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INTRODUCTION

We have fundamentally mischaracterized the undue-burden standard. Because of its prominence in abortion law, we often think of the standard as an anomaly—a distortion of legal doctrine that characterizes the Supreme Court's jurisprudence on reproductive rights.[1] And because of its place in abortion law, we often see the undue-burden standard as a relatively toothless alternative to strict

1. For arguments of this kind, *see, e.g.*, Caitlin Borgmann, *Abortion Exceptionalism and Undue Burden Preemption*, 71 WASH. & LEE L. REV. 1047, 1048 (2014); Caroline Mala Corbin, *Abortion Distortion*, 71 WASH. & LEE L. REV. 1175, 1210 (2014) ("Abortion exceptionalism means the rules are different for abortion cases.").

scrutiny.[2] As a result, the Supreme Court's recent decision in *Whole Woman's Health v. Hellerstedt*[3] was a surprising, if modest, reinvention of an abortion-specific undue-burden standard.[4] But by misunderstanding what the undue-burden standard has meant, we have almost erased its rich history as an alternative approach to fundamental-rights jurisprudence, and we have missed the potential jurisprudential impact of *Whole Woman's Health*.

This Article shows that rather than the weak alternative to strict scrutiny as many describe it, the undue-burden standard is as an effective tool for social movements challenging the distinction between a constitutionally-recognized right and an unprotected privilege. The Article also shows that unlike the versions of the undue-burden standard that critics often target, its recent history includes more meaningful forms of review. The standard allows attorneys to challenge seemingly-neutral laws—including those framed as conferring benefits or privileges—by bringing out evidence of their real-world impact. While the Court has not always embraced this version of the undue-burden test, the understanding set out in *Whole Woman's Health* has deeper roots. Put in proper context, *Whole Woman's Health* represents an important new approach to analyzing fundamental-rights cases in other contexts, including voting rights, gun control, and unconstitutional conditions.

The Article proceeds in four parts. Part I examines the genesis of three fundamentally different versions of the undue-burden standard in the 1970s and 1980s. This Part shows that religious believers and supporters of reproductive rights crafted one version of the standard to attack apparently-neutral laws. Other social-movement attorneys picked up on a different understanding of the undue-burden test, one that reinforced the distinction between a right and a privilege. This Part shows that these competing versions of the undue-burden

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2. *See, e.g.*, Katherine Shaw & Alex Stein, *Abortion, Informed Consent, and Regulatory Spillover*, 92 IND. L.J. 1, 3 (2016) (reasoning that the undue-burden standard "has vindicated state regulation of abortion facilities, procedures, and decisions"); Linda Wharton, Susan Frietsche, & Kathryn Kolbert, *Preserving the Core of Roe: Reflections on Planned Parenthood v. Casey*, 18 YALE J. L. & FEMINISM 317, 327 (2006).

3. 136 S. Ct. 2292, 2318 (2016).

4. For commentary on the impact of *Whole Woman's Health*, *see* Elizabeth Price Foley, *Whole Woman's Health and the Supreme Court's Kaleidoscopic Review of Constitutional Rights*, 2016 CATO SUP. CT. REV. 153; Reva B. Siegel & Linda Greenhouse, *The Difference a Whole Woman Makes: Protection for the Abortion Right After Whole Woman's Health*, 126 YALE L.J. FORUM 149 (2016); Steven Morrison, *Personhood Amendments After Whole Woman's Health v. Hellerstedt*, 67 CASE W. L. REV. 447 (2016).

standard ran through the jurisprudence of the Supreme Court and the lower courts for more than a decade.

Part II revisits *Whole Woman's Health*, revealing how it resurrects a potent version of the undue-burden standard. Part III explores the possible impact of the decision on the Court's analysis of fundamental rights, and Part IV briefly concludes.

I. THE CREATION OF UNDUE-BURDEN STANDARDS

The undue-burden standard bears a striking similarity to tests used in unrelated doctrinal areas. As Gillian Metzger has shown, the version of the undue-burden standard test embraced in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[5] bears a striking similarity to several doctrinal approaches in constitutional law, including the Dormant Commerce Clause and the Establishment Clause.[6] But commentators have mostly missed the fact that well before *Casey*, activists and judges saw and exploited the possibilities inherent in the standard.

Between 1977 and 1992, in the abortion context alone, the Supreme Court recognized several versions of the undue-burden standard. Although it emerged because of the constraints imposed by *Roe*'s trimester framework, the standard addressed problems common across doctrinal areas. Understanding the reasons that the Court proposed different concepts of an undue burden—and how those concepts differed from one another—helps us to make sense of what *Whole Woman's Health* means.

The Court developed an undue-burden standard as an alternative to what had become a rigid trimester framework developed in *Roe v. Wade*. Under *Roe*, the states had very little power to regulate abortion in the first trimester of pregnancy.[7] In the second trimester, the states could regulate to protect women's health.[8] Only after fetal viability could the states act to protect fetal life.[9] But by the 1970s, perhaps because of the rigidity of the trimester framework, the Court no longer consistently applied it. Instead, over the course of the next decade, the Court sometimes looked to an alternative doctrinal approach: the undue-burden standard. On close examination, however, the Court developed not one but several conflicting ideas of an unconstitutional

5. 505 U.S. 833 (1992) (plurality decision).

6. *See* Gillian E. Metzger, *Unburdening the Undue Burden Standard: Orienting Casey in Constitutional Jurisprudence*, 94 COLUM. L. REV. 2025, 2025–40 (1994).

7. 410 U.S. 113, 163 (1973).

8. *Id.* at 163–64.

9. *See id.*

burden on the right to choose abortion. By closely looking at these competing undue-burden standards, we can better see the origins and impact of *Whole Woman's Health.*

One version of the standard, embodied in *Maher v. Roe*[10] and *Harris v. McRae,*[11] used the undue-burden standard to rearticulate and reinforce the distinction between a right and a privilege. A second, articulated by Justice Sandra Day O'Connor in 1983,[12] presented the undue-burden as a less-protective alternative that triggered strict scrutiny only when a law created an absolute or far-reaching obstacle. A third, less well-known version, endorsed in cases like *Bellotti v. Baird I* and *II,*[13] *City of Akron v. Akron Center for Reproductive Health (Akron I),*[14] and *Planned Parenthood of Kansas City v. Ashcroft,*[15] proposed that courts should require meaningful proof of the purpose and effect of any law, regardless of whether lawmakers framed it as the regulation of a welfare benefit. This final understanding of the standard drew on other articulations of an undue-burden in constitutional law, including those tied to the free exercise of religion.[16]

The differences between these ideas about the undue-burden standard gradually blurred as the Supreme Court seemed ready to overrule *Roe.* Supporters of abortion rights sometimes strategically positioned the undue-burden standard as another form of deferential rational-basis review, daring the Court to face the backlash that would accompany a decision explicitly overruling *Roe.*[17]

The Court's decision in *Casey* made it harder to remember the history of the many undue-burden standards that had once been available to attorneys. *Casey* suggested that all of the past mentions of an undue-burden standard signaled the application of a single, coherent test.[18] For this reason, after *Casey,* contests about the

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10. 432 U.S. 464 (1977).

11. 448 U.S. 297 (1980).

12. Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 431–35 (1983) (O'Connor, J., dissenting).

13. 428 U.S. 132 (1976); 443 U.S. 622 (1979).

14. 462 U.S. 416 (1983).

15. 462 U.S. 476 (1983).

16. *See infra,* Part I.

17. *See, e.g.,* EDWARD LAZARUS, CLOSED CHAMBERS: THE RISE, FALL, AND FUTURE OF THE SUPREME COURT 462–64 (2005); JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 48–50 (2007).

18. *See Casey,* 505 U.S. at 874–75. Recent studies have shown that rational-basis review, like the undue-burden standard, itself has a complex history, one that suggests that the standard is far from universally deferential; *see, e.g.,* Katie Eyer,

meaning of an undue burden faded from view.[19] As importantly, while some commentators and attorneys briefly saw new possibilities after *Casey*,[20] the Court's apparent willingness to uphold almost any abortion regulation quickly obscured the potential of the undue-burden standard.[21] *Casey* and the cases following it were part of a much longer series of conversations about what constituted an undue burden and about the very nature of constitutional rights.

A. The Court Recognizes Three Undue-Burden Standards

When the Supreme Court heard its second case on parental-involvement regulations, the idea of an unconstitutional undue burden was not new. In Establishment Clause and Dormant Commerce Clause cases, the Court applied a related analysis for some time.[22] But it was not until 1976 that the Court first announced an undue-burden test in abortion doctrine.

Bellotti I addressed a Massachusetts law that required most minors to get the consent of both parents before getting an abortion.[23] The law made an exception for minors who could convince a judge that there was "good cause" to proceed without parental approval.[24] Attorneys on both sides assumed that the Court would uphold the law only if it could survive strict scrutiny—that is, if it was narrowly tailored to serve a compelling governmental interest.[25] But the Supreme Court hinted that a different approach would apply in cases involving the reproductive rights of minors.[26]

In reaching a decision, the Court primarily discussed competing interpretations of the purpose and effect of the law.[27] On the surface, the law seemed unobjectionable enough: any minor having good cause to terminate a pregnancy would be able to convince a judge of that

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Constitutional Crossroads and the Canon of Rational Basis Review, 48 U.C. DAVIS L. REV. 527, 548 (2014).

19. *See infra* Part I.

20. *See, e.g.*, Erin Daly, *Reconsidering Abortion Law: Liberty, Equality, and the New Rhetoric of Planned Parenthood v. Casey*, 45 AM. U. L. REV. 77, 81–82 (1994).

21. For commentary on the supposed limits of the undue-burden standard, *see* Shaw & Stein, *supra* note 2 and accompanying text.

22. *See* Metzger, *supra* note 6 at 2042–43.

23. 428 U.S. at 133–34.

24. *Id.* at 134.

25. *See* Brief for the Appellants at 40–53, Bellotti v. Baird, 428 U.S. 132 (1976) (No. 75-73), 1976 WL 181395, at *40; Brief for the Appellees at 35–40, Bellotti v. Baird, 428 U.S. 132 (1976) (No. 75-73), 1976 WL 181395, at *42–47.

26. *See Bellotti I*, 428 U.S. at 143.

27. *Id.*

fact.[28] But was the real-world effect different? Massachusetts argued that the law's "good cause" exception would allow minors to request an abortion from a court without previously contacting their parents.[29] The state claimed that in this way, the law created a "speedy and nonburdensome procedure" that would guarantee young women's "anonymity."[30] Those challenging the law saw it quite differently, suggesting that in practice, the law forced minors to carry an almost-impossible burden of proof if their parents disapproved of an abortion.[31] They claimed that if parents opposed an abortion, a minor would have no realistic way of demonstrating that she was capable of making her own decision.[32]

The Supreme Court could not tell which of these interpretations was right and asked the Massachusetts Supreme Judicial Court to resolve any ambiguity.[33] The Court also suggested that an undue-burden standard, not strict scrutiny, would govern the outcome of the case:

> In *Planned Parenthood of Central Missouri v. Danforth*, we today struck down a statute that created a parental veto. At the same time, however, we held that a requirement of written consent on the part of a pregnant adult is not unconstitutional unless it unduly burdens the right to seek an abortion. In this case, we are concerned with a statute directed toward minors, as to whom there are unquestionably greater risks of inability to give an informed consent. Without holding that a requirement of a court hearing would not unduly burden the rights of a mature adult, we think it clear that in the instant litigation adoption of appellants' interpretation would "at least materially change the nature of the problem" that appellants' claim is presented.[34]

Bellotti I referenced a decision, *Planned Parenthood of Central Missouri v. Danforth*,[35] decided the same day.[36] That case addressed a multi-restriction statute that set out requirements involving, among

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28. *Id.* at 145.
29. *Id.* at 146.
30. *Id.*
31. *Id.* at 147.
32. *Id.*
33. *Id.* at 152.
34. *Id.* at 147 (citations omitted).
35. 428 U.S. 52 (1976).
36. *Bellotti I*, 428 U.S. at 147.

other things, spousal consent, parental involvement, and informed consent.[37] As *Bellotti I* noted, *Danforth* struck down the parental-consultation provision while upholding a requirement on informed consent.[38] The difference, according to *Bellotti I*, came not in the formal requirements of the law.[39] Both requirements said nothing about preventing a woman from terminating a pregnancy.[40] The difference between the informed-consent and parental-consent provisions in *Danforth* lay in the evidence of how they would work.[41] Because the Court concluded that the parental-involvement measure would create a functional veto, it created an undue burden that the statute's informed-consent provision did not.[42]

While *Bellotti I* did not go into much detail, the Court's language brought to mind undue-burden language used in cases involving the free exercise of religion.[43] Following the decision of *Sherbert v. Verner*[44] in 1963, the Court often approached free-exercise cases by asking whether a regulation unduly burdened a believer's free exercise.[45] In these cases, strict scrutiny applied, and a law had to be narrowly tailored to accomplish a compelling purpose.[46]

The parallels between *Bellotti I* and *Sherbert* seemed clear. In *Sherbert*, Adeil Sherbert, a Seventh Day Adventist, lost her job and sought unemployment compensation.[47] Because Saturday counted as the Sabbath in her faith, Sherbert was unwilling to take jobs that required her to work that day.[48] Under state law, recipients could lose eligibility for compensation if they did not have good cause for accepting suitable employment.[49] A state commissioner found the petitioner ineligible for compensation on this basis.[50] The Court asked whether "the purpose or effect of a law [was] to impede the observance

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37. *See Danforth*, 428 U.S. at 65–75.
38. *Id.*
39. *See Bellotti I*, 428 U.S. at 147.
40. *See id.*
41. *See id.*
42. *See id.*
43. *See id.*
44. 374 U.S. 398 (1963).
45. For applications of the *Sherbert* standard, *see* Hobbie v. Unempl. Appeals Comm'n of Fla., 480 U.S. 136, 138–39 (1987); Thomas v. Rev. Bd., 450 U.S. 707, 709–13 (1981); Wisconsin v. Yoder, 406 U.S. 205, 220–21 (1972).
46. *See supra* note 45 and accompanying text.
47. *Sherbert*, 374 U.S. at 399.
48. *Id.*
49. *Id.* at 401.
50. *Id.*

of one or all religions or is to discriminate invidiously between religions."[51]

It did not make a difference to the Court's analysis that access to unemployment compensation could be considered a "privilege" instead of a right.[52] Nor did it matter that the need for unemployment compensation depended on factors outside the government's control, such as Sherbert's qualifications for other jobs.[53] *Sherbert* explained that if a law had the purpose or effect of burdening religious exercise, then the Court would apply strict scrutiny.[54]

Bellotti I hinted that a similar undue-burden test applied to regulations governing both minors and adults.[55] By invoking *Danforth*, the Court suggested that it had already applied such an analysis to cases involving women of any age.[56] Partly for this reason, supporters of abortion rights began experimenting with the undue-burden test in 1976 when the Court took its first cases on abortion funding.[57] Laws restricting the use of public dollars or facilities for abortion presented a difficult challenge for those defending legal abortion. *Roe* and most of the cases following it dealt with laws that punished doctors for performing abortions under certain circumstances. By contrast, funding and facilities laws denied what arguably was a privilege—whether that involved access to a public hospital or Medicaid reimbursement.

