THE YALE LAW JOURNAL FORUM
OCTOBER 12, 2016

The Difference a Whole Woman Makes: Protection for the Abortion Right After *Whole Woman's Health*

Linda Greenhouse & Reva B. Siegel

As the case that became *Whole Woman's Health*[1] worked its way to the Supreme Court, few were confident about how the Court would respond to a law, enacted in the name of protecting women's health, that would predictably shut most of a state's abortion clinics. All agreed that the governing standard was the undue burden framework the Court had adopted a quarter century earlier in *Planned Parenthood v. Casey*.[2] But the meaning of "undue burden" was in doubt. Opponents of the abortion right asserted that after the Court decided *Gonzales v. Carhart*,[3] upholding the Partial Birth Abortion Ban Act, the *Casey* framework meant little more than rational basis deference to legislative decision making.[4] Supporters were confident that the undue burden framework provided women more constitutional protection than that—but many still worried that the standard was too indeterminate to constrain state legislatures.

In *Whole Woman's Health*, the Court defied those expectations and held that *Casey*'s undue burden framework imposes real limits on state efforts to restrict

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

2. 505 U.S. 833 (1992).

3. 550 U.S. 124 (2007).

4. *See, e.g.*, Brief for Respondents at 21-23, Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016) (No. 15-274). Lawyers for a leading antiabortion advocate, Americans United For Life, *see infra* notes 20-24, served as counsel of record for a group of state officials whose amicus brief was devoted to advancing the rational basis argument, *see* Amicus Curiae Brief of More than 450 Bipartisan and Bicameral State Legislators and Lieutenant Governors in Support of the Respondents and Affirmance of the Fifth Circuit, Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016) (No. 15-274).

women's access to abortion. The opinion decisively reaffirms robust judicial protection for the right declared two generations ago and under relentless attack for much of the time since.

This Essay draws on our recent article on health-justified abortion restrictions—Casey *and the Clinic Closings: When "Protecting Health" Obstructs Choice*[5]—to offer a brief account of the social movement strategy and the lower court rulings that led to the judgment in *Whole Woman's Health*. We show that in *Whole Woman's Health* the Court applies the undue burden framework in ways that have the potential to reshape the abortion conflict.

The Court's most recent abortion decision repudiates rational-basis claims about *Casey*.[6] Crucially, the decision instructs judges how to apply the *Casey* framework in evaluating the benefits and burdens of restrictions on abortion. In *Whole Woman's Health*, the Court weighed Texas's interest in enacting the challenged law, with close attention to scientific evidence about the health benefits of regulating abortion,[7] and it evaluated the burdens imposed by the Texas law, with close attention to the many ways abortion restrictions can adversely affect the conditions in which women exercise their rights.[8] The methods the Court employed to identify and to balance benefits and burdens call into question myriad health-justified restrictions on abortion.[9] The guidance the Court provided judges in identifying benefits and burdens under the *Case*y framework applies in cases challenging fetal-protective restrictions on abortion as well.[10]

I. THE "TRAP LAW" STRATEGY

In 2013 Texas enacted a law requiring abortion providers to secure admitting privileges at nearby hospitals and requiring clinics to outfit themselves as ambulatory surgical centers.[11] The asserted purpose of the law was to protect women's health. In an important sense the law had its origins in the *Casey* deci-

5. Linda Greenhouse & Reva B. Siegel, Casey *and the Clinic Closings: When "Protecting Health" Obstructs Choice*, 125 YALE L.J. 1428 (2016).

6. *See infra* text accompanying notes 48-50.

7. *See infra* text accompanying notes 55-69.

8. *See infra* text accompanying notes 70-74.

9. Leaders of antiabortion organizations are adjusting their strategies in response to the decision. *See infra* note 55.

10. *See infra* text accompanying notes 74-76.

11. *See* Act of July 18, 2013, 2013 Tex. Sess. Law Serv. 4795-4802 (West) (codified at TEX. HEALTH & SAFETY CODE ANN. §§ 171.0031, 171.041-048, 171.061-064, 245.010-011 (West, Westlaw through 2015 Reg. Sess.); TEX. OCC. CODE ANN. §§ 164.052, 164.055 (West, Westlaw through 2015 Reg. Sess.)).

sion itself. In the years preceding *Casey*, opponents of abortion sought *Roe v. Wade*'s[12] overruling.[13] Instead the Court narrowed *Roe* but reaffirmed the right to abortion before fetal viability.[14] It held that a state could enact legislation to promote the state's interests in potential life and in women's health throughout pregnancy, so long as the laws did not impose an undue burden on a woman's decision about whether to carry a pregnancy to term.[15] The Court defined an undue burden as "a state regulation [that] has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[16] In upholding Pennsylvania's requirement of a waiting period and mandatory counseling,[17] *Casey* authorized forms of fetal-protective regulation that *Roe* had barred. Opponents quickly seized on this opportunity to enact laws that might accomplish incrementally and indirectly what *Casey* forbade their doing directly.

