*Fourteenth Amendment — Due Process Clause — Undue Burden* — Whole Woman's Health v. Hellerstedt

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[1] the Supreme Court reaffirmed the basic holding of *Roe v. Wade*[2]: the Fourteenth Amendment protects a woman's decision to terminate her pregnancy before fetal viability.[3] But the Court replaced *Roe*'s rule-like analytical framework[4] with a legal standard recognizing that an abortion restriction violates the Constitution if it "imposes an undue burden" on a woman's abortion decision.[5] What exactly constituted an undue burden was unclear. *Casey* featured seemingly conflicting language on this point: the decision proscribed laws having "the *purpose or effect* of placing a substantial obstacle in the path of" women seeking abortions,[6] but elsewhere described an undue burden without referencing purpose.[7] And like many standards, the undue burden test added uncertainty by leaving courts to engage in fact-intensive line-drawing exercises along a sliding scale, from tolerably to unduly burdensome.[8] Over the years, *Casey*'s undue burden standard devolved into something even less defined, with *Gonzales v. Carhart*[9] in particular introducing confusion regarding how much deference the undue burden framework affords legislatures. Last Term, in *Whole Woman's Health v. Hellerstedt*,[10] the Supreme Court held two health-related abortion restrictions unconstitutional under the undue burden standard, which the Court explicitly framed as a balancing test.[11] In so

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[1] 505 U.S. 833 (1992).

[2] 410 U.S. 113 (1973).

[3] *Casey*, 505 U.S. at 845–46.

[4] *Id.* at 872–73 (plurality opinion) ("*Roe* established a trimester framework to govern abortion regulations. . . . We reject the trimester framework . . . .").

[5] *Id.* at 874.

[6] *Id.* at 877 (emphasis added).

[7] *Id.* ("[Abortion restrictions] *are permitted, if they are not a substantial obstacle* to the woman's exercise of the right to choose." (emphasis added)).

[8] *See* Kathleen M. Sullivan, *The Supreme Court, 1991 Term — Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 33 (1992) ("The test permits a state to burden a woman's right to choose, but not too much. The state may 'make abortions a little more difficult or expensive to obtain,' but there are limits. It may 'inform,' 'encourage,' or 'influence' a woman's choice, but it may not 'hinder' or 'interfere with' the choice by placing a 'substantial obstacle' in her path." (citations omitted)).

[9] 550 U.S. 124 (2007) (upholding a federal partial-birth abortion ban, *id.* at 168).

[10] 136 S. Ct. 2292 (2016).

[11] *Id.* at 2300. This framing of the undue burden standard can be thought of as either a "cost-benefit analysis," *see, e.g.*, Noah Feldman, *A Cost-Benefit Test Defeats Texas Abor-tion Restrictions*, BLOOMBERG VIEW (June 27, 2016, 12:25 PM), http://www.bloomberg.com/view/articles/2016-06-27/a-cost-benefit-test-defeats-texas-abortion-limits [https://perma.cc/WS45-RCUM], or a type of proportionality review, used elsewhere in constitutional law, *see, e.g.*, Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094 (2015); *see also* Kevin Walsh, *The Constitutional Law of Abortion After* Whole Woman's Health — *What Comes Next?*,

doing, the Court resolved much of the doctrinal uncertainty that plagued the undue burden standard, but it allowed for continued judicial discretion where abortion restrictions fit less comfortably into a cost-benefit framework.

In July 2013, Texas enacted House Bill 2[12] (H.B. 2), which introduced two abortion restrictions. First, it required every physician performing abortions to have admitting privileges at a hospital within 100 miles of the abortion site.[13] Second, it subjected abortion facilities to particularly exacting standards for ambulatory surgical centers.[14] A group of abortion providers — clinics and the physicians working at those clinics — sued Texas, seeking facial invalidation of the admitting-privileges requirement.[15] The providers argued that every application of the requirement violated the Fourteenth Amendment by unduly burdening a woman's fundamental liberty to terminate her pregnancy.[16] Agreeing, the district court enjoined enforcement of the admitting-privileges requirement.[17] The Fifth Circuit reversed the district court on the merits, accepting the State's argument that the admitting-privileges requirement would improve health outcomes and doubting the abortion providers' claim that they would "be unable to comply" with the requirement.[18]

A second group of providers — including many from the prior case — later sought targeted relief from the admitting-privileges requirement for two facilities as well as facial invalidation of the surgical-center requirement.[19] The district court concluded that the

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SCOTUSBLOG (June 28, 2016, 10:56 AM), http://www.scotusblog.com/2016/06/symposium-the-constitutional-law-of-abortion-after-whole-womans-health-what-comes-next [https://perma.cc/EUF5-5W2S] (describing the majority's test interchangeably as "cost-benefit analysis" and "proportionality review").