The undue-burden test applied in *Sherbert* and *Bellotti I* struck movement lawyers as a promising way to attack these restrictions. Lawyers had an opportunity to test this theory in 1976, when the Court agreed to hear three cases on laws governing the use of public funding or facilities for abortion.[58] *Maher v. Roe*, the lead case, involved a Connecticut regulation prohibiting Medicaid reimbursement for any elective abortion.[59]

Representing those challenging the law, Lucy Katz and Catherine Roraback of the Planned Parenthood League of Connecticut suggested that an undue-burden test should apply to any apparently-neutral

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51. *Id.* at 404.
52. *Id.*
53. *See id.* at 402–03.
54. *Id.* at 403.
55. *See Bellotti I*, 428 U.S. at 147.
56. *See id.*
57. *See, e.g.*, Brief of Appellees, 20–30, Maher v. Roe, 432 U.S. 464 (1977) (No. 75-1440), 1976 WL 181642, at 20–30.
58. *See generally Maher*, 432 U.S. 464 (1977); Beal v. Doe, 432 U.S. 438 (1977); Poelker v. Doe, 432 U.S. 519 (1977).
59. *Maher*, 432 U.S. at 466.

regulation that burdened constitutional rights.[60] They made clear that the analysis was not unique to abortion, citing cases dealing with everything from the right to travel to the free exercise of religion.[61] Katz and Roraback also stressed that the undue-burden standard applied to virtually any kind of law.[62] It made no difference whether the law was discriminatory on its face,[63] nor should it be important whether a law dealt with a "positive" or "negative" right or whether some of the obstacles to the exercise of a right arose for reasons beyond the government's control.[64]

Significantly, Katz and Roraback positioned the undue-burden standard as an alternative to more familiar doctrinal approaches taken in welfare cases.[65] For example, in cases addressing residency requirements, the Court had sometimes applied unconstitutional-conditions doctrine.[66] In unconstitutional-conditions cases, the Court reasoned that the government could not condition receipt of a welfare benefit on the surrender of a constitutional right.[67] Roraback and Katz presented the unconstitutional-conditions doctrine as one reason that the Court might invalidate Connecticut's welfare regulation.[68]

But they also presented the undue-burden standard as a different way of viewing welfare cases. First, under the undue-burden standard, the Court would ask if a law had the purpose or effect of burdening a right.[69] This inquiry would apply regardless of whether a law involved a privilege or a criminal restriction and regardless of whether a law on its face addressed the right at issue.[70] If such a burden applied, the Court would apply strict scrutiny.[71]

Katz and Roraback walked through how this undue-burden standard applied in both free-exercise and abortion cases. Katz and Roraback argued that in *Danforth* and *Bellotti*, the Court focused on "the actual impact on the abortion decision" created by each challenged provision.[72] To be sure, parental-involvement laws did not

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60. *See* Brief of Appellees, *supra* note 57 at 20–30.
61. *Id.* at 13–15.
62. *Id.* at 20–30.
63. *Id.*
64. *Id.*
65. *Compare id.* at 15–18 *with id.* at 20–30.
66. *See, e.g.*, Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1416 (1989).
67. *Id.*
68. *See* Brief of Appellees, *supra* note 57 at 15–16.
69. *Id.* at 20–22.
70. *See id.*
71. *See id.*
72. *Id.* at 20.

formally say that any woman could not get an abortion.[73] Yet their practical effect could be to give parents a functional veto.[74] Similarly, when Missouri banned saline abortions, a then-common second trimester technique, the Court looked at how the law would affect access to any abortion procedure after the first trimester.[75] For Roraback and Katz, this was the same inquiry applied in *Sherbert*.[76] The burden created in *Sherbert* was onerous even though no one had a right to unemployment compensation.[77]

Roraback and Katz's vision of the undue-burden standard shared a great deal with other doctrinal approaches, especially a fact-intensive examination of the purpose and effect of a law. In public-forum cases, for example, the Court closely examines evidence concerning the use of a property.[78] The Court also focuses on the purpose and effect of a law regulating speech in a traditional public forum.[79] In the context of the Establishment Clause, the Court also looked closely at the facts of a case to determine whether the purpose of a law is to endorse or disapprove of religion or whether the effect of such a law is to send a message of endorsement or disapproval.[80] Roraback and Katz saw something similar at work in abortion and free-exercise cases.[81] When a fundamental right was at issue, an undue-burden standard could apply to any kind of regulation that impacted a right.[82]

Connecticut interpreted the undue-burden standard in a quite different way. In its brief, the State claimed that the Court had applied a version of the standard in cases involving the right to travel.[83] According to Connecticut, the justices had invalidated residency requirements governing access to non-emergency medical care, welfare benefits, or the right to vote.[84]

Connecticut distinguished these cases, thereby outlining a different idea of an undue burden.[85] As Connecticut saw it, the undue-burden standard updated and reinforced the distinction between a

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73. *See id.* at 20–21.
74. *See id.*
75. *Id.*
76. *See id.* at 14, 21.
77. *See id.* at 14.
78. *See, e.g.*, Metzger, *supra* note 6 at 2063–65.
79. *Id.*
80. *Id.* at 2072–73.
81. *See* Brief of Appellees, *supra* note 57 at 20–22.
82. *See id.*
83. Brief of the Appellant, 9–14, *Maher v. Roe*, 432 U.S. 464 (1977) (No. 75-1440).
84. *Id.* at 13.
85. *See id.* at 13–16.

right and a privilege.[86] The right-to-travel cases involved laws that restricted or punished people.[87] These laws "impinged upon the plaintiffs' right to travel by *preventing* them from receiving nonemergency medical care, in the former case, and public welfare benefits in the latter."[88] If the government did not create the obstacles to a person exercising a right, no legal burden existed on that right, much less an undue one.[89]

Connecticut argued that in *Maher*, any obstacles had nothing to do with the government.[90] Women were poor for other reasons.[91] Doctors' inability to perform the procedure for a discount or work out a payment plan also could not be blamed on the government.[92] This, in Connecticut's view, reflected the true meaning of an unconstitutional undue burden.[93] Connecticut did not read *Bellotti I* and *Danforth* as creating a new, fact-intensive approach to fundamental-rights cases.[94] Instead, Connecticut reasoned that the Court had simply restated the distinction between a positive and negative right.[95]

When the Court issued a decision in 1977, *Maher* began a decades-long debate on the Court about what the undue-burden test meant to abortion doctrine and to fundamental-rights cases more broadly.[96] Did the undue-burden standard bolster and expand the right/privilege distinction? Did it thinly disguise some form of rational basis review? Or was it an alternative, fact-intensive approach to fundamental-rights cases that undermined the distinction between a right and a privilege? *Maher* itself suggested answers to only some of these questions. The Court indicated that at a minimum, the undue-burden test applied to all abortion regulations, not just those involving minors.[97] The Court further held that the abortion "right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy."[98]

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86. *See id.*
87. *See id.*
88. *Id.* at 14 (emphasis in original).
89. *See id.* at 13–16.
90. *See id.*
91. *See id.* at 14–15.
92. *See id.* at 14.
93. *See id.* at 15.
94. *See id.*
95. *Id.*
96. *See Maher*, 432 U.S. at 471–74.
97. *Id.* at 472–74.
98. *Id.* at 474.

Maher further implied that the undue-burden test neither resembled the one applied in free-exercise cases nor undermined the distinction between a privilege and a right.[99] First, the Court suggested that there was something distinctive about the abortion context.[100] In Establishment Clause cases, for example, it might raise a concern if the government seemed to favor religion over non-religion or show a preference for one religion over another.[101] *Maher* reasoned that by contrast, in the abortion context, there was no constitutional "limitation on the authority of the State to make a judgment favoring childbirth over abortion. . . ."[102]

Regardless of how broadly the undue-burden standard applied, *Maher* also interpreted it as a restatement of the right/privilege distinction.[103] Rather than asking whether a law impacted a negative or a positive right, the Court focused on where the obstacles to the exercise of a right came from.[104] As the *Maher* Court saw it, women's poverty did not depend on anything done by the state.[105] The Court explained that "[a]n indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth [because] she continues as before to be dependent on private sources for the service she desires."[106]

Maher represented one of several competing visions of the undue-burden standard that took hold in the coming years. When *Bellotti* returned to the Court, the decision suggested that the undue-burden standard might not always operate as it did in *Maher*.[107] The Massachusetts Supreme Judicial Court held that the law allowed judges to stop a young woman from having an abortion if they found the procedure was not in her best interest, regardless of whether the minor was mature.[108] The court had also interpreted the law to allow

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99. *See id.*

100. *See id.*

101. Some members of the Court would allow for laws preferring religion over irreligion and privileging Judeo-Christian faith traditionally favored by some of the Framers, while others embrace a neutrality principle that would prohibit the government from preferring religion over irreligion or placing one faith above others. *See, e.g.*, Christopher Harwood, *Evaluating the Supreme Court's Establishment Clause Jurisprudence in the Wake of Van Orden v. Perry and McCreary v. ACLU*, 71 MO. L. REV. 317, 350–60 (2006).

102. *Maher*, 432 U.S. at 474.

103. *Id.* at 471–74.

104. *See id.*

105. *See id.*

106. *Id.*

107. *See Bellotti II*, 443 U.S. at 639.

108. *See Baird v. Att'y Gen.*, 360 N.E. 2d 288, 293 (Mass. 1977).

women to go before a judge only after first seeking out parental consent.[109]

In *Bellotti II*, the Supreme Court had to determine whether the Massachusetts law, as interpreted by the state's highest court, created an undue burden. Significantly, the law did not formally prevent any woman from getting an abortion.[110] Nor did the law create some of the obstacles that might prevent a minor from terminating a pregnancy.[111] If a law required a young woman to consult with her parents, their reasons for potentially obstructing her, whether they were personal, religious, or moral, had nothing to do with the government.[112] And if a minor was underage and living at home, the government had no say in that either.[113]

It would be possible to apply the undue-burden standard articulated in *Maher*, upholding the Massachusetts law, because the state did not create most of the obstacles faced by minors.[114] But the Court saw the law—and the application of the undue-burden standard—differently in *Bellotti II*. The Court held that Massachusetts had unduly burdened a minor's abortion right by denying her the opportunity to demonstrate to a judge that she was mature or that terminating the pregnancy would be in her best interest.[115] It did not make a difference that some parents' ability or desire to prevent abortion was not the government's fault.[116]

After *Bellotti II*, conflict about the meaning of the undue-burden standard raged on for several years. It was not until the Court seemed ready to overrule *Roe* that lawyers abandoned the effort to define an undue burden.

B. The Court Debates Different Visions of an Undue Burden

The Court continued invoking more than one version of the undue-burden standard in the early 1980s. *Harris v. McRae* returned to *Maher*'s interpretation of the undue-burden standard.[117] *McRae* involved the Hyde Amendment, a ban on the Medicaid funding of

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109. *Id.* at 294.
110. *See Bellotti II*, 443 U.S. at 644–47.
111. *See id.* at 647.
112. *See id.* at 640–42.
113. *See id.* at 647.
114. *See id.* at 651.
115. *See id.*
116. *See id.* at 640–51.
117. *See* 448 U.S. 297, 304 (1980).

abortion.[118] The appellees challenging the law revived the understanding of the undue-burden standard articulated by Roraback and Katz in *Maher*.[119] The appellees' brief in *McRae* applied a similar undue-burden analysis in arguing that the Hyde Amendment violated the Due Process Clause of the Fourteenth Amendment, the Establishment Clause, and the Free Exercise Clause of the First Amendment.[120]

The appellees argued that when it came to any of these doctrinal areas, the Court should dive into the facts concerning the purpose and effect of a law.[121] According to the appellees, the effects of the Hyde Amendment were several: the restrictions "burden[ed] the ability of the woman and her physician to act to protect her life and health" and compromised the freedom of religious conscience of welfare recipients.[122] The purpose of the Hyde Amendment, in the appellees' view, also distinguished it from earlier funding bans.[123] The appellees presented evidence that the Hyde Amendment was intended to obstruct women's access to abortion and to codify the religious beliefs of those who opposed abortion.[124] The same undue-burden analysis applied to the appellees' claims across doctrinal areas—the Court should closely examine the facts addressing the purpose and effect of the law.[125]

When the Court handed down a decision, *McRae* suggested that the undue-burden standard did not resemble the one described by the appellees and by the *Bellotti II* Court.[126] *McRae* rejected the invitation to apply a single undue-burden standard to free-exercise, establishment-clause, and fourteenth-amendment claims.[127] Nor did the Court look closely at the facts of the case to identify the purpose or effect of the Hyde Amendment.[128] Instead, the Court's undue-burden analysis focused on whether the government created the obstacles faced by women.[129] "The financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally

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118. *See id.* at 300–01.
119. *See* Brief for Appellees, at 107, Harris v. McRae, 448 U.S. 297 (1980) (No. 79-1268).
120. *Id.* at 116, 151, 168.
121. *Id.* at 116, 135, 165.
122. *Id.* at 107.
123. *Id.* at 116.
124. *Id.* at 134, 167.
125. *See id.* at 138, 164, 168, 177.
126. See *McRae*, 448 U.S. at 314
127. *Id.* at 315–20.
128. *See id.* at 326.
129. *See id.* at 316.

protected freedom of choice. . ." the Court explained, "are the product not of governmental restrictions on access to abortions, but rather of her indigency."[130]

For several years after *McRae*, the lower courts debated the boundaries of the undue-burden test. Did it apply only to abortion laws or would be it more broadly relevant? If it had some specific impact on abortion doctrine, was it applicable only to funding restrictions and parental-involvement laws? The Court's next opportunity to examine the standard came in a trio of cases, all involving multi-restriction model legislation. *City of Akron v. Akron Center for Reproductive Health* (*Akron I*) addressed an ordinance that required, among other things, that providers offer mandated counseling and perform all abortions in a hospital after the first trimester.[131] *Planned Parenthood Ass'n v. Ashcroft* dictated that a second physician be present at all arguably post-viability abortions and that a pathologist's report be completed.[132] *Simoupolos v. Virginia* took on another second-trimester hospitalization requirement.[133]

In any of these cases, the Court could have applied the version of the undue-burden test announced in *McRae* and *Maher*, focusing on whether the government created the obstacles that a woman faced. Instead, the Court revived a version of the doctrine that seemed to be at work in *Bellotti II*. Consider the Court's analysis of Akron's hospitalization requirement.[134] The effect of the law likely would have been to severely limit access to abortion because by the early 1980s, freestanding clinics performed the vast majority of abortions.[135] Yet, the reasons for this effect were arguably beyond the state's control.[136]

Hospitals might refuse to perform abortions for political reasons that had more to do with the controversy surrounding abortion than with the government.[137] Hospital abortions might also be more expensive, but the government did not create the financial constraints limiting some women.[138] Whether the government created these obstacles made no difference to the Court.[139] Instead, *Akron I*

