THE BURDEN IS UNDUE: *WHOLE WOMAN'S HEALTH* AND THE EVOLUTION, CLARIFICATION, AND APPLICATION OF THE UNDUE BURDEN STANDARD

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INTRODUCTION

"Something special is happening in Austin tonight."[1] On June 25, 2013, the tenacity, rhetorical skills, and striking footwear of one inspiring woman captivated an entire nation.[2] Without pause or physical support, Texas State Senator Wendy Davis commanded the chamber floor for nearly eleven hours, successfully thwarting a measure containing some of the most severe regulations on abortion procedures, providers, and facilities in the country.[3] Throughout this exhausting speaking session, Davis demanded her colleagues detail the exact manner in which the proposed legislation would achieve its stated purpose of promoting women's health and safety.[4] Although Davis received no response to her imperative query, her historic filibuster effectively prevented the shuttering of most state abortion clinics and sent a powerful message to "every politician who wants to interfere in women's medical decisions: Enough is enough."[5]

Unfortunately, this monumental victory benefitting women across Texas proved short-lived. Refusing to abandon "his goal to make abortion at

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1 Barack Obama (@BarackObama), TWITTER (June 25, 2013, 9:40 PM), https://twitter.com/barackobama/status/349703625616011264.

2 *See* John Sutton & Matt Smith, *Lawmaker's Filibuster to Kill Texas Abortion Bill Ends Early*, CNN (June 25, 2013), http://www.cnn.com/2013/06/25/politics/texas-abortion-bill/; Karen Tumulty & Morgan Smith, *Texas State Senator Wendy Davis Filibusters Her Way to Democratic Stardom*, WASH. POST (June 26, 2013), https://www.washingtonpost.com/politics/texas-state-senator-wendy-davis-filibusters-her-way-to-democratic-stardom/2013/06/26/aace267c-de85-11e2-b2d4-ea6d8f477a01_story.html.

3 *See* Manny Fernandez, *In Texas, a Senator's Stand Catches the Spotlight*, N.Y. TIMES (June 26, 2013), http://www.nytimes.com/2013/06/27/us/politics/texas-abortion-bill.html; Rachel Weiner, *6 Key Moments from Wendy Davis' Filibuster*, WASH. POST (June 26, 2013), https://www.washingtonpost.com/news/the-fix/wp/2013/06/26/key-moments-from-wendy-daviss-11-hour-filibuster/.

4 *See* Jessica Arden Ettinger, Note, *Seeking Common Ground in the Abortion Regulation Debate*, 90 NOTRE DAME L. REV. 875, 875 (2014).

5 Press Release, Cecile Richards, President, Planned Parenthood Action Fund, Tonight, Texans Won (June 26, 2013), https://www.plannedparenthoodaction.org/pressroom/planned-parenthood-action-fund-tonight-texans-won. *See also* Ettinger, *supra* note 4.

any stage 'a thing of the past,'" Governor Rick Perry convened a special session of the legislature for further consideration of the bill.[6] On July 13, 2013, nineteen state senators officially approved House Bill 2 ("H.B. 2") over the objections of eleven vocal opponents, sending the restrictive act to the governor's desk without any of the twenty Democratic amendments offered during the lengthy debate.[7] The final law—signed by Governor Perry only five days later—prohibited abortion procedures performed at or after twenty weeks of pregnancy and compelled physicians to obtain admitting privileges at a hospital no further than thirty miles from the facility.[8] In addition, the statute mandated that clinics meet licensing criteria established for hospital-like ambulatory surgical centers, requiring expensive renovations and relocations in compliance with architectural and equipment standards.[9] At the time, only five Texas clinics fulfilled the measure's stringent requirements, depriving thirty-five percent of the population of a right that the Due Process Clause of the Fourteenth Amendment deemed fundamental and protected: the freedom to choose and access abortion care.[10]

The controversy over abortion rights once again played out before the eyes of a watchful public as groups of abortion providers turned to the courts, filing two separate actions ardently challenging the constitutionality of the new law.[11] In deciding the outcome of such cases, the courts applied a test first developed in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[12]—the undue burden standard.[13] According to the Court in this seminal case, "[a]n undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."[14] Although the application of this essential test in recent jurisprudence has often been characterized as inconsistent and erratic, the Supreme Court's June 2016 decision in

