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UNDULY BURDENING ABORTION JURISPRUDENCE

Mark Strasser*

INTRODUCTION

The undue burden standard is the current test to determine whether abortion regulations pass constitutional muster.¹ But the function, meaning, and application of that test have varied over time, which undercuts the test's usefulness and the ability of legislatures to know which regulations pass constitutional muster. Even more confusing, the Court has refused to apply the test in light of its express terms, which cannot fail to yield surprising conclusions and undercut confidence in the Court. The Court must not only clarify what the test means and how it is to be used, but must also formulate that test so that it accurately conveys the conditions under which regulations will be upheld. Otherwise, the Court will not only continue to mislead the country about the content and breadth of abortion rights, but will also further convince the populace that the Court is simply set on promoting a political agenda.

Part I of this Article discusses how the term “undue burden” was used and what it meant in several cases preceding *Planned Parenthood of Southeastern Pennsylvania v. Casey*.² Part II discusses how the undue burden test was construed in *Casey* and subsequent cases, noting some of the internal inconsistencies in the Court's approach. The Article concludes that, unless the Court clarifies what the test is and then applies it consistently, courts and state legislatures will continue not to understand what the Constitution requires, and the Court will not only continue to be criticized both by those favoring and those disfavoring abortion rights but will also continue to undermine public confidence in the Court's impartiality.

I. THE EARLY HISTORY OF THE UNDUE BURDEN TEST

In several relatively early abortion cases, members of the Court discussed undue burdens on abortion.³ The Justices not only disagreed about which conditions imposed

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¹ *Harris v. W. Ala. Women's Ctr.*, 139 S. Ct. 2606, 2607 (2019) (Thomas, J., concurring) (“[U]nder the ‘undue burden’ standard adopted by this Court, a restriction on abortion . . . is unconstitutional if ‘the ‘purpose or effect’ of the provision ‘is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.’” (quoting *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2300 (2016))), *denying cert. to* 900 F.3d 1310 (11th Cir. 2018).

² 505 U.S. 833 (1992).

³ *See Carey v. Population Servs. Int'l*, 431 U.S. 678, 686 (1977); *Bellotti v. Baird*, 428 U.S. 132, 147 (1976).

undue burdens but also about the role of the undue burden test itself.⁴ Regrettably, the Justices often failed to articulate (and possibly appreciate) these very different understandings of “undue burden,” which led to confused and confusing usages of the same term.⁵

A. Differing Usages of the Term “Undue Burden”

Members of the Court have long disagreed about which state regulations unduly burden abortion rights and about the significance of such a finding. Some have suggested that a finding of an undue burden means that the challenged regulation violates constitutional guarantees, while others have suggested that such a finding means that closer scrutiny should be employed to determine whether the regulation passes muster.⁶ With such a lack of agreement about what essential terms mean, abortion jurisprudence could not help but be confused and confusing.

The Court first discussed the imposition of an undue burden on abortion rights in *Bellotti v. Baird*.⁷ At issue was a Massachusetts statute requiring parental notification in cases involving a minor seeking an abortion.⁸ The Supreme Judicial Court of Massachusetts had interpreted the statute to require parental notification “for every nonemergency abortion where the mother is less than eighteen years of age and unmarried.”⁹ The question at hand was whether such a broad notification requirement infringed upon minors’ abortion rights.¹⁰

When analyzing whether such a requirement violated constitutional guarantees, the *Bellotti* Court acknowledged that there were important differences between minors and adults, offering three reasons that minors’ rights were not as robust as those of adults: “[T]he peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.”¹¹ However, the Court also made clear that “[a] child, merely on account of his minority, is not beyond the protection of the Constitution.”¹²

⁴ See *Maier v. Roe*, 432 U.S. 464, 473–74 (1977) (majority upholding a Connecticut regulation that limited Medicaid benefits for first trimester abortions); *id.* at 483 (Brennan, J., dissenting) (arguing that the Connecticut law posed a significant burden on impoverished pregnant women).

⁵ Some members of the Court appreciate that the term “undue burden” has not been used consistently. See *Casey*, 505 U.S. at 876 (plurality opinion) (“The concept of an undue burden has been utilized by the Court as well as individual Members of the Court, including two of us, in ways that could be considered inconsistent.”).

⁶ See *infra* notes 33–50 and accompanying text.

⁷ 443 U.S. 622 (1979).

⁸ *Id.* at 646.

⁹ *Id.* (quoting *Baird v. Att’y Gen.*, 360 N.E.2d 288, 294 (Mass. 1977)).

¹⁰ See *id.* at 631–32.

¹¹ *Id.* at 634.

¹² *Id.* at 633.

In discerning what the Constitution requires, the Court seemed to balance two distinct considerations. Some minors need parental advice and guidance¹³ about the best course of action when deciding a momentous matter such as whether to give birth to a child.¹⁴ However, other minors possessing sufficient judgment and maturity to make the decision themselves not only may not need parental input but also should not in effect be denied the opportunity to make that decision merely because they strongly disagree with their parents about the best course of action to take.¹⁵

The *Bellotti* Court was not without guidance from previous decisions when seeking to determine whether the Massachusetts parental notification law violated constitutional guarantees. In *Planned Parenthood of Central Missouri v. Danforth*, the Court held that “the State may not impose a blanket provision . . . requiring the consent of a parent or person *in loco parentis* as a condition for abortion of an unmarried minor during the first 12 weeks of her pregnancy.”¹⁶ While not dispositive, the *Danforth* holding was instructive because it made clear that the Constitution does not permit a state to shift all decision-making regarding a minor’s pregnancy to the minor’s parents. The *Bellotti* Court reasoned that “young pregnant minors, especially those living at home, are particularly vulnerable to their parents’ efforts to obstruct both an abortion and their access to court.”¹⁷ That vulnerability suggests that in some cases parental notification would result in “the ‘absolute, and possibly arbitrary, veto’ that was found impermissible in *Danforth*.”¹⁸ The *Bellotti* Court concluded that *Danforth* counseled against the constitutionality of the Massachusetts statute precisely because some mature, informed minors would be precluded from exercising their constitutional rights.¹⁹

The *Danforth* Court had reasoned that the state did not have the power to transfer to the parents the absolute right to determine whether their minor child may

¹³ See *id.* at 637 (“[T]he guiding role of parents in the upbringing of their children justifies limitations on the freedoms of minors.”); see also *id.* at 635 (“[D]uring the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.”).

¹⁴ See *id.* at 642 (“[T]here are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible.”).

¹⁵ *Id.* at 643–44 (“In sum, the procedure must ensure that the provision requiring parental consent does not in fact amount to the ‘absolute, and possibly arbitrary, veto’ that was found impermissible in *Danforth*.” (quoting *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976))).

¹⁶ 428 U.S. at 74.

¹⁷ *Bellotti*, 443 U.S. at 647.

¹⁸ *Id.* at 644 (quoting *Danforth*, 428 U.S. at 74).

¹⁹ See *id.* at 643–44; cf. Mary Ziegler, *Liberty and the Politics of Balance: The Undue-Burden Test After Casey/Hellerstedt*, 52 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 421, 436–37 (2017) (“[T]he Court had struck down parental and spousal consent laws that did not formally prohibit the procedure because they would effectively bar some women from seeking abortions.”).

obtain an abortion: “[T]he State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient’s pregnancy, regardless of the reason for withholding the consent.”²⁰ In so holding, the *Danforth* Court was not stating that all minors may exercise their abortion rights whenever they wish regardless of the circumstances or the minor’s maturity.²¹ Rather, the Court was suggesting that the pregnant minor has a constitutionally protected abortion right²² that may be exercised *under certain conditions*, parental disagreement with the content of that decision notwithstanding.²³

Danforth and *Bellotti* are distinguishable, because *Danforth* involved parental consent,²⁴ whereas *Bellotti* involved parental notification.²⁵ The law at issue in *Danforth* might not only have required that the minor reveal her pregnancy and her desire to end it but also in effect have required the minor to convince her parent that abortion was the best solution.²⁶ A notification statute would not require that the parent agree with the decision to abort.²⁷ Nonetheless, the *Bellotti* Court noted that while a notification provision did not give the pregnant minor’s parent the legal authority to refuse to permit the abortion, such a provision as a practical matter might have made a minor’s obtaining of an abortion impossible, even if that minor was capable of making an adult decision,²⁸ and even if not obtaining the abortion would have dire consequences for that minor.²⁹

²⁰ *Danforth*, 428 U.S. at 74.

²¹ *Id.* at 75 (“We emphasize that our holding that § 3(4) is invalid does not suggest that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy.”).

²² *See id.* at 74 (“Minors, as well as adults, are protected by the Constitution and possess constitutional rights.”).

²³ *See id.* at 75 (“Any independent interest the parent may have in the termination of the minor daughter’s pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant.”).

²⁴ *Id.* at 72 (“Section 3(4) requires, with respect to the first 12 weeks of pregnancy, where the woman is unmarried and under the age of 18 years, the written consent of a parent or person *in loco parentis* unless, again, ‘the abortion is certified by a licensed physician as necessary in order to preserve the life of the mother.’”).

²⁵ *Bellotti v. Baird*, 443 U.S. 622, 631 (1979) (“[A]s construed by the Supreme Judicial Court, § 12S requires parental notice in virtually every case where the parent is available.”).

²⁶ *See* Amanda M. Lanham, Note, *Parental Notification Under the Undue Burden Standard: Is a Bypass Mechanism Required?*, 37 RUTGERS L.J. 551, 551, 557–78 (2006) (“Parental consent laws require a pregnant minor to obtain the consent, usually written, of at least one parent or custodial guardian prior to undergoing an abortion procedure.”).

²⁷ *Id.* at 551.

²⁸ *See Bellotti*, 443 U.S. at 647 (“If she satisfies the court that she is mature and well enough informed to make intelligently the abortion decision on her own, the court must authorize her to act without parental consultation or consent.”).

²⁹ *Id.* at 642 (“Moreover, the potentially severe detriment facing a pregnant woman is not mitigated by her minority. Indeed, considering her probable education, employment skills,

The *Bellotti* Court held that a pregnant minor must be given the opportunity to prove whether “she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents’ wishes” or, alternatively, “that even if she is not able to make this decision independently, the desired abortion would be in her best interests.”³⁰ Where a minor can make such a showing before a judge, “the court must authorize her to act without parental consultation or consent.”³¹ A state that fails to afford the pregnant minor the opportunity to make the requisite showing and, where appropriate, obtain an abortion authorization without parental notification or consent thereby “impose[s] an *undue burden* upon the exercise by minors of the right to seek an abortion.”³²

Here, the *Bellotti* Court used the term “undue burden” to indicate that the state regulation violated constitutional guarantees.³³ That determination was made in light of other factors: (1) the pregnant minor had a constitutional right to obtain an abortion,³⁴ and (2) the enforcement of a parental notification requirement might have prevented the minor from exercising that right, even where doing so would have been in her best interest or even where she was capable of making an informed, deliberate, and mature choice.³⁵ The finding of an undue burden triggered not closer scrutiny of the regulation but, instead, a conclusion that the regulation abridged a constitutional right and thus was unconstitutional.³⁶

Yet, not all members of the Court used the term “undue burden” to indicate that a particular regulation does not pass constitutional muster.³⁷ In her concurring and

financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor.” (citing *Roe v. Wade*, 410 U.S. 113, 153 (1973))).

³⁰ *Id.* at 643–44 (footnote omitted).

³¹ *Id.* at 647.

³² *Id.* (emphasis added).

³³ *Cf.* April L. Cherry, *The Detention, Confinement, and Incarceration of Pregnant Women for the Benefit of Fetal Health*, 16 COLUM. J. GENDER & L. 147, 185 n.177 (2007) (“[T]he ‘unduly burdensome’ standard of the Court seems to be more conclusory than a clearly articulated analytical framework.”).

³⁴ *See Bellotti*, 443 U.S. at 642.

³⁵ *See id.* at 647–48. The Court takes a different approach when the minor is not sufficiently mature to make the decision herself. *See H. L. v. Matheson*, 450 U.S. 398, 409 (1981) (“[A] statute setting out a ‘mere requirement of parental notice’ does not violate the constitutional rights of an immature, dependent minor.” (quoting *Bellotti*, 443 U.S. at 640)).

³⁶ *See Bellotti*, 443 U.S. at 648 (“[T]he constitutional right to seek an abortion may not be unduly burdened by state-imposed conditions . . .”).

³⁷ It may be that Justice O’Connor subsequently changed her view. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992) (plurality opinion) (“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. A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman’s free choice, not hinder it. And a statute which, while furthering the interest in potential life or some other

dissenting opinion in *Planned Parenthood Ass'n of Kansas City v. Ashcroft*, Justice O'Connor wrote:

I believe that the second-trimester hospitalization requirement imposed by § 188.025 does not impose an undue burden on the limited right to undergo an abortion. *Assuming, arguendo, that the requirement was an undue burden*, it would nevertheless 'reasonably relat[e] to the preservation and protection of maternal health.' I therefore dissent from the Court's judgment that the requirement is unconstitutional.³⁸

Justice O'Connor argued that the regulations were reasonably related to the protection and preservation of pregnant women's health, did not impose an undue burden upon abortion rights, and were not unconstitutional.³⁹ But, she noted, even if the challenged hospital stay requirement imposed an undue burden, that regulation would nonetheless pass constitutional muster.⁴⁰

An important difference between the *Bellotti* majority's and Justice O'Connor's understandings of the undue burden test was that in Justice O'Connor's view, a regulation can impose an undue burden and nonetheless pass muster, which meant that the conclusion that a law imposed an undue burden was not equivalent to a conclusion that constitutional guarantees had been violated.⁴¹ Basically, Justice O'Connor used the "undue burden" test to determine when abortion regulations should be examined with close scrutiny—she noted in her *City of Akron* dissent the "requirement that state interference 'infringe substantially' or 'heavily burden' a right *before heightened scrutiny is applied*."⁴² Where there had been no substantive infringement or undue burden, the Court's "inquiry [was] limited to whether the state law bears 'some rational relationship to legitimate state purposes,'"⁴³ which in most if not all cases would result in the statute or ordinance being upheld.⁴⁴

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.").

³⁸ 462 U.S. 477, 505 (1983) (O'Connor, J., concurring in the judgment in part and dissenting in part) (emphasis added) (quoting *Roe v. Wade*, 410 U.S. 113, 163 (1973)).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *See id.*

⁴² *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 462 (1983) (O'Connor, J., dissenting) (emphasis added), *overruled by Casey*, 505 U.S. 833.

⁴³ *Id.* (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 40 (1973)).

⁴⁴ *See id.* at 453 ("Our recent cases indicate that a regulation imposed on 'a lawful abortion "is not unconstitutional unless it unduly burdens the right to seek an abortion."') (quoting *Maier v. Roe*, 432 U.S. 464, 473 (1977)); *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993) ("[A] statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld . . . if there is any reasonably

To support her understanding of the undue burden test, Justice O'Connor cited *Maher v. Roe*,⁴⁵ which involved Connecticut's refusal to fund abortions that were not medically indicated.⁴⁶ Citing *Bellotti*, the *Maher* Court explained that "a requirement for a lawful abortion 'is not unconstitutional unless it unduly burdens the right to seek an abortion.'"⁴⁷

The position that an abortion regulation passes constitutional muster unless unduly burdening abortion rights is consistent with the position that a regulation imposing an undue burden on abortion rights⁴⁸ unconstitutionally infringes upon those rights. If a necessary *and* sufficient condition for a finding of unconstitutionality is that an undue burden had been placed on the right, then the term "undue burden" indicates that a statute or regulation is unconstitutional. If, instead, the imposition of an undue burden is a necessary but *not* sufficient condition for such a finding, then the term does not indicate that the statute or regulation at issue fails to pass muster.⁴⁹ An important difference between the ways the *Bellotti* majority and Justice O'Connor used the term "undue burden" was that the majority suggested that a statute imposing an undue burden on abortion rights was a sufficient condition for that statute's unconstitutionality, whereas Justice O'Connor believed that the imposition of such a burden was a necessary but not sufficient condition for its unconstitutionality.⁵⁰

conceivable state of facts that could provide a rational basis for the classification."); Stephen G. Gilles, *Restoring Casey's Undue-Burden Standard After Whole Women's Health v. Hellerstedt*, 35 QUINNIPIAC L. REV. 701, 744–45 (2017) ("Regulations that did not impose an undue burden, she maintained, should be subject only to highly deferential rational-basis review."); Emma Freeman, Note, *Giving Casey Its Bite Back: The Role of Rational Basis Review in Undue Burden Analysis*, 48 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 279, 282 (2013) ("To uphold state action under rational basis, a court must only determine that the challenged legislation is reasonably related to a legitimate state interest.").