130. *Id.*
131. 483 U.S. 416, 421–24 (1983).
132. 483 U.S. 476, 486–90 (1983).
133. 462 U.S. 506, 506 (1983).
134. *See Akron*, 438 U.S. at 426–33.
135. On the decline of hospital-based abortions and the rise of freestanding clinics, *see* Stanley K. Henshaw et al., *Abortion Services in the United States, 1979 and 1980*, 14 FAM. PLANNING PERSPECTIVES 5, 11 (1982).
136. *See id.* at 9–11.
137. *See id.* at 11.
138. *See id.* at 5.
139. *See Akron*, 462 U.S. at 435.

considered record evidence of the purpose and effect of the requirement, concluding that it would more than double the cost of an abortion and force women to travel further to find a hospital that would perform the abortion.[140]

Writing in dissent, Justice Sandra Day O'Connor described a third interpretation of the undue-burden standard that differed from the ones set out both in *McRae* and *Akron I*.[141] O'Connor's version of the standard, like the one described in *McRae*, treated abortion differently from other fundamental rights, emphasizing that abortion rights were more limited and came up in a more "sensitive area."[142]

But O'Connor suggested that the test depended not on whether the government created the obstacles facing a woman, as *McRae* stated, but instead on the degree of interference a woman experienced.[143] In her view, only "absolute" or "severe" burdens required meaningful scrutiny.[144] O'Connor reinterpreted *McRae*, *Bellotti II*, and cases like it.[145] In her reading, *McRae* upheld the Hyde Amendment because it did not create a substantial enough obstacle.[146] *Bellotti II*, she suggested, struck down the disputed Massachusetts law because it gave parents the ability to completely veto a minor's decision.[147]

O'Connor's idea of the undue-burden standard treated abortion the most differently from other constitutional issues. *McRae* presented the undue-burden test as an articulation of a general difference between negative and positive rights.[148] *Akron I* applied a fact-intensive version of the undue-burden test that had applied and could apply outside of the abortion context.[149] For O'Connor, the undue-burden standard instead captured key differences between abortion and any other constitutional right.[150]

After *Akron I*, lawyers and the lower courts did not have a clear sense of what the undue-burden standard was or when it applied. Would the test function the way Justice O'Connor described, applying only to abortion laws and guaranteeing that most of such regulations

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140. *Id.*
141. *See id.* at 462–64 (O'Connor, J., dissenting).
142. *See id.* at 462.
143. *See id.* at 464.
144. *Id.*
145. *See id.* at 462–66.
146. *See id.*
147. *See id.* at 464.
148. *See id.* at 453, 462.
149. *See id.* at 430–38.
150. *See id.* at 452–53.

would be upheld? Did the test mostly operate the way *McRae* or *Maher* described, applying to laws governing privileges or welfare benefits? Or did the test represent a broader, fact-intensive approach to abortion and other types of fundamental rights cases? The lower courts provided no consensus on the matter, and some, like the Third Circuit, suggested that the standard applied only to regulations of abortion in the second trimester.[151]

Supreme Court decisions issued between 1986 and 1992 did nothing to clarify this state of affairs. In *Thornburgh v. American College of Obstetricians and Gynecologists*, a five-to-four majority struck down every part of a disputed Pennsylvania law.[152] But, the majority did little to explain what test the Court applied in invalidating the statute.[153] While Justice O'Connor continued calling for the application of her version of the undue-burden standard,[154] other dissenting justices focused on broader problems with *Roe v. Wade*, suggesting that the time had come for it to be overruled.[155]

After *Thornburgh*, the Supreme Court increasingly focused on the continuing validity of *Roe v. Wade*. The undue-burden standard did make a few appearances in the Court's decision in *Webster v. Reproductive Health Services*, an opinion that many believed signaled the coming end of *Roe*.[156] The Court invoked the standard in addressing Missouri's ban on the use of public facilities or employees for abortion.[157] Those challenging the law distinguished earlier funding decisions by pointing to the fact that Missouri would not have lost money if the state had to make public facilities or employees available for abortion.[158]

The *Webster* majority found these arguments unavailing.[159] As in *McRae* and *Maher*, the Court's idea of an undue burden depended on whether the state had formally created the obstacles facing a woman.[160] Because the government did not make women poor, there was no problem with Missouri's facility ban.[161] Justice O'Connor wrote separately to state that upholding the challenged Missouri law did not

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151. *See, e.g.*, American Coll. of Obstet. & Gynec. v. Thornburgh, 737 F.2d 283, 293 (3d Cir. 1984).
152. Am. Coll. Of Obset. & Gynec. v. Thornburgh, 476 U.S. 747, 750, 772 (1986).
153. *See generally id.*
154. *Id.* at 824 (O'Connor, J., dissenting).
155. *See id.* at 785, 791 (Burger, White, and O'Connor, J., dissenting).
156. *See* 492 U.S. 490, 495, 506, 509 (1989).
157. *Id.* at 509.
158. *See id.* at 510–11.
159. *Id.*
160. *See id.* at 509–11.
161. *See id.*

require the Court to overrule *Roe* or depart from its earlier interpretations of the undue-burden standard.[162]

In 1989, it would have been difficult to predict that the Court would soon adopt an undue-burden standard for all abortion cases. When *Casey* adopted the test, the Court's decision sparked discussion about the origins and impact of the undue-burden standard.[163] But *Casey* offered its own history of the test—one that glossed over crucial differences once noted by the justices themselves.[164] In the years after *Casey*, it increasingly seemed to many that there had only been one undue-burden standard, not several.

C. Casey *and the Adoption of the Undue-Burden Standard*

The meaning, or meanings, of the undue-burden standard gained attention once the Supreme Court agreed to hear *Casey*, a challenge to a multi-restriction Pennsylvania abortion law.[165] But many expected *Casey* to be more than a run-of-the-mill abortion case. After Presidents Ronald Reagan and George H.W. Bush reshaped the Supreme Court, there appeared to be more than five votes to overrule *Roe*, and observers expected *Casey* to deliver the fatal blow.[166]

Earlier on in litigation of the case, the Third Circuit had applied what it described as O'Connor's undue-burden standard, upholding each part of a disputed Pennsylvania law except a spousal-notification provision.[167] Kathryn Kolbert and Linda Wharton, the lawyers challenging the Pennsylvania law, took the position that if the Court adopted the undue-burden standard, the justices would have effectively overruled *Roe v. Wade*.[168] The two distinguished the undue-burden standard from both strict scrutiny, the most demanding standard of judicial review, and rational basis, the most deferential.[169]

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162. *See id.* at 525–31 (O'Connor, J., concurring in part and concurring in the judgment).

163. On the debate about the meaning of the undue-burden standard, *see, e.g.*, Mary Ziegler, *Liberty and the Politics of Balance: The Undue Burden Test After Casey/Hellerstedt*, 52 Harv. C.R.-C.L. L. Rev. 421, 422–50 (2017).

164. *See* 505 U.S. 833, 874–77 (1992) (plurality decision).

165. *See id.* at 844.

166. On the expectation that *Casey* would overrule *Roe*, *see, e.g.*, ANITA L. ALLEN ET AL., WHAT *ROE V. WADE* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S MOST CONTROVERSIAL SUPREME COURT DECISION, 15–17 (Jack M. Balkin ed., 2005).

167. *See Planned Parenthood v. Casey*, 947 F.2d 682, 687–97 (3d Cir. 1991).

168. *See* Katherine Kolbert & Linda Wharton to *Planned Parenthood v. Casey* Work Team (Dec. 10, 1991), *in* The Kathryn Kolbert Papers, Barnard College.

169. *See id.*

Insisting that *Roe* required strict scrutiny of any abortion regulation, Kolbert and Wharton argued that adoption of the undue-burden standard amounted to a complete overruling of the 1973 decision.[170]

To be sure, Kolbert and Wharton's argument had a political dimension: pro-choice leaders hoped that if the Court clearly overruled *Roe*, the resulting decision would lead to a backlash at the polls.[171] The plan entailed convincing voters that the ambiguous undue-burden standard was as bad as a decision officially rejecting *Roe* to capitalize on the Court's retreat from reproductive rights.[172]

When *Casey* adopted an undue-burden standard, its meaning or application was far from clear. The Court first made apparent that adoption of the undue-burden test was consistent with what the plurality called retention of "the essential holding of *Roe*."[173] While recognizing a liberty for women to terminate a pregnancy, *Casey* insisted that most of the Court's abortion cases since *Roe* applied some version of the undue-burden standard.[174] Citing Justice O'Connor's concurring and dissenting opinions, as well as *Maher*, *McRae*, and *Bellotti*, *Casey* suggested that the Court had applied an undue-burden standard more often than the trimester framework often identified in *Roe*.[175] *Casey* also reasoned that the undue-burden standard was different from the trimester framework and perhaps irreconcilable with it.[176] While the trimester framework underestimated the value of the government's interest in protecting fetal life, *Casey* reasoned, the undue-burden standard fully accounted for it.[177]

What did *Casey*'s undue-burden standard require? The Court suggested that it went beyond the idea articulated in *McRae* that only state-created burdens ran afoul of the Constitution.[178] Instead, the Court explained that a law violated the Constitution if it had the "purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[179] So, while the government could seek to protect fetal life, the means chosen to do so

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170. *See id.*

171. *See, e.g.*, Kitty Kolbert and Lynn Paltrow to Nadine Strossen et al. (Dec. 24, 1991), *in* The Kathryn Kolbert Papers, Barnard College (explaining that supporters of reproductive rights expected that "a loss of *Roe* would spark mass protest and outrage").

172. *See* Kolbert & Wharton, *supra* note 168 at 1–2.

173. *Casey*, 505 U.S. at 846.

174. *See id.* at 874.

175. *See id.*

176. *See id.*

177. *See id.*

178. *See id.* at 876.

179. *Id.* at 877.

could not create a substantial obstacle to women seeking to exercise the abortion right, and the government could not mask a desire to obstruct women's access to abortion by claiming to advance an interest in fetal life.[180] The Court seemed particularly receptive to laws that allowed the state or a parent to express a preference for childbirth.[181]

It would not be enough, the Court explained, to demonstrate that a law had an "incidental effect of increasing the cost or decreasing the availability of medical care."[182] Here, *Casey* suggested two ways of understanding what counted as an undue burden.[183] First, the plurality suggested that some laws would make abortion less accessible even though lawmakers had in no way targeted reproductive rights.[184] Thus, the purpose of a law mattered to the undue-burden analysis.[185] So too did the degree of interference with an abortion right.[186] Merely "incidental" burdens, inconveniences, or increases in cost would not be enough to trigger constitutional concern.[187]

Casey also suggested that at least when applied to abortion, the undue-burden standard treated some forms of state interference as appropriate and even desirable.[188] Because the "State has a substantial interest in potential life[,]" many restrictions would not be "unwarranted."[189] Indeed, when analyzing the Pennsylvania law at issue in the case, the Court upheld every disputed provision but one, a spousal-involvement law.[190] Even then, it seemed that the Court took issue with the regulation partly because it touched on sex-equality issues.[191] But generally, it seemed that most laws would not create an undue burden.[192]

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180. *See id.*

181. *See id.* ("Regulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted. . . .").

182. *Id.* at 874.

183. *See id.*

184. *See id.*

185. *See id.*

186. *See id.*

187. *See id.*

188. *See id.* at 875–76.

189. *Id.* at 876.

190. *See id.* at 879 ("husband notification requirement").

191. *See id.* at 898 (stressing that "[t]he Constitution protects all individuals, male or female, married or unmarried, from the abuse of governmental power. . .").

192. *See id.* at 874–99.

Casey helped to erase much of the earlier history of the undue-burden standard. The Court suggested that whenever earlier opinions had adopted the test, there was a single, uniform interpretation of it.[193] Of course, there had been many undue-burden standards, some of them applicable outside of the abortion context.[194] Indeed, for some time, members of the Court recognized that different possible interpretations of the standard could dictate the outcome of abortion cases.[195]

By focusing so heavily on the government's interest in potential life, *Casey* glossed over features of the undue-burden standard drawn from other doctrinal contexts.[196] In earlier years, the Court had sometimes used the undue-burden test as a vehicle for a close factual examination of the purpose and effect of a law. There was nothing particularly deferential about this inquiry. Nor did the undue-burden standard always place laws in neat categories, like those involving negative or positive rights. Partly because of *Casey*, much of this history was forgotten.

Casey also left open key questions about how the undue-burden standard, as the Court currently understood it, would operate. Was "the purpose or effect" prong conjunctive or disjunctive? That is to say, did those challenging a law have to show that a law had both an impermissible purpose and effect, or would it be enough to demonstrate one or the other? Was the undue burden a balancing analysis, such that even a law with a beneficial purpose could be unconstitutional if it weighed too heavily on women's abortion rights? In the next several years, the Court offered no clear answer to this question.

D. The Undue-Burden Standard in Casey *and* Carhart

Until recently, the abortion cases following *Casey* also made it more difficult to remember that the undue-burden standard was anything more than a thinly-veiled form of rational basis review. *Gonzales v. Carhart*, the Court's next major case applying the standard, applied the undue-burden test to a federal statute banning dilation and extraction, an abortion procedure whereby a fetus was removed intact.[197] In evaluating the purpose of the law, the Court

193. *See id.* at 874–77.
194. *See supra*, Part I.
195. *See supra*, Part I.
196. *See Casey*, 505 U.S. at 874–77.
197. *See* 550 U.S. 124, 135, 146 (2007). For more on the partial-birth abortion conflict, *see* Cynthia Gorney, *Gambling with Abortion: Why Both Sides Think They*

emphasized that the government could legitimately act to protect the dignity of fetal life and prevent women from regretting their abortions.[198] *Carhart*'s discussion of the purpose of the law suggested that abortion—and the undue-burden test applied to it—were unique.[199] *Carhart* reasoned, "[r]espect for human life finds an ultimate expression in the bond of love the mother has for her child."[200] *Carhart* also suggested that the undue-burden standard differed from other doctrinal approaches partly because abortion rights enjoyed less protection than did other constitutional liberties.[201] In analyzing the effect of the Partial Birth Abortion Ban Act, the Court focused on the law's lack of a health exception.[202] Joined by the American College of Obstetricians and Gynecologists, those challenging the law argued that dilation and extraction would sometimes be the procedure the most protective of women's health and future fertility.[203] Those defending the laws maintained that dilation and extraction never benefitted women's health.[204] The Court sided with those demanding a deferential standard and upheld the law.[205] *Carhart* emphasized that "state and federal legislatures [had] wide discretion to pass legislation in areas where there is medical and scientific uncertainty."[206]

Yet, the government had particularly wide latitude when it came to restricting abortion. According to *Carhart*, deference to the legislature was "consistent with *Casey*, which confirms the State's interest in promoting respect for human life at all stages in the pregnancy."[207] According to the Court, *Casey* also made plain that even though the abortion decision still counted as a protected liberty,

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Have Everything to Lose, HARPER'S, Nov. 2004, available at https://harpers.org/archive/2004/11/gambling-with-abortion/ (last visited May 22, 2017).

