uphold the twenty-four-hour waiting period requirement in *Casey*.¹⁷⁰ The district court had found that the twenty-four-hour waiting period, which required two visits to an abortion provider, would often delay abortions for much more than a day, increase travel distances, and increase costs.¹⁷¹ As a result, the requirement disproportionately burdened women who had limited financial resources, lived far away from the nearest clinic, or "ha[d] difficulty explaining their whereabouts to husbands, employers, or others."¹⁷² The *Casey* plurality was "troubl[ed] in some respects" by these findings, but ultimately determined that the evidence in the record did not demonstrate that these increased costs and delays amounted to substantial obstacles for any population.¹⁷³

In *Whole Woman's Health*, the Court was once again confronted with lower court findings regarding the burdens imposed by increased travel distances and the "particularly high barrier [they created] for poor, rural, or disadvantaged women."¹⁷⁴ Justice Breyer's majority

dilation and evacuation abortion. *See supra* notes 30–33, 57–69 and accompanying text; *see also* GUTTMACHER, *supra* note 168.

170. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 887 (1992).

171. *Id.* at 885–86 (citing *Planned Parenthood of Se. Pa. v. Casey*, 744 F. Supp. 1323, 1351–52 (E.D. Pa. 1990)).

172. *Id.* at 886 (citing *Casey*, 744 F. Supp. at 1352).

173. *Id.*

174. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2302 (2016) (quoting *Whole Woman's Health v. Lakey*, 46 F. Supp. 3d 673, 683 (W.D. Tex. 2014)). The district court also highlighted the combined impact of increased travel distances together with "practical concerns," such as "lack of availability of child care, unreliability of transportation, unavailability of appointments at abortion facilities, unavailability of time off from work, immigration status and inability to pass border checkpoints, poverty level, the time and expense involved in traveling long distances, and other, inarticulable psychological obstacles." *Whole Woman's Health v. Lakey*, 46 F. Supp. 3d 673, 683 (W.D. Tex. 2014). The court concluded that the cumulative impact of these factors together with increased travel distances amounted to "a *de facto* barrier to obtaining an abortion for a large number of Texas women of reproductive age who *might* choose to seek a legal abortion." *Id.* Justice Breyer's majority opinion in *Whole Woman's Health* noted the combined impact of increases in travel distance "taken together with other[] [burdens] that the closings

opinion highlighted the significant increases in the necessary travel distance to reach an abortion provider in Texas, caused by the clinic closures. The Court cited evidence in the record showing that:

[The] number of women of reproductive age living in a county . . . more than 150 miles from a provider increased from approximately 86,000 to 400,000 . . . and the number of women living in a county more than 200 miles from a provider [increased] from approximately 10,000 to 290,000.¹⁷⁵

The Court noted that, under *Casey*, “increased driving distances do not *always* constitute an ‘undue burden,’” and ultimately considered the cumulative impact of the increased travel distances together with all of the other burdens caused by the clinic closings.¹⁷⁶ The majority’s wording seems to leave open the possibility that increased driving distances *could* constitute an undue burden when considered as the sole obstacle created by a challenged restriction. The opinion, however, does not clarify whether the increased driving distances that the Court details in its analysis are enough to independently support a finding of undue burden.

The majority’s consideration of increased travel distances as part of its cumulative-burden analysis certainly represented progress towards a greater recognition that requiring women to travel long distances for abortion care is a substantial burden in and of itself. The Court, however, missed an opportunity to recognize the impact of increased travel distance and cost on the right to abortion. The Court was clear in *Casey* that its determination was “based on the insufficiency of the record before it,”¹⁷⁷ leaving open the possibility of a different holding in the future. Numerous studies performed after *Casey* was decided have demonstrated that increased distance to the nearest abortion clinic does, in fact, impede women’s ability to obtain an abortion. The record in *Whole Woman’s Health* contained evidence showing that when distance to the nearest abortion clinic increases, women’s access decreases.¹⁷⁸ However, these findings received no mention by the Court.

brought about,” 136 S. Ct. at 2313, but did not reference the district court’s specific findings regarding these practical concerns.

175. *Id.* at 2313 (quoting *Lakey*, 46 F. Supp. 3d at 681) (internal quotes omitted).

176. *Id.* (emphasis added) (citing *Casey*, 505 U.S. at 885–87) (joint opinion of O’Connor, Kennedy, and Souter, JJ).

177. *Casey*, 505 U.S. at 926 (Blackmun, J., concurring).

178. *See, e.g.*, Joint Appendix Volume II, Direct Testimony of Daniel Grossman, M.D. at 248–49, *Whole Woman’s Health*, 136 S. Ct. 2292 (No. 15-274) (citing Silvie Colman & Ted Joyce, *Regulating Abortion: Impact on Patients and Providers in Texas*, 30 J. POL’Y ANALYSIS & MGMT. 775 (2011); Ushma D. Upadhyay et al., *Denial of Abortion Because of*

The majority opinion did, however, make it clear that burdens short of preventing women from obtaining an abortion can constitute “substantial obstacles” for the purposes of the undue-burden test. While the majority’s determination that the remaining clinics would not have the capacity to meet the statewide need for abortion services certainly implies that some Texas women would be unable to obtain a desired abortion, the Court’s analysis did not focus on the women who would be forced to forego the procedure entirely. Rather, the Court highlighted the numerous negative impacts on individuals attempting to obtain an abortion, such as increased driving distances, longer wait times, overcrowded facilities, and declines in quality of care and individualized attention. The Court held that these burdens taken together outweighed the lack of medical benefits and thus constituted an undue burden.¹⁷⁹ This cumulative analysis opened the door for other burdens, previously dismissed as not sufficiently substantial, to amount to constitutional violations when considered together.

3. Theoretical Possibilities Insufficient to Counter Evidence of Burden

In analyzing the burden imposed by the challenged abortion restrictions, the majority rejected arguments made by both the dissent and Texas that suggested abortion clinics and providers could adapt to the increased need for their services if the challenged restrictions forced the majority of clinics to close. In his dissent, Justice Alito argued that the remaining clinics may have been able to “hire more physicians who perform abortions, utilize their facilities more intensively or efficiently, or shift the mix of services provided” in order to increase their capacity.¹⁸⁰ Texas also argued that the few remaining clinics could “expand sufficiently” to serve the “60,000 to 72,000” women seeking

Provider Gestational Age Limits in the United States, 104 AM. J. PUB. HEALTH 1687 (2014)); Brief of Amicus Curiae American Public Health Association in Support of Petitioners at 20 n.43, *Whole Woman’s Health*, 136 S. Ct. 2292 (No. 15-274) (citing Colman & Joyce, *supra*, at 777–79; Stanley K. Henshaw, *Factors Hindering Access to Abortion Services*, 27 FAMILY PLANNING PERSPECTIVES 54, 54 (1995)). The evidence Dr. Grossman discussed included a study of the impact of a Texas “law limiting the performance of abortions at sixteen weeks or later to ASCs and hospitals” that was enacted in 2003, which found that:

[W]hen the law took effect, there was an immediate and dramatic reduction in both the number of licensed facilities in Texas able to provide abortion services at 16 weeks and later and in the number of abortions performed in Texas at those gestational ages. Two years later, the abortion rate for those gestational ages remained 50% below what it was prior to the law’s enactment.