⁴⁵ *Akron*, 462 U.S. at 453 (O'Connor, J., dissenting).

⁴⁶ *Maher*, 432 U.S. at 466 ("A regulation of the Connecticut Welfare Department limits state Medicaid benefits for first trimester abortions to those that are 'medically necessary,' a term defined to include psychiatric necessity." (footnote omitted) (quoting CONN. WELFARE DEP'T, 3 PUBLIC ASSISTANCE PROGRAM MANUAL § 275 (1975))).

⁴⁷ *Id.* at 473 (quoting *Bellotti v. Baird*, 428 U.S. 132, 147 (1976)).

⁴⁸ The Court examines whether a statute imposes an undue burden in other contexts as well. See *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2090–91, 2099–2100 (2018) (upholding a statute imposing a sales and use tax on sellers who do not have a physical presence in the state after finding that the statute did not impose an undue burden on interstate commerce); *Bullcoming v. New Mexico*, 564 U.S. 647, 665–68 (2011) (minority opinion) (analyzing whether "application of the Confrontation Clause to forensic evidence would impose an undue burden on the prosecution").

⁴⁹ Ironically, neither the *Maher* Court nor Justice O'Connor seemed willing to countenance the possibility that an abortion regulation would be unconstitutional because it was not rationally related to a legitimate state interest. Cf. *Akron*, 462 U.S. at 461–66 (O'Connor, J., dissenting) (noting that not every fundamental right demands the highest level of scrutiny, but asserting that abortion cases require some heightened scrutiny).

⁵⁰ See *id.* at 453 (suggesting that abortion regulations pass muster unless unduly

B. Who Should Be Held Responsible When Women Do Not Have Access to Abortion?

Whether abortion rights have been unduly burdened depends in part on whether the state has done anything to prevent women from obtaining abortions.⁵¹ But merely because the state has done something resulting in fewer women having abortions does not establish that the state has unduly burdened abortion rights. Whether abortion rights have been unduly burdened will depend upon a number of factors including the anticipated benefits of the restriction and, *perhaps*, background understandings regarding the state's obligations to its citizens.

The Court tried to explain what qualified as unduly burdening abortion rights in *Maier v. Roe*.⁵² At issue was whether Connecticut's refusal to fund non-medically necessary abortions imposed an undue burden on the right to abortion.⁵³ The *Maier* Court began its analysis by noting that "[t]he Constitution imposes no obligation on the States to pay the pregnancy-related medical expenses of indigent women, or indeed to pay any of the medical expenses of indigents."⁵⁴ However, the state's lack of obligation to fund such medical care did not end the analysis, because "when a State decides to alleviate some of the hardships of poverty by providing medical care, the manner in which it dispenses benefits is subject to constitutional limitations."⁵⁵ Thus, once the state has decided to fund some indigent medical care, the Constitution imposes

burdening the right). In *Danforth*, the Court suggested that "the outright legislative proscription of saline fails as a reasonable regulation for the protection of maternal health. It comes into focus, instead, as an unreasonable or arbitrary regulation designed to inhibit, and having the effect of inhibiting, the vast majority of abortions after the first 12 weeks." *See* Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 79 (1976). The *Danforth* Court's comment suggests that the Missouri statute failed rational basis review. It is simply unclear whether Justice O'Connor would have been willing to strike an abortion regulation under rational basis review. *Cf. Akron*, 462 U.S. at 467 (O'Connor, J., dissenting) ("[T]he regulation has a 'rational relation' to a valid state objective of ensuring the health and welfare of its citizens.") (citing *Williamson v. Lee Optical Co.*, 348 U.S. 483, 491 (1955)). By citing *Williamson*, Justice O'Connor suggests that she employed deferential rational basis when examining statutes designed to promote maternal health. *See* H. Jefferson Powell, *Reasoning About the Irrational: The Roberts Court and the Future of Constitutional Law*, 86 WASH. L. REV. 217, 245–51 (2011) (discussing the "extraordinarily deferential form of judicial review that the Court employed in *Williamson*").

⁵¹ *See Maier*, 432 U.S. at 473.

⁵² *See id.* at 473–74 ("[T]he right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy. It implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds.").

⁵³ *See id.* at 466 ("A regulation of the Connecticut Welfare Department limits state Medicaid benefits for first trimester abortions to those that are 'medically necessary,' a term defined to include psychiatric necessity.").

⁵⁴ *Id.* at 469.

⁵⁵ *Id.* at 469–70.

some limitations on the method adopted to determine what will be covered and what will not.⁵⁶

The *Maier* Court read the existing jurisprudence to “recognize a constitutionally protected interest ‘in making certain kinds of important decisions’ free from governmental compulsion.”⁵⁷ That includes the right to abortion, which “protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy.”⁵⁸ But, the Court reasoned, “[a]n indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut’s decision to fund childbirth; she continues as before to be dependent on private sources for the service she desires.”⁵⁹ Basically, the *Maier* Court did not dispute that the indigent woman might be unable to obtain abortions without government funding,⁶⁰ but suggested that the *government* was not burdening the right to abortion by virtue of refusing to provide that funding.⁶¹

In cases where a state abortion ban is not at issue,⁶² the *Maier* approach requires some plausible way to distinguish between those times when the government may be held responsible for a woman’s inability to obtain an abortion and those times when the government should not be held responsible. Else, the *Maier* rationale would suggest, for example, that *Bellotti* was wrongly decided.⁶³ Even if it were true that a parent who had been notified of her child’s desire to obtain an abortion might, as a practical matter, make it very difficult if not impossible for her child to do so, *Maier* counsels that the interference should be attributed to a private party (the parent)

⁵⁶ See *The Supreme Court, 1979 Term*, 94 HARV. L. REV. 96, 99 (1980) (“The state cannot limit grants of benefits by making constitutionally forbidden classifications. While the state has considerable freedom in making public funding choices, these choices must be based on constitutionally permissible criteria.”).

⁵⁷ *Maier*, 432 U.S. at 473 (quoting *Whalen v. Roe*, 429 U.S. 589, 599–600, 599 n.24, 600 n.26 (1977)).

⁵⁸ *Id.* at 473–74.

⁵⁹ *Id.* at 474.

⁶⁰ See *id.* at 483 (Brennan, J., dissenting) (“The stark reality for too many, not just ‘some,’ indigent pregnant women is that indigency makes access to competent licensed physicians not merely ‘difficult’ but ‘impossible.’”).

⁶¹ Cf. Mary Ziegler, *Rethinking an Undue Burden: Whole Woman’s Health’s New Approach to Fundamental Rights*, 85 TENN. L. REV. 461, 471 (2018).

Connecticut argued that in *Maier*, any obstacles had nothing to do with the government. Women were poor for other reasons. Doctors’ inability to perform the procedure for a discount or work out a payment plan also could not be blamed on the government. This, in Connecticut’s view, reflected the true meaning of an unconstitutional undue burden.

Id.

⁶² Cf. *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 464 (1983) (O’Connor, J., dissenting) (“The abortion cases demonstrate that an ‘undue burden’ has been found for the most part in situations involving absolute obstacles or severe limitations on the abortion decision.”), *overruled by* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

⁶³ For a discussion of *Bellotti*, see *supra* notes 7–36 and accompanying text.

rather than the state and thus would not constitute governmental interference with a minor's abortion rights.⁶⁴

The *Maier* analysis of whether abortion rights have been unduly burdened focuses on: (1) the extent to which the challenged action makes obtaining an abortion more difficult, and (2) whether that increased difficulty is appropriately attributed to the government.⁶⁵ Even if the increased burden is significant, the Court may nonetheless believe that the state is not responsible for having made an abortion more difficult to obtain.⁶⁶ Unless the government is responsible for the increased difficulty in obtaining an abortion, the government will not be said to have unduly burdened abortion rights.

In *City of Akron*, the Court considered whether requiring a hospital stay for a second-term abortion involved a state-imposed, heavy burden on a woman's right to choose an abortion.⁶⁷ The *City of Akron* Court reasoned that "[t]here can be no doubt that § 1870.03's second-trimester hospitalization requirement places a significant obstacle in the path of women seeking an abortion"⁶⁸ if only because such a requirement would substantially increase the costs of the procedure.⁶⁹ However, Justice O'Connor explained in dissent that "an 'undue burden' has been found for the most part in situations involving absolute obstacles or severe limitations on the abortion decision."⁷⁰ Because there was no evidence that any of the hospitals had denied anyone an abortion⁷¹ and because the hospital stay requirement was reasonably calculated to promoting maternal health,⁷² Justice O'Connor concluded that "the hospitalization requirement does not impose an undue burden."⁷³

⁶⁴ *Cf. Maier*, 432 U.S. at 473–74. The Court reviewed its abortion cases to distinguish "direct state interference" with "freedom of choice" from "state encouragement of an alternative . . . policy." *Id.* at 473, 475.

⁶⁵ *See Maier*, 432 U.S. at 474.

⁶⁶ In *Geduldig v. Aiello*, the Court upheld California's refusal to include pregnancy complications from coverage under its disability insurance system. *See* 417 U.S. 484, 486, 497 (1974), *superseded by statute*, Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified as amended at 42 U.S.C. § 2000e), *as recognized in* *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 678–79 (1983). The Court explained:

There is no evidence in the record that the selection of the risks insured by the program worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program. There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.

Id. at 496–97.

⁶⁷ *See Akron*, 462 U.S. at 426.

⁶⁸ *Id.* at 434.

⁶⁹ *See id.* at 434–35 ("[T]here was testimony that a second-trimester abortion costs more than twice as much in a hospital as in a clinic.").

⁷⁰ *Id.* at 464 (O'Connor, J., dissenting).

⁷¹ *Id.* at 466.

⁷² *See id.* at 467.

⁷³ *Id.* at 466.

The *City of Akron* hospital stay requirement illustrates how the *Maher* approach *might* be used to determine whether the government has unduly burdened abortion rights. One question focuses on the question of degree—is the burden sufficiently substantial to qualify as an undue burden? Justice O’Connor suggested that a regulation that drives up costs but does not constitute an outright ban or severe limitation does not meet the test for constituting an undue burden.⁷⁴ Suppose, however, that Justice O’Connor had thought that such a regulation would constitute an undue burden for a subset of the population, e.g., for those without sufficient means, such that the increased cost would, in effect, preclude their obtaining an abortion.⁷⁵ The other question focuses on whether the inability of that subset of women to obtain an abortion should be attributed to the state and thus might amount to a government-imposed undue burden on the right to abortion. Just as the *Maher* Court suggested that the state was not responsible for the inability of indigent women to pay for abortion services,⁷⁶ the *City of Akron* Court might have said (but did not say) that the state was not responsible for the inability of indigent women to pay for the increased cost of abortion services where a hospital stay was required.

In *City of Akron*, the Court believed that requiring hospital stays for all second-term abortions made the procedure too costly without adequate justification⁷⁷ and thus imposed an undue burden. However, Justice O’Connor rejected that those very regulations imposed an undue burden, because she believed the requirement was a legitimate health measure rather than a pretextual attempt to burden abortions.⁷⁸ In

⁷⁴ See Dorothy E. Roberts, *Sandra Day O’Connor, Conservative Discourse, and Reproductive Freedom*, 13 WOMEN’S RTS. L. REP. 95, 98–99 (1991).

It is easier to catalogue the types of government action that O’Connor does *not* consider to be an undue burden. She has never acknowledged that significant cost increases constitute a burden on abortion. Thus, she disagreed with the majority in *Akron*, which struck down a regulation requiring that doctors perform all second trimester abortions in hospitals because it would have substantially increased the cost of abortions.

Id. at 98.

⁷⁵ Cf. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 894 (1992) (majority opinion) (“The analysis does not end with the one percent of women upon whom the statute operates; it begins there. Legislation is measured for consistency with the Constitution by its impact on those whose conduct it affects.”).

⁷⁶ See *Maher v. Roe*, 432 U.S. 464, 469 (1977).

⁷⁷ See *Akron*, 462 U.S. at 436 (“[E]xperience indicates that D&E may be performed safely on an outpatient basis in appropriate nonhospital facilities. The evidence is strong enough to have convinced the APHA to abandon its prior recommendation of hospitalization for all second-trimester abortions.”); *id.* at 437 (“We conclude, therefore, that ‘present medical knowledge,’ convincingly undercuts Akron’s justification for requiring that *all* second-trimester abortions be performed in a hospital.” (citing *Roe v. Wade*, 410 U.S. 113, 163 (1973))).

⁷⁸ See *id.* at 467 (O’Connor, J., dissenting) (“[T]he regulation has a ‘rational relation’ to a valid state objective of ensuring the health and welfare of its citizens.”) (citing *Williamson v. Lee Optical Co.*, 348 U.S. 483, 491 (1955)); see also *id.* (“In *Simopoulos v. Virginia*, the Court upholds the State’s stringent licensing requirements that will clearly involve greater cost

addition, Justice O'Connor took seriously the *Maier* position that the government did not have the obligation to fund abortions even if funding other medical procedures for the indigent.⁷⁹

The Court's position that the State is permitted to encourage childbirth over abortion can have important implications. Consider *Webster v. Reproductive Health Services*, which involved a Missouri statute that

prohibit[ed] the use of public employees and facilities to perform or assist abortions not necessary to save the mother's life, and it prohibit[ed] the use of public funds, employees, or facilities for the purpose of "encouraging or counseling" a woman to have an abortion not necessary to save her life.⁸⁰

The Eighth Circuit Court of Appeals struck down the ban on public employees' performing abortions, reasoning that "the ban on the use of public facilities 'could prevent a woman's chosen doctor from performing an abortion because of his unprivileged status at other hospitals or because a private hospital adopted a similar anti-abortion stance.'"⁸¹ But the *Webster* Court reasoned that "the State's decision here to use public facilities and staff to encourage childbirth over abortion 'places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy.'"⁸²

Missouri had not imposed a ban on abortion in the state, although it had precluded public facilities from providing that procedure.⁸³ Yet, such a preclusion might have

because the State's licensing scheme 'is not an unreasonable means of furthering the State's compelling interest in' preserving maternal health." (quoting 462 U.S. 506, 519 (1983)).

⁷⁹ See *Akron*, 462 U.S. at 466 (O'Connor, J., dissenting) ("We must always be mindful that '[t]he Constitution does not compel a state to fine-tune its statutes so as to encourage or facilitate abortions. To the contrary, state action "encouraging childbirth except in the most urgent circumstances" is "rationally related to the legitimate government objective of protecting potential life.'" (citations omitted) (quoting *H. L. v. Matheson*, 450 U.S. 398, 413 (1981))).

Justice O'Connor's *application* of the "undue burden" concept in practice has been far more troublesome than its invocation in the abstract. First, she has never acknowledged that significant cost increases constitute "burdens" on abortion. Yet, as every anti-abortion legislator well knows, one of the best ways to deter abortion is to raise the price.

Susan R. Estrich & Kathleen Sullivan, *Abortion Politics: Writing for an Audience of One*, 138 U. PA. L. REV. 119, 138 (1989).

⁸⁰ 492 U.S. 490, 501 (1989) (plurality opinion) (citation omitted) (quoting MO. REV. STAT. §§ 188.205, .215 (1986)).

⁸¹ *Id.* at 509 (majority opinion) (citing *Reprod. Health Serv. v. Webster*, 851 F.2d 1071, 1081 (8th Cir. 1988)).

⁸² *Id.* (citing *Harris v. McRae*, 448 U.S. 297, 315 (1980)).