198. *See Carhart*, 550 U.S. at 157–59.

199. *See id.*

200. *Id.* at 159.

201. *See id.* at 182–83; *see also* Maya Manian, *The Irrational Woman: Informed Consent and Abortion Decision-Making*, 16 DUKE J. GENDER L. & POL'Y 223, 274 (2009) ("If *Carhart* holds that fetuses are third parties that the government can choose to protect as a 'public health' matter, that would logically lead to a justification for denying the abortion right altogether.").

202. *See Carhart*, 550 U.S. at 163–65.

203. *See* Brief of American College of Obstetricians and Gynecologists, 22–29, *Gonzales v. Carhart*, 550 U.S. 124 (2007) (Nos. 05-380, 05-1382); Brief for Respondents, 16, *Gonzales v. Carhart*, 550 U.S. 124 (2007) (Nos. 05-380, 05-1382).

204. *See, e.g.*, Brief for Petitioners, 3–6, *Gonzales v. Carhart*, 550 U.S. 124 (2007) (Nos. 05-380, 05-1382).

205. *Carhart*, 550 U.S. at 164.

206. *Id.* at 163.

207. *Id.*

providers did not have a constitutional status any different from other medical professionals.[208] *Carhart* stressed that the undue-burden standard did not "elevate [providers'] status above other physicians in the medical community."[209] If anything, the government's interest in fetal life seemed more weighty than other purposes that the government might have in regulating medical procedures.[210]

After *Carhart*, it was difficult to remember that the undue-burden standard had been anything more than an abortion-specific, deferential standard of review quite similar to rational basis. When the Supreme Court agreed to hear a challenge to Texas's House Bill 2 (H.B. 2), many saw it as a referendum on the meaning of the undue-burden standard. Pro-lifers saw the case, *Whole Woman's Health v. Hellerstedt*, as a perfect chance to chip away at abortion rights.[211] The case concerned two provisions.[212] One required physicians performing abortions to have admitting privileges at a hospital within thirty miles.[213] A second mandated that abortion clinics comply with the regulations governing an ambulatory surgical center, many of which would be prohibitively expensive for existing clinics and for those seeking to open new facilities.[214]

Whole Woman's Health seemed promising to abortion opponents, because it came at the intersection of two helpful understandings of the undue-burden standard. Pro-lifers pointed to *Carhart* and *Casey* as evidence that the standard was just another form of rational-basis review.[215] Abortion opponents also compared *Whole Woman's Health* to *Maher* and *McRae*, arguing that any obstacles tied to H.B. 2 were not created by the government, but by women's economic circumstances, the market for abortions, or the operational realities of clinics.[216]

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208. *See id.* at 163–64.

209. *Id.* at 163.

210. *See id.*

211. *See* Americans United for Life, *2016 Supreme Court Abortion Case: Whole Woman's Health v. Hellerstedt*, available at http://www.aul.org/2016-scotus-abortion-case/ (last visited May 29, 2017) (describing *Whole Woman's Health* as "the most significant abortion case before the Supreme Court in decades").

212. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2296 (2016).

213. Tex. Health & Safety Code Ann. § 171.0031(a)(1)(A)); 25 Tex. Admin. Code §§ 139.53(c)(1), 139.56(a)(1).

214. *See* Tex. Health & Safety Code Ann. § 245.010(a)); 25 Tex. Admin. Code §§ 139.40, 135.4–13.56.

215. *See* Amici Curiae Brief of 44 Texas State Legislators, at 20–22, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (No. 15-274); Brief of United Conference of Catholic Bishops et al., at 10–24, 136 S. Ct. 2292 (2016) (No. 15-274).

216. *See* sources cited supra note 215.

Surprisingly, *Whole Woman's Health* rejected both of these understandings of the undue burden standard. Instead, the decision revived the version developed in cases like *Bellotti II* and *Akron I*. Part II illuminates the stakes of *Whole Woman's Health* by placing it within the broader history of the undue-burden standard. This Part shows that the opinion matters beyond the context of abortion jurisprudence. *Whole Woman's Health* taps into the broader potential of the undue-burden standard, suggesting a new approach to all fundamental-rights cases.

II. *WHOLE WOMAN'S HEALTH* AND FUNDAMENTAL-RIGHTS JURISPRUDENCE

As soon as *Whole Woman's Health* arrived at the Supreme Court, those on both sides viewed it as a window into the meaning of the undue-burden standard. This Part begins by examining advocacy in *Whole Woman's Health*, using briefs in the case to expose the different ideas about the undue-burden standard put before the Court. This Part turns next to the Court's opinion in *Whole Woman's Health*, establishing that it expands on a version of the undue-burden test first articulated in the 1970s—one that is relevant to any fundamental-rights case.

A. Contesting the Undue-Burden Standard

Texas lawmakers patterned H.B. 2 on the Women's Health Protection Act and the Abortion Providers Privileging Act, model laws crafted by the pro-life group Americans United for Life (AUL).[217] In July 2013, Governor Rick Perry signed into law both parts of H.B. 2.[218] The following September, a group of abortion providers sought the facial invalidation of the admitting-privileges measure.[219] Although the district court enjoined enforcement of the law, the Fifth Circuit

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217. *Abortion Providers Admitting Privileges Act*, Model Legislation and Policy Guide for the 2015 Legislative Year, Americans United for Life, http://www.aul.org/downloads/2015-Legislative-Guides/Abortion/Abortion_Providers_Admitting_Privileges_Act_-_2015_LG.pdf (last visited May 29, 2017). *See, e.g.*, *Women's Health Protection Act*, 2013 Model Law and Policy Guide, *available at* http://www.aul.org/wp-content/uploads/2012/11/Womens-Health-Protection-Act-Abortion-Clinic-Regulations-2013-LG.pdf (last visited May 29, 2017) regarding the AUL model legislation.

218. On the filibuster and the signing of the law, *see* Jayme Fraser and Kolten Parker, *Perry Signs Abortion Bill as Opponents Vow to Battle On*, HOUSTON CHRONICLE, Jul. 19, 2013, at A1.

219. Planned Parenthood of Greater Texas Surgical Health Services v. Abbott, 951 F. Supp. 891 (W.D. Tex. 2013).

reversed only days later, and the admitting-privileges provision went into effect.[220]

A week after the Fifth Circuit's decision, providers challenged the ambulatory-surgical center provision (ASC) and argued that the admitting-privileges provision was unconstitutional, at least as applied to facilities in McAllen and El Paso.[221] At trial, the parties stipulated that only seven facilities in major cities would be able to comply with the ambulatory surgical center provision.[222] Texas offered several expert witnesses in support of H.B. 2.[223] State witnesses claimed that the ASC provision was justified because any abortion required entry into the uterus, which was best performed in sterile facilities like hospitals.[224] State witnesses reiterated that an admitting-privilege requirement would improve the credentialing of abortion providers and guarantee women better continuity of care.[225]

Following the trial, the district court enjoined enforcement of the two provisions, and the Fifth Circuit again reversed.[226] Because that court had already rejected a challenge to the admitting-privileges regulation, the court held that the district court had directly violated the rule of res judicata.[227] Texas also argued that res judicata barred the challenge to the ASC requirement because the providers could have challenged it in 2013 and opted not to do so.[228] While holding that res judicata did stand in the way, the court nevertheless reached the merits of the challenge to the ASC restriction.[229] Concluding that the law ensured that women received only the best medical care, the court rejected any suggestion that the law was designed to restrict abortion access.[230]

Nor, according to the Fifth Circuit, did the ASC measure have an impermissible effect under *Casey*.[231] The court found that even if the law would require 17% of women in the state to travel 150 miles or

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220. For the Fifth Circuit's decision reversing the injunction, see Planned Parenthood of Greater Texas Surgical Health Services v. Abbott, 734 F.3d 406 (5th Cir. 2013).

221. Whole Woman's Health v. Lakey, 46 F. Supp. 673, 680–84 (W.D. Tex. 2014).

222. *Id.* at 680.

223. *Id.*

224. *See id.*

225. *See id.* at 680–84.

226. For the district court's decision on the merits, *see id.* For the Fifth Circuit's decision, see Whole Woman's Health v. Cole, 790 F.3d 563, 581–92 (5th Cir. 2015).

227. *See Cole*, 790 F.3d at 581–84.

228. *Id.* at 577.

229. *See id.* at 583–84.

230. *See id.* at 582–83.

231. *See id.* at 581–90.

more, that number was not high enough to satisfy the "large fraction" test set out in *Casey*.[232] The Fifth Circuit invoked the interpretation of the undue-burden standard seemingly at work in *Carhart*, suggesting that courts should generally defer to lawmakers' defenses of abortion restrictions.[233] The court also relied on the logic of the undue-burden standard used in *Maher* and *McRae*: if poor, young, or minority women would struggle to obtain an abortion after H.B. 2, their problems came from their existing circumstances, not from H.B. 2 itself.[234] When it came to the small number of ASCs currently operating in the state, the Fifth Circuit found that plaintiffs had failed to meet their burden of showing that ASCs could not expand and serve a larger clientele.[235]

When the Supreme Court agreed to hear *Whole Woman's Health*, AUL and other antiabortion groups also looked to the interpretations of the undue-burden standard used in *Carhart* and *McRae* in defending H.B. 2.[236] AUL compared H.B. 2 to a Louisiana statute, upheld by the Fifth Circuit, that exempted abortion providers from a state statute limiting medical practice liability.[237] According to AUL, the constitutionality of H.B. 2 and the Louisiana law flowed directly from *McRae*.[238] While Louisiana's law might make it impossible for providers to obtain liability insurance, providers did not face a state-created, formal obstacle.[239] Similarly, "any claimed inability of Plaintiffs to comply with the ambulatory surgical center requirement is not of the State's creation, and cannot be counted an 'undue burden.'"[240]

AUL also invoked *Carhart*, suggesting that the Court should defer to Texas's conclusion that H.B. 2 was needed to protect women's health.[241] The group's brief contended that "strict scrutiny was rejected in *Casey*, and regulations which serve a rational purpose . . . are constitutional."[242] According to AUL, *Carhart* made this point

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232. *See id.* at 586, 588.
233. *See id.* at 587.
234. *See id.* at 589.
235. *See id.* at 589–90.
236. *See* Amici Curiae Brief of 44 Texas State Legislators, *supra* note 215 at 20–23.
237. *See id.* at 23.
238. *Id.* at 21.
239. *Id.*
240. *Id.* at 22.
241. *Id.* at 12.
242. Brief of More Than 450 Bipartisan and Bicameral Legislators at 13, Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (No. 150-274).

much more evident.[243] There, the AUL claimed that the Court held that abortion regulations survived "'[w]here [the legislature] has a rational basis to act, and it does not impose an undue burden.'"[244] *Carhart*'s version of the undue-burden standard incorporated rational-basis review and thus demanded "an incredibly high level of deference to the State. . ."[245]

Similarly, an amicus brief on behalf of the United States Catholic Conference and other antiabortion organizations invoked *Carhart* and *McRae*'s versions of the undue-burden standard.[246] The brief insisted that after *Carhart*, the standard required the deference expected of rational-basis review.[247] *McRae* also informed the brief's understanding of the undue-burden standard. All of the reasons that it would be hard for clinics to comply with H.B. 2 had nothing to do with the government.[248] If "a private leasing opportunity fell through due to hostility to abortion" or "poverty makes it difficult for some women to obtain an abortion," the government could not be blamed.[249] The United States Catholic Conference explained: "*Casey* only forbids an undue burden by *the government* on the decision whether to have an abortion."[250]

Texas relied on *McRae* and *Carhart* both in leaning on the right/privilege distinction and in justifying the singling out of objections to abortion.[251] Both cases had made clear that under the undue-burden standard, "[a]bortion is inherently different from other medical procedures," and that the state had more latitude in singling it out.[252] Moreover, the undue-burden standard, Texas argued, addressed only state-created obstacles.[253] If H.B. 2 made it harder for women to get abortions, the government was not at fault.[254] "The State here has no due-process (or equal-protection) obligation to affirmatively subsidize abortion," Texas contended.[255]

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243. *Id.*
244. *Id.* (citing Gonzales v. Carhart, 550 U.S. 124, 157–58 (2007)).
245. *Id.* at 14 n.9.
246. *See* Brief of United Conference of Catholic Bishops et al. at 24, Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016) (No. 15-274).
247. *See id.* at 22–24.
248. *See id.* at 21, 24.
249. *Id.* at 24.
250. *Id.* (emphasis in original).
251. *See* Brief for Respondents at 43, 54, Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016) (No. 15-274).
252. *Id.* at 43 (citation and quotation omitted).
253. *See id.* at 51–54.
254. *See id.* at 53.
255. *Id.* at 54.

Texas and sympathetic antiabortion groups described *Casey's* undue-burden test as an extension of *McRae* and *Carhart*. *Casey* prohibited laws that created an undue burden, but Texas argued that when discerning whether such a burden existed, courts should look no further than the surface of the law. The undue-burden test required this kind of formalism, ignoring any question about the real-world impact of a statute.

To the surprise of many, *Whole Woman's Health* rejected these ideas about the undue-burden standard. Understood in context, the decision harkened back to an older version of the standard that was relevant outside of the abortion context.