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6 Manny Fernandez, *Abortion Restrictions Become Law in Texas, but Opponents Will Press Fight*, N.Y. TIMES (July 18, 2013), http://www.nytimes.com/2013/07/19/us/perry-signs-texas-abortion-restrictions-into-law.html?_r=0. *See also* Matt Smith & Joe Sutton, *Perry Renews Texas Abortion with Special Session*, CNN (June 28, 2013, 7:29 AM), http://www.cnn.com/2013/06/26/politics/texas-abortion-bill.

7 *See* Morgan Smith, Becca Aaronson, & Shefali Luthra, *Abortion Bill Finally Bound for Perry's Desk*, TEX. TRIB. (July 13, 2013), https://www.texastribune.org/2013/07/13/texas-abortion-regulations-debate-nears-climax/.

8 *See* TEX. HEALTH & SAFETY CODE ANN. §§ 171.0031(a), 171.044, 245.010(a) (West 2013).

9 *See id.* §§ 171.044, 245.010(a); Fernandez, *supra* note 6.

10 *See* Roe v. Wade, 410 U.S. 113, 154, 164 (1973); Fernandez, *supra* note 6.

11 *See* Whole Woman's Health v. Lakey, 46 F. Supp. 3d 673, 677 (W.D. Tex. 2014); Planned Parenthood of Greater Tex. Surgical Health Servs v. Abbott, 951 F. Supp. 2d 891, 895 (W.D. Tex. 2013).

12 505 U.S. 833 (1992).

13 *See* Whole Woman's Health v. Cole, 790 F.3d 563, 573–75 (5th Cir. 2015) (per curiam), *modified*, 790 F.3d 598 (5th Cir. 2015), *rev'd sub nom.* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016); Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 748 F.3d 583, 590 (5th Cir. 2014); *Lakey*, 46 F. Supp. 3d at 687; *Abbott*, 951 F. Supp. 2d at 909.

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

Whole Woman's Health v. Hellerstedt[15] regarding the constitutional validity of H.B. 2 further clarified the meaning and accurate use of this important standard.[16]

This Note argues that the cursory discussion of the undue burden standard presented in *Whole Woman's Health* does not offer adequate guidance as to the proper understanding and application of the relevant test. Consequently, this Note contends that the most effective method of strengthening and clarifying the standard would require the enactment of a federal statute codifying the constitutional protection of abortion and the intermediate level of scrutiny appropriately applied to regulations constraining this freedom. In light of the foreseeable difficulties associated with the passage of such legislation, this Note also details the ideal structure of undue burden analyses based upon the holding in *Whole Woman's Health*, providing an exemplary model for future courts to follow.

Part I of this Note describes the formulation and initial adoption of the undue burden standard in the landmark case of *Casey*.[17] Part II briefly analyzes the application and evolution of the test in two major opinions issued by the Supreme Court—*Stenberg v. Carhart*[18] and *Gonzales v. Carhart*.[19] Part III examines and synthesizes the Court's reasoning in *Whole Woman's Health*, including a discussion of the rationale underlying the concurring and dissenting opinions, with a distinct focus on the limited treatment of the undue burden standard.[20] Finally, Part IV assesses the adequacy of the Court's decision and proposes creating federal law that would safeguard abortion access and utilize a stricter form of constitutional review. In the alternative, this section also explains how courts should proceed with undue burden analyses in the future and outlines a framework for the proper application of the standard so as to best protect the essential rights of women choosing to have an abortion.

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15 136 S. Ct. 2292 (2016).

16 *See id.* at 2309–10; *see also* Emma Freeman, Note, *Giving* Casey *its Bite Back: The Role of Rational Basis Review in Undue Burden Analysis*, 48 HARV. C.R.–C.L.L. REV. 279, 279 (2013); Gillian E. Metzger, *Unburdening the Undue Burden Standard: Orienting* Casey *in Constitutional Jurisprudence*, 94 COLUM. L. REV. 2025, 2026 (1994); Linda J. Wharton, Susan Frietsche & Kathryn Kolbert, *Preserving the Core of* Roe*: Reflections on* Planned Parenthood v. Casey, 18 YALE J.L. & FEMINISM 317, 322 (2006).