Some of the laws that states enacted sought, like the measures in *Casey*, to dissuade women from acting on a decision to end a pregnancy. But others imposed requirements on abortion providers in the name of protecting women's health. These laws—which critics dubbed TRAP laws, for "Targeted Regulation of Abortion Providers"—single out abortion for onerous forms of regulation not applied to procedures of equivalent or greater medical risk.[18] By singling out abortion providers for onerous regulation concerning building standards, licensing, telemedicine, and admitting privileges, TRAP laws work either to raise the cost of providing abortions or to put providers out of business altogether.[19]

---

12. 410 U.S. 113 (1973).

13. *See, e.g.*, Brief for the United States as Amicus Curiae in Support of Appellants at 25, Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747 (1986) (Nos. 84-495 & 84-1379) (calling for the overruling of *Roe*).

14. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 869-70 (1992).

15. *Id.* at 876-77.

16. *Id.* at 877.

17. *Id.* at 881-87.

18. *See* Greenhouse & Siegel, *supra* note 5, at 1444-49.

19. For examples of recent TRAP laws, see *Targeted Regulation of Abortion Providers*, GUTTMACHER INST,, http://www.guttmacher.org/state-policy/explore/targeted-regulation-abortion-providers [http://perma.cc/5N56-64UR]. For accounts of how TRAP laws affect access, see, for example, Kathryn Smith, *Va. Tightens Abortion-Clinic Rules*, POLITICO (Apr. 15, 2013), http://www.politico.com/story/2013/04/virginia-adopts-stricter-rules-for-abortion-clinics-090042 [http://perma.cc/TT4V-QHKH]; and Esmé E. Deprez, *Abortion Clinics Are Closing at a Record Pace*, BLOOMBERG (Feb. 24, 2016), http://www.bloomberg.com/news/articles/2016-02-24/abortion-clinics-are-closing-at-a-record-pace [http://perma.cc/45DV-SQH2], which reported that "[s]tate regulations that make it

Americans United For Life (AUL), an organization dedicated to ending abortion through its incremental regulation, is a primary proponent of the woman's health justification for restricting abortion and an architect of TRAP laws, including those at issue in the Texas case.[20] The group provides states model legislation that it claims will protect life and protect women's health.[21] The organization's recent past-President, Charmaine Yoest, was frank in describing AUL's state legislative strategy: "As we're moving forward at the state level, we end up hollowing out *Roe*, even without the Supreme Court."[22] Dan

---

too expensive or logistically impossible for facilities to remain in business drove more than a quarter of the [clinic] closings."

TRAP laws have closed or threatened to close clinics in large numbers, leaving many states with few remaining sites to meet patient needs. For example, the combination of Texas's admitting privileges and ambulatory surgical center requirements would have closed approximately three-fourths of the forty-one clinics in the state. *See* Greenhouse & Siegel, *supra* note 5, at 1430; *see also* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2312, 2317 (2016) (describing the effect of the requirements on the numbers of abortion facilities). Mississippi's admitting privileges law would have resulted in the closing of the state's last remaining abortion clinic. *See* Greenhouse & Siegel, *supra* note 5, at 1450. If allowed to go into effect, Wisconsin's admitting privileges requirement would have closed two of the state's four clinics. *See id.* at 1451. Louisiana's admitting privileges requirement was enjoined because enforcement would leave "four of the five clinics in the state without an abortion provider and the last remaining clinic with only one provider." *Id.* For additional data on the declining numbers of abortion clinics due to regulations, see Laura Bassett, *Anti-Abortion Laws Take Dramatic Toll on Clinics Nationwide*, HUFFINGTON POST (Aug. 26, 2013, 7:30 AM), http://www.huffingtonpost.com/2013/08/26/abortion-clinic-closures_n_3804529.html [http://perma.cc/T6ZF-PYJX]; and Deprez, *supra*. For an account of the dozens of states with admitting privileges and ambulatory surgical center requirements comparable to those struck down by the Court in *Whole Woman's Health*, see Jennifer Prohov, *What Effect Will the Court's Abortion Ruling Have on Laws in Other States?* SCOTUSBLOG (Sept. 19, 2016), http://www.scotusblog.com/2016/09/what-effect-will-the-courts-abortion-ruling-have-on-laws-in-other-states/ [http://perma.cc/6FW7-TMXU].

20. Zoe Carpenter, *The Big Lie at the Heart of the Texas Abortion Clinic Case*, THE NATION (Mar. 1, 2016), http://www.thenation.com/article/the-big-lie-at-the-heart-of-the-texas-abortion-clinic-case [http://perma.cc/F357-9R7P]; Erica Hellerstein, *Inside the Highly Sophisticated Group That's Quietly Making It Much Harder to Get an Abortion*, THINKPROGRESS (Dec. 2, 2014), http://thinkprogress.org/health/2014/12/02/3597770/americans-united-life-abortion [http://perma.cc/CH4U-Q7CD]. For an early statement of AUL's incremental strategy, see Victor G. Rosenblum and Thomas J. Marzen, *Strategies for Reversing* Roe v. Wade *Through the Courts*, *in* ABORTION AND THE CONSTITUTION: REVERSING *ROE V. WADE* THROUGH THE COURTS 195, 196-197 (Dennis J. Horan et al. eds., 1987).