B. Whole Woman's Health*'s New Approach*

Whole Woman's Health began its analysis of the undue-burden test by noting that in *Casey*, "[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right."[256] The Court then examined the Fifth Circuit's analysis of the undue-burden standard, highlighting two flaws in the lower court's reasoning.[257] First, *Whole Woman's Health* explained that, contrary to the Fifth Circuit's ruling, courts should weigh the benefits and burdens of a challenged law.[258] The Court also took the Fifth Circuit to task for choosing 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."[259]

When detailing how the undue-burden standard should operate, the Court emphasized the importance of "factual findings and . . . research-based submissions of amici."[260] Explaining the result in *Carhart*, the Court noted that the decision took legislative findings into account but weighed them against contradictory record evidence.[261] *Carhart* further demonstrated that "[u]ncritical deference to Congress' factual findings . . . is inappropriate."[262]

In evaluating the challenged provisions of H.B. 2, *Whole Woman's Health* shed more light on how the undue-burden standard should

256. *Whole Woman's Health*, 136 S. Ct. at 2300.
257. *See id.* at 2309–19.
258. *See id.* at 2309–11.
259. *Id.* at 2309.
260. *Id.* at 2310.
261. *See id.*
262. *Id.* (citing *Carhart*, 550 U.S. at 165).

apply. Justice Breyer's majority suggested that the standard involved a balancing: the benefits of a law—in terms of both its purpose and effects—would be weighed against its costs.[263] The Court first addressed the purpose of the admitting-privileges law, which was supposedly designed to improve health outcomes for Texas women seeking abortions.[264] The Court pointed to peer-reviewed studies and expert evidence establishing that the rate of complications after an abortion was extremely low.[265] The Court also highlighted proof that any post-abortion problems often developed a considerable time after the woman left a clinic.[266] The Court then scoured the record for proof that the admitting-privileges requirement did more for women's health than the regulations previously applied in Texas.[267] Finding none, the Court concluded that the admitting-privileges law had few benefits.[268]

The Court turned next to the effect of the admitting-privileges requirement. *Whole Woman's Health* first observed that once the government began enforcing the provision, the number of abortion clinics operating in the state fell by fifty percent.[269] The Court looked to amicus briefs to explain why the requirement led to the closure of clinics.[270] *Whole Woman's Health* pointed to proof that physicians had trouble maintaining admitting privileges partly because abortion so rarely resulted in the need for hospitalization.[271] As importantly, the Court identified evidence that admitting privileges more often than not depended on considerations beyond a provider's clinical competence, including a hospital's residency requirements or the number of patients treated in a hospital setting in a calendar year.[272]

But did clinic closures count as an undue-burden? *Whole Woman's Health* emphasized that the Texas law meant that there would be increased driving distances, "fewer doctors, longer waiting times, and increased crowding."[273] These obstacles created an undue burden, particularly when balanced against "the virtual absence of any health benefit."[274] It did not matter to the Court's analysis that Texas was

263. *See id.* at 2309.
264. *See id.* at 2310–11.
265. *See id.* at 2310–14.
266. *See id.* at 2311.
267. *See id.*
268. *See id.*
269. *See id.* at 2313–14.
270. *See id.* at 2312–13.
271. *See id.* at 2312.
272. *See id.*
273. *Id.* at 2313.
274. *Id.*

not responsible for some of the variables that made H.B. 2 burdensome.[275] For example, the driving distance to clinics had as much to do with where women could afford to live as it did with the government's regulatory regime.[276] The fact that physicians could not obtain admitting privileges also stemmed from some factors beyond the government's control, including hospital policy.[277] But the Court found that the law could create an undue burden by exploiting background factors that made abortion impossible to obtain for many women.[278]

Whole Woman's Health applied a similar analysis to the ambulatory surgical center requirement. In discussing the benefits potentially tied to H.B. 2, the Court stressed that most abortion-related complications "almost always arise only after the patient has left the facility."[279] *Whole Woman's Health* then explained that Texas did not require procedures with similar safety records, including colonoscopies and liposuction, to be performed in an ambulatory surgical center, suggesting that the law did not reflect real medical differences between abortion and other medical procedures.[280] Even when it came to surgical abortions, most of the disputed regulations would offer no benefit, especially since the most serious complications required hospitalization, not surgery.[281]

Turning to the effect of the requirement, the Court discussed expert testimony indicating that the number of abortions existing facilities would have to perform would go up by a factor of four or five if the regulation were implemented.[282] The Court credited testimony that existing facilities might not be able to expand to cater to increased demand.[283] And, *Whole Woman's Health* reasoned, even if clinics could meet new demand, an undue burden might still be in place.[284] Women at "crammed-to-capacity super facilities" would face longer driving distances and a significantly lower quality of care even if they were able to access an abortion after the regulation took hold.[285]

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275. *See id.* at 2311–14.
276. *See id.* at 2313.
277. *See id.* at 2312.
278. *See id.*
279. *Id.* at 2311.
280. *See id.* at 2315.
281. *See id.* at 2316.
282. *Id.*
283. *See id.* at 2317.
284. *See id.* at 2317–18.
285. *Id.* at 2318.

C. *The Meaning of an Undue-Burden in* Whole Woman's Health

Whole Woman's Health at first seems to be a limited, fact-intensive ruling. Because the Court focused on abortion regulations claimed to protect women's health,[286] it was not immediately clear how the Court would approach fetal-protective abortion laws—a fact noted by pro-life groups in the immediate aftermath of the decision.[287] And *Whole Woman's Health* held itself out as a clarification of *Casey* and *Carhart* rather than an opinion staking out a new approach.[288] *Whole Woman's Health* also left open some questions. As was the case in *Maher*, can states still invoke a preference for childbirth as a legitimate legislative purpose under *Whole Woman's Health*? How would the balancing analysis required in the case play out if a law did have a beneficial purpose but still restricted access to abortion?

While the Court did not resolve many of the key questions surrounding the undue-burden standard, the decision did reveal the untapped potential of the undue-burden standard as an approach outside the abortion context. The version of the undue-burden test embraced in the case shares a great deal with those articulated in cases like *Akron I*. Put in context, *Whole Woman's Health* clearly announces an undue-burden standard that differs from both strict scrutiny, intermediate scrutiny, and rational-basis review. The tiers of scrutiny take a formalist approach, asking to which category a classification or right belongs. *Whole Woman's Health* announces a test centered much more on the facts of how a law affects the exercise of a right in the real world.

The undue-burden standard announced by *Whole Woman's Health*, like earlier versions of the test proposed in the 1970s and 1980s, provides a new way of analyzing the purpose of a law. Scholars have observed that it is notoriously hard to establish an invidious intent underlying a law.[289] Lawmakers are rarely candid when a law

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286. *See id.* at 2310 (treating H.B. 2 as a law claimed to protect women's health).

287. *See, e.g., National Right to Life Committee Responds to Supreme Court Decision in Whole Woman's Health v. Hellerstedt*, NATIONAL RIGHT TO LIFE (Jun. 29, 2016), http://www.nrlc.org/communications/releases/2016/release062716/ (last visited May 29, 2017).

288. *See Whole Woman's Health*, 136 S. Ct. at 2309–11.

289. On the difficulty of proving intent, *see* Katie R. Eyer, *Ideological Drift and the Forgotten History of Intent*, 51 HARV. C.R.-C.L. L. REV. 1, 4, 9 (2016); Alan David Freeman, *Legitimating Racial Discrimination Through Antidiscrimination Law*, 62 MINN. L. REV. 1049, 1070–71 (1978); Richard Hasen, *Racial Gerrymandering's Questionable Revival*, 67 ALA. L. REV. 365, 380–81 (2016); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*,

has impermissible aims.[290] Moreover, since the Court took a conservative turn in the 1970s, intent analysis has tended to describe discrimination as a "narrow, explicit, and intended phenomenon."[291] For this reason, scholars often present intent as an obstacle to Fourteenth Amendment claims.[292] Yet there have long been reasons to turn to intent-based challenges, especially when the government relies on neutral-seeming laws to accomplish suspicious goals.[293] In the aftermath of *Brown v. Board of Education*, for example, states passed school-choice laws designed to obstruct desegregation.[294] Abortion laws like the ones challenged in *Whole Woman's Health* similarly do not announce an invidious purpose.[295]

The version of purpose analysis at work in *Whole Woman's Health* offers a more helpful way of getting at the reasons lawmakers introduced a policy. Intent analysis has been problematic partly because, in the equal-protection context, the Court has asked whether lawmakers passed a law because of a desire to discriminate.[296] Courts justifiably hesitate to condemn legislators, especially when a ruling requires a holding that lawmakers passed a law to discriminate rather than merely ignoring the prejudicial impact of a law.[297] Because such an intent finding would be a damning indictment of lawmakers, the Court has also required more explicit evidence that legislators had an improper purpose in mind.[298]

Whole Woman's Health describes a more effective purpose analysis. Instead of asking whether the claimed purpose of a law is mere pretext, *Whole Woman's Health* considers whether a law

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49 STAN. L. REV. 1111, 1133–35 (1997); David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935, 947–48 (1989).

290. *See, e.g.*, Eyer, *supra* note 289 at 66, 68.

291. *Id.* at 68.

292. *See* Eyer, *supra* note 289 at 66, 68 and accompanying text.

293. *See generally* Eyer, *supra* note 289 at 4, 9.

294. *See, e.g.*, LIVA BAKER, THE SECOND BATTLE OF NEW ORLEANS: THE HUNDRED-YEAR STRUGGLE TO INTEGRATE THE SCHOOLS, 422, 449–50 (HarperCollins Publishers 1996) (detailing the array of legal approaches that the state of Louisiana took to resist *Brown*); MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961, 241, 252, 269–79 (Oxford Univ. Press 1994).

295. *See* statutes cited *supra* note 214; 44 Texas Legislators, *supra* note 215 at 1; United Conference, *supra* note 215 at 1–2; *supra* text accompanying note 202–03.

296. *See, e.g.*, Massachusetts v. Feeney, 442 U.S. 256, 279 (1977).

297. *See* Reshma Saujani, *"The Implicit Association Test": A Measure of Unconscious Racism in Legislative Decision-Making*, 8 MICH. J. RACE & L. 395, 395–406 (2003).

298. *See, e.g.*, Eyer, *supra* note 289 at 53, 68.

advances its stated purpose.[299] This analysis does not require the Court to accuse lawmakers of dishonesty or worse. As pro-life amici argued in the lead-up to *Whole Woman's Health*, a meaningful purpose analysis brings to mind the tailoring prong of strict scrutiny: the Court asks whether a law achieves the benefits lawmakers described in passing a law and whether a regulation does not unnecessarily compromise a constitutional right.[300] But the benefits analysis used in *Whole Woman's Health* is different. Instead of focusing on the fit between the means and ends of a law, the undue-burden standard looks at whether a law addresses a real problem.[301] And rather than inviting the Court to address less restrictive alternatives, the undue-burden standard addresses both whether a law is moderately effective and whether it adds any value compared to previous policies.[302]

This analysis allows courts to smoke out laws with an improper purpose without forcing them to accuse legislators of lying. It is also easier to identify evidence of the efficacy of a law than it is to establish an invidious intent. If lawmakers claim to address a problem, such as complications arising from abortion, both parties can bring forward evidence as to how grave a concern that issue presents. There is no need to figure out what to do when lawmakers in a collective body have different goals or to how to decipher intent when lawmakers have the good sense not to admit that they are doing something wrong. When lawmakers identify a measurable goal, the parties also can relatively easily find evidence on whether a law makes a positive difference.

The Court's undue-burden standard also applies to all fundamental-rights cases, regardless of whether a positive or negative right is at stake. In the past, relying on *McRae* and *Maher*, the Court held that the law impinged on fundamental rights only when the government created the obstacles to exercising a constitutional right.[303]

Whole Woman's Health instead applies the same fact-intensive analysis of the effect of a law regardless of whether lawmakers claim to regulate a right or privilege. When it came to the effect of the admitting-privilege law, for example, the Court attributed the closure

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299. *See Whole Woman's Health*, 136 S. Ct. at 2309–15.

300. *See* Brief of More Than 450 Bipartisan and Bicameral Legislators, *supra* note 242 at 14.

301. *See Whole Woman's Health*, 136 S. Ct. at 2311, 2316 (explaining that "there was no significant health-related problem that the new law helped to cure").

302. *See id.* at 2315.

303. *See Maher*, 432 U.S. at 478–79; *McRae*, 448 U.S. at 324–25.

of most of the clinics in the state to H.B. 2 notwithstanding the fact that the law's sting depended partly on surrounding circumstances that the state did not control.[304] The Court acknowledged that many hospitals would not grant clinics admitting privileges for reasons outside the power of the government, including requirements that an "applicant has treated a high number of patients in the hospital setting in the past year, clinical data requirements, [or] residency requirements."[305] Nevertheless, when H.B. 2 interacted with these background factors, a significant number of women lost access to abortion.[306]

In *McRae* or *Maher*, analysis of constitutional rights depends on whether the government has impinged or restricted a right. Because the government did not create poverty, *McRae* and *Maher* found that there could be no undue burden.[307] *Whole Woman's Health* departs significantly from this analysis. Under *Whole Woman's Health*, what matters to the undue-burden analysis is whether the law interacts with political, social, and economic forces to block the exercise of a constitutional right.[308] As the Court reasoned, the admitting-privilege provision took advantage of the safety of the abortion procedure, the nature of hospital policies, and the difficulty poor women might have in commuting to more distant facilities.[309] The law created an undue burden because of its real-world impact.[310] The Court insisted that H.B. 2 would create an undue-burden by ensuring that women confronted "fewer doctors, longer waiting times, and increased crowding."[311] That women faced more expense, inconvenience, and lost access stemmed partly from factors unrelated to H.B. 2, including a woman's economic status or place of residence.[312] The law created an undue burden because of its real-world impact,[313] and the Court recognized that the real-world impact of H.B. 2 was the same as a regulation that more formally restricted abortion.[314]

The Court's analysis of the ambulatory surgical center provision was also in tension with the formalism of *McRae* and *Maher*. In those

304. *See Whole Woman's Health*, 136 S. Ct. at 2312.
305. *Id.* at 2312.
306. *See id.* at 2313.
307. *See Maher*, 432 U.S. at 478–79; *McRae*, 448 U.S. at 324–25.
308. *See Whole Woman's Health*, 136 S. Ct. at 2312.
309. *See id.* 2311, 2313.
310. *See id.* at 2313.
311. *Id.*
312. *See id.*
313. *See id.* at 2313.
314. *See id.*

cases, the government claimed (and the Court accepted with little question) that the law encouraged childbirth over abortion. By contrast, in *Whole Woman's Health*, the Court did not accept at face value the argument that the ASC provision guaranteed better outcomes for women.[315] After looking at the record evidence, the Court instead reasoned that the regulation had no tangible health benefit at all.[316] In assessing the effect of the regulation, the Court emphasized that existing facilities might not be able to accommodate the demand that would arise if more clinics closed.[317] Moreover, the majority suggested that H.B. 2 would create an undue burden even if ASCs could serve more patients.[318] "Patients seeking these services [would be] less likely to get the kind of individualized attention, serious conversation, and emotional support that doctors at less taxed facilities may have offered," the Court explained.[319] Many of these effects—the capacity of clinics, the nature of care in more crowded facilities, the struggles of poor women to travel long distances—seem clearly outside the control of the government. Rather than asking courts to divide laws into neat categories, the undue-burden test forces judges to look closely at the facts and determine how a law operates in the real world.

It is too early to know how broadly the Court will apply this revamped version of the undue-burden standard in the future. Just the same, this approach to fundamental rights could upend constitutional analysis of fundamental rights in a variety of areas. Part III explores how the undue-burden standard set out in *Whole Woman's Health* might change the Court's approach in several doctrinal areas, such as those involving unconstitutional conditions and the Religious Freedom Restoration Act.

III. WHAT DOES IT MEAN TO BURDEN A RIGHT?

Whole Woman's Health takes an approach to fundamental rights that could remake doctrinal areas unrelated to abortion. This Part explores how the undue-burden standard articulated in the case could transform the Court's analysis in several doctrinal areas. To be sure, the promise of *Whole Woman's Health*'s undue-burden standard could be cut short in several ways. Because the standard is so fact intensive,

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315. *See id.* at 2315.
316. *See id.*
317. *See id.* at 2317.
318. *See id.* at 2317–18.
319. *Id.* at 2318.

it will make fundamental-rights litigation more expensive and time-consuming. *Whole Woman's Health* also makes analysis of constitutional rights turn so heavily on the facts that lower courts will have considerable power. Because the scope of a right will depend on interpretation of a particular factual record, the undue-burden standard may have unpredictable results, perhaps resulting in less protection for a right than might be expected.