17 *See Casey*, 505 U.S. at 877–78.

18 530 U.S. 914 (2000).

19 550 U.S. 124 (2007).

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

I. THE FORMULATION & ADOPTION OF THE UNDUE BURDEN STANDARD

The contentious debate surrounding abortion is by no means new to the public consciousness, spanning over four decades and evoking strong convictions on each side of the sensitive dispute.[21] The constitutional right to abortion is grounded in the well-known case of *Roe v. Wade*.[22] Beginning with this seminal 1973 decision, the Supreme Court endeavored to delineate a clear standard governing judicial review of regulations restricting such procedures.[23] The Court in *Roe* concluded that the "right of privacy . . . founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action . . . [was] broad enough to encompass a women's decision whether or not to terminate her pregnancy."[24] However, recognizing that this fundamental liberty was not absolute and that legitimate state interests prevailed at a certain stage of pregnancy, the Court adopted the trimester framework subjecting contested measures restricting abortion within the first three months to strict scrutiny.[25] This heightened level of protection for women, their doctors, and their freedom to choose abortion controlled for nearly twenty years.[26] Nevertheless, the Court in 1992 attempted to limit its previous holding, embracing a less rigorous test which remains in place to this day (albeit in modified form)—the undue burden standard.[27]

A. *The Trimester Framework*

In 1973, statutes similar to Articles 1191-1194 and 1196 of the Texas Penal Code—legislation at the heart of the controversy in *Roe*—governed in a majority of states, making it a crime to procure or attempt an abortion unless the procedure was necessary to save the life of the mother.[28] However, in *Roe*, the Supreme Court changed this by determining that only those laws narrowly designed to address compelling state interests as to the protection of health, medical standards, and potential life justified constraint of a woman's fundamental right to abortion.[29] Acknowledging such legitimate governmen-

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21 *See* Jon F. Merz, Catherine A. Jackson, & Jacob A. Klerman, *A Review of Abortion Policy: Legality, Medicaid Funding, and Parental Involvement, 1967–1994*, 17 WOMEN'S RTS. L. REP. 1, 1 (1995).

22 410 U.S. 113 (1973).

23 *See* Elizabeth Price Foley, Whole Woman's Health *and the Supreme Court's Kaleidoscopic Review of Constitutional Rights*, 2016 CATO SUP. CT. REV. 153, 153–54 (2016).

24 *Roe*, 410 U.S. at 153.

25 *See id.* at 163; Foley, *supra* note 23, at 153.

26 Foley, *supra* note 23, at 153.

27 *See Casey*, 505 U.S. at 878 (plurality opinion); Khiara M. Bridges, *"Life" in the Balance: Judicial Review of Abortion Regulations*, 46 U.C. DAVIS L. REV. 1285, 1287 (2013).

28 *See Roe*, 410 U.S. at 117–18.

29 *See id.* at 155.

tal aims, the Court set forth a framework detailing acceptable regulation contingent upon the stage of fetal development, allowing states to place increasing restrictions on abortion so long as they survived constitutional scrutiny.[30]

As the choice of abortion in the first trimester represented a private medical decision between a woman and her doctor, the Court held that the performance of the procedure during this period was to remain free from government interference.[31] Whereas the Court allowed the state to restrict abortions after the first trimester in order to safeguard maternal health, it further stipulated that regulation or prohibition of the procedure in the interest of potential life was permissible in the viability stage except when necessary to preserve the life of the mother.[32] This important decision was applied in several subsequent Supreme Court cases nullifying unconstitutional provisions of contested abortion statutes, its requirement of strict scrutiny serving as the law of the land for the next nineteen years.[33]