Direct Testimony of Daniel Grossman, M.D., *supra* (citing Colman & Joyce, *supra*).

179. *Whole Woman’s Health*, 136 S. Ct. at 2318.

180. *Id.* at 2347 (Alito, J., dissenting).

abortions each year, and pointed to a new clinic that had opened which “serves 9,000 women annually.”¹⁸¹

The majority was unconvinced by these theoretical scenarios. The majority found the contention that clinics could hire additional physicians “not [] quite as simple as the dissent suggest[ed],” considering that so many clinics were forced to close because they did not have a physician with admitting privileges.¹⁸² As for the argument that the remaining clinics could sufficiently expand to meet the increased need for services, the Court found that the plaintiffs “had satisfied their burden, [so] the obligation was on Texas, if it could, to present evidence rebutting that issue.”¹⁸³ Texas did not present such evidence. While noting that the opening of the new clinic was outside the record, the Court found that the \$26 million cost of constructing the new clinic was evidence “that requiring seven or eight clinics to serve five times their usual number of patients does indeed represent an undue burden on abortion access.”¹⁸⁴ Finally, the Court highlighted the district court’s findings regarding the amount that it would cost existing abortion clinics to comply with the ASC requirements. The cost ranged from \$1 million for a clinic that already had adequate space, to \$3 million for a clinic that would need to purchase additional land.¹⁸⁵ The majority determined that these costs made it unlikely that more ASC-compliant clinics would “fill the gap” created by clinic closures.¹⁸⁶

The majority’s refusal to entertain unsubstantiated speculation that clinics *may* be able to adapt to unnecessary regulations so as to minimize the burdens these regulations place on abortion access has important implications for both pre- and post-enforcement challenges. If the Court had accepted these speculative arguments, pre-enforcement challenges would become incredibly difficult for plaintiffs to win, and more individuals would have their rights unduly burdened before unconstitutional abortion restrictions could be enjoined.¹⁸⁷ Post-enforcement challenges would also become more difficult if plaintiffs were forced to demonstrate that they had taken every conceivable action in an attempt to comply with the challenged abortion restriction, regardless of how futile, difficult, expensive, or self-destructive.

181. *Id.* at 2317 (majority opinion).

182. *Id.*

183. *Id.*

184. *Id.* at 2317–18.

185. *Id.* at 2318.

186. *Id.*

187. Individuals forced to forgo or delay a desired abortion (as a result of an abortion restriction) experience irreversible harm. In addition, clinics that are forced to close because of abortion restrictions are unlikely to reopen their doors when the restrictions are struck down. *See infra* notes 203–206 and accompanying text.

The Fifth Circuit's majority opinion in *June Medical Services v. Gee*¹⁸⁸ illustrates the difficulties created for plaintiffs when courts focus on theoretical possibilities rather than the circumstances on the ground. The district court struck down Louisiana's admitting-privileges requirement—which, like the provision struck down in *Whole Woman's Health*, required abortion providers to hold admitting privileges at a hospital within thirty miles—after finding that the requirement placed an undue burden on the right to abortion.¹⁸⁹ The Fifth Circuit reversed the district court's judgment after holding that the district court had plainly erred in finding that the majority of abortion providers in Louisiana were unable to obtain admitting privileges despite their good-faith efforts.¹⁹⁰ The majority pointed out all of the possible actions that it believed the providers could and should have taken in an effort to obtain privileges, and it determined that because the providers did not take all of those actions, they had not put forth a good-faith effort to comply with the regulation.¹⁹¹ Based on this finding, the majority held that the plaintiffs had “failed to establish a causal connection between the regulation and its burden—namely, doctors' inability to obtain admitting privileges.”¹⁹² The dissenting judge admonished the majority for failing to give appropriate deference to the district court's findings and for failing to follow *Whole Woman's Health*.¹⁹³ One example of the majority's flawed analyses is its conclusion that one of the abortion providers had not put forth a good-faith effort because he made no attempt to obtain privileges from two hospitals located within thirty miles of the clinic where he worked, and these hospitals continued to be “open options” for the provider.¹⁹⁴ The dissent noted evidence in the record that one of the two hospitals “requires applicants to be able to admit fifty patients annually (something [the provider] c[ould not] do),” as well as evidence that a different provider applied for privileges at both hospitals but “was unable to obtain privileges from either.”¹⁹⁵ The provider had applied at three other hospitals but was unable to obtain

188. 905 F.3d 787 (5th Cir. 2018).

189. *June Med. Servs. LLC v. Kliebert*, 250 F. Supp. 3d 27, 88–89 (M.D. La. 2017), *rev'd sub nom. June Med. Servs. L.L.C. v. Gee*, 905 F.3d 787 (5th Cir. 2018).

190. *June Med. Servs.*, 905 F.3d at 807, 810, 815. The Supreme Court stayed the Fifth Circuit's mandate pending the outcome of the plaintiffs' petition for a writ of certiorari. *June Med. Servs., L.L.C. v. Gee*, 139 S. Ct. 663 (2019).

191. *June Med. Servs.*, 905 F.3d at 808–10.

192. *Id.* at 807.

193. *Id.* at 816 (Higgenbotham, J., dissenting).

194. *Id.* at 808 (majority opinion).

195. *Id.* at 829 n.40 (Higgenbotham, J., dissenting).

privileges that satisfied the regulatory requirements.¹⁹⁶ Clearly, the majority's conclusion relies on possibilities that are entirely improbable based on facts in the record and is inconsistent with the Court's pragmatic burden analysis in *Whole Woman's Health*.¹⁹⁷ Furthermore, the majority opinion would seemingly require abortion providers to submit futile applications for privileges before they can legally establish the burden imposed by admitting-privileges requirements, even if they do not meet the explicit eligibility requirements set by the hospital. Some providers may be unwilling to accrue a record of unsuccessful privilege applications, which can adversely affect their professional reputation and their ability to secure hospital privileges in the future.¹⁹⁸

B. Applicability of Whole Woman's Health's Burden Analysis to Future Abortion Challenges

While the pragmatic aspects of the majority's burden analysis seem to have a wide range of potential applications, the unique factual circumstances surrounding the challenged abortion restrictions in Texas and the majority's narrow focus on the facts of this case may limit the decision's utility in cases with less dramatic or otherwise different fact patterns.