These are valid concerns. Just the same, the undue-burden standard could be a less formal, artificial, and narrow approach, one that could clarify doctrinal areas that have long been a source of frustration to scholars and judges. The standard could simplify analysis, remove some of the inconsistency plaguing unconstitutional-conditions cases, and provide a much-needed tool to challenge facially neutral laws. Social-movement members once believed that the version of the standard articulated in *Whole Woman's Health* had relevance in a variety of doctrinal areas. It is worth exploring how, if taken seriously, the standard could change analysis of cases in related doctrinal areas.

A. Voting Rights

The Court has applied a similar balancing approach in cases involving indirect burdens on voting rights. For example, *Anderson v. Celebrezze* struck down an Ohio statute requiring presidential candidates to file a petition in March in order to appear on the ballot in November.[320] John Anderson, who had announced his candidacy in April, argued that the Ohio law violated the First and Fourteenth Amendments.[321] The Court agreed, holding that Ohio had "plac[ed] an unconstitutional burden on the voting and associational rights" of Anderson and his supporters.[322]

Anderson explained that courts should account for the "character and magnitude" of the burden created by a law by weighing those injuries against the legitimacy and strength of the interest put forth by the states.[323] *Burdick v. Takushi*, another voting rights case, applied a similar analysis.[324] The relationship between the two makes sense: the Court seems to have settled on some kind of intermediate approach to voting cases (notwithstanding an avowed commitment to strict scrutiny), and voting-rights jurisprudence already frequently

320. 460 U.S. 780, 783 (1983).
321. *See id.* at 782–83.
322. *Id.* at 782, 806.
323. *See id.* at 789.
324. *See* 504 U.S. 428, 434 (1992).

invokes the idea of an undue burden. How might *Whole Woman's Health* influence voting-rights analysis?

Consider the example of S.L. 2013-381, a voting restriction recently struck down by the Fourth Circuit in *North Carolina Conference of NAACP v. McCrory*.[325] After 2013, when the Supreme Court invalidated the preclearance formula that had once governed cases under the Voting Rights Act, North Carolina introduced S.L. 2013-381.[326] The law required in-person voters to carry certain forms of photo identification and no longer permitted the use of identification forms disproportionately used by African-American voters.[327] The law also limited early and provisional voting, both of which promised to further curb access for voters of color.[328]

In analyzing the law, the Fourth Circuit primarily focused on whether it had an impermissible intent under *Village of Arlington Heights v. Metropolitan Housing Corp.*[329] The court struck down the law, emphasizing ways in which it differed from others that had been previously upheld—the number of restrictions it imposed, the fact that it withdrew otherwise-available voting methods and times, and so on.[330] The problem with the Fourth Circuit's approach is a familiar one—at least as currently understood, the intent standard set forth in *Village of Arlington* is exceedingly difficult to satisfy.[331]

How might the undue-burden analysis set out in *Whole Woman's Health* shape voting-rights cases like *McCrory*? First, rather than forcing courts to identify a discriminatory intent, the undue-burden analysis first asks whether a law addresses a real problem.[332] The purpose offered for the North Carolina law involves the prevention of voter fraud. In the case of North Carolina's law, the evidence on this point is mixed. An audit of the 2012 election found 765 cases in which voters with the same first and last names, dates of birth, and last four digits of the social security number had voted in both North Carolina and another state.[333] The evidence suggests that voter fraud exists in North Carolina. Just the same, the magnitude of the problem seems

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325. 831 F.3d 204, 219 (4th Cir. 2016).
326. *See id.* at 215–16.
327. *See id.* at 216.
328. *See id.* at 216–17.
329. *See id.* at 219–34 (analyzing 429 U.S. 252 (1977)).
330. *See id.* at 231–32.
331. *See* Eyer, *supra* note 289 at 49, 57–58.
332. *See Whole Woman's Health*, 136 S. Ct. at 2309–14.
333. *See, e.g., New Evidence of Voter Fraud Uncovered in North Carolina*, NORTH CAROLINA ABC 11 NEWS, (2014), http://abc11.com/news/new-evidence-of-voter-fraud-in-nc-alleged/23005/ (last visited Jun. 14, 2017).

minimal. Seven hundred sixty-five votes would not have been enough to change the result in any race, given that more than four million ballots were cast in races across the state.[334]

But even if we assume there is a problem with voter fraud in North Carolina, the purpose analysis of *Whole Woman's Health* would ask next whether the law is effective, when evaluated in totality and when compared to earlier statutes. It is far from clear that the 2013 statute has made much of a difference compared to earlier policies. A 2017 audit in the state found that 508 ineligible voters cast ballots—a decrease since 2012, but hardly a sea change.[335]

Nor do the mechanisms put in place by the challenged statute do much to address the sources of the voter fraud that remains. First, the vast majority of voter fraud nationwide takes place though absentee voting.[336] This should come as no surprise—it is easier to pass off a fake ballot by mail than to impersonate another individual in person. North Carolina's voting restrictions do not address this issue. Nor does North Carolina's statute deal with most of the documented fraud in the state. In 2016, for example, most cases of voter fraud—441 in all—came from active felons, who are prevented from voting under state law.[337] Voter ID and early voting restrictions did nothing to stop these instances of fraud, many of which fell through the cracks because statewide election software had not been updated with the latest information on felony status.[338]

If the evidence concerning the beneficial purpose of the North Carolina is weak, what about its effects under *Whole Woman's Health*? Evidence heard in *McCrory* demonstrated that African-Americans disproportionately lacked the forms of ID required under the 2013 law and often relied on early or provisional voting.[339] Under *Whole Woman's Health*, the court focuses not only on absolute

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334. *See, e.g.*, *2012 Presidential Election Results: North Carolina*, POLITICO, https://beta.ops.politico.com/2012-election/results/president/north-carolina/ (last visited Jan. 16, 2018).

335. *See Now We Know How Bad Voter Fraud Is in North Carolina*, CHARLOTTE OBSERVER (Apr. 24, 2017), http://www.charlotteobserver.com/opinion/editorials/article146486019.html (last visited Jan. 12, 2018).

336. *See* Richard Hasen, *Exorcising the Voter Fraud Ghost*, REUTERS (Apr. 30, 2014), *http://blogs.reuters.com/great-debate/2014/04/30/exorcising-the-voter-fraud-ghost/* (last visited Jan. 12, 2018); Jason Snead, *Three Examples of Voter Fraud Across the U.S.*, THE DAILY SIGNAL, May 31, 2016, *http://dailysignal.com/2016/03/31/3-examples-of-voter-fraud-across-us/* (last visited Jan. 12, 2018).

337. *Now We Know*, *supra* note 335.

338. *See id.*

339. *See McCrory*, 831 F.3d at 216–19.

obstacles but on access to the means of exercising a right.[340] In *Whole Woman's Health*, the Court recognized the burden created by the loss of clinics, crammed-to-capacity super facilities, and lower quality services.[341] Thus, in *McCrory*, the question would not be whether voters of color would be blocked from the polls altogether. By eliminating the channels of voting and forms of identification disproportionately used by African-American voters, the law would undercut access to the vote just as H.B. 2 undercut access to abortion.

In contrast to the impermissible-intent analysis required by *Arlington Heights*, undue-burden analysis allows courts to sift through the same evidence without having to indict lawmakers for making racially biased decisions. *Whole Woman's Health* also permits courts to recognize that burdens that undermine access matter, even if a law stops short of eliminating access altogether.

B. The Second Amendment

In 2008, in *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment recognizes an individual right to bear arms, and several years later, the Court made clear that the right applies to both the states and the federal government.[342] Ever since, the lower courts have been unsure as to what standard of review applies to second-amendment cases.[343] A handful of courts have applied strict scrutiny, while most have found that some intermediate form of review, including some form of undue-burden analysis, would apply.[344]

The form of undue-burden analysis set out in *Whole Woman's Health* would add coherence and bite to second-amendment analysis.

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340. *See Whole Woman's Health*, 136 S. Ct. at 2309–17.

341. *Id.* at 2318.

342. *See* District of Columbia v. Heller, 554 U.S. 570, 636 (2008); McDonald v. City of Chicago, 561 U.S. 742, 791 (2010).

343. For the variety of approaches applied, *see United States v. Engstrum*, 609 F.Supp. 2d 1227, 1231–32 (D. Utah 2009) (discussing strict scrutiny); United States v. Miller, 604 F.Supp. 2d 1162, 1171 (W.D. Tenn. 2009) (discussing intermediate scrutiny); United States v. Marzzarella, 595 F.Supp. 2d 596, 606 (W.D. Pa. 2009); Nordyke v. King, 563 F.3d 439, 459–60 (9th Cir. 2009) (discussing undue-burden standard), *reh'g en banc granted*, 575 F.3d 890, 891 (9th Cir. 2009); *People v. Flores*, 169 Cal. App. 4th 568, 86 Cal. Rptr. 3d 804, 809 (2008) (same); United States v. Skoien, 587 F.3d 803, 812–13 (7th Cir. 2009) (applying a hybrid of the approaches detailed above).

344. *See Engstrum*, 609 F. Supp. 2d at 1231–32; *Miller*, 604 F. Supp. 2d at 1171; *Marzzarella*, 595 F. Supp. 2d at 606; *Nordyke*, 563 F.3d at 459–60, *reh'g en banc granted*, 575 F.3d at 891; *Flores*, 169 Cal. App. 4th 568, 86 Cal. Rptr. 3d at 809; *Skoien*, 587 F.3d at 812–13.

Consider how this analysis would apply to recent cases prohibiting domestic violence offenders from possessing firearms. In one such case, *United States v. Chovan*, the Ninth Circuit evaluated a federal law prohibiting domestic-violence misdemeanants from possessing a firearm for life.[345] Following a misdemeanor conviction, Daniel Chovan argued that the law violated his second-amendment rights.[346] The Ninth Circuit evaluated the law using the two-step inquiry that it had applied in earlier cases, first asking whether the law burdened Chovan's rights and then applying intermediate scrutiny in the event such a burden was found.[347] While recognizing the burden on Chovan's rights, the court found that the law satisfied intermediate scrutiny.[348] Most courts similarly apply some form of intermediate scrutiny.[349]

How might *Whole Woman's Health* reshape cases like *Chovan*? Intermediate scrutiny, as applied in cases like *Chovan*, first requires the government to show an important purpose.[350] The answer, in many such cases, seems to be a given—governments, as in *Chovan*, seek to prevent certain forms of gun violence, an interest that most courts would recognize to be important.

If purpose analysis under intermediate scrutiny does not have much bite, what about the tailoring analysis mandated by intermediate scrutiny? In *Chovan*, the court looked primarily at evidence that domestic violence offenders are more likely to recidivate, more likely to use guns, and more likely to kill victims when using guns.[351] In other words, the tailoring analysis used by the court covered much of the same ground as its evaluation of the government's interest—emphasizing the depth of the problem with gun use by domestic violence offenders.

As importantly, courts have often fallen back on the list of laws that *Heller* described as presumptively constitutional, upholding statutes that resemble those on the list and striking down those that do not.[352] Several courts have recognized the problems with this analogical approach. First, courts applying it seem too deferential to the government, contrary to the protection for gun rights mandated

345. 735 F.3d 1127, 1129 (9th Cir. 2013).
346. *See id.* at 1129–30.
347. *See id.* at 1136.
348. *See id.* at 1137.
349. *See id.* at 1137–38.
350. *See id.* at 1135–36.
351. *See id.*
352. *See, e.g.*, United States v. White, 593 F.3d, 1199 1205–06 (11th Cir. 2010).

by *Heller*.[353] Second, an analogical approach offers no real guidance ex ante, particularly since the similarity to one of the items on the *Heller* list is in the eye of the beholder.[354]

Whole Woman's Health's undue-burden analysis would steer the courts away from a sometimes-circular form of intermediate scrutiny. In *Chovan*, the court would first consider whether the law addressed a real problem and did so effectively. As the Ninth Circuit recognized, there is reason to think gun violence among domestic violence misdemeanants is a real issue: those convicted of domestic offense are less likely to be charged with felonies and more likely to reoffend and to use firearms.[355]

Would the lifetime ban be effective under *Whole Woman's Health*? The answer seems to be yes. While offenders could circumvent the law, a criminal prohibition would be more likely to deter reoffenders than would state equivalents, many of which had time-limited bans. A comparison to *Whole Woman's Health* might also be instructive. There, the Court emphasized that the safety requirements put in place by H.B. 2 did not seem to add much value.[356] For example, requiring clinics to meet the standards set for ambulatory surgical centers would not help much, given that most abortions are not surgical and that most complications develop well after a woman has left the facility.[357] By contrast, a lifetime ban seems likely to discourage many more misdemeanants from owning guns and using them when reoffending.

Just the same, *Chovan* would be a close case under *Whole Woman's Health*. The court would next consider the effect of the law on second-amendment rights. The federal law does have several exceptions for those whose convictions have been expunged or set aside and those who have been pardoned or had their civil rights restored.[358] But these exceptions are narrow and would not cover many domestic-violence offenders.[359] *Whole Woman's Health* would require evidence of the impact of the federal law on gun rights.

It seems possible that *Chovan* would come out the same way, given the evidence on the risk of reoffending among domestic-violence misdemeanants. Just the same, *Whole Woman's Health*'s undue-burden analysis would be truer to the mandate of *Heller*, a decision

353. *See, e.g.*, United States v. Chester, 628 F.3d 673, 679 (4th Cir. 2010).
354. *See* United States v. Skoien, 614 F.3d 638, 640 (7th Cir. 2010) (en banc).
355. *See Chovan*, 735 F.3d at 1135–41.
356. *See Whole Woman's Health*, 135 S. Ct. at 2310–15.
357. *See id.*
358. 18 U.S.C. § 921(a)(33)(B)(ii).
359. *See id.*

that recognized the importance of second-amendment rights, while allowing for sensible restrictions that address real problems.

C. Unconstitutional Conditions

Given the connection between *Maher*, *McRae*, and the undue-burden standard, it is also possible—although it would represent a more radical change—that *Whole Woman's Health* will change the analysis of unconstitutional-conditions cases. These disputes arise "whenever the government offers to provide a gratuitous benefit conditioned upon the offeree's waiver of a constitutional right."[360] Unconstitutional-conditions doctrine has a longstanding reputation for inconsistency and incoherence.[361] As Seth Kreimer put it, the doctrine "manifested an inconsistency so marked as to make a legal realist of almost any reader."[362]

To take just one example, in *FCC v. League of Women Voters*, the Court addressed a law forbidding anyone receiving a grant from the Corporation for Public Broadcasting from editorializing.[363] The Court struck down the law.[364] Shortly later, the Court upheld restrictions on abortion counseling that were strikingly similar to those invalidated in *League of Women Voters*.[365]

In *Rust v. Sullivan*, the Court addressed regulations governing grants and contracts for Title X family-planning funding.[366] The regulations dictated that no grantee could use the funds for programs that did referrals, counseling, or advocacy for abortion.[367] The Court's effort to distinguish *League of Women Voters* was unconvincing.[368] *Rust* reasoned that in regulating Title X funding, "the Government is not denying a benefit to anyone, but is instead simply insisting that

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360. Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions Cases in Three Dimensions*, 90 GEO. L. J. 1, 2–3 (2001).