B. *The Undue Burden Standard*

"Liberty finds no refuge in a jurisprudence of doubt. Yet 19 years after our holding that the Constitution protects a woman's right to terminate her pregnancy in its early stages, . . . that definition of liberty is still questioned."[34] This concise summary of the reaction to *Roe* opened the plurality opinion authored by Justices O'Connor, Kennedy, and Souter in *Casey*, a landmark decision in which the Court once again affirmed precedent establishing and upholding the freedom to choose abortion.[35] In striving to retain the essential conclusions of *Roe*, the plurality discarded the strict scrutiny trimester framework in favor of an entirely distinct test reflecting a significant transformation in the Court's approach to the issue of abortion.[36] The undue burden standard still controls contemporary constitutional review of abortion restrictions and demands consideration of the purpose and effects of such regulations before they are accepted as valid.[37]

Positioned at the center of the controversy in *Casey* was the Pennsylvania Abortion Control Act of 1982, a restrictive measure specifying that a woman seeking an abortion was to receive certain information and give her

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30 *See id.* at 164–65.

31 *See id.* at 163–64.

32 *See id.* at 164–65.

33 *See, e.g.*, Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 772 (1986); City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 452 (1983); Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 71 (1976).

34 *Casey*, 505 U.S. at 844 (citing *Roe*, 410 U.S. at 162–64).

35 *See id.* at 843–44.

36 *See* Freeman, *supra* note 16, at 289; Metzger, *supra* note 16, at 2027.

37 *See* Metzger, *supra* note 16, at 2027.

informed consent at least twenty-four hours prior to the procedure.[38] Another provision of the law similarly required a minor to obtain the informed consent of one parent before having an abortion, allowing for the option of judicial bypass if she did not wish to or was unable to secure such authorization.[39] Married women were further obligated to sign a statement confirming that their husbands had been notified of the intended procedure.[40] Compliance with the aforementioned stipulations was waived in the event of a "medical emergency."[41] Finally, the Act targeted abortion providers and facilities, regulating the performance of the procedure and establishing detailed reporting requirements.[42]

Before these five critical provisions went into effect, abortion clinics and physicians brought suit in federal court and challenged the legitimacy of the regulations on due process grounds.[43] Although the District Court found that the law of abortion created in *Roe* remained undisturbed, the Third Circuit determined that the strict scrutiny standard developed by the Court had been explicitly overruled and replaced in later decisions.[44] As such, the appellate court instead adopted a unique test articulated by Justice O'Connor in previous dissenting and concurring opinions.[45] Specifically, Justice O'Connor's 1989 concurrence in *Webster v. Reproductive Health Services*[46] concluded that the contested legislation did not impose an undue burden on a woman's choice to have an abortion and therefore employed a lower level of judicial scrutiny, rational basis review.[47] Further, Justice O'Connor's 1990 concurring opinion in *Hodgson v. Minnesota*[48] similarly declared that a statute levying an undue burden upon the decision to obtain an abortion must survive strict scrutiny in order to attain constitutional validity.[49] Consequently, in utilizing strict scrutiny to examine regulations imposing an undue burden and rational basis to review those which did not, the Third Circuit upheld four of the five challenged provisions of the Pennsylvania Abortion Control Act.[50]

On appeal to the Supreme Court, the justices issued a fractured 3-2-4 plurality decision, splitting evenly along ideological lines in determining

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38 *See* 18 PA. CONS. STAT. §§ 3203–3220 (1990); *Casey*, 505 U.S. at 844.

39 *See Casey*, 505 U.S. at 844.

40 *See id*.

41 *See id.*

42 *See id.*

43 *See id.* at 845.

44 *See* Planned Parenthood of Se. Pa. v. Casey, 947 F.2d 682, 695–97 (3d Cir. 1991); Planned Parenthood of Se. Pa. v. Casey, 744 F. Supp. 1323, 1397 (E.D. Pa. 1990).

45 *See Casey*, 947 F.2d at 697.

46 492 U.S. 490 (1989).

47 *See id.* at 530 (O'Connor, J., concurring).

48 497 U.S. 417 (1990).

49 *See id.* at 459 (O'Connor, J., concurring).