12 Act of July 12, 2013, ch. 1, 2013 Tex. Gen. Laws 5013.

13 *See* TEX. HEALTH & SAFETY CODE ANN. § 171.0031(a)(1)(A) (West Supp. 2015), *invalidated by Whole Woman's Health*, 136 S. Ct. 2292.

14 *See id.* § 245.010(a), *invalidated by Whole Woman's Health*, 136 S. Ct. 2292. The surgical center standards were designed "to enhance the safety of surgeries that involve cutting into sterile body tissue by reducing the likelihood of infection," and they were stricter than existing standards for abortion facilities. Brief for Petitioners at 18, *Whole Woman's Health*, 136 S. Ct. 2292 (No. 15-274); *see also* TEX. HEALTH & SAFETY CODE ANN. § 243.002(1) ("'Ambulatory surgical center' means a facility that operates primarily to provide surgical services to patients who do not require overnight hospital care.").

15 Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 951 F. Supp. 2d 891, 895 (W.D. Tex. 2013). A facial challenge seeks to invalidate a law in its entirety, while an as-applied challenge seeks invalidation of a law as applied to a particular context.

16 *Id.* at 899.

17 *Id.* at 909.

18 Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 748 F.3d 583, 595, 598 (5th Cir. 2014). The plaintiffs did not file a petition for certiorari in the Supreme Court. *See* Whole Woman's Health v. Cole, 790 F.3d 563, 577 (5th Cir. 2015) (per curiam).

19 Whole Woman's Health v. Lakey, 46 F. Supp. 3d 673, 678 (W.D. Tex. 2014). Typically, such targeted, as-applied challenges are brought only after a law has gone into effect.

requirements imposed an undue burden on women seeking abortions. It found that the admitting-privileges requirement had led almost half of the state's abortion facilities to close[20] and that the costs of complying with the surgical-center requirement would lead to more closures.[21] The court noted that the few remaining clinics would be unable to meet demand for abortion services and that the closures would force women seeking abortions to travel long distances to receive care.[22] Finally, the district court found that abortion procedures in Texas were already relatively safe and that neither the admitting-privileges nor the surgical-center requirement would appreciably lower any risks associated with abortion.[23] The court held both requirements unconstitutional, and it enjoined their enforcement throughout the state.[24]

The Fifth Circuit subsequently reversed the district court, holding that res judicata barred the clinics' claims.[25] Because certain plaintiffs had already unsuccessfully litigated a pre-enforcement facial challenge to the admitting-privileges requirement, the court held that res judicata barred facial relief from that requirement, especially given the plaintiffs had not requested such relief.[26] Res judicata also barred the surgical-center challenge because the plaintiffs could have litigated that claim in the prior case.[27] On the merits, the Fifth Circuit also rejected the district court's articulation of the relevant legal standard, framing the proper test as follows: a law is valid if it (1) "does not have the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus" and (2) "is reasonably related to (or designed to further) a legitimate state interest."[28] The court of appeals applied this test and concluded that both requirements were valid except as applied to one facility.[29] The Fifth Circuit emphasized that the requirements were "rationally related" to the state's legitimate interest in protecting the health of women seeking

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[20] *Id.* at 681.

[21] *Id.* at 682.

[22] *Id.* at 681–82. The court also found that poor, rural women would face a particularly high barrier to abortion access. *Id.* at 683.

[23] *Id.* at 684.

[24] *Id.* at 687–88. The district court facially invalidated both provisions, even though the plaintiffs requested only as-applied relief from the admitting-privileges requirement. In October 2014, the Fifth Circuit stayed the district court's injunction, allowing the law to go into effect. Whole Woman's Health v. Lakey, 769 F.3d 285, 305 (5th Cir. 2014). Twelve days later, the Supreme Court vacated the Fifth Circuit's stay. Whole Woman's Health v. Lakey, 135 S. Ct. 399 (2014) (mem.).