⁸³ See § 188.215 ("It shall be unlawful for any public facility to be used for the purpose of performing or assisting an abortion not necessary to save the life of the mother or for the purpose of encouraging or counseling a woman to have an abortion not necessary to save her life.").

prevented a significant percentage of women from obtaining abortions if many of the private hospitals did not provide abortions, e.g., because they were religiously affiliated.⁸⁴ Even more women would have been prevented from obtaining abortions if it were also true that in particular parts of the state there were few if any clinics providing abortions,⁸⁵ and most or all of the hospitals in the area were either public or private and religiously opposed to providing that procedure.⁸⁶

When justifying the claim that the government was merely encouraging women to choose alternatives to abortion, the *Webster* Court cited to *Harris v. McRae*.⁸⁷ *Harris* involved a challenge to the constitutionality of the Hyde Amendment,⁸⁸ which had denied Medicaid funding for many “medically necessary abortions.”⁸⁹ The *Harris* Court had cited to *Maher*, noting that “even though the Connecticut regulation favored childbirth over abortion by means of subsidization of one and not the other, the Court in *Maher* concluded that the regulation did not impinge on the constitutional freedom recognized in *Wade* because it imposed no governmental restriction on access to abortions.”⁹⁰ The *Harris* Court believed *Maher* to be dispositive, reasoning that “[t]he Hyde Amendment, like the Connecticut welfare regulation at issue in *Maher*, places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy, but rather, by means of unequal subsidization of abortion and other medical services, encourages alternative activity deemed in the public interest.”⁹¹ Here, the government was not imposing a burden on the right to obtain an abortion, e.g., by

⁸⁴ See Elizabeth B. Deutsch, Note, *Expanding Conscience, Shrinking Care: The Crisis in Access to Reproductive Care and the Affordable Care Act's Nondiscrimination Mandate*, 124 YALE L.J. 2470, 2477 (2015) (“As religious refusals and hospital consolidations have expanded, together they have helped to produce a crisis in access to reproductive care.”); Taylor Luckey Brennan, Note, “*Souls Aren't Saved Just in Church Buildings*”: *Defining “Religious Exercise” Under the Religious Land Use and Institutionalized Persons Act*, 69 DUKE L.J. 1353, 1387 n.201 (2020) (“[I]t is now the regular practice of states to exempt religiously affiliated hospitals from providing women with abortions or other contraceptive services when the health care facility objects on religious grounds.”).

⁸⁵ Cf. Nicole Ratelle, Note, *A Positive Right to Abortion: Rethinking Roe v. Wade in the Context of Medication Abortion*, 20 GEO. J. GENDER & L. 195, 208 (2018) (“[A] . . . challenge to the Idaho statute would be required to evaluate how the geographic distribution of clinics . . . and Idaho’s abortion restrictions compound to make accessing care more difficult.”).

⁸⁶ Cf. Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 HARV. L. REV. 989, 1033 (1991) (“[I]f all hospitals were public, the ban on abortions in public facilities would be equivalent to a direct prohibition of all abortions that must be performed in a hospital.”).

⁸⁷ See *Webster*, 492 U.S. at 509 (citing 448 U.S. at 315).

⁸⁸ *Harris*, 448 U.S. at 311 (“[W]e must consider the constitutional validity of the Hyde Amendment.”).

⁸⁹ See *id.* at 301; see also *Webster*, 492 U.S. at 508 (noting that in *Harris* the Court upheld a prohibition on federal funding of abortion except where the woman’s life would be endangered by carrying the pregnancy to term).

⁹⁰ *Harris*, 448 U.S. at 315.

⁹¹ *Id.*

making it illegal to obtain one in the state, but was “merely” choosing not to remove a burden (the woman’s poverty) that was itself not attributable to the state. Justice O’Connor also believed that the state was not imposing an undue burden on abortion “merely” by refraining from offering a subsidy and instead encouraging other kinds of practices.⁹²

The *Harris* Court’s (and Justice O’Connor’s) position on the constitutionality of the Hyde Amendment should be placed in context. Suppose that a poor, pregnant woman were to face severe, but non-life-threatening, medical complications if she did not abort her pregnancy. The Hyde Amendment, upheld in *Harris*, prevents federal funds from being used to pay for such an abortion, which would mean that the woman might be forced to carry the pregnancy to term and would simply have to hope that those complications did not occur.⁹³ The *Harris* Court explained that the Constitution “does not confer an entitlement to such funds as may be necessary to realize all the advantages of that [reproductive] freedom.”⁹⁴ Thus, the *Harris* Court reasoned, the state does not unduly burden abortion rights by refusing to fund those procedures, even if such a refusal might result in many women having severe, irreversible health complications that might easily have been avoided.

By the same token, the *Webster* majority reasoned that the Constitution does not require the state to provide abortions.⁹⁵ Nor does the Constitution require Missouri to open up its public hospitals so that private doctors could use those public facilities to perform abortions.⁹⁶ The *Webster* majority offered the consolation that “Missouri’s refusal to allow public employees to perform abortions in public hospitals leaves a pregnant woman with the same choices as if the State had chosen not to operate any public hospitals at all.”⁹⁷

Suppose, instead, that a different right were at issue. Suppose that Missouri were to bar public officials in public facilities from officiating at interracial marriage ceremonies,⁹⁸ denying that such a ban constituted an undue burden because such

⁹² See *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 466 (1983) (O’Connor, J., dissenting).

⁹³ See Sandra Berenknopf, Comment, *Judicial and Congressional Back-Door Methods That Limit the Effect of Roe v. Wade: There Is No Choice If There Is No Access*, 70 TEMP. L. REV. 653, 660 (1997) (“The most serious problem with the Hyde Amendment, however, is that it causes significant health risks to poor women who need Medicaid funding to have an abortion.”).

⁹⁴ *Harris*, 448 U.S. at 317–18.

⁹⁵ *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 510 (1989) (“Nothing in the Constitution requires States to enter or remain in the business of performing abortions.”).

⁹⁶ *Id.* (“Nor . . . do private physicians and their patients have some kind of constitutional right of access to public facilities for the performance of abortions.”).

⁹⁷ *Id.* at 509.

⁹⁸ Cf. David R. Upham, *Interracial Marriage and the Original Understanding of the Privileges or Immunities Clause*, 42 HASTINGS CONST. L.Q. 213, 260 (2015) (discussing a state judge “refusing a marriage license to an interracial couple, consistent with Nebraska’s law”).

couples would have been in the same position if the state had decided to get out of the marriage business.⁹⁹ Presumably, the Court would have struck down the law barring public officials from officiating at such marriages,¹⁰⁰ even if the state could have gotten out of the marriage business altogether.¹⁰¹ Once the state decides to operate public hospitals, it is not given carte blanche with respect to how those facilities will be used.¹⁰² While states may not be obligated to provide abortions,¹⁰³ the Court's rationale about women being no worse off than they would have been had the State offered no medical services was neither persuasive nor likely to promote confidence in the Court.

The *Webster* majority cautioned that “[a] different analysis might apply if a particular State had socialized medicine and all of its hospitals and physicians were publicly funded.”¹⁰⁴ Yet, the majority did not explain why. Presumably, the explanation would have been that the state would then have barred private hospitals from existing and so would have acted affirmatively to preclude abortion.¹⁰⁵ But if that is the correct understanding of *Webster*, then it was not the lack of access to abortion per se that violated constitutional guarantees but rather the state having affirmatively acted to bring about that lack of availability.

The *Harris* Court employed that same approach. The federal refusal to fund non-life-threatening abortions was not viewed as affirmatively acting to limit abortion

⁹⁹ Cf. George W. Dent Jr., *Meaningless Marriage: The Incoherent Legacy of Obergefell v. Hodges*, 17 APPALACHIAN J.L. 1, 50, 57 (2018) (suggesting that “government [get] out of ‘the marriage business’”).

¹⁰⁰ Compare *Griffin v. Cnty. Sch. Bd.*, 377 U.S. 218, 231 (1964) (In response to conditions in a Virginia county, the Court said that “[w]hatever nonracial grounds might support a State’s allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional.”), with Peter Wallenstein, *Race, Marriage, and the Law of Freedom: Alabama and Virginia, 1860s–1960s*, 70 CHI.-KENT L. REV. 371, 392 (1994) (In 1705, “[t]he [Virginia] legislature set a fine of 10,000 pounds of tobacco for any preacher who officiated at a marriage between a white and a nonwhite; half that amount would go to the colony and half to the informer.”).

¹⁰¹ Cf. *Palmer v. Thompson*, 403 U.S. 217, 226 (1971) (“But the issue here is whether black citizens in Jackson *are* being denied their constitutional rights when the city has closed the public pools to black and white alike. Nothing in the history or the language of the Fourteenth Amendment nor in any of our prior cases persuades us that the closing of the Jackson swimming pools to all its citizens constitutes a denial of ‘the equal protection of the laws.’”). But see Gregg Strauss, *Why the State Cannot “Abolish Marriage”*: A Partial Defense of *Legal Marriage*, 90 IND. L.J. 1261, 1287–88, 98–99 (2015) (“The state cannot simply get out of the marriage business.”).

¹⁰² See *Maher v. Roe*, 432 U.S. 464, 469–70 (1977) (holding that the state’s operation of medical care is subject to constitutional limitations).

¹⁰³ See *supra* notes 95–96.

¹⁰⁴ *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 510 n.8 (1989).

¹⁰⁵ The *Webster* majority reasoned, “This case might also be different if the State barred doctors who performed abortions in private facilities from the use of public facilities for any purpose.” See *id.* Here, too, the reasoning seems to be that the state would have acted in a way to limit abortion access.

access but as “simply a refusal to subsidize certain protected conduct,”¹⁰⁶ even though the Hyde Amendment may have resulted in many women not having been able to obtain abortions that otherwise would have been available.¹⁰⁷

The *Maier*, *Harris*, and *Webster* opinions suggested that a state, while precluded from prohibiting abortion, was not required to facilitate the procedure. Such a position meant that many women as a practical matter might not have access to abortion, which many, but not all, believed to be a substantial blow to abortion rights.¹⁰⁸

Prior to *Casey*, the abortion rights jurisprudence was confused and confusing. The Court neither offered a clear way to determine which conditions were unduly burdensome nor a way to determine which unduly burdensome conditions were attributable to the government. *Planned Parenthood of Southeastern Pennsylvania v. Casey*¹⁰⁹ provided an opportunity to clarify the existing jurisprudence.

II. THE UNDUE BURDEN STANDARD UNDER *CASEY* AND SUBSEQUENT CASES

Casey is important both because of what it did not do and because of what it did. *Casey* might have overruled *Roe v. Wade*,¹¹⁰ but did not do so.¹¹¹ Further, *Casey* announced the official standard for determining whether abortion regulations passed muster—the undue burden standard¹¹²—and attempted to clarify how that standard should be used.¹¹³ However, the clarification was much less helpful than it might have been, making the standard no less difficult to apply.¹¹⁴

¹⁰⁶ *Harris v. McRae*, 448 U.S. 297, 317 n.19 (1980).

¹⁰⁷ *See id.* at 338 (Marshall, J., dissenting) (“[T]he predictable result of the Hyde Amendment will be a significant increase in the number of poor women who will die or suffer significant health damage because of an inability to procure necessary medical services.”); cf. Richard Vuernick, Comment, *State Constitutions as a Source of Individual Liberties: Expanding Protection for Abortion Funding Under Medicaid*, 19 J. CONTEMP. L. 185, 195 (1993) (“Another effect of *Harris* was to drastically reduce the number of federally funded abortions.”).

¹⁰⁸ *See* James Bopp, Jr. & Richard E. Coleson, *What Does Webster Mean?*, 138 U. PA. L. REV. 157, 177 (1989) (“*Webster* has wrought a substantial de facto change in abortion law and forecasts an express, formal reconsideration and overruling of *Roe*.”); Lisa A. Kloppenberg, *Measured Constitutional Steps*, 71 IND. L.J. 297, 318 (1996) (“I argue that *Webster* was a measured ruling in certain respects.”).

¹⁰⁹ 505 U.S. 833 (1992).

¹¹⁰ *See id.* at 873 (plurality opinion) (“We reject the trimester framework, which we do not consider to be part of the essential holding of *Roe*.” (discussing *Roe v. Wade*, 410 U.S. 113 (1972)); *see also* Linda J. Wharton & Kathryn Kolbert, *Preserving Roe v. Wade . . . When You Win Only Half the Loaf*, 24 STAN. L. & POL’Y REV. 143, 144 (2013) (discussing “the expectations of most court watchers at the time, who fully believed that the [*Casey*] Court was prepared to overrule *Roe*”).

¹¹¹ *Casey*, 505 U.S. at 846 (reaffirming “*Roe*’s essential holding”).

¹¹² *Id.* at 876 (plurality opinion) (“In our view, the undue burden standard is the appropriate means of reconciling the State’s interest with the woman’s constitutionally protected liberty.”).

¹¹³ *See id.* (“Because we set forth a standard of general application to which we intend to adhere, it is important to clarify what is meant by an undue burden.”).

¹¹⁴ *See id.* at 877 (“A finding of an undue burden is a shorthand for the conclusion that a

Casey involved the constitutionality of several provisions in a Pennsylvania statute:

The Act requires that a woman seeking an abortion give her informed consent prior to the abortion procedure, and specifies that she be provided with certain information at least 24 hours before the abortion is performed. For a minor to obtain an abortion, the Act requires the informed consent of one of her parents, but provides for a judicial bypass option if the minor does not wish to or cannot obtain a parent's consent. Another provision of the Act requires that, unless certain exceptions apply, a married woman seeking an abortion must sign a statement indicating that she has notified her husband of her intended abortion.¹¹⁵

Writing for the majority—and, at times, pluralities—Justice O'Connor examined the provisions, explaining why each passed or failed to pass constitutional muster.¹¹⁶ Regrettably, the analyses of the constitutionality of some of the provisions undercut the articulated test, making its application even more difficult.

First, the majority articulated its three-part understanding of the essence of *Roe*:

1. The first part involved “a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State.”¹¹⁷ Prior to the fetus's “viability, 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.”¹¹⁸
2. The second part discussed the limitations on the state's power to regulate abortions after the fetus had attained viability. The majority confirmed “the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health.”¹¹⁹
3. The third part involved the recognition “that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.”¹²⁰

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.”)

¹¹⁵ *Id.* at 844 (majority opinion) (citations omitted).

¹¹⁶ *See generally id.* at 879–901 (majority & plurality opinions).

¹¹⁷ *Id.* at 846 (majority opinion).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

The Court explained that although these principles differ in content, they “do not contradict one another”¹²¹—they should be interpreted in a way that yields a coherent doctrine, which means that a particular approach may be rejected for failing to take one of these into account.¹²² Nonetheless, many approaches would be consistent with all three principles,¹²³ some being much more protective of abortion rights than others.¹²⁴ As to whether a particular set of regulations passes muster, that determination will be a product of “reasoned judgment . . . [whose] boundaries are not susceptible of expression as a simple rule,”¹²⁵ which means that a broad range of approaches might be consistent with these principles.¹²⁶

The majority offered a broad outline of the Constitution’s constraints upon the states, noting that “viability marks the earliest point at which the State’s interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions.”¹²⁷ Yet, the Court was not thereby suggesting that the state is precluded from regulating abortion prior to viability. On the contrary, some regulation of abortions prior to viability are permissible, notwithstanding that “[a]ll abortion regulations interfere to some degree with a woman’s ability to decide whether to terminate her pregnancy.”¹²⁸ Basically, the plurality rejected that “all governmental intrusion

¹²¹ *Id.*

¹²² For example, the state’s interest in fetal life even before viability has been reached might require the Court to reassess some of its prior holdings. *See id.* at 873 (plurality opinion) (“A logical reading of the central holding in *Roe* itself, and a necessary reconciliation of the liberty of the woman and the interest of the State in promoting prenatal life, require, in our view, that we abandon the trimester framework as a rigid prohibition on all previability regulation aimed at the protection of fetal life.”).