361. *See, e.g.*, Brooks R. Fudenberg, *Unconstitutional Conditions and Greater Powers: A Separability Approach*, 43 UCLA L. REV. 371, 379 (1995) ("What is interesting is not simply that the Justices fail to engage the other side's argument, but that they fail to grapple even with their *own* previous and apparently conflicting statements."); Louis Michael Seidman, *Reflections on Context and the Constitution*, 73 MINN. L. REV. 73, 75 (1988) (observing that unconstitutional conditions cases "display wildly inconsistent results").

362. Seth Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1304 (1984).

363. *See* 468 U.S. 364, 399–402 (1984).

364. *See id.* at 402.

365. *See* Rust v. Sullivan, 500 U.S. 173, 196 (1991).

366. *See id.* at 180–83.

367. *See id.*

368. *See id.* at 196.

public funds be spent for the purposes for which they were authorized."[369] But why were Title X funds not a benefit in the same way that public-broadcasting grants seemed to be?

The undue-burden analysis in *Whole Woman's Health* might offer a more straightforward and coherent approach to cases like *Rust* and *League of Women Voters*. Consider as an example how the standard might apply to the Hyde Amendment, the law upheld in *McRae*. *Whole Woman's Health* first requires a consideration of the benefit achieved by a law—something that must be established using tangible record evidence.[370] The purposes set forth for the Hyde Amendment have varied, but three command the most attention. First, supporters of the bill echoed the claim made in *Maher* and *McRae* that the Hyde Amendment was designed to encourage childbirth rather than abortion.[371] Second, proponents emphasized that the amendment vindicated the complicity-based objections of those who believed that paying taxes to support abortion would violate their conscience.[372] Finally, some proponents of the Hyde Amendment have presented it as a cost-saving mechanism, emphasizing that budgetary constraints limit what kind of services the state can guarantee.[373]

None of these purposes would obviously fare well under *Whole Woman's Health*. First, there is no compelling evidence that the Hyde Amendment actually encourages more women to carry pregnancies to term. Starting in 1981, studies have suggested that the amendment discouraged relatively few women—roughly four to six percent—from terminating their pregnancies.[374] Research suggests instead that the Hyde Amendment has shifted the expense of abortions for poor women from the public to the private sector, placing a financial burden on poor women themselves or on abortion providers.[375] The evidence on state funding restrictions suggests a similarly modest effect: a 1.9 to 2.4% increase in reported live births.[376]

While the Hyde Amendment may have modestly increased the number of women carrying pregnancies to term, it is hard to prove

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369. *Id.*

370. *See Whole Woman's Health*, 136 S. Ct. at 2309–10.

371. *See Maher*, 432 U.S. at 478–79; *McRae*, 448 U.S. at 324–25.

372. *See id.*

373. *See* IRVING BROOKS HARRIS, CHILDREN IN JEOPARDY: CAN WE BREAK THE CYCLE OF POVERTY 204 (1996).

374. *See* Willard Cates, *The Hyde Amendment in Action*, 246 J. AM. MED. ASS'N. 1109, 1112 (1981).

375. *See id.*

376. *See* Carol Korenbrot, Claire Brindis, and Fran Priddy, *Trends in Live Births and Abortions Following State Restrictions on Public Funding of Abortion*, 105 PUB. HEALTH REP. 555, 558 (1990).

any significant effect created by the appropriations rider. Nor is it even obvious that increasing the number of live births would qualify as a "benefit." Those on opposing sides of the abortion conflict would agree that making abortion safer for women is desirable. Not everyone would think that an increase in live births is always better, regardless of the underlying circumstances of a woman carrying a pregnancy to term.

What about the conscience-based objections of taxpayers who disapprove of abortions? To be sure, the Hyde Amendment sends a message that taxpayer monies will not fund Medicaid abortions. However, the Hyde Amendment is less effective in ensuring that no taxpayer money is used to fund abortion. Pro-lifers' campaign to deny funding for organizations that perform abortions relies on the idea that taxpayers are still wrongly obligated to subsidize abortions.[377] A recent Forbes study found that taxpayers subsidize roughly 24% of the annual costs of abortions, but the majority of the burden falls on state taxpayers, a group untouched by the Hyde Amendment.[378] The amendment cannot guarantee that taxpayers will not have any role in funding abortions. As a result, the Court may find that the Hyde Amendment is not a particularly effective way of protecting the conscience-based objections of taxpayers opposed to abortion.

Even the evidence on the cost-saving benefits of the Hyde Amendment raises questions. Supporters of the Hyde Amendment argue that the rider spares the government the obligation to cover the relatively high cost of an abortion procedure, particularly after the first trimester.[379] Even if the amendment has led to only modest

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377. For complicity arguments used in the effort to defund Planned Parenthood, *see, e.g.*, Janell Ross, *How Planned Parenthood Actually Uses Its Funding*, WASH. POST (Aug. 4, 2015), *https://www.washingtonpost.com/news/the-fix/wp/2015/08/04/how-planned-parenthood-actually-uses-its-federal-funding/* (last visited Jan. 12, 2018); *Are My Tax Dollars Being Used for Abortion?* RIGHT TO LIFE MICHIGAN NEWS, https://rtl.org/RLMNews/09editions/AreMyTaxDollarsPayingForAbortion.htm (last visited Jan. 12, 2018).

378. For the Forbes study, *see* Chris Conover, *Are American Taxpayers Paying for Abortions?*, FORBES (Oct. 5, 2015), *available at* http://www.forbes.com/sites/theapothecary/2015/10/02/are-american-taxpayers-paying-for-abortion/#60083d0c7709 (last visited Jan. 12, 2018).

379. For antiabortion arguments about the savings created by the Hyde Amendment, *see, e.g.*, Chris Smith, *The Life-Saving Amendment*, WASH. TIMES (Sep. 29, 2016), http://www.washingtontimes.com/news/2016/sep/29/hyde-amendment-has-saved-two-million-americans-fro/ (last visited Jan. 12, 2018); Arina Grossu, *The Hyde Amendment Saved Two Million Lives. Democrats Want to Kill It*, THE FEDERALIST (Sep. 30, 2016), http://thefederalist.com/2016/09/30/hyde-amendment-saved-2-million-lives-democrats-want-end/ (last visited Jan. 12, 2016).

reductions in the abortion rate, that reduction could mean a significant savings for taxpayers.[380]

However, the Hyde Amendment likely requires the government to spend money that might offset any potential gains. Research indicates that Medicaid recipients seeking to terminate a pregnancy have to make painful financial choices, often putting off bills for food, rent, and other necessities to assemble adequate funds for abortion.[381] In turn, these delays tend to only increase the cost of an abortion, particularly after the second trimester begins.[382] As the cost of a procedure increases, the financial burden on poor women also climbs, suggesting that the Hyde Amendment requires more women to seek supplementary forms of public assistance, particularly if they are unable to end a pregnancy.[383]

Even if a court found some evidence that the Hyde Amendment achieved its stated goals, it might still be unconstitutional under *Whole Woman's Health*. Opponents of the Hyde Amendment point to several kinds of burdens created by the law: delays in obtaining access to abortion, additional financial strain, and practical obstacles to receiving any abortion whatsoever.[384]

Abortion opponents once successfully defended the Hyde Amendment against these charges in two ways. First, the amendment's proponents insisted that these burdens result not from the Hyde Amendment but from women's personal circumstances.[385] They claimed that if a woman required time to put together the money

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380. *See supra* note 379 and accompanying text.

381. *See, e.g*, Stanley Henshaw et al., *Restrictions on Medicaid Funding for Abortion: A Literature Review*, GUTTMACHER INSTITUTE REPORT, 1, 22, (Jun. 2009), https://www.guttmacher.org/report/restrictions-medicaid-funding-abortions-literature-review (last visited Jan. 12, 2018); Jenna Jerman et al, *Characteristics of US Abortion Patients in 2014 and Changes Since 2008*, GUTTMACHER INSTITUTE REPORT, May 2016, http://www.guttmacher.org/sites/default/files/report_pdf/characteristics-us-abortion-patients-2014.pdf (last visited Oct. 24, 2016).

382. *See, e.g.*, Sarah C.M. Roberts et al., *Out of Pocket Costs and Insurance Coverage in the United States*, 24 WOMEN'S HEALTH ISSUES 211, 215–16 (2014); Jenna Jerman and Rachel K. Jones, *Secondary Measures of Access to Abortion in the United States*, 24 WOMEN'S HEALTH ISSUES 419, 419–24 (2014).

383. *See* Heather Boonstra, *Abortion in the Lives of Financially Struggling Women*, GUTTMACHER POLICY REVIEW 46, 49–50 (Jun. 2016), https://www.guttmacher.org/sites/default/files/article_files/gpr1904616_0.pdf (last visited Jan. 12, 2018).

384. *See id.*

385. *Cf.* Brief of 70 Texas State Legislators and Four Public Interest Groups at 14 & n.15, Whole Woman's Health v. Lakey, 790 F.3d 563 (5th Cir. 2015) (No. 15-274); Brief of Texas Eagle Forum et al. at 20–21, Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016) (No. 14-50928).

for an abortion, her limited financial circumstances had nothing to do with the government. Similarly, if she failed to find adequate funds and had to carry a pregnancy to term, her difficult financial situation cannot be traced back to the amendment.

Whole Woman's Health undermines these defenses. Take, for example, the argument that the burdens created by the Hyde Amendment result from a woman's poverty rather than from state intervention. *Whole Woman's Health* explicitly rejected this logic as applied to H.B. 2.[386] Texas and AUL both argued that clinics could not comply with H.B. 2 for reasons having nothing to do with the state, including hospital policy, the resources available to clinics, and the place of residence of women seeking abortions.[387]

The majority found this claim unpersuasive.[388] In tracing the effect of the law, the Court considered how H.B. 2 intersected with existing political, financial, and medical trends rather than analyzing the law in isolation.[389] The fact that hospitals often refused to grant abortion providers admitting privileges because of low admission rates from clinics did nothing to undermine the challenge to H.B. 2.[390] According to the Court, the law was unconstitutional because of its interaction with other factors shaping access to abortion care.[391]

The same reasoning could apply to the Hyde Amendment. On its face, the Hyde Amendment creates no formal sanctions. Instead, the interplay between the amendment and poor women's financial struggles creates the kind of delays and increased health risks so often highlighted by the amendment's critics. *Whole Woman's Health* departs from existing precedent by looking beyond the text of a law to its impact in the real world. Such an analysis would make it much harder to justify the Hyde Amendment.

But the undue-burden analysis set out in *Whole Woman's Health* would not always lead to the invalidation of laws claimed to create an unconstitutional condition. A helpful comparison can be drawn to the Solomon Amendment, a law that denies federal funding to law schools that denied access to military recruiters.[392] In *Rumsfeld v. Forum for*

386. *See Whole Woman's Health*, 136 S. Ct. at 2309–18.

387. *See* Brief of Respondents at 53–55, Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016) (No. 15-274); Brief of United States Conference of Catholic Bishops et al. at 21–24, Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016) (No. 15-274).

388. *See Whole Woman's Health*, 136 S. Ct. at 2313–18.

389. *See id.*

390. *See id.*

391. *See id.*

392. *See* 10 U.S.C. § 983.

Academic and Institutional Rights, Forum for Academic and Institutional Rights (FAIR), a group of law schools and law faculties, argued that compliance with the Solomon Amendment created an unconstitutional condition.[393] FAIR members had adopted policies opposing discrimination on a number of grounds, including sexual orientation.[394] FAIR members wished to restrict military recruiters' access to campus to protest Congress's then-effective policy on gays and lesbians in the military.[395] FAIR contended that the Solomon Amendment unconstitutionally "force[d] institutions to choose between enforcing their nondiscrimination policy against military recruiters in this way and continuing to receive specified federal funding."[396] The Supreme Court rejected this claim.[397]

How would *Rumsfeld* have come out under a version of the undue-burden standard articulated in *Whole Woman's Health*? The backers of the Solomon Amendment claimed that it would facilitate military recruiting by ensuring that the armed forces had "effective and uninhibited recruitment programs."[398] The law arguably delivered the benefit desired by its framers. Those who introduced the Solomon Amendment observed that law schools had introduced policies in the 1980s and 1990s making it harder for military recruiters to reach students on university campuses. When Congress tightened up the amendment's requirements, many more universities allowed military recruiters on campus.[399] Under *Whole Woman's Health*, it may be possible to assert that the Solomon Amendment addressed a real problem different from the threat to women's health claimed in the Texas case.

And the Solomon Amendment seems to have some demonstrable effect in expanding recruitment. After the government implemented stricter regulations governing the Solomon Amendment in 2003, more law schools afforded military recruiters equal access to students.[400] This benefit seems demonstrable even if the Court, as in *Whole Woman's Health*, compares the most recent version of the Solomon Amendment to earlier iterations.

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393. *See* 547 U.S. 47, 51–53 (2006).
394. *See FAIR v. Rumsfeld*, 291 F. Supp. 2d 269, 280 (D.N.J. 2003).
395. *See Rumsfeld*, 547 U.S. at 51–53.
396. *Id.* at 52.
397. *Id.* at 70.
398. H.R. REP. NO. 108-443, pt. 1, at 3–4 (2004).
399. *See* Gerald Walpin, *The Solomon Amendment Is Constitutional and Does Not Violate Academic Freedom*, 2 SETON HALL CIR. L. REV. 1, 7 (2001).
400. *Id.*

If the Court balanced the benefits and burdens of the Solomon Amendment, the outcome would likely be the same as in *Rumsfeld*. As an initial matter, it would not matter that the government would not be responsible for some of the obstacles facing FAIR. If law schools depend on the federal government to operate, the state does not shoulder the blame. Other factors—the generosity of donors, the fortunes of a school's endowment, and so on—contribute to this reality. But under *Whole Woman's Health*, this would be irrelevant. What would matter would be the burden imposed on law schools' ability to express their beliefs. It seemed clear that after the Solomon Amendment, law schools had no choice but to allow military recruiters on campuses under the same conditions as any other potential employer.

It was far less obvious that the amendment restricted the freedom of speech or association of law schools. In *Whole Woman's Health*, the Court emphasized that if H.B. 2 were implemented, most clinics would close.[401] According to the Court, even if remaining clinics could handle the excess capacity, the quality of care they would deliver would be far worse.[402] H.B. 2 made it difficult (if not impossible) for women to exercise their rights or receive the same quality of care. It is not obvious that the Solomon Amendment would impose the same kind of burden on law schools' expression. While allowing recruiters might inadvertently signal that law schools approved or had no position on the military's policies, the Solomon Amendment did not prevent any law school from expressing its opposition to the "don't ask, don't tell" policy. Nor was it obvious that the kind of expression available would be inferior: universities could distribute fliers, hold programs, organize protests, or issue a statement opposing the policy even when complying with the amendment. A fact-intensive evaluation of the Solomon Amendment seems likely to confirm the outcome of *Rumsfeld*.