[25] Whole Woman's Health v. Cole, 790 F.3d 563, 580–81 (5th Cir. 2015) (per curiam).

[26] *Id.*

[27] *Id.* at 581.

[28] *Id.* at 572. Although the discussion was not necessary to its holding, the court addressed the merits "for the purpose of completeness." *Id.* at 583–84.

[29] *Id.* at 567.

abortions.[30] It further noted that the abortion providers had offered insufficient evidence to demonstrate that the remaining clinics would be incapable of meeting statewide abortion demand and thus failed to show any undue burden.[31] The court of appeals then chastised the district court for "substituting its own judgment" for the legislature's on a question of "medical uncertainty."[32] It also added that even if H.B. 2 unduly burdened some women, there was no evidence that the burden extended to a "large fraction" of women, which would be necessary for facial invalidation.[33]

The Supreme Court reversed. Writing for the five-Justice majority, Justice Breyer[34] concluded that each provision "place[d] a substantial obstacle in the path of women seeking a previability abortion, each constitute[d] an undue burden on abortion access, and each violate[d] the Federal Constitution."[35] The majority first rejected the Fifth Circuit's res judicata holding, noting that material facts had developed since the first round of litigation[36] and that "important human values" were at stake.[37] The Court also rejected the idea that res judicata precluded a court from awarding otherwise appropriate facial relief merely because a party had sought as-applied relief instead.[38]

The Court next noted several problems with the Fifth Circuit's articulation of the undue burden standard. First, the Fifth Circuit omitted any inquiry whatsoever into the *actual* benefits of the law and therefore failed to assess whether the challenged provisions were "unnecessary" or the burden "undue."[39] Second, regarding the law's *purported* benefits, the Fifth Circuit improperly considered only whether the law was reasonably related to a legitimate state interest.[40] Finally, the majority dismissed the Fifth Circuit's assertion that courts defer to the legislature's judgment on questions of medical uncertainty, finding

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[30] *Id.* at 584.

[31] *Id.* at 590.

[32] *Id.* at 587 (noting that such questions include "[c]onsiderations of marginal safety" (quoting Gonzales v. Carhart, 550 U.S. 124, 166 (2007))).

[33] *Id.* at 586 (citing *Gonzales*, 550 U.S. at 167–68; Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 895 (1992)).

[34] Justice Breyer was joined by Justices Kennedy, Ginsburg, Sotomayor, and Kagan.

[35] *Whole Woman's Health*, 136 S. Ct. at 2300 (citations omitted).

[36] In the interim, more than half the clinics had closed because they could not obtain admitting privileges or could not comply with the surgical-center regulations. *Id.* at 2306–07.

[37] *Id.* at 2305 ("[W]here 'important human values . . . are at stake, even a slight change of circumstances may afford a sufficient basis for concluding that a second action may be brought.'" (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 24 cmt. f (AM. LAW. INST. 1980))).

[38] *Id.* at 2307 (citing FED. R. CIV. P. 54(c); Citizens United v. FEC, 558 U.S. 310, 333 (2010); Richard H. Fallon, Jr., Commentary, *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1339 (2000)).

[39] *Id.* at 2309–10; *see* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 878 (1992) (plurality opinion).

[40] *Whole Woman's Health*, 136 S. Ct. at 2309.

this deference particularly inappropriate where — as in this case — the legislature made no explicit findings on such questions.[41] Justice Breyer emphasized the need for courts to carefully evaluate all evidence and arguments, placing "considerable weight" on the district court's factual findings as well as arguments of amici.[42]

The majority then concluded that each of the two statutory requirements imposed an undue burden on a woman's right to seek an abortion. First, the Court noted that neither provision offered any benefit to women's health.[43] The evidence showed that complications arising from abortion procedures were exceedingly rare and mostly occurred after the patient had left the facility, when neither admitting privileges nor surgical-center standards would have done the patient any good.[44] The admitting-privileges requirement in particular did not advance the state's interest in protecting women's health because pre-existing law already required abortion providers to have a "working arrangement" with a doctor who had admitting privileges.[45]