¹²³ *See* Erika Bachiochi, *A Putative Right in Search of a Constitutional Justification: Understanding Planned Parenthood v. Casey’s Equality Rationale and How It Undermines Women’s Equality*, 35 QUINNIPIAC L. REV. 593, 606 (2017) (discussing “a better balance of these principles”); *cf.* Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin’s “Moral Reading” of the Constitution*, 65 FORDHAM L. REV. 1269, 1271 (1997) (noting “that many provisions of the Constitution are written in broad and abstract language, permitting many different plausible interpretations”).

¹²⁴ *See* Chris Whitman, *Looking Back on Planned Parenthood v. Casey*, 100 MICH. L. REV. 1980, 1985 (2002) (“*Casey* . . . marked the outer boundaries of a compromise that will protect women only from the most overwhelming and total coercion.”).

¹²⁵ *Casey*, 505 U.S. at 849.

¹²⁶ *See* Caitlin E. Borgmann, *Abortion, the Undue Burden Standard, and the Evisceration of Women’s Privacy*, 16 WM. & MARY J. WOMEN & L. 291, 292 (2010) (“The *Casey* standard is amorphous enough to allow a wide range of respect for women’s privacy.”); Krissa Webb, Note, *Gender Mis-Conception: The Prenatal Nondiscrimination Act as a Remix of the Abortion Debate*, 11 GEO. J.L. & PUB. POL’Y 257, 268 (2013) (“*Casey* can be a tool for those who prefer more or less abortion regulation.”).

¹²⁷ *Casey*, 505 U.S. at 860.

¹²⁸ *Id.* at 875 (plurality opinion).

is of necessity unwarranted.”¹²⁹ For example, the state is permitted to require that abortions be performed under sanitary conditions.¹³⁰

In some ways, *Casey* promised a new beginning in abortion jurisprudence.¹³¹ The plurality recognized that “[t]he concept of an undue burden has been utilized by the Court as well as individual Members of the Court . . . in ways that could be considered inconsistent,”¹³² which necessitated “clarify[ing] what is meant by an undue burden.”¹³³ The plurality explained 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.”¹³⁴ In the past, members of the Court had disagreed about whether a finding of an undue burden was simply a trigger for closer scrutiny or, instead, an indication that the regulation at issue violated constitutional guarantees,¹³⁵ and the *Casey* plurality took a position on that point of disagreement.

When pointing out that a regulation might impose an undue burden by virtue of its purpose or effect,¹³⁶ the plurality was discussing two *different* reasons that a regulation might be found impermissible. A statute with “the purpose . . . of placing a substantial obstacle in the path of a woman seeking” to abort her not-yet-viable fetus “is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman’s free choice, not hinder it.”¹³⁷ A statute with “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.”¹³⁸ Thus, a statute with such a purpose *or* effect would not merely trigger closer scrutiny but would be unconstitutional.¹³⁹ Further, lest there be any doubt about whether

¹²⁹ *Id.*

¹³⁰ See *Friendship Med. Ctr., Ltd. v. Chicago Bd. of Health*, 505 F.2d 1141, 1154 (7th Cir. 1974) (noting that “general requirements as to the maintaining of sanitary facilities and general requirements as to meeting minimal building code standards would be permissible”).

¹³¹ See Maya Manian, *The Irrational Woman: Informed Consent and Abortion Decision-Making*, 16 DUKE J. GENDER L. & POL’Y 223, 248 (2009) (“*Casey* dramatically changed the landscape of abortion law and set forth the basic test for abortion regulation that is still the law today . . .”); see also Claire O’Brien, *Casey, Camnitz, and Compelled Speech: Why the Fourth Circuit’s Interpretation of Casey Sets the Right Standard for Speech-and-Display Provisions*, 94 N.C.L. REV. 1036, 1044 (2016) (“Although the *Casey* Court nominally affirmed the right to an abortion first recognized in *Roe v. Wade*, it introduced a new test for assessing state regulations on access to abortion: the undue burden test.”).

¹³² *Casey*, 505 U.S. at 876 (plurality opinion).

¹³³ *Id.*

¹³⁴ *Id.* at 877.

¹³⁵ See *supra* notes 37–42 and accompanying text.

¹³⁶ *Casey*, 505 U.S. at 877 (plurality opinion).

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Cf. Gillian E. Metzger, Note, *Unburdening the Undue Burden Standard: Orienting Casey in Constitutional Jurisprudence*, 94 COLUM. L. REV. 2025, 2036 (1994) (“But the

the announced standard superseded past usages of the undue burden test, the plurality explained that, “[t]o the extent that the opinions of the Court or of individual Justices use the undue burden standard in a manner that is inconsistent with this analysis, [this is] . . . the controlling standard.”¹⁴⁰

In applying the newly announced standard, the plurality seemed to ignore the very test that had been adopted. For example, the plurality reasoned, “Unless it has that effect”—imposing a substantial obstacle—“on her right of choice, a state measure designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal.”¹⁴¹ Yet, regulations adopted with the purpose *or* effect (rather than purpose *and* effect) of placing a substantial obstacle in a woman’s path are unconstitutional. If that is so, then regulations with such a purpose are unconstitutional,¹⁴² even if those regulations do not in fact have that effect. If, instead, a measure with the purpose of hindering the exercise of abortion rights must *in addition* place a substantial obstacle on their exercise, then the purpose prong does no work.¹⁴³

After announcing the purpose prong and then gutting it,¹⁴⁴ the plurality discussed the effect prong, noting that “[r]egulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden.”¹⁴⁵ Such a standard requires guidance with respect to the point at which health regulations impose a “substantial obstacle,”¹⁴⁶ and the previous jurisprudence already suggests how elastic a concept that is.¹⁴⁷

Casey undue burden standard differs significantly from the version O’Connor developed in *Akron I*. Her earlier formulation defined an undue burden as an ‘absolute obstacle[] or severe limitation[]’ and did not inquire into the purpose of a regulation until after the existence of such a burden had been proven. Moreover, the question of whether an undue burden existed was only a threshold inquiry; after finding an undue burden, O’Connor then applied strict scrutiny to determine whether the undue burden was justified.”)

¹⁴⁰ *Casey*, 505 U.S. at 877 (plurality opinion).

¹⁴¹ *Id.* at 877–78.

¹⁴² *But see* Jenny K. Jarrard, Note, *The Failed Purpose Prong: Women’s Right to Choose in Theory, Not in Fact, Under the Undue Burden Standard*, 18 LEWIS & CLARK L. REV. 469, 501 (2014) (noting that “*Casey* devoted little attention to the purpose prong”).

¹⁴³ The plurality suggested that a regulation imposing a substantial obstacle on a woman exercising her right to abortion would itself violate constitutional guarantees, *see Casey*, 505 U.S. at 877 (plurality opinion) (“[A]n undue burden is an unconstitutional burden.”), so a regulation with that effect would be struck whether or not it had the purpose to do so. *Cf.* Thomas B. Colby, *The Other Half of the Abortion Right*, 20 U. PA. J. CONST. L. 1043, 1047 (2018) (“The vast majority of the cases applying *Casey*’s undue burden test ignore the purpose prong altogether, and analyze the law solely through the lens of effect.”).

¹⁴⁴ *Id.* at 1047–48 (“The *Casey* plurality announced the purpose prong, but . . . it did not even bother to seriously apply the purpose prong to the Pennsylvania statute at issue in the case—instead deciding the case solely on effects grounds, even while upholding most of the law.”).

¹⁴⁵ *Casey*, 505 U.S. at 878 (plurality opinion).

¹⁴⁶ *Id.* at 877.

¹⁴⁷ *See supra* notes 68–73 and accompanying text (discussing whether the *Akron* hospital stay requirement constituted an undue burden).

The plurality considered the challenge to Pennsylvania's informed consent provision, which included "the provision of specific information by the doctor and the mandatory 24-hour waiting period."¹⁴⁸ The state required that the pregnant woman be informed "of the availability of printed materials published by the State describing the fetus and providing information about medical assistance for childbirth, information about child support from the father, and a list of agencies which provide adoption and other services as alternatives to abortion."¹⁴⁹ Abortions were prohibited absent the woman's written certification that she had been informed of the availability of the relevant information and that she had received the information if requested.¹⁵⁰

The plurality "s[aw] no reason why the State may not require doctors to inform a woman seeking an abortion of the availability of materials relating to the consequences to the fetus, even when those consequences have no direct relation to her health."¹⁵¹ The requirement that "the woman be informed of the availability of information relating to fetal development and the assistance available should she decide to carry the pregnancy to full term [helps] ensure an informed choice, one which might cause the woman to choose childbirth over abortion."¹⁵² Might some women who chose to receive that information be persuaded to continue their pregnancies? Perhaps. Such a requirement allegedly furthered the state's "legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion."¹⁵³ Of course, in the interest of full and informed decision-making, one might have expected the state to require that the comparative morbidity and mortality rates of abortion and childbirth also be offered, which might have resulted in somewhat different decision-making.¹⁵⁴

Suppose that the state was imposing the informed decision-making requirement precisely because it wanted to deter women from having abortions.¹⁵⁵ The state's

¹⁴⁸ *Casey*, 505 U.S. at 881 (plurality opinion).

¹⁴⁹ *Id.*; see also Jeffrey Roseberry, Comment, *Undue Burden and the Law of Abortion in Arizona*, 44 ARIZ. ST. L.J. 391, 411 (2012) ("In *Casey*, the statute required the availability of printed information regarding the development of the fetus be made available to the woman, but not explicitly exposed to her.").

¹⁵⁰ *Casey*, 505 U.S. at 881 (plurality opinion).

¹⁵¹ *Id.* at 882.

¹⁵² *Id.* at 883.

¹⁵³ *Id.*

¹⁵⁴ See Amanda Warford, Note, *The Intersection of Kentucky's Abortion Parental-Consent Bypass Law and Mandatory Child-Abuse Reporting Statute: A Judicial Dilemma and Proposed Legislative Solution*, 50 U. LOUISVILLE L. REV. 177, 192 (2011) ("[M]edical risks associated with abortion are admittedly not as high as that of childbirth.").

¹⁵⁵ Cf. Gloria J. Banks, *Legal & Ethical Safeguards: Protection of Society's Most Vulnerable Participants in a Commercialized Organ Transplantation System*, 21 AM. J.L. & MED. 45, 85 (1995) ("The statute also required the disclosure of nonmedically related economic information geared to deter abortions based purely on financial reasons.").

doing so would seem to violate the purpose prong of the undue burden test, so it is difficult to understand the plurality's conclusion that "[t]his requirement cannot be considered a substantial obstacle to obtaining an abortion, and, it follows, there is no undue burden."¹⁵⁶

The plurality's discussion of the twenty-four-hour waiting period was even more disappointing. The district court had found that "because of the distances many women must travel to reach an abortion provider, the practical effect will often be a delay of much more than a day because the waiting period requires that a woman seeking an abortion make at least two visits to the doctor."¹⁵⁷ That court had concluded that the regulations would be "'particularly burdensome' [to] those women who have the fewest financial resources, those who must travel long distances, and those who have difficulty explaining their whereabouts to husbands, employers, or others."¹⁵⁸ However, because the district court had used the prevailing legal standard to strike down the requirement¹⁵⁹ rather than the undue burden test announced after the district court had issued its decision, the plurality concluded that the requirement did not offend the undue burden test rather than remand the case to see if the particularly burdensome requirement was unduly burdensome.¹⁶⁰

The plurality's reasoning did not inspire confidence that the undue burden test was being applied in good faith. The plurality rejected "the District Court's conclusion that the 'particularly burdensome' effects of the waiting period on some women require its invalidation" because "a particular burden is not of necessity a substantial obstacle."¹⁶¹ Yet, the description of something as "particularly burdensome" is not the equivalent of mentioning "a particular burden." A particular burden might not be very burdensome at all, much less particularly burdensome.

The plurality offered a different reason that the twenty-four-hour waiting period was not unduly burdensome: "The idea that important decisions will be more informed and deliberate if they follow some period of reflection does not strike us as unreasonable, particularly where the statute directs that important information become part of the background of the decision."¹⁶² Here, the plurality was suggesting that

¹⁵⁶ *Casey*, 505 U.S. at 883 (plurality opinion).

¹⁵⁷ *Id.* at 885–86.

¹⁵⁸ *Id.* at 886 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 744 F. Supp. 1323, 1352 (E.D. Pa. 1990)).

¹⁵⁹ *Id.* ("[A]pplying the trimester framework's strict prohibition of all regulation designed to promote the State's interest in potential life before viability the District Court concluded that the waiting period does not further the state 'interest in maternal health' and 'infringes the physician's discretion to exercise sound medical judgment.'" (quoting *Casey*, 744 F. Supp. at 1378)).

¹⁶⁰ *Id.*; see also Lauren Paulk, *What Is an "Undue Burden"? The Casey Standard as Applied to Informed Consent Provisions*, 20 UCLA WOMEN'S L.J. 71, 79 (2013) ("Rather than remanding the case for a new ruling . . . , the plurality used the fact that the District Court failed to apply [the undue burden] test . . . as a reason to uphold the 24-hour waiting period.").

¹⁶¹ *Casey*, 505 U.S. at 886–87 (plurality opinion).

¹⁶² *Id.* at 885.

where someone receives new information, the state acts reasonably when requiring that the person have time to mull it over.¹⁶³ But the plurality's interpretation of the Pennsylvania provision was that *as a general matter* the information had to be made available twenty-four hours before the abortion.¹⁶⁴

Suppose that the information were made available to a patient who politely declined. The statute still required enforcement of the waiting period, even though there was no additional information for the patient to mull over.¹⁶⁵ For those not asking for additional information for whom the requirement was particularly burdensome, it is difficult to conceive how the unduly burdensome test had not been met.¹⁶⁶ Nonetheless, the plurality concluded that “[i]n theory, at least, the waiting period is a reasonable measure to implement the State’s interest in protecting the life of the unborn, a measure that does not amount to an undue burden.”¹⁶⁷

The plurality struck down the spousal notification requirement because enforcing it would likely result in increased domestic violence.¹⁶⁸ The requirement did “not merely make abortions a little more difficult or expensive to obtain; for many women, it . . . impose[d] a substantial obstacle.”¹⁶⁹

Suppose, however, that those defending the law were correct that the spousal notification requirement would be burdensome for only one percent of the women.¹⁷⁰ Even so, the requirement violated constitutional guarantees: “The analysis does not end with the one percent of women upon whom the statute operates; it begins there. Legislation is measured for consistency with the Constitution by its impact on those whose conduct it affects.”¹⁷¹

¹⁶³ See C. Elaine Howard, Note, *The Roe'd to Confusion: Planned Parenthood v. Casey*, 30 HOUS. L. REV. 1457, 1495 (1993) (“[T]he plurality upheld a twenty-four hour waiting period provision because it was not unreasonable to assume that a woman’s abortion decision would be more informed and deliberate if it followed some period of reflection.”).

¹⁶⁴ See *Casey*, 505 U.S. at 881 (plurality opinion).

¹⁶⁵ See Susannah Iles, Note, *Prescription Restriction: Why Birth Control Must Be Over-the-Counter in the United States*, 26 MICH. J. GENDER & L. 389, 415 (2019) (“*Casey* involved a Pennsylvania law that, in part, required informed consent and a 24-hour waiting period for all women seeking to receive an abortion” (emphasis added)); see also *Casey*, 505 U.S. at 921 (Stevens, J., concurring in part and dissenting in part) (“[A] rigid requirement that all patients wait 24 hours or (what is true in practice) much longer to evaluate the significance of information that is either common knowledge or irrelevant is an irrational and, therefore, ‘undue’ burden.”).

¹⁶⁶ Cf. Robert D. Goldstein, *Reading Casey: Structuring the Woman’s Decisionmaking Process*, 4 WM. & MARY BILL RTS. J. 787, 828 (1996) (“For those who decline to receive the state’s message, the delay caused by a forced second visit is completely irrational.”).

¹⁶⁷ *Casey*, 505 U.S. at 885 (plurality opinion).

¹⁶⁸ See *id.* at 893 (majority opinion).

¹⁶⁹ *Id.* at 893–94.

¹⁷⁰ See *id.* at 894 (“[R]espondents argue [that] the effects of § 3209 are felt by only one percent of the women who obtain abortions.”).