21. *See* AMERICANS UNITED FOR LIFE, DEFENDING LIFE, http://www.aul.org/defending-life-2015/ [http://perma.cc/3Z8D-Y4ER].

22. Emily Bazelon, *Charmaine Yoest's Cheerful War on Abortion*, N.Y. TIMES MAG. (Nov. 4, 2012), http://www.nytimes.com/2012/11/04/magazine/charmaine-yoests-cheerful-war-on-abortion.html [http://perma.cc/XWW6-87C9]. At the same time, the organization's model legislation is designed to encourage the courts to narrow *Roe*. *See* Clarke D. Forsythe, *A Legal Strategy to Overturn* Roe v. Wade *After* Webster*: Some Lessons from Lincoln*, 1991 BYU

McConchie, the organization's vice president of government affairs, explained, "States can't outlaw abortion. That does not mean there's a constitutional right to abortion being convenient."[23]

AUL advised Texas in drafting its law.[24] The law's supporters well appreciated that it would close clinics. The day after the Texas Senate approved the bill requiring providers to obtain admitting privileges and to outfit themselves as ambulatory surgical centers, then-Lieutenant Governor David Dewhurst tweeted a photo of a map that showed all of the abortion clinics that would close as a result of the bill. "We fought to pass S.B. 5 thru the Senate last night, & this is why!"[25] He then followed with a second tweet: "I am unapologetically pro-life AND a strong supporter of protecting women's health. #SB5 does both."[26]

The district court found that, prior to the law's passage, abortion in the state of Texas was "extremely safe," that the law's requirements did not make the procedure safer, and that the combined operation of the admitting privileges and the surgical center requirements would close "almost all abortion clinics in Texas," and thus create an "impermissible obstacle" to abortion in the state.[27] But in a series of opinions the Fifth Circuit reversed and rebuked the district judge for interfering with the prerogatives of the legislature. The Fifth Circuit read the Supreme Court's decision in *Gonzales v. Carhart* as incorporating rational basis review into the undue burden inquiry, and then, even more expansively, insisted that "[n]othing in the Supreme Court's abortion jurisprudence deviates from the essential attributes of the rational basis test, which affirms a vital principle of democratic self-government."[28] It forbade the trial court from examining the evidence supporting the state's reasons for regulating: "The

---

L. REV. 519, 534 (1991) ("The legislation is carefully designed to present particular abortion issues to the courts that test Supreme Court doctrine and that will encourage the courts, and ultimately the Supreme Court, to cut back on *Roe v. Wade* or to readdress and overrule it.").

23. Olga Khazan, *Planning the End of Abortion*, THE ATLANTIC (July 16, 2015), http://www.theatlantic.com/politics/archive/2015/07/what-pro-life-activists-really-want/398297/ [http://perma.cc/8GKR-9UGS].

24. *See* Carpenter, *supra* note 20 ("A year after he signed the legislation into law, former Texas Governor Rick Perry thanked AUL for playing 'a key role in developing and promoting legislation.'").

25. David Dewhurst (@DavidHDewhurst), TWITTER (June 19, 2013, 7:41 AM), http://twitter.com/DavidHDewhurst/status/347363442497302528/photo/1 [http://perma.cc/3QF2-U6QQ].

26. *Id.*; *see also* Becca Aaronson, *Dewhurst Tweet on Abortion Bill Raises Eyebrows*, THE TEX. TRIB. (June 19, 2013), http://www.texastribune.org/2013/06/19/dewhurst-tweet-praising-abortion-bill-raises-eyebr/ [http://perma.cc/3SVU-A3MH].

27. Whole Woman's Health v. Lakey, 46 F. Supp. 3d 673, 684, 687-88 (W.D. Tex. 2014).

28. Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott ("Abbott II"), 748 F.3d 583, 590, 594 (5th Cir. 2014).

first-step in the analysis of an abortion regulation, however, is *rational* basis review, not *empirical* basis review."[29] The Circuit admonished the district court for "evaluat[ing] whether the ambulatory surgical center provision would actually improve women's health and safety," asserting that "[i]n our circuit we do not balance the wisdom or effectiveness of a law against the burdens the law imposes."[30]

In characterizing the *Casey* framework as mandating rational basis deference to state legislatures, the Fifth Circuit broke with the Ninth and Seventh Circuits, which understood the undue burden inquiry to require judges to examine the evidentiary basis of the state's claim to regulate in the interest of women's health, and then to balance whatever medical benefit, if any, the regulation conferred against the burden the regulation imposed.[31]As Judge Richard Posner put it, "The feebler the medical grounds, the likelier the burden, even if slight, to be 'undue' in the sense of disproportionate or gratuitous."[32]

II. HOW *CASEY* CONSTRAINS TRAP LAWS

As we have argued in this *Journal*, the Fifth Circuit flatly misconstrued the *Casey* framework.[33] Of course, *Casey* requires judges to balance the benefits of regulating abortion against the burdens on access that a law imposes; how else would a judge determine a burden is "undue?"[34] The determination of which burdens are "undue" is inherently comparative and contextual.[35] And it is empirical. In applying undue burden analysis to health regulations in *Casey* itself, the Court observed that "Unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right."[36] How are judges to determine whether a health regulation is "unnecessary" without examining the evidence supporting the state's case for regulating?