Second, the majority detailed the substantial obstacles that the two requirements imposed. Crediting the district court's finding that more than 75% of the clinics in Texas closed because of the two provisions,[46] the Court concluded that the plaintiffs' testimony and "common sense" established that the closures created a substantial obstacle by severely limiting abortion access.[47] Moreover, with fewer clinics attending to the same demand for abortions, the quality of care would likely decline.[48] The burden thus shifted to the state to prove that the remaining clinics could pick up the slack.[49] The Court also observed that the number of women forced to travel long distances — sometimes more than 200 miles — had skyrocketed because of the clinic closures.[50] It concluded that the increased travel distances were "but one additional burden, which, when taken together with others . . . and when viewed in light of the virtual absence of any health benefit," constituted an undue burden.[51] Finally, the majority briefly addressed and rejected

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[41] *See id.* at 2310.

[42] *Id.* (citing *Casey*, 505 U.S. at 888–94).

[43] *Id.* at 2311–12 ("[W]hen directly asked at oral argument whether Texas knew of a single instance in which the [admitting-privileges] requirement would have helped even one woman obtain better treatment, Texas admitted that there was no evidence in the record of such a case."); *id* at 2315 ("There is considerable evidence . . . that the statutory provision requiring all abortion facilities to meet all surgical-center standards does not benefit patients and is not necessary.").

[44] *Id.* at 2311, 2315.

[45] *Id.* at 2311.

[46] *See id.* at 2312, 2316.

[47] *Id.* at 2317.

[48] *Id.* at 2318.

[49] *Id.* at 2317.

[50] *Id.* at 2313.

[51] *Id.*

Texas's other arguments. Texas asked the Court to sever any provisions it found unconstitutional, but the Court declined.[52] The Court also rejected Texas's argument that plaintiffs failed to meet the "large fraction" requirement to obtain facial invalidation.[53]

Justices Thomas and Alito and Chief Justice Roberts dissented. Justice Thomas disagreed with an earlier decision holding that abortion providers have standing to raise their patients' constitutional rights,[54] and he disagreed with its application here.[55] He also disagreed with the Court's basic premise that a woman has a constitutionally protected right to obtain an abortion, as well as with its application of the undue burden standard.[56] Justice Alito[57] argued most forcefully that petitioners' claims should have been dismissed on res judicata grounds.[58] On the merits, Justice Alito suggested that the plaintiffs had not sufficiently demonstrated that the two challenged provisions caused the abortion facilities to close, as they might have closed because of — among other reasons — other provisions of H.B. 2 or physician retirement.[59] Justice Alito concluded by faulting the Court for not respecting the statute's severability clause.[60]

The majority's balancing test gave the Court's abortion jurisprudence a much-needed makeover. *Casey* and subsequent abortion decisions — particularly *Gonzales* — allowed challengers and states alike to cherry-pick language of purportedly equal precedential value to argue for their respective positions.[61] Thus, by the time the parties filed their briefs in *Whole Woman's Health*, the two sides were talking com-

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[52] *Id.* at 2319–20 (explaining that "when confronted with a facially unconstitutional statutory provision," the Court's precedent had "never required [it] to proceed application by conceivable application" to find a way to sever laws with severability clauses, *id.* at 2319).

[53] The Court clarified that the question is whether a provision affects a "large fraction of cases in which [the provision at issue] is *relevant*." *Id.* at 2320 (alteration in original) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 895 (1992) (emphasis added)). Justice Ginsburg joined the majority opinion but wrote separately to emphasize two points. First, she explicitly observed that H.B. 2 had an impermissible purpose — that it did "little or nothing for health, but rather strew[ed] impediments to abortion." *Id.* at 2321 (Ginsburg, J., concurring) (quoting Planned Parenthood of Wis., Inc. v. Schimel, 806 F.3d 908, 921 (7th Cir. 2015)). Second, she pointed out the grim likelihood that allowing the provisions to stay in effect would lead "women in desperate circumstances" to "resort to unlicensed rogue practitioners . . . at great risk to their health and safety." *Id.*

[54] Singleton v. Wulff, 428 U.S. 106 (1976).

[55] *See Whole Woman's Health*, 136 S. Ct. at 2321–23 (Thomas, J., dissenting).

[56] *See id.* at 2323–26.

[57] Justice Alito was joined by Chief Justice Roberts and Justice Thomas.

[58] *See Whole Woman's Health*, 136 S. Ct. at 2331–42 (Alito, J., dissenting).

[59] *See id.* at 2343–45.