¹⁷¹ *Id.*

The majority's point is well taken. Even if relatively few individuals marry outside of their race,¹⁷² that would not somehow justify upholding the constitutionality of interracial marriage bans. Yet, the plurality's reasoning would also suggest that the particularly burdensome waiting period for at least some women would have been unduly burdensome¹⁷³ and hence unconstitutional.¹⁷⁴

A separate question is whether the plurality even considered the difficult line-drawing problem suggested by *Maher*.¹⁷⁵ Suppose that requiring spousal notification would result in more domestic abuse or, perhaps, in more women not even seeking to obtain abortions precisely because they feared domestic abuse would result from fulfilling the notification requirement. The question would be whether the abuse (or threat of abuse) would constitute an undue burden attributable to the state (because the state had imposed the spousal notification requirement) or instead attributable to a private party (the abusive husband) rather than the state. If the new standard adopted in *Casey* does not take into account whether the undue burden is attributable to a private party rather than the state because, after all, the state will have done something resulting in some women having great difficulty in obtaining abortions, then there may be important implications for past decisions. Consider, for example, a state singling out therapeutic abortions as the only necessary medical procedure that the state would refuse to subsidize. Such a policy would likely result in many women being unable to obtain abortions whether or not the state was responsible for the poverty, putting non-subsidized abortions out of reach. But if the fact that the husband rather than the state would be responsible for any spousal abuse would nonetheless not immunize the spousal notification requirement from constitutional invalidation, then the fact that the state was not responsible for the women's poverty¹⁷⁶ would not

¹⁷² Angela Onwuachi-Willig, Essay, *Undercover Other*, 94 CALIF. L. REV. 873, 891 n.98 (2006) (“[I]nterracial marriages of any kind constitute a minuscule percentage of the married population, making up approximately 0.6% of all marriages.”).

¹⁷³ See *supra* notes 157–67 and accompanying text; see also Paulk, *supra* note 160, at 79–80 (“Had the *Casey* court applied the large fraction test in a manner similar to the way it applied the test to the husband notification provision, the decision may have read, ‘it is common sense to assume that cost would apply as a restriction amounting to a substantial obstacle for a large fraction of the women for whom cost is a concern.’”).

¹⁷⁴ See Khiara M. Bridges, “*Life*” in *the Balance: Judicial Review of Abortion Regulations*, 46 U.C. DAVIS L. REV. 1285, 1303–04 (2013) (“[T]his is a Court that is blind to the fact that there is ‘another world out there’ in which the increase in costs occasioned by a twenty-four hour waiting period are experienced not as ‘slight,’ but rather as tragic.”). Some commentators seem not to appreciate the Court’s continued unwillingness to apply the undue burden standard in a way that would secure abortion rights for the indigent. See Alyssa Engstrom, Note, *The Hyde Amendment: Perpetuating Injustice and Discrimination After Thirty-Nine Years*, 25 S. CAL. INTERDISC. L.J. 451, 474 (2016) (“[T]he Hyde Amendment is inconsistent with the precedent established by *Roe v. Wade* and *Planned Parenthood v. Casey*, which prohibits the government from establishing an ‘undue burden’ in the path of a woman seeking an abortion, a standard that is almost certainly met here by indigent women seeking an abortion.”).

¹⁷⁵ See *supra* notes 62–66 and accompanying text.

¹⁷⁶ But see Rhonda Copelon, *Losing the Negative Right of Privacy: Building Sexual and*

immunize from constitutional invalidation a law putting abortion out of the reach of many women, which would mean that *Harris*¹⁷⁷ might require reconsideration.

The point about *Harris* might be generalized. In some ways, *Casey* was offering a new abortion jurisprudence.¹⁷⁸ But if that is so, then one would not expect that past precedent would determine whether a particular practice was constitutional,¹⁷⁹ because the new test might yield a different conclusion than the previous test had yielded.¹⁸⁰ If it were clear that *Casey* imposed a less demanding standard than had previously existed in *all* cases and that the former standard had been applied properly, then whatever regulations had been upheld earlier would of course be upheld under the less demanding standard. But the *Casey* standard was preserving the essential holding of *Roe*,¹⁸¹ so the standard was presumably not weaker in all cases. Further, a separate question was whether *Roe* had always been properly applied. If *Roe* had been misapplied when upholding certain practices,¹⁸² then past precedent

Reproductive Freedom, 18 N.Y.U. REV. L. & SOC. CHANGE 15, 47 (1991) (“To treat a poor woman’s restricted choice as a consequence of her own personal failure, rather than of public policy and resulting market conditions, is a dangerous fiction. It permits the state to escape responsibility for the tragic conditions of people’s lives and allows it to blame the poor, who are largely women, for their hardship.”).

¹⁷⁷ See *supra* notes 87–94 and accompanying text.

¹⁷⁸ See *supra* notes 131–40 and accompanying text.

¹⁷⁹ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 899 (1992) (plurality opinion) (“Under these precedents, in our view, the one-parent consent requirement and judicial bypass procedure are constitutional.”).

¹⁸⁰ For example, *Casey* overruled some past precedents:

To the extent [*City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416 (1983)] and [*Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986)] find a constitutional violation when the government requires, as it does here, the giving of truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the ‘probable gestational age’ of the fetus, those cases go too far, are inconsistent with *Roe*’s acknowledgment of an important interest in potential life, and are overruled.

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

¹⁸¹ See *id.* at 846 (majority opinion) (discussing “*Roe*’s essential holding, the holding we reaffirm”).

¹⁸² See, e.g., *Maier v. Roe*, 432 U.S. 464, 483 (1977) (Brennan, J., dissenting) (“None can take seriously the Court’s assurance that its ‘conclusion signals no retreat from *Roe* [*v. Wade*] or the cases applying it.’” (alteration in original)); *Harris v. McRae*, 448 U.S. 297, 329 (1980) (Brennan, J., dissenting) (“I write separately to express my continuing disagreement with the Court’s mischaracterization of the nature of the fundamental right recognized in *Roe v. Wade*, and its misconception of the manner in which that right is infringed by federal and state legislation withdrawing all funding for medically necessary abortions.” (citation omitted)); *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 538 (1989) (Blackmun, J., concurring in part and dissenting in part) (“The simple truth is that *Roe* would not survive the plurality’s analysis, and that the plurality provides no substitute for *Roe*’s protective umbrella.”); see also Teresa L. Scott, Note, *Burying the Dead: The Case Against Revival of Pre-Roe and Pre-Casey*

should certainly not be viewed as dispositive when attempting to apply the new undue burden test.

III. THE POST-*CASEY* UNDUE BURDEN JURISPRUDENCE

The undue burden jurisprudence after *Casey* reflects some of the ambiguities and uncertainties that were in *Casey* itself. For example, in *Mazurek v. Armstrong*, the Court examined a Montana regulation precluding non-physicians from performing abortions.¹⁸³ The Court noted that *Casey* had upheld a Pennsylvania provision precluding non-physicians from giving abortion information to women because there had been a lack of evidence that such a restriction posed a substantial obstacle to women seeking an abortion.¹⁸⁴ But the fact that *Casey* had upheld a physicians-only requirement under the undue burden effects prong would not negate the force of the instant challenge where the basis for enjoining enforcement of the requirement was improper purpose.¹⁸⁵ Even had the *Casey* challenge been analyzed under the purpose prong,¹⁸⁶ a challenge based on purpose might be rejected in one case and upheld in another, precisely because the evidence was stronger in the latter case that the purpose had been invidious.¹⁸⁷

The *Mazurek* Court was unwilling to say that improper purpose alone would suffice to establish the unconstitutionality of the statute.¹⁸⁸ Instead of citing *Casey* for the proposition that an improper purpose would invalidate an abortion regulation,¹⁸⁹ the *Mazurek* Court offered its analysis “even assuming the correctness of the

Abortion Statutes in a Post-Casey World, 19 N.Y.U. REV. L. & SOC. CHANGE 355, 361 (1992) (“Previous decisions had weakened *Roe* . . .”).

¹⁸³ 520 U.S. 968, 969 (1997) (per curiam) (“In 1995, the Montana Legislature enacted a statute restricting the performance of abortions to licensed physicians.”).

¹⁸⁴ *See id.* at 971 (citing *Casey*, 505 U.S. at 884–85 (plurality opinion)).

¹⁸⁵ *See id.* at 972.

¹⁸⁶ A separate issue is whether the purpose prong does any work. *See supra* notes 141–43 and accompanying text.

¹⁸⁷ *See Lassiter v. Northampton Cnty. Bd. of Elections*, 360 U.S. 45, 53 (1959) (noting that a literacy test might be unconstitutional in one case and not the other because in the former the purpose was clearly invidiously discriminatory whereas in the latter the purpose was not clearly invidiously discriminatory).

¹⁸⁸ *See* Linda J. Wharton et al., *Preserving the Core of Roe: Reflections on Planned Parenthood v. Casey*, 18 YALE J.L. & FEMINISM 317, 344 (2006) (“[T]he [*Mazurek*] Court flirted with the suggestion that an unconstitutional purpose standing alone would not suffice to invalidate an abortion restriction.”); *see also* David L. Rosenthal, *Refocusing the Undue Burden Test: Inconsistent Interpretations Pose A Substantial Obstacle to Constitutional Legislation*, 31 ISSUES L. & MED. 3, 22 (2016) (discussing “the Supreme Court’s reasoning in *Mazurek v. Armstrong*, which held that an impermissible purpose will only be found if the law succeeds in achieving an impermissible effect; therefore, there need not be an analysis of the legislative purpose before examining the effect of the law”).

¹⁸⁹ *See supra* note 134 and accompanying text (noting that under *Casey* a regulation can be invalidated because of its purpose *or* effect).

Court of Appeals' implicit premise—that a legislative *purpose* to interfere with the constitutionally protected right to abortion without the *effect* of interfering with that right . . . could render the Montana law invalid,”¹⁹⁰ as if the Court of Appeals was proposing something ridiculous. The *Mazurek* Court then noted that there was no smoking gun to indicate invidious purpose,¹⁹¹ rejecting as insufficient the point that “all health evidence contradicts the claim that there is any health basis’ for the law.”¹⁹² After all, *Casey* had emphasized “that the Constitution gives the States broad latitude to decide that particular functions may be performed only by licensed professionals, even if an objective assessment might suggest that those same tasks could be performed by others.”¹⁹³

Yet, a classification that is objectively underinclusive would at least be a candidate for being struck down as offending constitutional guarantees because it is irrational or invidiously motivated.¹⁹⁴ Further, if a requirement for establishing invidious intent is that a member of the legislature or council *expressly* articulate improper purpose, then many invidious actions will go unpunished as long as council members and legislators can restrain themselves from making invidious comments.¹⁹⁵

It may be that the Montana Legislature was not aiming to substantially burden abortion rights but was instead targeting one particular individual.¹⁹⁶ Nonetheless, the difficulty in both *Mazurek* and *Casey* is that if invidious purpose is a basis upon which to strike down an abortion regulation, but one cannot establish invidious purpose by objectively establishing that the regulation does not promote the claimed

¹⁹⁰ *Mazurek*, 520 U.S. at 972.

¹⁹¹ *Id.* (“One searches the Court of Appeals’ opinion in vain for any mention of any evidence suggesting an unlawful motive on the part of the Montana Legislature.”).

¹⁹² *Id.* at 973 (quoting Respondents’ Brief in Opposition at 7, *id.* (No. 96-1104)).

¹⁹³ *Id.* (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 885 (1992) (plurality opinion)).

¹⁹⁴ *See id.*; *see also* *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985) (“The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.”) (first citing *Zobel v. Williams*, 457 U.S. 55, 61–63 (1982); and then citing *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 535 (1973)); *Plyler v. Doe*, 457 U.S. 202, 245 (1982) (Burger, C.J., dissenting) (“The Equal Protection Clause protects against arbitrary and irrational classifications, and against invidious discrimination stemming from prejudice and hostility . . .”).

¹⁹⁵ The Court has already suggested that the refusal to consider anything other than direct evidence such as express discriminatory states would exclude too much. *See Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (“Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.”).

¹⁹⁶ *Mazurek*, 520 U.S. at 978 (“The record strongly indicates that the physician assistant provision was aimed at excluding one specific person—respondent Cahill—from the category of persons who could perform abortions.”); *see also* *Roseberry*, *supra* note 149, at 395 (“[B]ecause only one abortion provider was affected it was unlikely ‘the legislature intended the law to do what it plainly did not do,’ create an undue burden.” (quoting *Mazurek*, 520 U.S. at 973–74)).

goals, then the purpose prong is a prong in name only. In the past, the Court has been willing to require that state regulations be reasonably related to asserted goals,¹⁹⁷ so the deference suggested in *Casey* and *Mazurek* undermines confidence in the Court's commitment to protecting abortion rights.

In *Stenberg v. Carhart*¹⁹⁸ and *Gonzales v. Carhart*,¹⁹⁹ the Court examined two statutes criminalizing partial birth abortions. *Stenberg* involved a Nebraska statute that applied to abortions of both pre-viable and viable fetuses.²⁰⁰ The *Stenberg* Court struck down the statute both because it did not pass the undue burden test insofar as it regulated abortions of pre-viable fetuses²⁰¹ and because significant medical authority suggested that the health of certain women would be put at risk if the procedure at issue were proscribed, which meant that the statute could not pass muster even insofar as it regulated abortions of viable fetuses.²⁰² The *Stenberg* Court explained that it was not relevant that many women would not incur increased health risks if the procedure were banned: "[T]he State cannot prohibit a person from obtaining treatment simply by pointing out that most people do not need it."²⁰³

In contrast, the *Gonzales* Court held that the federal law banning partial birth abortion was constitutional, notwithstanding that the law limited abortions of both pre-viable and viable fetuses.²⁰⁴ While significant authority suggested that women's health would thereby be put at risk, others had testified that the ban would not put women's health at risk.²⁰⁵ The Court explained that "state and federal legislatures [are given] wide discretion to pass legislation in areas where there is medical and scientific uncertainty."²⁰⁶ But if all that is needed to establish medical and scientific

¹⁹⁷ See *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 434 (1983) ("[T]he State is obligated to make a reasonable effort to limit the effect of its regulations to the period in the trimester during which its health interest will be furthered.").

¹⁹⁸ 530 U.S. 914 (2000).

¹⁹⁹ 550 U.S. 124 (2007).

²⁰⁰ *Stenberg*, 530 U.S. at 930 ("Nebraska's law applies both previability and postviability . . .").

²⁰¹ See *id.* at 948 (O'Connor, J., concurring) ("Nebraska's statute is unconstitutional on the alternative and independent ground that it imposes an undue burden on a woman's right to choose to terminate her pregnancy before viability.").

²⁰² See *id.* at 931 (majority opinion) ("Our cases have repeatedly invalidated statutes that in the process of regulating the *methods* of abortion, imposed significant health risks."); *id.* at 932 ("[T]he record shows that significant medical authority supports the proposition that in some circumstances, D&X would be the safest procedure."); *id.* at 947 (O'Connor, J., concurring) ("[T]he Nebraska statute is inconsistent with *Casey* because it lacks an exception for those instances when the banned procedure is necessary to preserve the health of the mother.").

²⁰³ *Id.* at 934 (majority opinion).

²⁰⁴ *Gonzales*, 550 U.S. at 147 ("The Act does apply both previability and postviability . . .").

²⁰⁵ *Id.* at 161 ("[W]hether the Act creates significant health risks for women has been a contested factual question. The evidence presented in the trial courts and before Congress demonstrates both sides have medical support for their position.").