1. The "Benefit" of Hindsight

The *Whole Woman's Health* plaintiffs filed suit after the admitting-privileges requirement had already gone into effect and half of the abortion clinics in Texas had been forced to close.¹⁹⁹ Public health researchers studied the impact of these closures on abortion access and the provision of abortion services at the remaining clinics.²⁰⁰ Accordingly, the plaintiffs were able to present empirical evidence to the court measuring the actual burdens imposed by one of the abortion restrictions they were challenging. Access to this data proved helpful. In support of its conclusion that the abortion clinics "that were still

196. *Id.* at 821–22.

197. The dissenting judge clearly articulated the majority's unreasonable departure from *Whole Woman's Health*:

The majority . . . essentially holds that, because private actors (the physicians) have not tried hard enough to mitigate the effects of the act (a conclusion contradicted by the district court's factual findings), those effects are not fairly attributable to the act. That position finds no support in [*Whole Woman's Health*].

Id. at 830 (Higgenbotham, J., dissenting).

198. *See, e.g.*, *Planned Parenthood Se., Inc. v. Strange*, 33 F. Supp. 3d 1330, 1347 (M.D. Ala. 2014).

199. Daniel Grossman, *The Use of Public Health Evidence in Whole Woman's Health v. Hellerstedt*, 177 JAMA INTERNAL MED. 155, 155 (2017); Peterson, *supra* note 2.

200. Grossman, *supra* note 199.

operating after the effective date of the admitting-privileges provision were not able to accommodate increased demand,” the *Whole Woman’s Health* majority cited evidence, gathered by public health researchers, of “3-week wait times, staff burnout” and severely overcrowded waiting rooms.²⁰¹ This evidence also provided much of the foundation for the Court’s common-sense inference that if the ASC requirement went into effect, once again causing the number of Texas abortion clinics to decrease by more than half, the remaining clinics would not be capable of meeting the need for abortion services in Texas.²⁰²

In some circumstances, it can be difficult to predict the full impact that abortion restrictions will have on abortion access before they take effect. Researchers who “evaluate[d] the impact of HB 2” found that “it was critical to document the changes in abortion service delivery after it went into effect.”²⁰³ However, while damage is easier to measure empirically once it has occurred, it is not always easy to reverse. Two years after *Whole Woman’s Health* was decided, only three of the nineteen clinics forced to close by HB 2’s requirements had reopened.²⁰⁴ Many of the shuttered clinics will never reopen, and those that do will face an uphill battle. An article published in the Texas Tribune on the day *Whole Woman’s Health* was decided described some of the barriers preventing clinics from reopening:

In the three years since Gov. Rick Perry signed HB 2, many of the shuttered clinics have sold their buildings or let go of their leases. Some had to surrender their abortion facility licenses to the state and will need to apply for a new one. They will also need to rehire staff and raise funds to acquire new medicine and equipment.²⁰⁵

As a result of stigma, public relations concerns, and personal opposition to abortion, clinics have also had a difficult time hiring

201. *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2318 (2016) (citing Brief for National Abortion Federation and Abortion Providers as Amici Curiae in Support of Petitioners at 17–20, *Whole Woman’s Health*, 136 S. Ct. 2292 (No. 15–264)).

202. *See id.* at 2317–18.

203. Grossman, *supra* note 199, at 155.

204. Claire Landsbaum, *Here’s Why Texas Abortion Clinics Are Still Struggling to Reopen*, THE CUT (June 27, 2017, 4:07 PM), <https://www.thecut.com/2017/06/texas-abortion-clinics-struggling-to-reopen-whole-womans-health-vs-hellerstedt-anniversary.html> [https://perma.cc/V8DL-XN3Y]; *supra* note 9 and accompanying text.

205. *See* Aneri Pattani, *Don’t Expect Shuttered Texas Abortion Clinics to Reopen Soon*, TEX. TRIB. (June 27, 2016, 1:00 PM), <https://www.texastribune.org/2016/06/27/dont-expect-shuttered-abortion-clinics-reopen-soon/> [https://perma.cc/S8EH-SZPG].

contractors and finding vendors willing to sell them furniture and equipment.²⁰⁶

However, while the Court's capacity analysis did cite evidence gathered after the admitting-privileges requirement went into effect, this type of post-enforcement evidence should not be required of all plaintiffs challenging abortion restrictions. Public health studies demonstrating the impact of clinic closures in other states, considered together with case-specific facts, should prove sufficient to infer lack of capacity. *Whole Woman's Health* supports this conclusion, as it referenced a number of studies and expert opinions in its analysis that were not specific to Texas.²⁰⁷ Furthermore, when analyzing the burden that would be imposed by the ASC requirement if it was allowed to go into effect, the Court's capacity analysis also relied on "common sense."²⁰⁸ The majority found it reasonable to infer that "a physical facility that satisfies a certain physical demand will not be able to meet five times that demand without expanding or otherwise incurring significant costs."²⁰⁹ This type of analysis should be possible to perform prior to the enforcement of other restrictions, provided that information is available about the average number of abortions currently performed per provider or clinic and about the anticipated number of clinics or providers that would remain if the restriction went into effect.

2. Dramatic Fact Patterns

As the saying goes, "everything is bigger in Texas." The public health data cited by the Court pertaining to travel distance and demand for abortion care was extremely dramatic, due in part to factors including: the geographical size of Texas,²¹⁰ the size of Texas's population,²¹¹ the geographical distribution of Texas's remaining clinics,

206. *See* Landsbaum, *supra* note 204.

207. *See, e.g.*, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2312 (2016) (discussing evidence of common prerequisites to obtaining admitting privileges at a hospital). The Supreme Court has condoned the use of "outside" studies in other contexts as well. *See, e.g.*, *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51–52 (1986) (allowing the city to rely on studies regarding the effects of adult theaters in other residential neighborhoods).

208. *Whole Woman's Health*, 136 S. Ct. at 2317.

209. *Id.*

210. Texas is the second largest state in the United States, as measured by total area. *State Area Measurements and Internal Point Coordinates*, U.S. CENSUS BUREAU, <https://www.census.gov/geo/reference/state-area.html#n1> [<https://perma.cc/25ZE-GMNQ>] (last revised Dec. 5, 2012).