[60] *See id.* at 2350–53.

[61] *See generally* Gillian E. Metzger, *Unburdening the Undue Burden Standard: Orienting* Casey *in Constitutional Jurisprudence*, 94 COLUM. L. REV. 2025, 2027–38 (1994) (arguing that *Casey* failed "to develop a methodical analysis of the undue burden standard," thereby "perpetuat[ing] the inconsistency of rulings on abortion," *id.* at 2037).

pletely past each other. *Whole Woman's Health* did not totally resolve this problem, but it helpfully clarified how the undue burden standard applies to health-justified abortion restrictions.

*Gonzales* capitalized on *Casey*'s ambiguity to grant greater deference to legislatures enacting abortion restrictions. Though the *Gonzales* Court quoted *Casey*'s "purpose or effect" language,[62] it nevertheless neglected to conduct a meaningful review of Congress's purpose.[63] The Court opted instead for a new articulation of the undue burden standard: "Where it has a *rational basis* to act, and it does not impose an undue burden, the State may [impose certain abortion restrictions]."[64] Although *Casey* itself rejected both rational basis review and strict scrutiny in favor of the undue burden standard,[65] *Gonzales* invoked *Casey* to support its framing: "*Casey* overruled [two cases interpreting *Roe*[66]] because they undervalued the State's interest in potential life."[67] Additionally, *Gonzales* granted "wide discretion" to legislatures where "medical and scientific uncertainty" was present,[68] although it confusingly noted that courts also had "an independent constitutional duty to review factual findings [including medical and scientific findings] where constitutional rights are at stake."[69]

The lack of clarity for courts applying the undue burden standard — along with hints that certain Justices might be willing to overturn *Roe*[70] — allowed parties on either side of a challenged abor-

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[62] Gonzales v. Carhart, 550 U.S. 124, 146 (2007) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992) (plurality opinion)).

[63] *See id.* at 156 (largely reciting legislative findings and focusing its analysis on "whether the Act . . . imposes a substantial obstacle" to previability abortions).

[64] *Id.* at 158 (emphasis added).

[65] *See Casey*, 505 U.S. at 871–76 (plurality opinion).

[66] Thornburgh v. Am. Coll. of Obstetricians and Gynecologists, 476 U.S. 747 (1986); City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416 (1983).

[67] *Gonzales*, 550 U.S. at 146; *see also id.* (emphasizing *Casey*'s statement that "[r]egulations which do no more than create a structural mechanism by which the State . . . may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle" (alteration in original) (quoting *Casey*, 505 U.S. at 877) (plurality opinion)); *Casey*, 505 U.S. at 875 (plurality opinion) ("[I]n practice, [*Roe*] undervalues the State's interest in the potential life within the woman.").

[68] *Gonzales*, 550 U.S. at 163.

[69] *Id.* at 165. This ambiguity is especially significant given how heavily the existence of medical uncertainty factored into the *Gonzales* Court's analysis, with the Court going so far as to say that medical uncertainty "provides a sufficient basis to conclude . . . that the Act does not impose an undue burden." *Id.* at 164; *see also* Michael C. Dorf, *Abortion Rights*, 23 TOURO L. REV. 815, 821–24 (2008) (detailing several problems with *Gonzales*'s medical uncertainty argument).

[70] *See* Linda Greenhouse, *How the Supreme Court Talks About Abortion: The Implications of a Shifting Discourse*, 42 SUFFOLK U. L. REV. 41, 57 (2008) ("[F]our Justices in the *Carhart* majority [Chief Justice Roberts and Justices Scalia, Thomas, and Alito] give every sign of being ready and willing to [overturn *Roe*]."); *see also* Stenberg v. Carhart, 530 U.S. 914, 920–21 (2000) (opening with a lengthy acknowledgment that abortion is controversial, before apologetically reiterating

tion restriction to argue forcefully and credibly for diametrically opposed positions. A stark example is the clear breakdown of communication between the petitioners' and respondents' briefs in *Whole Woman's Health*. Relying on gaps in *Casey*'s ambiguous treatment of legislative purpose, petitioners proposed the following standard of review: "The purpose prong of the undue burden standard requires courts reviewing abortion restrictions to confirm that the restrictions are reasonably designed to serve a valid state interest in a permissible way."[71] Texas, by contrast, dodged the purpose inquiry by arguing simply and dispositively under *Gonzales* that where "both sides have medical support for their position," there is "a sufficient basis to conclude . . . that the Act does not impose an undue burden."[72]