But, as we have argued, there is a deeper reason why judges must examine the factual basis of the state's claim to regulate abortion in the interests of protecting women's health. In *Casey*, the Supreme Court revised the *Roe* framework to allow the state greater opportunities to protect life throughout preg-

29. *Id.* at 596.

30. Whole Woman's Health v. Lakey, 769 F.3d 285, 297 (5th Cir. 2014).

31. Planned Parenthood of Ariz. v. Humble, 753 F.3d 905 (9th Cir. 2014); Planned Parenthood of Wis. v. Van Hollen, 738 F.3d 786 (7th Cir. 2013).

32. *Van Hollen*, 738 F 3d at 798.

33. Greenhouse & Siegel, *supra* note 5, at 1466-73.

34. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992).

35. Greenhouse & Siegel, *supra* note 5, at 1476-78.

36. *Casey*, 505 U.S. at 878-79.

nancy.[37] Yet, at one and the same time, *Casey* affirmed a woman's right to decide whether to carry a pregnancy to term: "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment."[38] For this reason, *Casey* imposed crucial restrictions on the *means* by which the government could protect fetal life: "[T]he 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."[39] Under *Casey*, states can protect potential life by persuading a woman to carry a pregnancy to term, but may not do so by obstructing her access to abortion.

Thus, while government can enact dissuasive regulation to protect unborn life, it cannot achieve that end through unnecessary health regulations that have the effect of obstructing access. Yet at numerous junctures Texas was open in claiming a fetal-protective goal in enacting the admitting privileges and surgical center requirement. The Governor of Texas explained that "Texas' goal is to protect innocent life, while ensuring the highest health and safety standards for women,"[40] and state officials repeatedly acknowledged that they sought to protect unborn life as well as women's health.[41]

Even when the state was not expressly invoking its interest in protecting unborn life, it made that goal apparent in the way it singled out abortion for health regulation. Texas engaged in what we have called "abortion exceptionalism," treating the health regulation of abortion differently from other forms of health regulation.[42] Singling out abortion for onerous health regulation that is not applied to other medical procedures of similar or even greater risk, out of

---

37. *Id.* at 872-73.

38. *Id.* at 851.

39. *Id.* at 877.

40. *Governor Abbott Statement on Supreme Court's HB 2 Ruling*, OFFICE OF THE GOVERNOR GREG ABBOTT (June 27, 2016), http://gov.texas.gov/news/press-release/22427 [http://perma.cc/Y32M-65DS]. The Governor of Mississippi described the goals of an admitting privilege law that threatened to close the last abortion clinic in the state in remarkably similar terms. *See* Phil Bryant, Miss. Governor, State of the State Address (Jan. 22, 2014), http://www.jacksonfreepress.com/news/20l4/jan/22/gov-bryants-state-state-speech [http://perma .cc/RV77-AP75]; Greenhouse & Siegel, *supra* note 5, at 1452.

41. For examples, see Greenhouse & Siegel, *supra* note 5, at 1452 n.115, 1452-53 n.117; and *supra* text accompanying note 26. Advocates also depicted the Texas legislation as designed to protect unborn life. *See* Steven Ertelt, *Supreme Court Overturns Texas Law Saving Tens of Thousands of Babies From Abortion*, LIFE NEWS (June 27, 2016, 10:12 AM), http://www.lifenews.com/2016/06/27/supreme-court-overturns-texas-law-saving-tens-of-thousands-of-babies-from-abortion/ [http://perma.cc/SCJ4-QR8C].

42. *See* Greenhouse & Siegel, *supra* note 5, at 1446-49.

express or implied concern for unborn life, is constitutionally suspect.[43] Disparate and unwarranted health regulation that hinders exercise of women's choice violates *Casey*'s protections for women's dignity.[44]

III. PROTECTING THE WHOLE WOMAN

The Supreme Court's opinion in *Whole Woman's Health* is remarkable for its total repudiation of the Fifth Circuit's reading of the undue burden framework,[45] and more broadly, of the TRAP law strategy that Texas and other states employed.

Specifically rejecting the reasoning of the Fifth Circuit, Justice Breyer insists that *Casey* requires balancing: "The rule announced in *Casey* . . . requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer."[46] In "weigh[ing] the asserted benefits against the burdens . . . the District Court applied the correct legal standard."[47] And the Court chastises the Fifth Circuit for suggesting that rational basis applied, observing that the Court of Appeals was "wrong to equate the judicial review applicable to the regulation of a constitutionally protected personal liberty with the less strict review applicable where, for example, economic legislation is at issue."[48] The Court further emphasizes that judicial examination of the evidence supporting the state's interest in regulating is an essential portion of the undue burden inquiry, crucial in both the Court's decisions in *Casey* and in *Carhart*.[49] Where the Fifth Circuit held that judges may not inquire into the factual grounds of the state's interest in regulating, the Supreme Court holds that judges must, quoting *Carhart*: "The Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake."[50] The Court's decision is rich with factual findings of the district court and of amici that bear on the balance of benefits and burdens in the case.