211. Texas is the second most populous state in the United States. *Idaho Is Nation's Fastest-Growing State*, *Census Bureau Reports*, U.S. CENSUS BUREAU (Dec. 20, 2017), <https://www.census.gov/newsroom/press-releases/2017/estimates-idaho.html> [<https://perma.cc/8WS3-84H9>].

and the geographic distribution of Texas' poor and rural residents. Given these hard-to-replicate numbers and circumstances, courts may uphold similar abortion restrictions by distinguishing the facts of subsequent challenges that present less shocking data.²¹²

Furthermore, the impact of the challenged H.B. 2 provisions was both severe and sudden; the admitting-privileges requirement cut the number of Texas clinics nearly in half over a very short period of time, and the ASC requirement was expected to do the same.²¹³ In other states, however, clinic closures have occurred more gradually, as the result of a number of different restrictions enacted over time.²¹⁴ The end result may be the same, but successfully challenging abortion restrictions that only shut down one or two clinics at a time may prove to be more difficult than challenging restrictions that cause dramatic closures. The capacity analysis applied in *Whole Woman's Health* seems to lend itself better to the latter than the former. Evidence presented by the plaintiffs in *Whole Woman's Health* demonstrated that, should the ASC requirement have been enforced, the remaining clinics would have been required to perform five times as many abortions to meet the statewide need.²¹⁵ The majority determined that, as a matter of common sense, the remaining facilities were likely incapable of increasing their services to this degree.²¹⁶ Courts may decline to make similar inferences about capacity when remaining clinics have to adjust for a less dramatic decrease in clinics or providers.

The dramatic fact pattern in *Whole Woman's Health* may also limit the decision's utility when an abortion restriction creates an ongoing risk of clinic closures that does not manifest all at once. For example, admitting-privileges requirements, like the one struck down in *Whole Woman's Health*, place clinics in a precarious position, even when their providers are initially able to secure compliant privileges. This is because abortion providers face an ongoing risk of losing their privileges due to circumstances unrelated to their competence as medical

212. *See, e.g.*, June Med. Servs. L.L.C. v. Gee, 905 F.3d 787, 791, 815 (5th Cir. 2018) (holding that Louisiana's admitting privileges requirement, similar to the provision struck down in *Whole Woman's Health*, did not impose an undue burden, and contrasting the facts with those in *Whole Woman's Health*, finding the "impact . . . in Louisiana [dramatically less] than in Texas").

213. *See supra* notes 9, 11.

214. *See, e.g.*, *Supreme Court Hears Dispute on Abortion Clinic Closure*, AP NEWS (Sept. 12, 2017), <https://apnews.com/2fc5de23be2e44e284b4befdd1a19a7a> [<https://perma.cc/5S7M-4FCN>] ("Restrictions on abortion clinics in Ohio passed by lawmakers over the last six years have contributed to the closings of several clinics already. The state has 8 clinics left operating. It had twice that many in 2011.").

215. *Whole Woman's Health*, 136 S. Ct. at 2316.

216. *Id.* at 2317–18.

professionals. For example, the purchase of the only local hospital by a Catholic hospital system²¹⁷ or pressure from anti-abortion activists could cause an abortion provider to lose their admitting privileges.²¹⁸ Finding another hospital willing to grant privileges is often difficult or impossible.²¹⁹ Accordingly, this type of requirement may cause more gradual clinic closures in some states than it did in Texas, creating potential challenges for plaintiffs trying to establish the burden imposed by the requirement.

3. Decreasing Access vs. Impeding the Expansion of Access

Whole Woman's Health analyzed two requirements that “restrict[ed] access to previously available legal [abortion] facilities.”²²⁰ Because this case—as well as the majority of abortion jurisprudence—analyzes burden through the lens of *decreases* in abortion access from the status quo, it is hard to tell how courts will measure the burden imposed by abortion restrictions that impede the *expansion* of abortion access.

Telemedicine-abortion bans are a prime example of restrictions that impede the expansion of abortion access. Technological advances have led to a massive growth in telemedicine, or “the remote delivery of healthcare services, such as health assessments or consultations, over the telecommunications infrastructure.”²²¹ Seeing an opportunity to

217. See Debra Stulberg & Lori Freedman, *How Catholic Hospitals Restrict Reproductive Health Services*, SCHOLAR STRATEGY NETWORK (May 30, 2016), <http://www.scholarsstrategynetwork.org/brief/how-catholic-hospitals-restrict-reproductive-health-services> [https://perma.cc/BJ2E-BXKV] (discussing the expansion of Catholic hospitals and systems, and the directives that, “[a]s a condition of employment or *medical privileges*, doctors, nurses, and other clinical personnel are required to follow”) (emphasis added).

218. See Feminist Newswire, *Texas Hospitals Revoke Admitting Privileges to Abortion Providers*, FEMINIST MAJORITY FOUND. (Apr. 18, 2014, 11:30 AM), <https://feminist.org/blog/index.php/2014/04/18/texas-hospitals-revoke-admitting-privileges-to-abortion-providers/> [https://perma.cc/J23F-WDRY] (reporting that “[t]hree Texas abortion providers this week had their hospital admitting privileges revoked at nearby hospitals after abortion opponents threatened the hospitals with negative publicity,” more than five months after H.B. 2’s admitting privileges requirement went into effect).

219. See, e.g., *Whole Woman’s Health*, 136 S. Ct. at 2312–13 (describing “common prerequisites to obtaining admitting privileges,” such as minimum annual admissions requirements that are impossible for most abortion providers to meet due to the safety of the procedure).

220. *Whole Woman’s Health*, 136 S. Ct. at 2303 (quoting *Whole Woman’s Health v. Lakey*, 46 F. Supp. 3d 673, 687–88 (W.D. Tex. 2014)).

221. Margaret Rouse, *Telemedicine*, SEARCHHEALTHIT, <http://searchhealthit.techtarg.com/definition/telemedicine> [https://perma.cc/P2G9-3DZR] (last visited Jan. 23, 2019).

reach women who do not live near an abortion clinic, abortion providers in a handful of states have started using telemedicine to provide medication abortions.²²² In response, many states have passed preemptive bans. As of March 2019, “17 states require that the clinician providing a medication abortion be physically present during the procedure, thereby prohibiting the use of telemedicine to prescribe medication for abortion remotely.”²²³

Although telemedicine-abortion bans purport to protect women’s health, peer-reviewed studies show that medication abortions are just as safe when provided through telemedicine as when provided in person.²²⁴ Furthermore, many of the states that have enacted these bans do not prohibit other forms of telemedicine.²²⁵ Based on this evidence, states should have a difficult time showing that the bans further their interest in protecting women’s health. The more pressing question is whether courts will find that these bans impose a burden and, if so, what kind of evidence is required to support such a finding.²²⁶ Would

222. *Medication Abortion*, GUTTMACHER INST., <https://www.guttmacher.org/state-policy/explore/medication-abortion> [<https://perma.cc/8WRH-G8A7>] (last updated Mar. 1, 2019); Angie Leventis Lourgos, *Illinois Clinic Provides Abortions via Telemedicine, Which Provides Wider Access but Is Prohibited in 19 States*, CHI. TRIB. (Jan. 19, 2018, 5:00 A.M.), <https://www.chicagotribune.com/lifestyles/health/ct-met-telemedicine-abortion-illinois-20171220-story.html> [<https://perma.cc/UR8R-HJFQ>] (describing telemedicine abortion in Illinois); Eric Wicklund, *Abortion-by-Telemedicine Pilot Launches in 4 States*, MHEALTH INTELLIGENCE (Apr. 1, 2016), <https://mhealthintelligence.com/news/abortion-by-telemedicine-pilot-launches-in-4-states> [<https://perma.cc/C76U-L3ZN>] (discussing telemedicine abortion in Iowa and a pilot program launched in Hawaii, Oregon, New York, and Washington).