The *Whole Woman's Health* majority foreclosed such opportunities to manipulate the undue burden standard by establishing a helpful and clear balancing test, at least where health-justified restrictions are concerned.[73] By explicitly and precisely requiring future courts to "consider the burdens a law imposes on abortion access together with the benefits [that law] confer[s],"[74] the Court added clarity in at least three ways. First, it translated the undue burden inquiry into a framework with which all government branches have become intimately familiar in recent decades: cost-benefit analysis.[75] Cost-benefit analysis is certainly a far cry from the rule-like trimester framework established in *Roe* and subsequently rejected by *Casey*.[76] But it is a standard to which courts are more accustomed, and it will thus likely be applied with greater consistency than the undue burden standard has been applied in the past. Second, the majority itself applied the reworked undue burden standard with refreshing consistency throughout its opinion. For both of the statutory provisions at issue, the Court identified the state's purported purpose.[77] It carefully reviewed the

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*Roe*'s and *Casey*'s conclusion "that the Constitution offers basic protection to the woman's right to choose").

[71] Brief for Petitioners, *supra* note 14, at 36.

[72] Brief for Respondents at 20, *Whole Woman's Health*, 136 S. Ct. 2292 (No. 15-274) (quoting *Gonzales*, 550 U.S. at 161, 164).

[73] *See* Margaret Talbot, *The Supreme Court's Just Application of the Undue-Burden Standard for Abortion*, NEW YORKER (June 27, 2016), http://www.newyorker.com/news/news-desk/the-supreme-courts-just-application-of-the-undue-burden-standard-for-abortion [https://perma.cc/5XVB-8KNY] (noting that "the standard has been applied weakly and inconsistently," but that in *Whole Woman's Health* "the Court appears to have done the real weighing of costs and benefits which the test deserves").

[74] *Whole Woman's Health*, 136 S. Ct. at 2309.

[75] *See, e.g.*, CASS R. SUNSTEIN, THE COST-BENEFIT STATE: THE FUTURE OF REGULATORY PROTECTION 10–16 (2002) (documenting the "rise of the cost-benefit state," *id.* at ix).

[76] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 872 (1992) (plurality opinion).

[77] *Whole Woman's Health*, 136 S. Ct. at 2311 (admitting privileges); *id.* at 2315 (surgical center).

district court's findings, parties' evidence, and amici's briefs to determine whether the asserted benefits were likely to be realized.[78] And it did the same in evaluating the burdens imposed by each provision.[79] The Court left little room for future parties and courts to maneuver around this analytical framework without rejecting it outright.

Finally, the Court clarified in two ways the level of deference due to legislatures enacting health-justified abortion restrictions. First, the Court reinvigorated the purpose prong of the undue burden standard, which was historically manipulated, discounted, or ignored completely.[80] Prior to *Whole Woman's Health*, and as exemplified by Texas's brief, a state could summarily assert its interest and face only a cursory review of its purpose, if any.[81] But the *Whole Woman's Health* majority flatly and formally rejected rational basis review,[82] requiring instead a more searching purpose analysis. Thus, under *Whole Woman's Health*, a state asserting its interest in women's health must show that an abortion restriction *actually* leads to health benefits[83] — that is, it must now show a nexus between the law and the state interest, as opposed to the mere legitimacy of the interest.[84] Second, the Court explicitly rejected Texas's "statement that legislatures, and not courts, must resolve questions of medical uncertainty" as "inconsistent with this Court's case law."[85] In subsequently holding that the district court correctly grounded its analysis in the judicial record — and aptly discounted the judgment of the legislature[86] — the Court rejected *Gonzales*'s deference to states on questions of medical uncertainty.

Although *Whole Woman's Health* has done much to clarify the undue burden standard's application to health-justified abortion restrictions, how well the majority's cost-benefit framework extends to other types of restrictions is less clear. By rejecting rational basis re-

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78 *Id.* at 2311–12 (admitting privileges); *id.* at 2314–16 (surgical center).

79 *Id.* at 2312–14 (admitting privileges); *id.* at 2316–18 (surgical center).