As we have observed, *Casey* provides a framework to evaluate health-justified restrictions on abortion: "Unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an

---

43. *See id.* at 1448-49.

44. *See id.* at 1448-49, 1480.

45. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2309-10 (2016) (observing that "[t]he Court of Appeals' articulation of the relevant standard is incorrect" and "simply does not match the standard that this Court laid out in *Casey*").

46. *Id.* at 2309.

47. *Id.* at 2310.

48. *Id.* at 2309.

49. *Id.* at 2310.

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

abortion impose an undue burden on the right."[51] *Whole Woman's Health* applies *Casey*'s undue burden framework to the admitting privileges and surgical center requirements and concludes that "neither of these provisions confers medical benefits sufficient to justify the burdens upon access that each imposes."[52]

Some commentators have read *Whole Woman's Health* as little more than a mechanical exercise in cost-benefit analysis.[53] But reading the opinion in this fashion overlooks how the Court clarifies the law defining what counts as a benefit and a burden to be balanced within the *Casey* framework. In what follows, we examine how the Court assessed the benefits conferred and burdens imposed by the Texas law. Each of these aspects of the Court's ruling will guide judges called upon to determine the constitutionality of health-justified restrictions on abortion; as we show, they should guide evaluation of fetal-protective restrictions on abortion as well.[54]

A. Evidence-Based Balancing

Justice Breyer's unusually close examination of the facts as he identifies and balances the benefits and burdens of the Texas law models a kind of scrutiny that few TRAP laws could withstand.[55] In reviewing the detailed evidence provided in trial by the plaintiffs' experts and on appeal by medical organizations

---

51. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 878 (1992).

52. *Whole Woman's Health*, 136 S. Ct. at 2300.

53. *See, e.g.*, Noah Feldman, *Will Cost-Benefit Test Be New Tool for Abortion Foes?*, CHI. TRIB. (June 27, 2016, 5:44 PM), http://www.chicagotribune.com/news/opinion/commentary/ct-abortion-restrictions-texas-supreme-court-20160627-story.html [http://perma.cc/NK3X-NVAW]; *see also* Kevin C. Walsh, *Symposium: The Constitutional Law of Abortion After* Whole Woman's Health – *What Comes Next?* 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/ [http://perma.cc/Z5QT-RCGB].

54. As the Court points out, the undue-burden framework, requiring courts to balance a law's benefits against the burdens it imposes, applies to the range of abortion restrictions that serve state interests beyond women's health. *Whole Woman's Health*, 136 S. Ct. at 2309. *Casey*, of course, applied the undue burden framework to fetal-protective as well as health-justified restrictions on abortion. *See Casey*, 505 U.S. at 882, 885-86, 887-98 (applying the undue burden framework to the dissuasive counseling, waiting period, and spousal notice requirements).

55. Leading antiabortion advocates read *Whole Woman's Health* as restricting the TRAP strategy. Even AUL agrees, although it plans to press ahead with "more narrowly targeted" regulations of abortion providers. *See* Julie Rovner, *Anti-Abortion Groups Take New Aim with Diverse Strategies*, NAT'L PUB. RADIO (July 20, 2016, 5:00 AM), http://www.npr.org/sections/health-shots/2016/07/20/486652584/anti-abortion-groups-take-new-aim-with-diverse-strategies [http://perma.cc/JMZ4-KT5H].

as amici, Justice Breyer documents the "virtual absence of any health benefit"[56] conferred by the Texas law. And examining the evidence about the law's impact—its role in closing clinics and shrinking the available medical care—Justice Breyer concludes that the law was at cross-purposes with its stated ends.[57] A "commonsense inference," he observes, is that the effect of the Texas law "would be harmful to, not supportive of, women's health."[58]

This evidence-based balancing of the law's benefits and burdens calls into question Texas' very purpose in enacting the state's health-justified restrictions on abortion. While the majority never explicitly states that Texas enacted the admitting privileges and surgical center requirements with a purpose to obstruct women's access to abortion, the Court's deep skepticism of the state's actual motivation shines through the opinion. The Court repeatedly observes that the restrictions served little or no health benefit, and takes account of many ways the law adversely affected women's access.[59] Judges are extremely reluctant to accuse the government of acting with an unconstitutional purpose.[60] But *Whole Woman's Health* provides a textbook illustration of how a court can show unconstitutional purpose without explicitly asserting it.

The fact that, as Justice Breyer shows, Texas singled out abortion for onerous forms of health regulation that it did not apply to procedures of much greater risk only amplifies this suggestion.[61] In her concurring opinion, Justice

---

56. *Whole Woman's Health*, 136 S. Ct. at 2313. Justice Breyer points to the absence of health benefits in several ways. *See, e.g.*, *id.* at 2311-12, 2315.

57. For discussion of the law's impact on the clinics, see *id.* at 2312-13, 2316-18.

58. *Id.* at 2318. The opinion is notable for its willingness to step back and assess the likely *cumulative* impact of the challenged regulations on actual—rather than claimed—health outcomes for women. *See infra* Section III.B.

59. *See supra* text accompanying note 56; *infra* notes 70-73 and accompanying text.