²⁰⁶ *Id.* at 163 (citations omitted).

uncertainty is a lack of unanimity, then there will be medical uncertainty about almost everything,²⁰⁷ which means that *Gonzales* requires deference to the legislature about virtually any health-related regulation.²⁰⁸

In addition, the *Gonzales* Court justified upholding the constitutionality of the statute by noting that the “respondents have not demonstrated that the Act would be unconstitutional in a large fraction of relevant cases.”²⁰⁹ After all, “the statute . . . applies to all instances in which the doctor proposes to use the prohibited procedure, not merely those in which the woman suffers from medical complications.”²¹⁰

Yet, the same analysis would have resulted in the spousal notification requirement being upheld in *Casey*. The notification requirement was not only applicable to women who might be abused and “impose[d] almost no burden at all for the vast majority of women seeking abortions,”²¹¹ so the *Gonzales* reasoning suggests that the *Casey* regulation would not have been “unconstitutional in a large fraction of relevant cases.”²¹²

The *Stenberg* Court noted that “the State cannot prohibit a person from obtaining treatment simply by pointing out that most people do not need it,”²¹³ and the *Casey* majority had explained that “[t]he analysis does not end with the one percent of women upon whom the statute operates; it begins there.”²¹⁴ The *Gonzales* Court’s analysis of why the statute at issue would not be unconstitutional in a large fraction of cases defined the “relevant cases” incorrectly, ignoring the *Casey* admonition that “[l]egislation is measured for consistency with the Constitution by its impact on those whose conduct it affects.”²¹⁵

²⁰⁷ See *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 590 (1993) (“[I]t would be unreasonable to conclude that the subject of scientific testimony must be ‘known’ to a certainty; arguably, there are no certainties in science.”); see also *McKay v. State*, 235 S.W.2d 173, 174 (Tex. Crim. App. 1950) (“This Court may recognize generally accepted scientific conclusions, even though there should be some who disagree with them. In all probability a scientist may be found who will disagree with practically every generally accepted scientific theory.”); Mary Ziegler, *Facing Facts: The New Era of Abortion Conflict After Whole Woman’s Health*, 52 WAKE FOREST L. REV. 1231, 1277 (2017) (“Requiring definitive proof is a clever way of justifying almost any abortion restriction, particularly since reaching the point of absolute scientific certainty will likely be impossible.”).

²⁰⁸ Cf. *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 462 (1983) (O’Connor, J., dissenting) (“[T]he regulation has a ‘rational relation’ to a valid state objective of ensuring the health and welfare of its citizens.” (citing *Williamson v. Lee Optical Co.*, 348 U.S. 483, 491 (1955))).

²⁰⁹ *Gonzales*, 550 U.S. at 167–68 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 895 (1992)).

²¹⁰ *Id.* at 168.

²¹¹ *Casey*, 505 U.S. at 894.

²¹² *Gonzales*, 550 U.S. at 167–68.

²¹³ *Stenberg v. Carhart*, 530 U.S. 914, 934 (2000).

²¹⁴ *Casey*, 505 U.S. at 894.

²¹⁵ *Id.*

Gonzales could be read in numerous ways. As Justice Ginsburg pointed out in dissent, the federal law was being upheld, notwithstanding the law lacking a health exception²¹⁶ and the law applying to abortions of pre-viable as well as viable fetuses.²¹⁷ If, indeed, the Court was upholding a statute that imposed an undue burden on pre-viability abortions, then the Court would have been rejecting *Casey*.²¹⁸ Or, *Gonzales* might be read as rejecting the premise that banning one abortion procedure imposed an undue burden on abortion rights²¹⁹ and as rejecting that an exemption was required to protect women's health,²²⁰ notwithstanding testimony that the banned procedure was "significantly safer for women with certain pregnancy-related conditions, such as placenta previa and accreta, and for women carrying fetuses with certain abnormalities, such as severe hydrocephalus."²²¹ If banning one abortion method is not particularly significant and not unduly burdensome,²²² then *Gonzales* might not be thought a particularly worrisome development insofar as the general jurisprudence is concerned.²²³

Whether *Gonzales* represents a turning point that might eventually result in overturning *Roe* and *Casey*²²⁴ or, instead, an application of *Casey* with no significant implications for the evolving jurisprudence²²⁵ is an open question. *Whole Woman's Health v. Hellerstedt* offered a partial answer.²²⁶ At issue were two Texas requirements:

²¹⁶ *Gonzales*, 550 U.S. at 171 (Ginsburg, J., dissenting) ("[F]or the first time since *Roe*, the Court blesses a prohibition with no exception safeguarding a woman's health.").

²¹⁷ *Id.* ("It blurs the line, firmly drawn in *Casey*, between pre-viability and postviability abortions.").

²¹⁸ *See id.* at 170–71 ("Today's decision is alarming. It refuses to take *Casey* and *Stenberg* seriously. It tolerates, indeed applauds, federal intervention to ban nationwide a procedure found necessary and proper in certain cases by the American College of Obstetricians and Gynecologists (ACOG).").

²¹⁹ *Id.* at 164 (majority opinion) ("The medical uncertainty over whether the Act'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.").

²²⁰ *See id.* at 166–67 ("The Act is not invalid on its face where there is uncertainty over whether the barred procedure is ever necessary to preserve a woman's health, given the availability of other abortion procedures that are considered to be safe alternatives.").

²²¹ *Id.* at 177–78 (Ginsburg, J., dissenting).

²²² *See Webb, supra* note 126, at 268 ("[T]he Court found that the law did not impose a substantial obstacle on the woman obtaining an abortion.").

²²³ *But see Gonzales*, 550 U.S. at 170 (Ginsburg, J., dissenting) ("Today's decision is alarming.").

²²⁴ Bernice Bird, *Fetal Personhood Laws as Limits to Maternal Personhood at Any Stage of Pregnancy: Balancing Fetal and Maternal Interests at Post-Viability Among Fetal Pain and Fetal Homicide Laws*, 25 HASTINGS WOMEN'S L.J. 39, 46 (2014) (noting that in certain respects *Gonzales* was "contrary to *Roe* and *Casey*").

²²⁵ *See* Barry P. McDonald, *A Hellerstedt Tale: There and Back Again?*, 85 U. CIN. L. REV. 979, 995–96 (2018) (suggesting that *Gonzales* is quite compatible with *Casey*).

²²⁶ 136 S. Ct. 2292 (2016).

1. Physicians performing or inducing abortions had to have admitting privileges at hospitals within thirty miles of where the abortions took place;²²⁷ and
2. The minimum standards for abortion facilities were the equivalent of the minimum standards for ambulatory surgical centers.²²⁸

The *Hellerstedt* Court reasoned that the purpose behind the admitting privileges requirement was “to help ensure that women have easy access to a hospital should complications arise during an abortion procedure.”²²⁹ However, because “abortion in Texas was extremely safe,”²³⁰ the admitting privileges requirement was neither necessary nor even helpful.²³¹ Further, given that enforcement of the admitting privileges requirement resulted in half of the clinics closing, the Court concluded that such a requirement imposed an undue burden.²³²

The *Hellerstedt* Court also considered the requirement that abortion facilities meet the same standards as ambulatory surgical centers.²³³ The district court had found that “the statutory provision requiring all abortion facilities to meet all surgical-center standards does not benefit patients and is not necessary,”²³⁴ and that enforcement of such a requirement “places a substantial obstacle in the path of women seeking an abortion.”²³⁵

In addition to the district court finding that the ambulatory center requirement would not benefit patients and was unnecessary, the *Hellerstedt* Court noted that the surgical ambulatory center requirement was imposed on abortion facilities but not on other non-surgical centers with less impressive safety records: “[A]bortions taking place in an abortion facility are safe—indeed, safer than numerous procedures that take place outside hospitals and to which Texas does not apply its surgical-center requirements.”²³⁶ The selective imposition of the requirement, especially where neither

²²⁷ *Id.* at 2300.

²²⁸ *Id.*

²²⁹ *Id.* at 2311.

²³⁰ *Id.*

²³¹ *See id.* (“[T]here was no significant health-related problem that the new law helped to cure.”).

²³² *Id.* at 2312 (“[A]s of the time the admitting-privileges requirement began to be enforced, the number of facilities providing abortions dropped in half, from about 40 to about 20.”); *see also id.* (“[T]he record evidence indicates that the admitting-privileges requirement places a ‘substantial obstacle in the path of a woman’s choice.’” (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992) (plurality opinion))).

²³³ *Id.* at 2314.

²³⁴ *Id.* at 2315; *see also* *Whole Woman’s Health v. Lakey*, 46 F. Supp. 3d 673, 684 (W.D. Tex. 2014) (“[W]omen will not obtain better care or experience more frequent positive outcomes at an ambulatory surgical center as compared to a previously licensed facility.”).

²³⁵ *Hellerstedt*, 136 S. Ct. at 2316.

²³⁶ *Id.* at 2315.

necessary nor beneficial, at least suggested that a purpose behind the adoption of the requirement was to hinder access to abortion, although the *Hellerstedt* Court did not invalidate the restriction under the *Casey* purpose prong.²³⁷ Instead, the Court “conclude[d] that neither of these provisions confer[red] medical benefits sufficient to justify the burdens upon access that each imposes,” because “[e]ach place[d] a substantial obstacle in the path of women seeking a previability abortion . . . [and] constitute[d] an undue burden on abortion access.”²³⁸ One reason that these two provisions imposed an undue burden on abortion rights was that enforcement of the provisions would cause the number of abortion providers to decrease from forty to seven or eight,²³⁹ and such a small number of providers would not be able to meet the state’s needs.²⁴⁰

The Fifth Circuit had upheld both provisions, reasoning that they “‘were rationally related to a legitimate state interest,’ namely, ‘rais[ing] the standard and quality of care for women seeking abortions and . . . protect[ing] the health and welfare of women seeking abortions.’”²⁴¹ But the Supreme Court disagreed with that analysis, at least in part, because the Court rejected that “legislatures, and not courts, must resolve questions of medical uncertainty,” which the Court claimed was “inconsistent with this Court’s case law.”²⁴² The Court cited *Gonzales* in support, notwithstanding the *Gonzales* Court’s “pointing out that [the Court] must review legislative ‘factfinding under a deferential standard.’”²⁴³

The *Hellerstedt* decision is open to several different interpretations depending upon which features of the case are emphasized.²⁴⁴ For example, upholding the Texas laws would have resulted in eighty percent of abortion providers ceasing to provide services, which would have had a huge impact on the availability of abortion providers.²⁴⁵ But the Court invalidating laws resulting in such a significant reduction in the number of providers might not be thought particularly relevant in

²³⁷ See Colby, *supra* note 143, at 1047 (“[T]he Court then went on to analyze only whether the law had the effect of imposing an undue burden, ultimately striking the law down on that ground alone, notwithstanding the considerable evidence of a purpose to restrict abortion rights.”).

²³⁸ See *Hellerstedt*, 136 S. Ct. at 2300 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 878 (1992) (plurality opinion)).

²³⁹ See *id.* at 2301, 2316 (citing *Whole Woman’s Health v. Lakey*, 46 F. Supp. 3d 673, 681–82 (W.D. Tex. 2014)).

²⁴⁰ See *id.* at 2316.

²⁴¹ *Id.* at 2303 (quoting *Whole Woman’s Health v. Cole*, 790 F.3d 563, 584 (5th Cir. 2015)).

²⁴² *Id.* at 2310.

²⁴³ *Id.* (quoting *Gonzales v. Carhart*, 550 U.S. 124, 165 (2007)).

²⁴⁴ See Ziegler, *supra* note 207, at 1231 (“*Whole Woman’s Health v. Hellerstedt* has introduced unprecedented uncertainty into abortion jurisprudence.”).

²⁴⁵ See *Hellerstedt*, 136 S. Ct. at 2317–18 (“[R]equiring seven or eight clinics to serve five times their usual number of patients does indeed represent an undue burden on abortion access.”).

a different case where the challenged abortion statute did not have as drastic an effect, which would mean that *Hellerstedt* should not be read as affirming robust protection for abortion rights.²⁴⁶ Or, because the Court was unwilling to uphold restrictive abortion legislation where other medical procedures with worse outcomes were not subject to similarly restrictive legislation, perhaps *Hellerstedt* is reinstating robust protection for abortion rights.²⁴⁷ Rather than provide some guidance about how to read *Hellerstedt* or even *Casey*, *June Medical Services L.L.C. v. Russo*²⁴⁸ created even more disarray in abortion jurisprudence.

At issue was a Louisiana law requiring a physician to have admitting privileges within thirty miles of the clinic where he or she performed abortions.²⁴⁹ The law was challenged because it allegedly imposed an undue burden on the right to obtain an abortion.²⁵⁰ The district court struck down the statute in light of *Hellerstedt*.²⁵¹ At the time of trial there were five abortion clinics in the state, but two had subsequently ceased operation.²⁵² Five doctors provided all abortions in the state.²⁵³ Several of the

²⁴⁶ See Mary Ziegler, *After Life: Governmental Interests and the New Antiabortion Incrementalism*, 73 U. MIAMI L. REV. 78, 79 (2018) (“[T]he Court’s recent decision in *Whole Woman’s Health v. Hellerstedt* is part of the story of an equally important tactic used by those chipping away at abortion rights”); Mary Ziegler, *Substantial Uncertainty: Whole Woman’s Health v. Hellerstedt and the Future of Abortion Law*, 2016 SUP. CT. REV. 77, 78 (“*Whole Woman’s Health* could provide far less reliable protection for abortion rights than might appear, especially when one considers the strategies that abortion opponents have used.”).

²⁴⁷ See Maxwell L. Stearns, Obergefell, Fisher, and the Inversion of Tiers, 19 U. PA. J. CONST. L. 1043, 1050 n.26 (2017) (describing the *Hellerstedt* Court as having “applied a more stringent version of the undue burden test to strike down two provisions of a Texas law that limited access to abortions by requiring physician-admitting privileges at local hospitals and by restricting abortions to facilities upgraded to match those of a surgical center”); Paula Walter, *Hellerstedt—2016—How the United States Supreme Court Aborted the Texas Abortion Statute*, 12 J. HEALTH & BIOMED. L. 233, 271 (2017) (“*Hellerstedt* effectively put ‘judicial teeth’ into the *Casey* undue burden test when it demanded that a restrictive abortion statute not be enforced absent a real health purpose justification.”).

²⁴⁸ 140 S. Ct. 2103 (2020).

²⁴⁹ *Id.* at 2113 (plurality opinion) (“Act 620 requires any doctor who performs abortions to hold ‘active admitting privileges at a hospital that is located not further than thirty miles from the location at which the abortion is performed or induced and that provides obstetrical or gynecological health care services.’” (quoting LA. STAT. ANN. § 40:1061.10(A)(2)(a))).

²⁵⁰ *Id.* (“[T]hree abortion clinics and two abortion providers . . . alleged that Act 620 was unconstitutional because (among other things) it imposed an undue burden on the right of their patients to obtain an abortion.”).

²⁵¹ *June Med. Servs. LLC v. Kliebert*, 250 F. Supp. 3d 27, 35 (M.D. La. 2017), *rev’d sub nom.* *June Med. Servs. L.L.C. v. Gee*, 905 F.3d 787 (5th Cir. 2018), *rev’d sub nom. Russo*, 140 S. Ct. 2103.

²⁵² *Id.* at 40.

²⁵³ *Id.* at 41. While the court discussed six doctors, one had decided to discontinue once the clinic near him closed. *See id.* at 41–44.

doctors had not been able to get the required admitting privileges.²⁵⁴ While one doctor had obtained admitting privileges,²⁵⁵ those admitting privileges were accorded because “he regularly admit[ted] patients to the hospital as part of his private OB/GYN practice,” not because of his abortion practice.²⁵⁶ Another doctor had been able to obtain admitting privileges in New Orleans but not near Baton Rouge.²⁵⁷

If the ability to perform abortions was predicated on obtaining admitting privileges, then an important issue involved the conditions under which those admitting privileges could be granted or denied. “There [was] no state or federal statute . . . govern[ing] . . . the granting” of such privileges in Louisiana²⁵⁸ nor even a law specifying how soon a hospital would have to act on an application.²⁵⁹ The lack of such regulation in effect permitted a hospital to deny an application through inaction.²⁶⁰

Some of the criteria for such privileges are “non-competency based”²⁶¹—for example, that the physician have treated a large number of patients at the hospital during the previous year, which would mean that “an obstetrician with 38 years’ experience” might be denied admitting privileges for a non-competency-based reason.²⁶²

²⁵⁴ *Id.* at 42 (“Despite beginning his efforts to get admitting privileges at a nearby hospital in July 2014, Doe 1 still does not have active admitting privileges at a hospital within 30 miles of Hope Clinic.”); *id.* (“Doe 2 has been unsuccessful in getting active admitting privileges within 30 miles of Bossier and, prior to Causeway’s closure, had been able to obtain only limited privileges, which did not meet the requirements of Act 620, within 30 miles of Causeway.”); *id.* at 43 (“[Doe 4] was not able to get admitting privileges at a hospital within 30 miles of Causeway.”). However, “[w]hen Doe 4 maintained a full OB/GYN practice, he had admitting privileges at four hospitals in the Baton Rouge area. He was required to have admitting privileges to do OB/GYN surgery and, in his words, ‘to deliver babies.’” *Id.* Doe 6, who had only been providing medication abortions, had not been successful “in his efforts to get active admitting privileges.” *Id.* at 44.