80 *See, e.g.*, Emma Freeman, *Giving* Casey *Its Bite Back: The Role of Rational Basis Review in Undue Burden Analysis*, 48 HARV. C.R.-C.L. L. REV. 279, 296 (2013) ("[C]ourts frequently omit purpose prong analysis.").

81 *See id.* at 317 ("Though *Gonzales* correctly separated purpose and effects analysis, [the Court] declin[ed] to inquire whether the state's *actual* purpose was permissible and neglect[ed] to engage in substantial nexus analysis . . . .").

82 *Whole Woman's Health*, 136 S. Ct. at 2309 ("[T]he second part of the [Fifth Circuit's] test is wrong to equate the judicial review applicable to the regulation of a constitutionally protected personal liberty with the less strict review applicable where . . . economic legislation is at issue.").

83 *Id.* at 2309–10.

84 *See* Linda Greenhouse, *The Courts Begin to Call Out Lawmakers*, N.Y. TIMES (Aug. 18, 2016), http://www.nytimes.com/2016/08/18/opinion/the-courts-begin-to-call-out-lawmakers.html [https://perma.cc/DK78-VWLE] (identifying *Whole Woman's Health* as an example of courts "abandoning the traditional diffidence of the judicial role and expressing a new willingness to call out legislatures for what they are really doing, not just what they say they are doing").

85 *Whole Woman's Health*, 136 S. Ct. at 2310.

86 *Id.*

view, the majority eliminated formal deference to states enacting abortion restrictions, but it left open the possibility of informal deference. Where a law's benefits are hard to objectively measure and weigh against its burdens, a court might unofficially defer to the state by playing up the state's interest. This will be particularly easy to do in cases involving the state's interest in respecting potential life, as deference to this particular interest drove *Casey*,[87] was reiterated in *Gonzales*,[88] and apparently survived *Whole Woman's Health*. Indeed, although at least one court has applied the majority's balancing test broadly,[89] some commentators suggest the test could be limited to only those cases involving the state's interest in women's health.[90]

In his dissent, Justice Thomas made the fair observation that the Court has an "increasingly common practice of invoking a given level of scrutiny . . . while applying a different standard of review entirely."[91] By clearly articulating and consistently applying a balancing test to evaluate H.B. 2, the majority did much to clarify the undue burden standard and make such a practice more difficult where health-justified abortion restrictions are concerned. But the majority's decision may provide less guidance where courts are asked to weigh burdens and benefits that fit less neatly into a cost-benefit framework. Moreover, the undue burden standard remains a standard, and as such its application will continue to depend upon the personal beliefs of judges and Justices.[92] Thus, it remains to be seen precisely how much order *Whole Woman's Health* will bring to the Court's abortion jurisprudence.

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87 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 878 (1992) (plurality opinion) (repeatedly invoking "the State's profound interest in potential life").

88 Gonzales v. Carhart, 550 U.S. 124, 157 (2007) ("The government may use its voice and its regulatory authority to show its profound respect for the life within the woman.").

89 *See* W. Ala. Women's Ctr. v. Miller, 2016 WL 3621273, at *6 (M.D. Ala. July 5, 2016) ("[T]he analytical approach the parties and the court will employ for assessing the constitutionality of the school-proximity law will likely largely be the same [as for the admitting-privileges law].").

90 *See, e.g.*, Noah Feldman, *Justices Haven't Ended Abortion Restrictions Yet*, BLOOMBERG VIEW (July 5, 2016, 12:30 PM), https://www.bloomberg.com/view/articles/2016-07-05/supreme-court-hasn-t-ended-abortion-restrictions-yet [https://perma.cc/E849-JYKZ]. *But see* Greenhouse, *supra* note 84 (suggesting that the Court's balancing test will have *broader* implications, if picked up by courts reviewing voting restrictions); Kimberly Strawbridge Robinson, *SCOTUS Abortion Case May Have Voting Rights Ramifications*, BLOOMBERG BNA (Aug. 15, 2016), http://www.bna.com/scotus-abortion-case-n73014446338 [https://perma.cc/Y2G5-755P].

91 *Whole Woman's Health*, 136 S. Ct. at 2321 (Thomas, J., dissenting).

92 *See, e.g.*, Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 841–42 (2009) (arguing that legal analyses grounded in subjective assessments endanger the perceived and actual legitimacy of judicial decisions).