60. *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 208 (1962) ("There is a wise and ancient doctrine . . . that a Court will not inquire into the motives of a legislative body or assume them to be wrongful." (quoting United States v. Constantine, 296 U.S. 287, 299 (1935) (Cardozo, J., dissenting))). In his first encounter with Wisconsin's admitting privileges law, Judge Posner affirmed a preliminary injunction while declining to hold that the legislature, which gave doctors a single holiday weekend to come into compliance, "intended to hamstring abortion." He observed: "Discovering the intent behind a statute is difficult at best because of the collective character of a legislature, and may be impossible with regard to the admitting-privileges statutes." Planned Parenthood of Wis. v. Van Hollen, 738 F.3d 786, 791 (7th Cir. 2013). But two years later, in his final ruling on the merits, Judge Posner marshaled the evidence and reached a conclusion: "the legislature's intention to impose the two-day deadline, the effect of which would have been to force half the Wisconsin abortion clinics to close for months, is difficult to explain save as a method of preventing abortions that women have a constitutional right to obtain." Planned Parenthood of Wis. v. Schimel, 806 F.3d 908, 912 (7th Cir. 2015).

61. *See Whole Woman's Health*, 136 S. Ct. at 2315 (comparing the state's regulation of abortion to its regulation of more dangerous procedures including colonoscopy, liposuction, and child-

Ginsburg also emphasizes that the state had singled out abortion for onerous regulation that it did not direct at procedures of greater risk, and observes more bluntly: "Given those realities, it is beyond rational belief that H.B. 2 could genuinely protect the health of women, and certain that the law 'would simply make it more difficult for them to obtain abortions.'"[62]

The Court invalidates the Texas law on grounds that cast into doubt the constitutionality of other TRAP laws that single out abortion for special health regulation—not only ambulatory surgical center and admitting-privileges laws,[63] but also, for example, laws that prohibit the use of telemedicine for medication abortion only[64] or that require abortion providers to give inspectors access to many more patient records than health care professionals who "perform more complicated procedures and have more adverse outcomes" must supply.[65]

In evaluating the state's interest in restricting abortion, the Court closely scrutinizes scientific evidence marshaled by opposing parties. Evidence-based balancing of this kind will guide courts in evaluating the state interest in enacting health-justified restrictions on abortion such as laws in Texas and Kansas

---

birth, the last of which Justice Breyer notes is "14 times more likely than abortion to result in death").

62. *Id.* at 2321 (quoting *Schimel*, 806 F.3d at 910). In an interview after the close of the Term with the Associated Press, Justice Ginsburg explained the motivation for her separate opinion: "I fully subscribe to everything Breyer said, but it was long, and I wanted something pithy. I wrote to say 'Don't try this anymore.'" Mark Sherman, *AP Interview: Ginsburg Doesn't Want To Envision a Trump Win*, ASSOCIATED PRESS: BIG STORY (July 8, 2016, 11:46 AM), http://bigstory.ap.org/article/0da3a641190742669ccod01b90cd57fa/ap-interview-ginsburg-reflects-big-cases-scalias-death [http://perma.cc/7DQJ-SE37].

63. Hours after the Court handed down *Whole Woman's Health*, Alabama's Attorney General announced that the state would drop its appeal of a U.S. district court decision invalidating the state's admitting privileges law. *See* Mike Cason, *Alabama AG Luther Strange Says State Will Drop Appeal of Abortion Ruling*, AL (June 27, 2016, 3:54 PM), http://www.al.com/news/index.ssf/2016/06/alabama_ag_luther_strange_says.html [http://perma.cc/SQA9-SKKT]. The state's appeal was pending in the Eleventh Circuit. The Attorney General, Luther Strange, said that in light of the Supreme Court's ruling, "there is no good faith argument that Alabama's law remains constitutional." *Id.* The day after the ruling, the Supreme Court denied certiorari to two states' appeals of decisions that had invalidated similar laws in Mississippi (Currier v. Jackson Women's Health Org., 136 S. Ct. 2536 (2016)) and Wisconsin (Schimel v. Planned Parenthood of Wis., 136 S. Ct. 2545 (2016)). Admitting privileges laws were enacted in about ten states. *Targeted Regulation of Abortion Providers*, GUTTMACHER INST., http://www.guttmacher.org/state-policy/explore/targeted-regulation-abortion-providers [http://perma.cc/D9D5-FDZC].

64. Planned Parenthood of the Heartland v. Iowa Bd. of Med., 865 N.W.2d 252 (Iowa 2015); *see also* Greenhouse & Siegel, *supra* note 5, at 1462.