²⁵⁵ Doe 3 had admitting privileges. *See id.* at 43; *see also id.* at 77 (“[A]t the time Act 620 was passed, only one of the six doctors performing abortions, Doe 3, had admitting privileges at a hospital and he maintained these admitting privileges for years in order to facilitate his general OB/GYN practice which was and is unrelated to that portion of his practice performing abortions at Hope.”).

²⁵⁶ *Id.* at 43.

²⁵⁷ *Id.* (“Doe 5 has been successful in getting active admitting privileges within 30 miles of Women’s Health in New Orleans but has been unsuccessful in his efforts to get active admitting privileges within 30 miles of Delta in Baton Rouge.”).

²⁵⁸ *Id.* at 44.

²⁵⁹ *Id.* at 45 (“Unlike some states, there is also no statute or rule in Louisiana which sets a maximum time period within which a physician’s application for admitting privileges must be acted upon.”).

²⁶⁰ *Id.* (“[U]nless there is such a time limit in the hospital’s by-laws, a hospital can effectively deny a doctor’s application of privileges by never acting on it, a decision on any one doctor’s application permanently delayed without a consequence being effected or a reason being given.”).

²⁶¹ *Id.* at 46.

²⁶² *See* June Medical Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2122 (2020) (plurality opinion) (citing Whole Woman’s Health v. Hellerstedt, 136 S. Ct. 2292, 2312 (2016)).

Further, precisely because of the safety of abortion procedures, it would be unlikely that a physician focused primarily or solely on an abortion practice would have enough referrals to either obtain or retain admitting privileges.²⁶³

As a separate matter, the district court noted “an abundance of evidence introduced at the hearing demonstrating that hospitals can and do deny privileges for reasons directly related to a physician’s status as an abortion provider.”²⁶⁴ That might be because individuals at the hospital would refuse to recommend a doctor who was an abortion provider due to their opposition to abortion rather than questions regarding the individual’s competence²⁶⁵ or because physicians who object to abortion would refuse to cover for an abortion provider, and having such coverage might be a condition of obtaining admitting privileges.²⁶⁶

Because of the animus toward abortion, the plaintiffs and even one of the hospitals granting privileges to an abortion provider requested to proceed anonymously.²⁶⁷ Further, each of the clinics had to hire extra security because of frequent demonstrations by anti-abortion activists, some of which were violent.²⁶⁸

Sometimes, anti-abortion activists would try to interfere with an abortion provider’s admitting privileges at a local hospital,²⁶⁹ which in one instance led to an ultimatum that a physician choose between providing abortion services and remaining employed at or associated with a hospital.²⁷⁰ Another abortion provider testified that if he were the only provider in his region (or in the state as a general matter), he would cease providing abortions out of safety concerns and out of concern for his ability to continue his non-abortion practice.²⁷¹

The district court made numerous findings including that: (1) a purpose of the law was “to make it more difficult for abortion providers to legally provide abortions”;²⁷² (2) Louisiana abortions were already “very safe procedures with very few

²⁶³ *Kliebert*, 250 F. Supp. 3d at 50 (“Because, by all accounts, abortion complications are rare, an abortion provider is unlikely to have a consistent need to admit patients.”).

²⁶⁴ *Id.* at 47.

²⁶⁵ *Id.* at 48 (“Although competent, an abortion provider can face difficulty in getting the required staff references because of staff opposition to abortion.”).

²⁶⁶ *See id.* at 49 (“[O]pposition to abortion can present a major, if not insurmountable hurdle, for an applicant getting the required covering physician.”).

²⁶⁷ *Id.* at 51–52 (“The security concerns even went beyond the Parties, however. A request for anonymity was made on behalf of a hospital which had granted privileges to Doe 5 and the non-party doctors who assisted in the privileges request.”).

²⁶⁸ *Id.* at 52.

²⁶⁹ *Id.*

²⁷⁰ *Id.* (“When Doe 5 worked as a hospital employed physician, protests outside the hospital caused the hospital administration to give him an ultimatum: quit performing abortions or resign from the hospital staff.”).

²⁷¹ *Id.* at 53 (“As a result of his fears, and the demands of his private OB/GYN practice, Doe 3 has testified that if he is the last physician performing abortion in either the entire state or in the northern part of the state, he will not continue to perform abortions.”).

²⁷² *Id.* at 59.

complications”;²⁷³ (3) the “medical benefits which would flow from Act 620 [were] minimal and . . . outweighed by the burdens which would flow from this legislation”;²⁷⁴ and (4) the law “will not improve the safety of abortion in Louisiana.”²⁷⁵

The court explained why as a practical matter the law was very unlikely to promote women’s health. Even if the physician who had performed the abortion did not have admitting privileges, a patient in need of care would be admitted to a hospital and would not “receive a lesser standard of care.”²⁷⁶ Further, when there are complications, most do not occur at the clinic.²⁷⁷ A patient experiencing complications would be advised to go to the nearest hospital, which might well mean that a physician’s admitting privileges at a hospital near the clinic would be irrelevant because the patient would be told to go to a hospital near her rather than near the clinic.²⁷⁸ All of these reasons suggested that the state would not significantly improve women’s health by requiring admitting privileges both because there were already relatively few instances in which there were complications and also because the physicians having those privileges in a hospital near the clinic would likely not affect the healthcare given to the woman who had had complications. The district court noted in addition that “limiting access to legal abortions substantially increase[s] the risk of harm to women’s health by increasing the risks associated with self-induced or illegal and unlicensed abortions.”²⁷⁹

The district court concluded that the law would likely undermine women’s health.²⁸⁰ Because two of the three remaining clinics would not have abortion providers and because the other clinic would lose one of its providers, the sole remaining clinic would not be able to provide the services needed in the state.²⁸¹ Because of the law’s “substantial burdens” and the lack of evidence that it had “any significant health

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.* at 64.

²⁷⁶ *Id.*

²⁷⁷ *Id.* at 65.

²⁷⁸ *Id.*

²⁷⁹ *Id.* at 66; *see also* Ratelle, *supra* note 85, at 203–04 (“People are more likely to attempt self-induced abortion when access to safe, legal, and clinic-based abortion care is restricted.”); *id.* at 197–98 (discussing “the dangerous history of illegal abortions”); Rachael N. Pine & Sylvia A. Law, *Envisioning a Future for Reproductive Liberty: Strategies for Making the Rights Real*, 27 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 407, 416 (1992) (“Such laws force only women to . . . confront the significant risks of illegal abortion.”).

²⁸⁰ *See Kliebert*, 250 F. Supp. 3d at 66 (“Act 620 would do very little, if anything, to advance women’s health and indeed would, by limiting access to legal abortions, substantially increase the risk of harm to women’s health by increasing the risks associated with self-induced or illegal and unlicensed abortions.”).

²⁸¹ *Id.* at 80 (“If Act 620 were to be enforced, two of the three remaining clinics—Hope and Delta—would have no abortion provider, with the one remaining clinic (Women’s) without one of the two doctors that normally serves its patients. . . . Furthermore, since Women’s Health would be the only clinic to serve all the women of Louisiana, it clearly could not perform that task as a logistical matter.”).

benefits,” the district court found that the law “places an unconstitutional undue burden on women seeking abortion in Louisiana.”²⁸²

Reversing the trial court,²⁸³ the Fifth Circuit found that “the Act does not impose a substantial burden on a large fraction of women,”²⁸⁴ justifying that conclusion for a number of reasons. For example, the circuit court decided that the physicians were themselves to blame for their failure to gain admitting privileges,²⁸⁵ which meant that this failure could not be attributed to the Act.²⁸⁶ The court reasoned that the Act would not cause driving distances to increase in Louisiana because all three clinics could remain open if doctors were able to get admitting privileges.²⁸⁷

One of the surprising aspects of the Fifth Circuit’s opinion was how markedly it diverged from the findings of fact of the district court opinion.²⁸⁸ Indeed, the State of Louisiana had not contested that several of the physicians had put in a good-faith but ultimately unsuccessful effort to obtain admitting privileges,²⁸⁹ but the Fifth Circuit nonetheless concluded that the physicians had not put in the requisite effort.²⁹⁰

The *Russo* Court reversed the Fifth Circuit decision,²⁹¹ but nonetheless made the abortion jurisprudence even less clear than it was before. The *Russo* plurality implied that the decision was straightforward because this case was a mirror image of *Hellerstedt*, where a similar law with similar effects was struck down as unconstitutional.²⁹²

²⁸² *Id.* at 86.

²⁸³ *June Med. Servs. L.L.C. v. Gee*, 905 F.3d 787, 815 (5th Cir. 2018), *rev’d sub nom. June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103 (2020).

²⁸⁴ *Id.* at 791.

²⁸⁵ *Id.* at 811 (“Here, by contrast, there was clear evidence in the record before the district court that various doctors failed to seek admitting privileges in good faith.”).

²⁸⁶ *See id.* at 807 (“[T]here is insufficient evidence to conclude that, had the doctors put forth a good-faith effort to comply with Act 620, they would have been unable to obtain privileges.”).

²⁸⁷ *Id.* at 811 (“Because all three clinics could remain open, the Act will cause no increase in driving distance for any woman . . .”).

²⁸⁸ *Id.* at 816 (Higginbotham, J., dissenting) (“The divergence between the findings of the district court and the majority is striking—a dissonance in findings of fact inexplicable to these eyes as I had not thought that abortion cases were an exception to the coda that appellate judges are not the triers of fact.”).

²⁸⁹ *Id.* at 819 (“The state did not challenge the district court’s findings that Does 2, 5, and 6 each put in a good-faith effort to obtain admitting privileges—a plain waiver.”).

²⁹⁰ *Id.* at 819–20 (“Undeterred, the majority simply finds the opposite.”).

²⁹¹ *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. at 2132 (majority upholding the district court’s factual and legal determinations); *see also id.* at 2142 (Roberts, C.J., concurring in the judgment) (“I concur in the judgment of the Court that the Louisiana law is unconstitutional.”).

²⁹² *Id.* at 2113 (plurality opinion) (“We have examined the extensive record carefully and conclude that it supports the District Court’s findings of fact. Those findings mirror those made in *Whole Woman’s Health* in every relevant respect and require the same result. We consequently hold that the Louisiana statute is unconstitutional.”); *see also id.* at 2139 (Roberts, C.J., concurring in the judgment) (“Under principles of *stare decisis*, I agree with the plurality that the determination in *Whole Woman’s Health* that Texas’s law imposed a substantial obstacle requires the same determination about Louisiana’s law.”).

To some extent, *Russo* merely suggested that the district court findings were supported in the record and thus could not be displaced by the circuit court.²⁹³

The plurality and dissenting opinions reflected the district court and circuit court opinions respectively. The plurality discussed some of the non-competency-based reasons that a competent physician might be denied admitting privileges, including that the very safety of the abortion practice would result in the physician having too few hospital admissions to qualify for obtaining or retaining admitting privileges.²⁹⁴ The plurality also suggested that “opposition to abortion played a significant role in some hospitals’ decisions to deny admitting privileges.”²⁹⁵

The dissents reflected the Fifth Circuit opinion in suggesting that the law had not been shown to impose an undue burden on abortion. Justice Alito implied that the physicians who did not obtain admitting privileges did not try hard enough to do so.²⁹⁶ Justice Gorsuch suggested that the law would not impose an undue burden on abortion because enforcement of the law might result in hospitals modifying their admitting privilege policies or because clinics might move closer to hospitals that would grant admitting privileges.²⁹⁷ Both Justices Gorsuch and Alito suggested that the admitting privileges requirement might promote women’s health.²⁹⁸

The differing views about whether the statute would significantly promote women’s health were likely due, at least in part, to the differing implicit questions that were being asked. The district court and the plurality were trying to assess how

²⁹³ See *id.* at 2121 (plurality opinion) (“Where ‘the district court’s account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.’ *Anderson v. Bessemer City*, 470 U.S. [564,] 573–74 [(1985)]. ‘A finding that is “plausible” in light of the full record—even if another is equally or more so—must govern.’ *Cooper v. Harris*, 137 S. Ct. 1455, 1465 (2017).”)

²⁹⁴ See *id.* at 2123 (plurality opinion).

²⁹⁵ *Id.*

²⁹⁶ *Id.* at 2165 (Alito, J., dissenting) (“[T]hose challenging Act 620 [should] demonstrate that the doctors who lack admitting privileges attempted to obtain them with the same zeal they would have exhibited if the Act were in effect and they stood to lose by failing in those efforts.”)

²⁹⁷ See *id.* at 2177 (Gorsuch, J., dissenting) (“Today’s decision also appears to assume that, if Louisiana’s law took effect, not a single hospital would amend its rules to permit abortion providers easier access to admitting privileges; no clinic would choose to relocate closer to a hospital that offers admitting privileges rather than permanently close its doors; the prospect of significant unmet demand would not prompt a single Louisiana doctor with established admitting privileges to begin performing abortions; and unmet demand would not induce even one out-of-state abortion provider to relocate to Louisiana.”)

²⁹⁸ *Id.* at 2155 (Alito, J., dissenting) (“[T]here is ample evidence in the record showing that admitting privileges help to protect the health of women by ensuring that physicians who perform abortions meet a higher standard of competence than is shown by the mere possession of a license to practice.”); *id.* at 2172 (Gorsuch, J., dissenting) (“[T]he Louisiana legislature passed Act 620 only after extensive hearings at which experts detailed how the Act would promote safer abortion treatment.”)

much women's health would be improved by the law's enforcement, starting from the vantage point that in Louisiana abortions were already "very safe procedures with very few complications."²⁹⁹ But with that as a starting point, there was virtually "no room for improvement,"³⁰⁰ which would make it difficult for the state to establish that the law would be likely to promote women's health. When Justices Alito and Gorsuch talked about how having more demanding standards might result in better outcomes,³⁰¹ they seemed to be implicitly addressing whether the law was passed for pretextual reasons.³⁰² For example, it might seem legitimate and non-pretextual to "protect the health of women by ensuring that physicians who perform abortions meet a higher standard of competence."³⁰³ However, were that really the concern, then one would expect a cost-benefit analysis focusing on how many adverse outcomes might be avoided by having higher standards and, in addition, how many adverse outcomes might occur because the supply of physicians performing abortions had been reduced.³⁰⁴ In any event, even if a regulation was intended to promote and in fact promoted women's health a little bit, that would not prevent its imposing an undue burden on abortion if its enforcement would result in very few women being able to obtain abortions.

One of the issues highlighted in *Russo* was whether the *Hellerstedt* Court had modified *Casey*.³⁰⁵ Chief Justice Roberts noted, "Under *Casey*, the State may not impose an undue burden on the woman's ability to obtain an abortion."³⁰⁶ However,

²⁹⁹ See *June Med. Servs. L.L.C. v. Kliebert*, 250 F. Supp. 3d 27, 59 (M.D. La. 2017), *rev'd sub nom.* *June Med. Servs. L.L.C. v. Gee*, 905 F.3d 787 (5th Cir. 2018), *rev'd sub nom. Russo*, 140 S. Ct. 2103.

³⁰⁰ *City of Milwaukee v. Illinois*, 451 U.S. 304, 342 (1981) (Blackmun, J., dissenting).

³⁰¹ See *supra* note 298 and accompanying text.