223. *Medication Abortion*, *supra* note 222.

224. Daniel Grossman & Kate Grindlay, *Safety of Medical Abortion Provided Through Telemedicine Compared with in Person*, 130 OBSTETRICS & GYNECOLOGY 778, 778–80 (2017); Abigail R. A. Aiken et al., *Self Reported Outcomes and Adverse Events After Medical Abortion Through Online Telemedicine: Population Based Study in the Republic of Ireland and Northern Ireland*, 357 BMJ 1 (2017).

225. *See, e.g.*, LATOYA THOMAS & GARY CAPISTRANT, AM. TELEMEDICINE ASS’N, STATE TELEMEDICINE GAPS ANALYSIS: PHYSICIAN PRACTICE STANDARDS & LICENSURE 69–74 (2017).

226. In *Planned Parenthood of the Heartland, Inc. v. Iowa Board of Medicine*, 865 N.W.2d 252 (Iowa 2015), the Supreme Court of Iowa held that the state’s telemedicine abortion ban “places an undue burden on a woman’s right to terminate her pregnancy as defined by the United States Supreme Court in its federal constitutional precedents.” *Id.* at 269. Based on the record evidence, the court found that the telemedicine ban had “very limited health benefits” and “would make it more challenging for many women who wish to exercise their constitutional right to terminate a pregnancy in Iowa to do so.” *Id.* at 268. However, the clinic challenging the ban was one of the first to provide telemedicine abortions in the

evidence of the number of clinics that would begin providing telemedicine abortions if the ban is lifted be sufficient? If not, would the plaintiffs need to provide evidence that women in remote regions of the state currently face obstacles to accessing abortion care or that the existing clinics are not capable of meeting the statewide demand? Under these circumstances, it would be very difficult to measure the number of women who are unduly burdened by the status quo. Plaintiffs would likely have to rely on travel-distance data, supplemented with empirical studies measuring the impact of travel distance on abortion rates.²²⁷

IV. REMAINING QUESTIONS REGARDING THE CORRECT APPLICATION OF THE UNDUE-BURDEN STANDARD

A. Balancing Benefits and Burdens

While the majority made clear that the undue-burden test requires courts to weigh the actual benefits of an abortion regulation against the burdens it imposes, the opinion left some remaining questions about how the test should be applied. After the decision, courts have disagreed about whether *Whole Woman's Health* called for a true balancing test, or whether the burdens imposed by a challenged abortion regulation must reach some quantitative or qualitative threshold before the balancing even becomes necessary. The majority opinion was not entirely clear regarding how the weighing of benefits and burdens should be reconciled with *Casey's* heavy reliance on the ambiguous phrase “substantial obstacle” in an attempt to clarify the meaning of “undue burden.”²²⁸ Some courts have interpreted the *Whole Woman's Health* opinion to mean that the burdens imposed by an abortion regulation amount to a substantial obstacle, and are thus undue, if they outweigh the benefits of the regulation.²²⁹ Others, however, continue to read the test as requiring a finding that the burden has reached the level of a substantial obstacle, independent of the outcome of any balancing.

United States, and clinics across Iowa were already providing this service when the state legislature instituted the ban. *See* Lourgos, *supra* note 222.

227. *See, e.g.*, Jason Lindo et al., *How Far is Too Far?: New Evidence on Abortion Clinic Closures, Access, and Abortions*, J. HUMAN RESOURCES (2019).

228. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992) (explaining that “[a] finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a *substantial obstacle* in the path of a woman seeking an abortion of a nonviable fetus”) (emphasis added).

229. *Whole Woman's Health v. Paxton*, 264 F. Supp. 3d 813, 821 (W.D. Tex. 2017) (“Where a law’s burdens exceed its benefits, those burdens are, by definition, undue, and the obstacles they embody are, by definition, substantial.”).

A circuit split on this issue is forming along familiar lines. The Seventh Circuit applied a true balancing test before *Whole Woman's Health* was decided and has stayed true to this interpretation in more recent decisions. Under this interpretation, even minor burdens can justify the invalidation of certain abortion restrictions: “[t]he more feeble the state’s asserted interest, ‘the likelier the burden, even if slight, to be “undue” in the sense of disproportionate or gratuitous.’”²³⁰ In direct contrast, the Fifth Circuit opined in *Gee* that the standard articulated in *Whole Woman's Health* is not “a ‘pure’ balancing test under which *any* burden, no matter how slight, invalidates the law.”²³¹ The majority went on to explain that a regulation can only be unconstitutional if its burdens amount to a substantial obstacle, regardless of how minimal its benefits are.²³² This articulation is conspicuously reminiscent of the Fifth Circuit’s prior articulation of the undue burden test, which the Supreme Court summarily rejected in *Whole Woman's Health*.²³³ The dissenting judge on the Fifth Circuit panel criticized the majority for not heeding the Court’s recent admonitions, “failing to meaningfully balance the burdens and benefits . . . and leav[ing] the undue burden test devoid of meaning.”²³⁴

Requiring the burden to reach the ambiguous threshold requirement of constituting a “substantial obstacle” before weighing it against the benefits would seemingly provide even lesser protections to the constitutional right than the Fifth Circuit’s formulation of the test in *Whole Woman's Health v. Cole*. After all, under the Fifth Circuit’s interpretation, once the burden reached the point of being a substantial obstacle to abortion access, the burden became undue and the law unconstitutional.²³⁵ Considering that the Supreme Court adamantly rejected this interpretation of the test in *Whole Woman's Health v. Hellerstedt* and admonished the Fifth Circuit for not weighing the

230. *Planned Parenthood of Ind. & Ky., Inc. v. Comm’r of Ind. State Dep’t of Health*, 896 F.3d 809, 828 (7th Cir. 2018) (quoting *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 798 (7th Cir. 2013)).