50 *See Casey*, 947 F.2d at 697, 719.

whether to preserve or abandon *Roe*'s framework.[51] The Court first affirmed the three essential components of the pronouncement in *Roe*: (1) the recognition of a woman's right to choose and obtain a pre-viability abortion free from state interference; (2) the confirmation of governmental authority to restrict abortions after viability so long as the law included exceptions in the event of danger to the mother's life or health; and (3) the validation of the state's legitimate interest in safeguarding maternal health and potential life.[52] The plurality next considered stare decisis, reasoning that no development in law or fact weakened *Roe*'s central ruling and concluding that the Court's commitment to the rule of law necessitated adherence to the essence of this precedential holding.[53]

However, in a subsequent portion of the joint opinion, the Court expressly rejected *Roe*'s trimester framework and its prohibition on all pre-viability legislation proposed for the protection fetal life.[54] The plurality declared the Court's order in *Roe* inherently contradictory, recognizing state interests in defending life while simultaneously forbidding any abortion restrictions advancing this governmental aim prior to viability.[55] Opining that a logical reading of *Roe* mandated the reconciliation of a woman's freedom to choose abortion and the state's concern for prenatal life, the plurality asserted that the trimester formulation misconceived the nature of the former interest and undervalued the latter.[56] For example, the Court maintained that a law enacted to serve a valid purpose could nevertheless have the effect of increasing the cost or decreasing the availability of abortion despite the fact that it was not specifically designed to achieve such ends.[57] As these incidental consequences could not be enough to invalidate the measure, the plurality held that only state regulation constraining a woman's ability to decide to have an abortion exceeded governmental authority and directly limited the right protected by due process, thereby placing an undue burden upon this fundamental liberty.[58]

The plurality adopted a test, previously considered mere dicta as expressed in ancillary opinions of Justice O'Connor, and attempted to define and set forth a framework for the application of the undue burden standard by articulating the following passage:

> A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. A statute with this purpose is invalid because the means chosen by the

51 *See Casey*, 505 U.S. at 841–45; Foley, *supra* note 23, at 158–59.
52 *See Casey*, 505 U.S. at 846.
53 *See id*. at 860–61, 869 (plurality opinion).
54 *See id.* at 873.
55 *See id.* at 875–76.
56 *See id.* at 873.
57 *See id.* at 874.
58 *See Casey*, 505 U.S. at 874.

> State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it. And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends.[59]

This standard is commonly understood as requiring the Court to conduct rational basis review in searching for a legitimate nexus between the means (the structure of the statute) and ends (the goals and consequences of the statute) of the legislature, applying such minimal scrutiny when considering the two-tiered purpose and effects test.[60] Whereas the purpose prong prevents the government from attempting to curtail the woman's right to make the ultimate decision to have an abortion, the effects prong analyzes both the intended and incidental impact of abortion restrictions.[61] In utilizing this model, the Court must uphold regulations promoting maternal health, encouraging women to choose childbirth, or instituting structural barriers to abortion access through which the government exhibits its respect for unborn life only if reasonably related to legitimate governmental goals.[62] In contrast, legislation having the purpose or effect of placing substantial obstacles in the path of a woman seeking an abortion by unnecessarily regulating health inevitably constitutes an undue burden.[63] Therefore, as the Court equated an undue burden with an unconstitutional burden, a law crafted to further a compelling state interest which created such a burden would be deemed legally invalid.[64]

The proper use of the undue burden standard as elucidated in *Casey* was nevertheless obscured in its actual application to the contested provisions of the Pennsylvania law.[65] With regard to medical emergencies, the plurality concluded that the language describing the permissible exceptions to the statute was sufficiently broad to encompass all significant threats to maternal health and life, thereby imposing no undue burden on the abortion right.[66] The plurality also upheld the informed consent requirement, observing that the provision was not an undue burden, but instead promoted mature and knowledgeable decision-making.[67] Similarly, finding that the reporting provisions contained in the Act served to improve medical research rather than to make abortions more difficult to procure, the plurality was joined by Justice Stevens in reasoning that such stipulations presented no substantial obstacle to a woman seeking to terminate her pregnancy.[68] Finally, the Court