D. Rethinking the Religious Freedom Restoration Act

In the 1970s, advocates saw clear connections between the tests applied under the Free Exercise Clause of the First Amendment and the undue-burden standard.[403] In 1990, the Supreme Court decided *Employment Division v. Smith*, reasoning that neutral laws of general

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401. *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016).
402. *Id.*
403. *See* Brief for Appellees at 20–29, Maher v. Roe, 432 U.S. 474 (1977) (No. 75-1440).

applicability do not violate the Free Exercise Clause.[404] In the aftermath of *Smith*, the burden analysis at work in *Sherbert v. Verner* no longer applies to free-exercise cases.[405] But since Congress passed the federal Religious Freedom Restoration Act (RFRA), the Supreme Court has applied a similar analysis to cases decided under that statute.[406] Under RFRA, the government may not substantially burden a believer's freedom of religion, even by applying a facially neutral law, unless the government's policy is narrowly tailored to serve a compelling interest.[407]

To be sure, RFRA cases primarily turn on statutory interpretation, but because Congress intended the law to reinstate the *Sherbert* test, parallels between the idea of an unconstitutional burden in free-exercise and abortion cases should provide helpful guidance. Moreover, the idea of an undue burden set out in *Whole Woman's Health* traces its roots back to a test that applied in both religious freedom and abortion cases. For that reason, applying *Whole Woman's Health* might give the Court more guidance in interpreting RFRA.

It is particularly important to have a more principled sense of when a law creates a substantial burden. Since the Supreme Court decided *Burwell v. Hobby Lobby Stores*,[408] commentators have argued that the Court defines as burdensome any law experienced as problematic by believers.[409]

How might *Whole Woman's Health* help us understand what counts as a burden under RFRA and the *Sherbert* test? Consider how this analysis might illuminate a recent group of RFRA cases, including *Zubik v. Burwell*.[410] The seven cases consolidated with *Zubik* involved the so-called contraceptive mandate of the Affordable Care Act.[411] The mandate required all U.S. insurers to cover all

404. *See* 494 U.S. 872 (1990).

405. *See id.* at 883–84.

406. *See* 42 U.S.C. § 2000bb(b)(1).

407. *See id.*

408. 134 S. Ct. 2751.

409. *See, e.g.*, Scott W. Gaylord, *RFRA Rights Revisited: Substantial Burdens, Judicial Competence, and the Religious Nonprofit Cases*, 81 MO. L. REV. 655, 702 (2016); Michael A. Helfand, *Identifying Substantial Burdens*, 2016 U. ILL. L. REV. 1772, 1790–91 (2016); Amy J. Sepinwall, *Conscience and Complicity: Assessing Pleas for Religious Exemptions in Hobby Lobby's Wake*, 82 U. CHI. L. REV. 1897, 1922–23 (2015).

410. 136 S. Ct. 1557, 1557 (2016).

411. *See id.* at 1559–60.

twenty forms of FDA-approved contraception at no cost to patients.[412] The mandate exempted religious employers, and after the Supreme Court decided *Hobby Lobby*, the government introduced an accommodation for closely-held, for-profit businesses that have a religious objection.[413] These businesses could fill out a form and submit it to the government, and the government would ask a third party to provide the contraceptive coverage instead.[414] In *Zubik*, religious employers claimed that the accommodation itself substantially burdened their religious exercise under RFRA because it triggered third-party coverage and hijacked their insurance plans.[415]

In *Zubik*, the Supreme Court did not reach the merits of the case, instead remanding the seven cases to the courts of appeal to work out a compromise.[416] But the underlying issue in the case—when accommodations create a substantial burden—will inevitably return to the Court. The religious employers in *Zubik* argued that it should generally be up to religious believers to decide when a law was a substantial burden.[417] As the parties in *Zubik* explained, the "courts have neither the authority nor the competence to second-guess the reasonableness of those sincere beliefs."[418] On the other side, those defending the mandate contend that this sincere-belief interpretation runs contrary to the text of RFRA, which singles out "substantial" burdens.[419]

But *Sherbert* defined undue burdens in a different way—one captured relatively well in the Court's decision in *Whole Woman's Health*. How would the claim in *Zubik* fare under this approach to an undue burden? First consider the benefits of the mandate. It seems effective in achieving the benefit it was designed to achieve, even when compared to policies previously in place. The percentage of women who received contraception without co-pays rose from 14% in

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412. *See* Emma Green, *The Little Sisters of the Poor Are Headed to the Supreme Court*, THE ATLANTIC (Nov. 6, 2015), *https://www.theatlantic.com/politics/archive/2015/11/the-little-sisters-of-the-poor-are-headed-to-the-supreme-court/414729/* (last visited Jan. 12, 2018).

413. *See id.*

414. *See Zubik*, 136 S. Ct. at 1559–60.

415. *See id.*

416. *See id.* at 1560–61.

417. *See* Brief of the Petitioners at 46–51, East Texas Baptist Univ. v. Burwell, 136 S. Ct. 1557 (2016) (Nos. 15-35, 15-105, 15-119, & 15-191).

418. *Id.* at 2.

419. *See* Brief for Respondents at 13–16, Zubik v. Burwell, 136 S. Ct. 1557 (2016) (Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119, & 15-191).

2012 to 67% in 2014, and research indicates that women are more likely to use contraception when costs are removed.[420]

What about the burdens created by the accommodation? Unlike Texas's H.B. 2, the accommodation does not foreclose most options for religious believers objecting to the contraceptive mandate. H.B. 2 forced the closure of most abortion clinics in the state, making it difficult for many women to access the procedure and lowering the quality of care at the remaining facilities.[421] Complying with the accommodation at issue in *Zubik* was not as inconvenient or expensive.

The burden experienced by believers in *Zubik* was more symbolic and subjective—a sense that filling out a form would trigger an undesirable government action and would make believers complicit in sin.[422] In *Hobby Lobby*, the Court emphasized how easy it would be to carve out an accommodation to the contraceptive mandate.[423] It would be much harder for the government to meet the demands of the believers in *Zubik* who requested that Congress introduce a new program or overhaul an existing one to prevent any possible taint from contraceptive coverage.[424] And *Whole Woman's Health* requires a balancing of the benefits and burdens achieved by a law.[425] Unlike in *Whole Woman's Health*, where the Court found little evidence that H.B. 2 achieved any benefit, *Zubik* involves a policy that has effectively delivered its stated benefits. The idea of an undue burden developed in *Whole Woman's Health* makes it easier to understand why the burden in cases like *Zubik* is neither undue nor substantial.

E. Plugging the Holes in the Undue-Burden Standard

There might be reason to think that the undue-burden approach applied in *Whole Woman's Health*, if broadly applied, might only replicate the problems identified both with unconstitutional-conditions doctrine and with earlier iterations of the undue-burden

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420. *See* Adam Sonfield, *What Is At Stake with the Federal Contraceptive Guarantee*, GUTTMACHER POL. REV., Jan. 10, 2017, https://www.guttmacher.org/gpr/2017/01/what-stake-federal-contraceptive-coverage-guarantee (last visited Jan. 12, 2018).

421. *See Whole Woman's Health*, 136 S. Ct. at 2312.

422. *See* Brief of the Petitioners at 48–52, East Texas Baptist Univ. v. Burwell, 136 S. Ct. 1557 (2016) (Nos. 15-35, 15-105, 15-119, & 15-191).

423. *See Hobby Lobby*, 134 S. Ct. at 2760.

424. *See* Brief of the Petitioners, 72–78, East Texas Baptist Univ. v. Burwell, 136 S. Ct. 1557 (2016) (Nos. 15-35, 15-105, 15-119, & 15-191).

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

standard. As framed by *Whole Woman's Health*, the outcome of undue-burden analysis depends heavily on the facts of an individual case. Fact-intensive litigation rarely yields generalizable rules or consistent results. If courts have stayed away from unconstitutional-conditions doctrine because of its incoherence or inconsistency, undue-burden analysis may be no more appealing.

It may also be difficult to prove that a law creates an undue burden. Data on controversial subjects like abortion rates may be hard to come by.[426] Other burdens, like the claimed complicity in *Zubik*, are abstract and therefore hard to quantify. Even if data is available, litigants may struggle to show that a disputed law partly or entirely caused the problem pinpointed in a case. Take abortion as an example. Data showing a lower abortion rate might be inaccurate, missing women who terminated a pregnancy illegally or out of state.[427] The rate may reflect a changing economic climate, evolving views about abortion, or better contraceptive access rather than the impact of a disputed law.[428] As importantly, a burden may be created by all or several of the laws implemented in a state rather than an isolated policy challenged in one particular case.[429]

The available data may make it impossible or expensive to document some of the burdens that *Whole Woman's Health* asks us to take seriously. There, the Court dignified concerns that abortion care would be less accessible and of lower quality.[430] Focusing on the facts might encourage a court to zero in on statistics, missing the ways that a law forced a person to overcome undue burdens on their way to exercising a right.

Finally, the undue-burden standard is malleable and leaves room for different judges to inject their own views about the scope of constitutional rights. There is reason to believe that the current Supreme Court, following the addition of Justice Neil Gorsuch, might not reach the same conclusion in *Whole Woman's Health*. Nor might

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426. On the difficulty of getting accurate data on abortion rates, *see* Amelia Thomson-DeVeaux, *It's Really Hard To Measure The Effects Of Abortion Restrictions In Texas*, FIVETHIRTYEIGHT(Aug. 28, 2014), http://fivethirtyeight.com/features/its-really-hard-to-measure-the-effects-of-abortion-restrictionsin-texas/ (last visited Jan. 12, 2018).

427. *See* Susheela Singh (ed.) et. al., *Methodologies for Estimating Abortion Incidence and Abortion-Related Morbidity: A Review*, GUTTMACHER INSTITUTE1,13 (2010), https://www.guttmacher.org/sites/default/files/pdfs/pubs/compilations/IUSSP/abortionmethodologies.pdf (last visited Jan. 12, 2018).

428. *See* Thomson-Devaux, *supra* note 426.

429. *See Casey*, 505 U.S. at 885–86 (explaining that the Court analyzes each disputed regulation separately under an undue-burden standard).

430. *See Whole Woman's Health*, 136 S. Ct. at 2311–16.

the current Court sign off on the application of the standard to other fundamental-rights cases.

Just the same, *Whole Woman's Health* gives us reason to believe that these objections can be overcome. The Court instructed that the burden created by a law depends not only on obstacles created by the government but also on how a law interacts with the surrounding economic and political environment.[431] Under *Whole Woman's Health*'s undue-burden analysis, it is not necessary to isolate the effect of a law.[432] Instead, courts look at how a law operates in a much broader context.[433] Proving causation under such an approach may not be as difficult as it would first appear.

Nor did *Whole Woman's Health* narrow the possible options for proving an undue burden. In that case, for example, the Court relied on expert testimony and peer-reviewed studies to predict the likely impact of a law.[434] The majority also relied on common-sense inferences in evaluating the effect of a law.[435] While statistical evidence on an undue burden may be hard to come by, *Whole Woman's Health* opens the door to a variety of ways of proving an undue burden. And the standard, if widely adopted, will encourage social movements to develop new sources of data. For some time, pro-choice and pro-life groups have funded research partly to strengthen their constitutional case.[436] If the undue-burden standard applied more broadly, new sources of data might evolve.

The malleability and fact-intensive nature of the undue-burden standard may be strengths as much as weaknesses. Many doctrinal approaches, even the theoretically-rigid tiers of scrutiny, leave room for judges' views of their proper role and of the Constitution. It is partly for this reason that scholars have observed so much inconsistency in the way that the tiers of scrutiny typically apply.[437] The undue-burden standard is not particularly easy to manipulate when compared with other doctrinal tests. And application of the standard turns mostly on questions of fact—matters that will be

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431. *See id.* at 2309–16.

432. *See id.*

433. *See id.*

434. *See id.*

435. *See id.* at 2317.

436. *See* Nina Martin, *Behind the Supreme Court's Decision, More Than a Decade of Privately-Funded Research*, PROPUBLICA, Jul. 14, 2016, https://www.propublica.org/article/supreme-court-abortion-decision-more-than-decade-privately-funded-research (last visited Jan. 12, 2018).

437. *See* Eric Berger, *In Search of a Theory of Deference: The Eighth Amendment, Democratic Pedigree, and Constitutional Decision-making* 88 WASH. U. L. REV. 1, 4 (2010).

decided by lower court judges. To be sure, the polarization and partisanship that have rocked the federal judiciary have left a mark on district courts as well as appellate judges and Supreme Court nominations: the Brookings Institute has shown that since 1981, 7% of Republican district court nominees and 14% of Democratic nominees have failed.[438] Just the same, lower court nominations garner less attention from interest groups and the media, and more moderate nominees are on the bench as a result (as a point of comparison, 23% of Democratic and 19% of Republican nominees to the appellate courts have failed).[439] District courts may do a fairer job applying the undue-burden standard, and appellate courts, more often shaped by political polarization, will have less discretion to overturn fact-based rulings.

Perhaps most importantly, the undue-burden standard as the Supreme Court currently defines it deals more closely with the reality facing those exercising a constitutional right. The standard offers a more coherent, persuasive way to understand cases involving poverty, privileges, and welfare benefits. In this way alone, *Whole Woman's Health* could change how the courts approach fundamental-rights cases.

CONCLUSION

To many, *Whole Woman's Health* seemed to be far from a blockbuster decision. The Court's decision put some teeth in the undue-burden standard and made review of abortion regulations more meaningful. But understood in context, the Court's decision could mean much more.

Whole Woman's Health picks up on an understanding of an undue burden at work in earlier decisions. Prior to *Casey*, abortion jurisprudence offered at least three competing definitions of an undue burden. Cases like *McRae* concluded that a law was unduly burdensome only if the government created the obstacles facing exercise of a constitutional right. While not specific to abortion cases, this idea of an undue burden reinforced the formalist distinction between a right and a privilege. A second understanding first

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438. *See* David Leonhardt, *How to Stop the Politicization of the Courts*, N.Y. TIMES, Apr. 4, 2017, https://www.nytimes.com/2017/04/04/opinion/how-to-end-the-politicization-of-the-courts.html (last visited Jan. 12, 2018). On the reasons that the lower courts attract less attention from interest groups, *see* SARAH BINDER AND FORREST MALTZMAN, ADVICE AND DISSENT: THE STRUGGLE TO SHAPE THE FEDERAL JUDICIARY 1–12 (2009).

439. *See* Leonhardt, *supra* note 438.

appeared in Justice O'Connor's dissent in *Akron I*. According to O'Connor, an undue burden had more to do with the degree to which a law impacted the exercise of a right.

These understandings of an undue burden contrasted with one developed earlier. Supporters of abortion rights had drawn on a definition of an undue-burden forged in free-exercise cases, asking the Court to look at evidence of the purpose and effect of neutral-seeming laws. *Whole Woman's Health* revives this idea of an undue burden. For this reason, the Court's approach holds out promise not just in abortion cases but in a variety of doctrinal domains.

It is too early to know whether *Whole Woman's Health* will live up to its potential. But the history of the undue-burden standard shows that a new approach to fundamental-rights jurisprudence is realistic, available, and compelling.