231. *June Med. Servs. L.L.C. v. Gee*, 905 F.3d 787, 803 (5th Cir. 2018).

232. *Id.* (claiming that “even regulations with a minimal benefit are unconstitutional only where they present a substantial obstacle to abortion”).

233. *See Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016) (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 887–98 (1992)).

234. *June Med. Servs.*, 905 F.3d at 831 (Higginbotham, J., dissenting).

235. *Whole Woman's Health v. Cole*, 790 F.3d 563, 572 (5th Cir. 2015), *rev'd and remanded sub nom. Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

benefits and burdens,²³⁶ it would make little sense to read a threshold requirement into the Court's articulation of the balancing test.

B. Large-Fraction Test

Although the Fifth Circuit reversed the district court's facial invalidation of the ASC requirement after finding that the plaintiffs had not demonstrated that the requirement unduly burdened a large fraction of women,²³⁷ the *Whole Woman's Health* majority waited until the end of the opinion to address this issue. The majority denounced Texas's articulation of the "denominator" as "Texan women 'of reproductive age,'" explaining that "the relevant denominator is 'those [women] for whom [the provision] is an actual rather than an irrelevant restriction.'"²³⁸ The opinion's discussion of the large-fraction test began and ended with this brief rebuke; the majority made no attempt to plug any numbers into the equation to justify facially invalidating the Texas abortion requirements. Nor did the Court defer to any explicit numerical calculations made by the district court, as the district court engaged in no such analysis. Indeed, it seemed as if the majority rejected the need for confusing and ambiguous numerical calculations entirely when it held that the challenged abortion restrictions were facially unconstitutional without engaging in any such analysis, thus putting this confusing test to rest.

Although even the dissent in *Whole Woman's Health* interpreted the majority opinion as rendering the large-fraction test obsolete,²³⁹ a number of lower courts have taken a very different message from the decision. Some courts have justified their continuing application of the large-fraction test by citing the Court's "limited discussion" of the matter in *Whole Woman's Health*.²⁴⁰ In *Gee*, the Fifth Circuit asserted

236. See *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309–10 (2016).

237. *Cole*, 790 F.3d at 588–89.

238. *Id.* at 2320 (citing *Casey*, 505 U.S. at 895).

239. *Id.* at 2343 n.11 (Alito, J., dissenting) ("Under the Court's holding, we are supposed to use the same figure (women actually burdened) as both the numerator and the denominator. By my math, that fraction is always '1,' which is pretty large as fractions go."). In *Whole Woman's Health v. Cole*, the Fifth Circuit made the same argument, claiming that this approach, which was set forth by the plaintiffs on appeal, would "make the large fraction test merely a tautology, always resulting in a large fraction." 790 F.3d at 589 (quoting *Whole Woman's Health v. Lakey*, 769 F.3d 285, 299 (5th Cir. 2014), *vacated in part*, 135 S. Ct. 399 (2014)). Justice Alito also criticized the majority's failure to acknowledge that the correct standard for facial challenges to abortion regulations was an "open question." *Whole Woman's Health*, 136 S. Ct. at 2343 n.11 (Alito, J., dissenting).

240. See, e.g., *Jackson Women's Health Org. v. Currier*, 320 F. Supp. 3d 828, 841 (S.D. Miss. 2018) ("Had the *Hellerstedt* Court wished to make that dramatic departure, it could have simply said there is no longer a

that the *Whole Woman's Health* decision unambiguously adopted the large-fraction test as the correct standard for facial challenges to abortion restrictions, yet the majority opinion failed to clearly explain “how to delimit the numerator and denominator to define the relevant fraction,” thus leaving room for interpretation.²⁴¹ The Fifth Circuit proceeded to engage in the same type of numerical calculations that the court had performed in the opinion overturned by *Whole Woman's Health*, using slightly more narrow populations as denominators so as to “comply” with the Supreme Court’s directions.²⁴² As the sole dissenting judge pointed out, these types of “elaborate ‘mathematical’ calculations” are not required by Supreme Court precedent, as “[n]either *Casey* nor [*Whole Woman's Health*] calculated a numerical fraction of women who would be burdened before invalidating statutory provisions.”²⁴³

In *Planned Parenthood of Arkansas & Eastern Oklahoma v. Jegley*,²⁴⁴ the Eighth Circuit also focused solely on the *Whole Woman's Health*’s articulation of the correct denominator, ignoring the fact that the Court had facially invalidated the Texas regulations without making numerical calculations. The Eighth Circuit vacated a district court’s preliminary injunction of an Arkansas law targeting medication abortion providers,²⁴⁵ holding that the district court had failed to appropriately apply the large-fraction test.²⁴⁶ According to the Eighth Circuit, the district court correctly defined the denominator, but mistakenly “focused on amorphous groups of women to reach its conclusion that the Act was facially unconstitutional.”²⁴⁷ The circuit court remanded the case, directing the district court to first make concrete estimations of the number of women who would forgo or

distinction between as-applied and facial attacks in the abortion context. But its limited discussion of the issue never says that.”).

241. June Med. Services L.L.C. v. Gee, 905 F.3d 787, 802, 813 (5th Cir. 2018).

242. *Id.* at 813–15.

243. *Id.* at 832 (Higginbotham, J., dissenting).

244. 864 F.3d 953 (8th Cir. 2017), *cert. denied*, 138 S. Ct. 2573 (2018).

245. The challenged law requires medication-abortion providers to contract with a physician who has “active admitting privileges and gynecological/surgical privileges at a hospital designated to handle any emergencies associated with the use or ingestion of the abortion-inducing drug.” *Planned Parenthood Ark. & E. Okla. v. Jegley (Jegley I)*, No. 4:15-CV-00784-KGB, 2016 WL 6211310, at *2 (E.D. Ark. Mar. 14, 2016), *vacated and remanded* *Planned Parenthood of Ark. & E. Okla. v. Jegley (Jegley II)*, 864 F.3d 953 (8th Cir. 2017), *cert. denied*, 138 S. Ct. 2573 (2018) (quoting ARK. CODE ANN. § 20-16-1504(d)). It also requires providers to give medication-abortion patients the name and phone number of the contracted physician and the hospital. *Id.*

246. *Jegley II*, 864 F.3d at 960–61.

247. *Id.* at 959.

postpone a desired abortion because of the challenged regulation, and then to determine “whether they constitute a ‘large fraction’ of women seeking medication abortions in Arkansas.”²⁴⁸ The Court in *Whole Woman’s Health* required no such calculations.