³⁰² Cf. Caitlin E. Borgmann, *Borrowing from Dormant Commerce Clause Doctrine in Analyzing Abortion Clinic Regulations*, 26 HEALTH MATRIX: J.L.-MED. 41, 51 (2016) ("If a state treats abortion differently (and more burdensomely) than comparable medical procedures but cannot justify the differential treatment on medical grounds, it is likely that the purpose is a pretext for the state's ideological opposition to abortion.").

³⁰³ See *Russo*, 140 S. Ct. at 2155 (Alito, J., dissenting); see also *id.* at 2172 (Gorsuch, J., dissenting) ("In Act 620, Louisiana's legislature found that requiring abortion providers to hold admitting privileges at a hospital within 30 miles of the clinic where they perform abortions would serve the public interest by protecting women's health and safety.").

³⁰⁴ Cf. Cathren Cohen, "Beyond Rational Belief": *Evaluating Health-Justified Abortion Restrictions After Whole Woman's Health*, 42 N.Y.U. REV. L. & SOC. CHANGE 173, 176 (2018) ("[R]equirements that only physicians provide abortion care . . . are purportedly justified by states' interest in protecting women's health, but such claims are not based on empirical evidence. In fact, these laws can often lead to adverse health outcomes for women seeking abortions.").

³⁰⁵ *Russo*, 140 S. Ct. at 2153 (Alito, J., dissenting) ("In *Whole Woman's Health*, . . . [*Casey*] was altered."); cf. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2324 (2016) (Thomas, J., dissenting) ("Even taking *Casey* as the baseline, however, the majority radically rewrites the undue-burden test in three ways.").

³⁰⁶ *Russo*, 140 S. Ct. at 2135 (Roberts, C.J., concurring in the judgment).

he suggested, that test was modified when “the Court in *Whole Woman’s Health* added the following observation: ‘The rule announced in *Casey* . . . requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer.’”³⁰⁷

To explain the difficulty that he believed was presented, he noted that in *Casey* the twenty-four-hour waiting period would not only lead to a delay but would increase the costs of abortion.³⁰⁸ However, he explained, those costs notwithstanding, the district court did not find that the waiting period imposed a substantial obstacle.³⁰⁹ He then concluded, “Because the law did not impose a substantial obstacle, *Casey* upheld it . . . notwithstanding the District Court’s finding that the law did ‘not further the state interest in maternal health.’”³¹⁰

Chief Justice Roberts’s analysis needs to be unpacked. First, he omitted why the district court failed to find that the waiting period imposed a substantial burden—namely, that the district court struck down that requirement under the then-prevailing standard, and thus, of course, did not in addition analyze whether the requirement was unduly burdensome because it failed a not-yet-adopted standard.³¹¹ Chief Justice Roberts’s conclusion that the requirement in fact did not impose a substantial burden merely because the district court did not foresee that the plurality would later adopt the undue burden standard helps illustrate that the *Casey* plurality may not have been applying the very standard that it had articulated.³¹²

Chief Justice Roberts’s worry seemed to be that the cost-benefit analysis might be used to strike down an abortion regulation even if that regulation did not impose a substantial burden on abortion access. While he recognized that such a statute would still have to be rationally related to a legitimate state interest in order to pass muster,³¹³ he seemed confident that such a forgiving test would not pose much of a problem.³¹⁴

Regrettably, Chief Justice Roberts’s example allegedly establishing the difficulty with the cost-benefit analysis only made the jurisprudence murkier. He wrote:

[C]ourts applying a balancing test would be asked in essence to weigh the State’s interests in “protecting the potentiality of human

³⁰⁷ *Id.* at 2135 (quoting *Hellerstedt*, 136 S. Ct. at 2309).

³⁰⁸ *See id.* at 2136 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 886 (1992) (plurality opinion)).

³⁰⁹ *Id.*

³¹⁰ *Id.* at 2136 (quoting *Casey*, 505 U.S. at 886 (plurality opinion)).

³¹¹ *See supra* notes 157–67 and accompanying text (discussing the *Casey* plurality reversing the district court’s striking of the waiting period).

³¹² *See supra* notes 173–74 and accompanying text.

³¹³ *Russo*, 140 S. Ct. at 2135 (Roberts, C.J., concurring in the judgment) (“Laws that do not pose a substantial obstacle to abortion access are permissible, so long as they are ‘reasonably related’ to a legitimate state interest.” (citing *Casey*, 505 U.S. at 878 (plurality opinion))).

³¹⁴ *See id.* at 2136 (“Because the law did not impose a substantial obstacle, *Casey* upheld it.”).

life” and the health of the woman, on the one hand, against the woman’s liberty interest in defining her “own concept of existence, of meaning, of the universe, and of the mystery of human life” on the other.³¹⁵

Chief Justice Roberts cautioned: “There is no plausible sense in which anyone, let alone this Court, could objectively assign weight to such imponderable values and no meaningful way to compare them if there were.”³¹⁶ Such a task would be impossible and “[a]ttempting to do so would be like ‘judging whether a particular line is longer than a particular rock is heavy.’”³¹⁷

Yet, Chief Justice Roberts’s point proves too much. Suppose, for example, that a particular regulation is independently determined to impose a substantial burden on abortion access, e.g., because it will cause many clinics to close down. Presumably, the fact that a substantial burden is imposed will not be enough to invalidate the statute. Instead the Court will want to do a cost-benefit analysis to determine whether closing down so many clinics was justified, e.g., because they posed a health hazard. But if such cost-benefit analyses simply cannot be done because they would require comparing protecting women’s health with undermining women’s liberty interests in defining their own existence, then courts would have difficulty justifying upholding a statute imposing a substantial burden, even if enforcement of the regulation would save many women’s lives. By casting doubt on whether cost-benefit calculations could ever legitimately be performed by courts, Chief Justice Roberts cast doubt on whether the Court could find that a regulation should be upheld despite its imposing a substantial burden on abortion access.

To make matters even more confusing, Chief Justice Roberts reasoned that “[t]he legal doctrine of *stare decisis* requires us, absent special circumstances, to treat like cases alike. The Louisiana law imposes a burden on access to abortion just as severe as that imposed by the Texas law, for the same reasons. Therefore Louisiana’s law cannot stand under our precedents.”³¹⁸ But then the question becomes what the Court is supposed to do when a different kind of law imposes an undue burden on abortion access. Is the Court supposed to use a different analysis if the statute imposes a substantial burden but not “for the same reasons?”³¹⁹ Or is the question now whether the burden imposed is “just as severe as that imposed by the Texas [or Louisiana] law,”³²⁰ such that anything less severe could not be considered unduly burdensome. Regrettably, *Russo* sheds little light on what qualifies as a substantial burden on abortion rights.

³¹⁵ *Id.* at 2136 (citing *Casey*, 505 U.S. at 851, 871 (majority & plurality opinions)).

³¹⁶ *Id.*

³¹⁷ *See id.* (quoting *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment)).

³¹⁸ *Id.* at 2134.

³¹⁹ *See id.*

³²⁰ *See id.*

Justice Alito also focused on whether *Hellerstedt* modified *Casey*,³²¹ suggesting that the correct test was whether the Louisiana law “would diminish the number of abortion providers in the State to such a degree that women’s access to abortions would be substantially impaired.”³²² He noted that “unless an abortion law has an adverse effect *on women*, there is no reason why the law should face greater constitutional scrutiny than any other measure that burdens a regulated entity in the name of health or safety.”³²³ But his later analysis cast doubt on whether he was really serious about using that test. For example, he pointed out that requiring physicians to have attending privileges was designed to help women,³²⁴ as if the legislature asserting that purpose sufficed to establish that it was the purpose.³²⁵ Even if that were the purpose, a separate argument would be required to show that a well-intended statute could not at the same time impose an undue burden on abortion. If, as *Hellerstedt* suggested, closing down a substantial number of clinics would impose a substantial burden on abortion access, that would be true whether the legislature had intended to impose such a burden or, instead, had incidentally imposed such a burden.

The *Casey* plurality warned that “a statute which, while furthering the interest in potential life or some other 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.”³²⁶ Good intent does not immunize an abortion statute from constitutional review. Further, the *Casey* plurality addressed Chief Justice Roberts’s worry about cost-benefit analyses of incommensurables—*Casey* made clear that a state’s interest in protecting potential life cannot be used to justify substantially burdening abortion rights.³²⁷

In *Russo*, while Chief Justice Roberts’s concurrence and Justice Alito’s dissent (which was joined at least in part by several Justices)³²⁸ differed with respect to whether the Louisiana law imposed a substantial burden on abortion rights,³²⁹ they

³²¹ *Id.* at 2153 (Alito, J., dissenting) (“In *Whole Woman’s Health*, . . . [*Casey*] was altered.”).

³²² *Id.* at 2154.

³²³ *Id.* (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884–85 (1992) (plurality opinion)).

³²⁴ *Id.* at 2153 (“[T]he legislature enacted [the law] for the asserted purpose of protecting women’s health.”).

³²⁵ *Cf. id.* (critiquing the plurality and Chief Justice Roberts for undermining “state laws that are enacted to protect a woman’s health”).

³²⁶ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992) (plurality opinion).

³²⁷ *Id.* at 877–78.

³²⁸ Justice Gorsuch joined Justice Alito’s dissent in whole and Justices Thomas and Kavanaugh joined it in part. *See Russo*, 140 S. Ct. at 2153 (Alito, J., dissenting).

³²⁹ *Compare id.* at 2139 (Roberts, C.J., concurring in the judgment) (“Under principles of *stare decisis*, I agree with the plurality that the determination in *Whole Woman’s Health* that Texas’s law imposed a substantial obstacle requires the same determination about Louisiana’s law.”), *with id.* at 2165 (Alito, J., dissenting) (“The Court should remand this case for a new trial under the correct legal standards. The District Court should apply *Casey*’s ‘substantial obstacle’ test.”).

agreed about some matters. For example, they agreed on the constitutional test that should be used when an abortion regulation does not unduly burden abortion rights. Both suggested that a very deferential standard should be used,³³⁰ which means that a more restrictive understanding of what constitutes an undue burden will in effect give states wide discretion with respect to abortion regulation.

CONCLUSION

Members of the Court have analyzed whether statutes unduly burdened abortion rights since the 1970s,³³¹ although the justices neither agreed about what constituted an undue burden nor even about the implications of such a finding.³³² One of the issues that has repeatedly divided the Court involves when a law's foreseeable effect of reducing the number of abortions may be attributed to the law and hence might constitute an undue burden. For example, laws requiring parental notification unduly burden abortion rights if there is no judicial bypass, even though the anticipated obstacle would be due to the actions of a private party (the parent).³³³ Laws denying state funding of non-therapeutic or even non-life-threatening abortions may also result in a reduction in abortions, but such a limitation is not attributed to the state and hence is not an undue burden.³³⁴

Casey was described as providing a new beginning which was to prevent states from attempting to impose or in fact imposing undue burdens on abortion.³³⁵ Regrettably, the plurality did not seem to apply in good faith the announced test,³³⁶ and the disconnect between the test as articulated and the test as applied has continued since then. For example, the plurality announced a purpose prong but did not apply it in that case, and the Court has not applied it since.³³⁷

The Court continues to employ the undue burden test but is as divided as ever about what constitutes a substantial obstacle to abortion rights. Some seem to believe that abortion regulations purportedly intended to improve women's health cannot

³³⁰ See *id.* at 2135 (Roberts, C.J., concurring in the judgment) (“Laws that do not pose a substantial obstacle to abortion access are permissible, so long as they are ‘reasonably related’ to a legitimate state interest.” (citing *Casey*, 505 U.S. at 878 (plurality opinion))). *Casey* itself cited to *Lee Optical*. See *Casey*, 505 U.S. at 851 (majority opinion); see also *Russo*, 140 S. Ct. at 2154 (Alito, J. dissenting) (discussing the rational basis test under *Lee Optical*).

³³¹ See *supra* notes 7–32 and accompanying text (discussing *Bellotti*).

³³² See *supra* notes 33–50 and accompanying text.

³³³ See *supra* notes 24–32, 57–64 and accompanying text (discussing *Bellotti*'s judicial bypass requirement and *Maher*'s distinction between state- and private-sponsored interference).

³³⁴ See *Maher v. Roe*, 432 U.S. 464, 473–74 (1977).

³³⁵ See Manian, *supra* note 131, at 248.

³³⁶ See *supra* Part II.

³³⁷ See *supra* Parts II and III.

constitute an undue burden,³³⁸ even though such an approach would enable states to enact very restrictive regulations by affording very slight health benefits.

One difficulty posed by the Court adopting a new standard in *Casey* is that policies upheld in cases prior to *Casey* might not have passed muster under the undue burden test. For example, *Casey* struck down a regulation imposing an undue burden on abortion, even though the burden was imposed by a private party (the potentially abusive husband) rather than the state.³³⁹ Presumably, the reason was that the state passed a regulation where it knew (or should have known) that such a requirement would result in many women being unable to obtain abortions. But the same analysis might establish that the state picking out abortion as the only therapeutic procedure that would not be funded was unconstitutional, even if the state was not responsible for the underlying poverty of the women who might need that funding.

Hellerstedt and *Russo* also struck down laws imposing undue burdens, even where the burden might not be attributed to the State but to hospitals (whose admitting privilege practices were not subject to state regulation).³⁴⁰ In *Russo*, the debate was about whether the law rather than the physicians themselves should be held responsible for the inability to obtain admitting privileges.³⁴¹ One might expect that in future cases members of the Court might adopt Justice Gorsuch's rationale suggesting that admitting privilege requirements are constitutional because hospitals or clinics could modify their policies in light of the law or, even if they did not do so, that would be their decision rather than the state's decision.³⁴²

Russo is worrisome because it significantly undercuts undue burden abortion jurisprudence while purportedly applying it. Chief Justice Roberts in his concurrence made clear that he believed the regulations at issue in *Hellerstedt* and *Russo* constitutional but that he felt compelled by stare decisis considerations to decide the cases in the same way.³⁴³ But such a view virtually guarantees that the current jurisprudence will not continue, and the only question is how significantly it will change. Lower courts and state legislatures cannot help but feel that the only guidance that they have received is that the current jurisprudence cannot be trusted as a guide.

The *Casey* majority noted that the Court's power lies "in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands."³⁴⁴ The majority cautioned that the loss of legitimacy carries a heavy price: "If

³³⁸ See *supra* notes 298–301 and accompanying text (discussing Justices Alito's and Gorsuch's *Russo* dissents); cf. *supra* notes 70–73 and accompanying text (discussing a view suggested by Justice O'Connor that regulations promoting health were not unduly burdensome).

³³⁹ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 897 (majority opinion).

³⁴⁰ See *supra* notes 226–47, 248–304 (discussing *Hellerstedt* and *Russo*, respectively).

³⁴¹ See *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2154–55 (2020) (Alito, J., dissenting).

³⁴² See *id.* at 2177 (Gorsuch, J., dissenting).

³⁴³ *Id.* at 2134 (Roberts, C.J., concurring in the judgment).

³⁴⁴ *Casey*, 505 U.S. at 865.

the Court's legitimacy should be undermined, then, so would the country be in its very ability to see itself through its constitutional ideals."³⁴⁵ But how can the Court's legitimacy not be questioned by both those who are pro-life and those who are pro-choice when in effect the Court has announced a little more than four months before a presidential election that it will strike down a law that five members of the Court do not believe unconstitutional without explaining what jurisprudential changes to expect in the future. *Russo* upholds abortion rights for the time being, but a majority on the Court have signaled that the current approach will not last long.

Will the undue burden test remain? Perhaps, but only because the Court can raise the bar so high as to what constitutes an undue burden that virtually any regulation that arguably improves women's health a little might be viewed as not imposing an undue burden, and virtually any regulation that does not impose an undue burden must be upheld. Justice Blackmun once suggested that members of the Court had "cast[] into darkness the hopes and visions of every woman in this country who had come to believe that the Constitution guaranteed her the right to exercise some control over her unique ability to bear children."³⁴⁶ *Russo* may represent the last glimmer of light before that darkness descends, possible appearance to the contrary notwithstanding.

³⁴⁵ *Id.* at 868.

³⁴⁶ *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 557 (1989) (Blackmun, J., concurring in part and dissenting in part).