65. Planned Parenthood of Sw. & Cent. Fla v. Philip, 2016 WL 3556568, at *6 (N.D. Fla. 2016).

requiring scientifically inaccurate warnings that abortion causes breast cancer.[66] Courts must also weigh scientific evidence when evaluating counseling laws in at least nine states requiring abortion providers to inform women that they are more likely to experience psychological harm if they obtain abortions than if they carry their unplanned pregnancies to term[67]—claims that social scientists have debunked.[68] Evidence-based balancing of this kind should also guide

66. Some states require doctors to give women seeking abortion frightening and highly contested medical advice, such as that abortion may cause breast cancer. *See Counseling and Waiting Periods for Abortion*, GUTTMACHER INST., http://www.guttmacher.org/state-policy/explore/counseling-and-waiting-periods-abortion [http://perma.cc/8WDE-CFQA] (stating that Texas and Kansas law require counseling materials to inaccurately assert a link between abortion and an increased risk of breast cancer, and that the same link is included in counseling materials in Alaska, Mississippi, and Oklahoma although not specified by state law). These claims appear in a pamphlet called "A Woman's Right to Know," which the Texas Department of State Health Services publishes and distributes in accordance with state law. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 171.012-171.014 (West 2010); *A Woman's Right to Know, Informational Material*, TEXAS DEP'T OF STATE HEALTH SERVS. (2016), http://www.texasrighttolife.com/wp-content/uploads/2016/07/NewWRTKdraft.pdf [http://perma.cc/G3ZR-AVN4]. Claims of this kind should violate *Casey*'s "truthful and not misleading" standard. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 882 (1992) (discussing constitutional forms of dissuasion). Government authorities have refuted the claimed link between abortion and breast cancer. *See* Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under* Casey/Carhart, 117 YALE L.J. 1694, 1720-21 n.81 (2008). For additional respects in which the Texas statement asks providers to provide women inaccurate information, see Daniel Grossman, *State's "Woman's Right To Know" Booklet Is Lacking*, AUSTIN AM.-STATESMAN (Aug. 5, 2016, 5:00 AM), http://www.mystatesman.com/news/news/opinion/grossman-states-womans-right-to-know-booklet-is-la/nr9jZ/ [http://perma.cc/MHQ7-8A6V].

67. *See Counseling and Waiting Periods for Abortion*, *supra* note 66 (stating that out of twenty-two states that have counseling laws that include information on possible psychological responses to abortion, nine states stress negative emotional responses); Katherine Shaw & Alex Stein, *Abortion, Informed Consent, and Regulatory Spillover*, 92 IND. L.J. (forthcoming 2016) (manuscript at 11-12) (on file with authors) (listing fourteen states in which doctors must inform women about the risk of post-abortion depression and describing the spillover effects these requirements have in states that lack the requirement yet follow a "patient expectation" informed consent standard).

68. For a comprehensive review of the social science literature regarding mental health and abortion, see APA Task Force on Mental Health & Abortion, *Report of the Task Force on Mental Health and Abortion*, AM. PSYCHOLOGICAL ASS'N (2008), http://www.apa.org/pi/women/programs/abortion/mental-health.pdf [http://perma.cc/NBV7-8A9J], which found that among adult women who have an unplanned pregnancy, the relative risk of mental health problems is no greater if they have a single elective first-trimester abortion than if they deliver that pregnancy. *See also* M. Antonia Biggs et al., *Does Abortion Increase Women's Risk for Post-Traumatic Stress? Findings from a Prospective Longitudinal Cohort Study*, 6 BMJ OPEN (2016) (concluding after a longitudinal study of women who sought abortion care that women who obtained abortions are no more likely to experience post-traumatic stress symptoms within four years than women who are denied abortions and must carry their unwanted pregnancies to term).

courts in evaluating fetal-protective abortion restrictions that rest on contested factual claims—for example, claims that abortion before viability inflicts fetal pain.[69]

B. Evaluating the Impact of Abortion Restrictions on Women's Lives

Another groundbreaking and perhaps unanticipated aspect of the *Whole Woman's Health* opinion is the Court's manifest concern for the impact of TRAP laws on women. The Fifth Circuit's narrow reading of *Casey* would seem to permit the government to impose any burdens on women's access to abortion short of a criminal ban. *Whole Woman's Health* categorically rejects that view.

In *Whole Woman's Health*, the Court evaluates the burdens of abortion restrictions with the same care it devotes to evaluating the benefits of abortion restrictions. In identifying the burdens imposed by the Texas law, the Court describes how enforcing the law would transform women's experience of abortion, and treats these changes in the conditions of access as constitutionally cognizable harms to women. The Court observes that the admitting privileges law led to the closure of half of Texas' clinics, and notes: "Those closures meant fewer doctors, longer waiting times, and increased crowding."[70] To this Court it matters not only whether women can ultimately manage to get an abortion, but also how the state degrades the conditions in which women must make and act on decisions about abortion. The Fifth Circuit read *Casey* as authorizing state laws that inflict on women increased driving distances of up to 150 miles.[71] But

---

69. For an account of laws on fetal pain, see *Counseling and Waiting Periods for Abortion*, GUTTMACHER INST., http://www.guttmacher.org/state-policy/explore/counseling-and-waiting-periods-abortion [http://perma.cc/4KET-UB6N], which lists the twelve states that require counseling on the ability of the fetus to feel pain, the thirty-three states that require that women be told the gestational age of the fetus, and the twenty-eight states that require counseling on fetal development throughout pregnancy. For a recent statement by the American Congress of Obstetricians and Gynecologists on research refuting the claim that the fetus at 20 weeks development can feel pain, see *Texas-ACOG Statement Opposes Texas Fetal Pain Legislation, HB 2364*, AM. CONG. OF OBSTETRICIANS AND GYNECOLOGISTS (Apr. 10, 2013), http://www.acog.org/-/media/Departments/State-Legislative-Activities/20130410CookLtr.pdf [http://perma.cc/5V4J-847B]. *See also* Susan J. Lee et al., *Fetal Pain: A Systematic Multidisciplinary Review of the Evidence*, 294 J. AM. MED. ASS'N 947 (2005); Mark S. DeFrancesco, *No Evidence to Show Fetal Pain in Second Trimester*, MEDSCAPE (May 27, 2015), http://www.medscape.com/viewarticle/845157 [http://perma.cc/KU6S-Y75F].

70. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2313 (2016).

71. *See* Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 748 F.3d 583, 598 (5th Cir. 2014); Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 734 F.3d 406, 415 (5th Cir. 2013).

Whole Woman's Health repudiates this understanding of *Casey*. The Court recognizes that, especially when considered in combination with other burdens, increased driving distances may count as a constitutionally cognizable obstacle to women's exercise of their rights.[72]

While the Fifth Circuit reasoned as if *Casey* and the Constitution allowed the state to impose almost any obstacle to abortion short of criminalization, in *Whole Woman's Health* the Court assesses the impact of an abortion restriction in constitutional terms sensitive to women's experience in making and carrying out a decision to end a pregnancy. The Court considers restrictions cumulatively and in context, describing how, taken as a whole, they will alter the lived conditions of exercising the abortion right. These concerns are evident in the way the majority assesses the impact of the surgical center requirement:

> [I]n the face of no threat to women's health, Texas seeks to force women to travel long distances to get abortions in crammed-to-capacity superfacilities. Patients seeking these services are less likely to get the kind of individualized attention, serious conversation, and emotional support that doctors at less taxed facilities may have offered. Healthcare facilities and medical professionals are not fungible commodities. Surgical centers attempting to accommodate sudden, vastly increased demand . . . may find that quality of care declines.[73]

In analyzing how a restriction on abortion will detrimentally alter the conditions in which women exercise their right to an abortion, the Court assesses constitutionally cognizable harms in ways that should guide judges in applying the undue burden framework to laws enacted to protect potential life as well as women's health. *Whole Woman's Health* does not speak to the weight that any given judge will attach to the state's interest in enacting restrictions on abortion to protect fetal life. But the decision contains law governing the identification of benefits and burdens in such cases. The decision guides judges in evaluating claims of scientific fact that a state may assert to justify fetal-protective regulation,[74] and the decision guides judges in evaluating the burdens on women's access to abortion that fetal-protective restrictions may impose. For these reasons, *Whole Woman's Health* will have consequences for the constitutionality of fetal-protective as well as health-justified restrictions on abortion.

---

72. *See Whole Woman's Health*, 136 S. Ct. at 2313.

73. *Id.* at 2318.

74. *See supra* note 69 (discussing fetal-pain) and accompanying text.

CONCLUSION

In securing women's control over the abortion decision, *Casey* safeguards women's liberty, equality, and dignity.[75] We have argued that this core constitutional commitment should continue to guide judges in evaluating the constitutionality of abortion restrictions, whether health-justified or fetal-protective.[76]

Whole Woman's Health does not expressly discuss the constitutional values at the core of the abortion right. But the Court demonstrates its attention to the constitutional values at stake in the care it devotes to scrutinizing the facts[77] and to identifying and balancing benefits and burdens under the *Casey* framework. Concern for protecting women's liberty, equality, and dignity guides the majority's close scrutiny of the rationale for health regulations that obstruct access to abortion, and its sensitivity to the impact of these laws on women's lives.

Linda Greenhouse is Joseph Goldstein Lecturer in Law, Yale University. Reva B. Siegel is Nicholas deB. Katzenbach Professor of Law, Yale University. *For comments on the manuscript, we thank Jack Balkin, Douglas NeJaime, Neil Siegel, and Priscilla Smith. For research assistance, we thank Olivia Horton and Emma Roth.*

Preferred Citation: Linda Greenhouse & Reva B. Siegel, *The Difference a Whole Woman Makes: Protection for the Abortion Right After Whole Woman's Health*, 126 YALE L.J. F. 149 (2016), http://www.yalelawjournal.org/forum/the-difference-a-whole-woman-makes.

---

75. *See* Greenhouse & Siegel, *supra* note 5, at 1434-44 (discussing the values at *Casey*'s core); Siegel, *supra* note 66, at 1735-66, 1751 ("The joint opinion does not understand abortion regulation as a zero-sum game requiring a choice between dignity as life and dignity as liberty or equality; instead, the undue burden framework requires government to vindicate multiple dimensions of human dignity, concurrently. The joint opinion adopts an undue burden framework that allows government to regulate abortion in ways that respect the dignity of life, so long as the regulation respects the dignity of women.").

76. *See* Greenhouse & Siegel, *supra* note 5, at 1434-44 (analyzing health-justified restrictions on abortion); Siegel, *supra* note 66, at 1746-48 (analyzing fetal-protective restrictions on abortion).

77. *See Whole Woman's Health*, 136 S. Ct. at 2310 (quoting Gonzales v. Carhart, 550 U.S. 124, 165 (2007)).