These decisions out of the Fifth and Eighth Circuits may claim to adhere to the Supreme Court’s decision in *Whole Woman’s Health*, but their application of the large-fraction test and balancing test contradict both the word and the spirit of the majority opinion. It is not evident that these courts would have ruled any differently if Justice Breyer’s opinion had been devoid of any ambiguities regarding the correct application of both tests. Perhaps these courts are attempting to narrow the precedent set by *Whole Woman’s Health* by taking advantage of its ambiguities, but the extent to which these decisions depart from a logical interpretation of the decision suggests that the courts may be hoping that a shift in the makeup of the Supreme Court will lead to a different outcome on appeal.²⁴⁹

C. Fetal-Protective Restrictions

In *Whole Woman’s Health*, the Supreme Court assumed that Texas’s interest in enacting the challenged H.B. 2 provisions was protecting women’s health.²⁵⁰ Accordingly, while the majority opinion provided a useful roadmap for analyzing and balancing the benefits and burdens of woman-protective restrictions, the decision raised some questions regarding the test’s applicability to fetal-protective restrictions. To be clear, the Court’s description of the undue-burden balancing test was not specific to woman-protective restrictions.²⁵¹ In fact, the Court supported its articulation of this test by citing *Casey*’s application of a balancing test to a spousal-notification requirement and a parental-notification requirement, neither of which were justified as health protections.²⁵² Regardless, states are now arguing that fetal-protective legislation should not be decided under the balancing test

248. *Id.* at 959–60.

249. For a general discussion of lower court decisions that narrow Supreme Court precedent, see Richard M. Re, *Legal Scholarship Highlight: When Lower Courts Don’t Follow Supreme Court Precedent*, SCOTUSBLOG (Oct. 18, 2016, 10:02 AM), <http://www.scotusblog.com/2016/10/legal-scholarship-highlight-when-lower-courts-dont-follow-supreme-court-precedent/> [<https://perma.cc/L225-RF9Y>].

250. *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2310 (2016).

251. *Id.* at 2309 (“The rule announced in *Casey*, however, requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer.”).

252. *Id.* (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 887–901 (1992)).

articulated in *Whole Woman's Health*.²⁵³ Courts have rejected this argument, either explicitly or implicitly by applying a similar balancing test to fetal-protective regulations.²⁵⁴ However, only a few courts have issued decisions pertaining to fetal-protective restrictions at this time, and at least one court that applied a balancing test to woman-protective abortion restrictions prior to *Whole Woman's Health* believed that a different test applied to fetal-protective abortion restrictions.²⁵⁵

Assuming that courts are expected to apply the same test, the question becomes, how. Some fetal-protective restrictions are justified by empirical assumptions or scientific claims, allowing for an easier analysis of whether the restrictions actually further a legitimate purpose.²⁵⁶ However, the benefits of other fetal-protective restrictions may be much more difficult to measure. For example, courts may struggle to measure the actual benefits of laws purporting to promote respect for fetal life. Despite these potential difficulties, courts must critically scrutinize how well a challenged abortion restriction actually

253. See, e.g., *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health*, 896 F.3d 809, 817–18 (7th Cir. 2018) (rejecting Indiana's argument "that the test for weighing abortion regulations differs depending on the purpose of the statute and that *Casey* and *Whole Women's Health* [sic] establish different tests depending on the nature of the regulation"); *Whole Woman's Health v. Hellerstedt*, 231 F. Supp. 3d 218, 228 (W.D. Tex. 2017) ("According to [the Texas Department of State Health Services], the Court should not balance the benefits and burdens of regulations expressing respect for the life of the unborn. The Court disagrees."); *Whole Woman's Health v. Paxton*, 264 F. Supp. 3d 813, 820–21 (W.D. Tex. 2017).

254. See, e.g., *Planned Parenthood of Ind. & Ky., Inc.*, 896 F.3d at 817 (explicitly rejecting Indiana's argument that *Whole Woman's Health's* balancing test did not apply to the state's challenged ultrasound waiting period requirement because it was a fetal-protective law); *Whole Woman's Health v. Hellerstedt*, 231 F. Supp. 3d at 228 ("[Texas's] argument [that] a different test applies when the State expresses respect for the life of the unborn is a work of fiction, completely unsupported by reading the sections of Supreme Court opinions DSHS cites in context."); *Whole Woman's Health v. Hellerstedt*, No. A-16-CA-1300, slip op. at 10–13 (W.D. Tex. Jan. 29, 2018) (balancing the benefits and burdens of Texas's fetal disposition requirements).

255. See *Planned Parenthood of the Heartland, Inc. v. Iowa Bd. of Med.*, 865 N.W.2d 252, 263 (Iowa 2015) ("The Court applies the undue burden test differently depending on the state's interest advanced by a statute or regulation.").

256. When considering challenges to laws based on fetal pain, for example, courts can analyze the reliability of the evidence presented by both sides, which would likely include scientific studies and testimony.

advances this type of fetal-protective interest²⁵⁷—a task the Supreme Court has previously been unwilling to take on.²⁵⁸

Weighing a challenged restriction's fetal-protective benefits against the burdens it places on the right to abortion poses additional challenges. When analyzing woman-protective restrictions, the benefits and burdens are often, but not always, “measured by the same unit—women's health.”²⁵⁹ This is not the case for fetal-protective restrictions.

Furthermore, the application of a legal balancing test necessarily requires judges to “combin[e] value judgments and empirical judgments on one scale, and weigh[] them against similar judgments on the other scales.”²⁶⁰ In practice, balancing tests “allow[] [judges] maximum flexibility with minimum accountability.”²⁶¹ While these issues also arise when judges balance the benefits and burdens of woman-protective abortion restrictions, asking judges to weigh a restriction's fetal-protective benefits against the burdens it imposes on the abortion decision seemingly invites personal values and bias into the analysis on a much greater scale. Judicial decision makers who identify with a government defendant's preference for childbirth over abortion may weigh the benefits prong more heavily than those who value respect for women's reproductive choices.

D. Impermissible Purpose

Since the Supreme Court first articulated the undue-burden standard in *Casey*, the Court has never invalidated an abortion restriction based on impermissible purpose. In *Whole Woman's Health v. Cole*,²⁶² the Fifth Circuit overturned the district court's determination that Texas enacted the ASC requirements for the purpose of placing a substantial obstacle in the way of women's right to abortion.²⁶³ The majority opinion in *Whole Woman's Health v.*

257. See, e.g., *Whole Woman's Health v. Smith*, 338 F. Supp. 3d 606, 627–28 (W.D. Tex. 2018) (analyzing benefits of Texas law governing the disposition of fetal tissue with claimed purpose of expressing respect for potential human life).

258. In *Gonzales*, Justice Kennedy rejected the challengers' argument that banning D&X but not the standard D&E procedure did not actually further any interest in promoting respect for fetal life because D&E can be “as brutal, if not more, than [D&X].” *Gonzales v. Carhart*, 550 U.S. 124, 160 (2007). *But see id.* at 181–82 (Ginsburg, J., dissenting) (distinguishing D&X from D&E).

259. Leah M. Litman, Response, *Potential Life in the Doctrine*, 95 TEX. L. REV. 204, 207 (2017).

260. Faigman, *supra* note 144, at 586.

261. *Id.*

262. 790 F.3d 563 (5th Cir. 2015), *rev'd and remanded sub nom.* *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

263. *Id.* at 584–86.

Hellerstedt provides no direct insight into whether the district court's holding on purpose was proper.

The district court analyzed Texas's purpose in enacting the challenged restrictions, despite noting that a finding of impermissible purpose was not necessary because the court had already determined that the challenged provisions had the *effect* of imposing an undue burden. The court "conclude[d], after examining the act and the context in which it operates, that the ambulatory-surgical-center requirement was intended to close existing licensed abortion clinics."²⁶⁴ In support of this conclusion, the court cited the requirement's disparate and arbitrary treatment of abortion clinics in comparison to other health care facilities with ASC requirements, which the court found particularly telling when considered against the lack of any credible evidence of health benefits.²⁶⁵ The court also pointed to Texas's argument that women in certain areas of the state could easily travel across the border to a clinic in New Mexico, where abortion clinics do not have to meet similar surgical-center requirements. Accordingly, the court reasoned that Texas's argument was "disingenuous and incompatible" with the state's purported purpose of "protect[ing] the health and safety of Texas women who seek abortions" but was "perfectly congruent" if Texas's "underlying purpose in enacting the requirement was to reduce or eliminate abortion in parts or all of Texas."²⁶⁶

On appeal, the Fifth Circuit found the district court's determination of purpose was made in error, claiming that the plaintiffs "failed to proffer competent evidence contradicting the legislature's statement of a legitimate purpose for H.B. 2."²⁶⁷

The Supreme Court did not deal with this holding directly. In analyzing whether the ASC requirement actually provided any health-related benefit, Justice Breyer discussed abortion clinics' disparate treatment under the requirement, pointing to the district court's finding that Texas grandfathered or waives the requirements in whole or part for approximately two-thirds of non-abortion-clinic facilities that are required by statute to comply but does not grandfather or waive

264. *Whole Woman's Health v. Lakey*, 46 F. Supp. 3d 673, 685 (W.D. Tex. 2014).

265. *Id.* Specifically, the court noted that "[t]he requirement's implementing rules specifically deny grandfathering or the granting of waivers to previously licensed abortion providers. This is in contrast to the 'frequent' granting of some sort of variance from the standards which occur in the licensing of nearly three-quarters of all licensed ambulatory surgical centers in Texas." *Id.*

266. *Id.* at 685–86.

267. *Whole Woman's Health v. Cole*, 790 F.3d 563, 585 (5th Cir. 2015), *rev'd and remanded sub nom.* *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

requirements for abortion clinics.²⁶⁸ The Court also pointed to evidence that Texas does not impose surgical-center requirements on comparable procedures with much greater mortality and complication rates.²⁶⁹ The Court went as far as declaring that this evidence “indicate[s] that the surgical center provision imposes ‘a requirement that simply is not based on differences’ between abortion and other surgical procedures ‘that are reasonably related to’” Texas’s purported purpose of “preserving women’s health.”²⁷⁰ While the Court’s analysis seems to subtly imply that Texas did not enact this requirement with the goal of protecting women’s health, the Court does not explicitly discuss the purpose behind either of the challenged restrictions.

The majority’s silence on this issue seems like a missed opportunity. While in this particular case the plaintiffs were able to provide plentiful evidence of the challenged restrictions’ effects, future plaintiffs challenging other abortion restrictions may not have access to such strong evidence of effect. They may, however, be able to demonstrate an impermissible purpose based on disparate treatment, legislative history, and other relevant evidence. Presumably, it is not necessary to apply the balancing test once such a purpose is found. While the majority opinion did not rule out future analyses of the government’s true purpose, its decision did not provide future plaintiffs with a strong precedent to use in support of such an argument.

CONCLUSION

Whole Woman’s Health was a monumental decision because it saved a woman’s right to have an abortion from becoming a right only in theory, but not in fact. Some commentators, however, have drastically overstated the decision’s ability to act as a shield against all future attacks on a woman’s reproductive autonomy. Justice Breyer’s articulation and application of the undue-burden balancing test strengthened this standard of review to an extent, but ambiguities in the decision left it vulnerable to manipulation.

Notably, the decision has not deterred legislatures across the country from persistently passing new abortion restrictions. During 2017, the year after *Whole Woman’s Health* was decided, “19 states adopt[ed] 63 new restrictions on abortion rights and access,” for the “largest [total] number of abortion restrictions enacted in a year since 2013,” when Texas enacted H.B. 2.²⁷¹ In addition to enacting regulations

268. *Whole Woman’s Health*, 136 S. Ct. at 2315 (citing *Lakey*, 46 F. Supp. 3d at 680–81).

269. *Id.*

270. *Id.* (quoting *Doe v. Bolton*, 410 U.S. 179, 194 (1973)).

271. Elizabeth Nash et al., *Policy Trends in the States, 2017*, GUTTMACHER INST. (Jan. 2, 2018), <https://www.guttmacher.org/article/2018/01/policy-trends-states-2017> [<https://perma.cc/BJ86-DNDR>].

that gradually chip away at abortion's constitutional protections, states have been increasingly passing blatantly unconstitutional abortion bans with the overt goal of overturning *Roe v. Wade*.²⁷² The strength of the *Whole Woman's Health* decision will be tested as challenges to these abortion restrictions make their way through the courts. Even if the current constitutional precedent remains intact, however, the ambiguities in the *Whole Woman's Health* decision may allow courts to narrow its application and gut it of the protections it affords to abortion access without overturning the decision outright.

Despite the *Whole Woman's Health's* weaknesses and its uncertain future, the decision's articulation of the undue-burden standard is what reproductive rights advocates currently have to work with. A careful reading of the decision provides helpful guidance to potential plaintiffs regarding the types of evidence they should present in a challenge and ways to address anticipated defenses. The decision should also inspire continued research into the impacts of abortion restrictions that have gone into effect, the safety of technological advances in reproductive health, and other topics relevant to future litigation.

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272. See Elizabeth Nash et al., *Radical Attempts to Ban Abortion Dominate State Policy Trends in the First Quarter of 2019*, GUTTMACHER INST. (Apr. 3, 2019), <https://www.guttmacher.org/article/2019/04/radical-attempts-ban-abortion-dominate-state-policy-trends-first-quarter-2019> [<https://perma.cc/YJY3-SNJ5>].

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