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59 *Id.* at 877.
60 *See* Freeman, *supra* note 16, at 290.
61 *See* Metzger, *supra* note 16, at 2030.
62 *See Casey*, 505 U.S. at 877–78.
63 *See id.* at 878.
64 *See id.* at 877.
65 *See* Wharton, Frietsche & Kolbert, *supra* note 16, at 332–33.
66 *See Casey*, 505 U.S. at 880.
67 *See id.* at 883, 887.
68 *See id.* at 900–01.

cited established precedent and the state interest in compelling minors to discuss the ramifications of abortion with their families when confirming the constitutionality of the one-parent consent mandate and judicial bypass procedure.[69]

Perhaps most illuminating of the reasoning underlying the plurality's application of the undue burden standard was its decision to declare the spousal notification requirement invalid. Utilizing evidence from medical and psychological research, the plurality determined that the millions of American women plagued by domestic abuse had substantial reasons for not informing their husbands of their choice to have an abortion.[70] Further, while acknowledging the husband's interest in the life of the child carried by his wife, the plurality asserted that he had no right to demand that she consult him prior to executing a personal choice.[71] In deeming the statutory requirement unconstitutional, the plurality affirmed that "[t]he Constitution protects all individuals, male or female, married or unmarried, from the abuse of governmental power, even where that power is employed for the supposed benefit of a member of the individual's family."[72]

As evidenced in the above discussion, scholars have generally described the undue burden standard articulated in *Casey* and the subsequent application thereof as internally contradictory and perplexing.[73] Despite the fact that empirical evidence regarding domestic abuse was used to strike down the spousal notification requirement, the plurality neglected to use research similarly demonstrating the negative effects of parental consent mandates in reviewing this separate provision.[74] Moreover, while the opinion recounted the significant burden imposed by waiting period laws in great detail, the Court still upheld the 24-hour informed consent requirement as the lower court had not specifically deemed this provision a substantial obstacle in the path of a woman seeking an abortion.[75] Accordingly, such inconsistencies within the opinion itself only led to further irregularities in the precedential application of *Casey*'s undue burden standard.[76]

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69 *See id.* at 899.

70 *See id.* at 892–94.

71 *See id.* at 898.

72 *See Casey*, 505 U.S. at 898.

73 *See, e.g.*, Metzger, *supra* note 16, at 2035; Wharton, Frietsche & Kolbert, *supra* note 16, at 332–33, 335–39.

74 *See* Metzger, *supra* note 16, at 2035; Wharton, Frietsche & Kolbert, *supra* note 16, at 337.

75 *See* Metzger, *supra* note 16, at 2035–36; Wharton, Frietsche & Kolbert, *supra* note 16, at 335–36.

76 *See* Freeman, *supra* note 16, at 279; Metzger, *supra* note 16, at 2025–26; Wharton, Frietsche & Kolbert, *supra* note 16, at 353–54.

II. THE APPLICATION & EVOLUTION OF THE UNDUE BURDEN STANDARD

Following the Court's groundbreaking 1992 decision in *Casey*, the undue burden standard was applied in cases analyzing the constitutionality of regulations concerning abortion procedures, physicians, and facilities.[77] However, the subsequent employment of this important test was often characterized as inconsistent, confusing, and problematic.[78] The *Casey* Court's failure to enunciate a detailed methodology governing the use of the undue burden standard has contributed to elevated and unconstrained judicial discretion in examining abortion regulations, thereby permitting individual judges to define the significance and relevancy of evidence on a case-by-case basis.[79] Additionally, the absence of clear guidance concerning the application of the test has produced variable results, allowing one court to fully litigate a challenge to an abortion law despite the fact that another dismissed action against a comparable measure as frivolous.[80] The cases of *Stenberg* and *Gonzales* exemplify this trend, bringing to light inherent issues emanating from the lack of specificity in the plurality's articulation of the undue burden standard in *Casey* and the Court's ever-shifting jurisprudence with regard to the restriction of abortion.[81]

A. *Subsequent Application of the Standard*

In 2000, the Court issued its decision in *Stenberg*, ruling that a state statute classifying the performance of a partial-birth abortion as a Class III felony violated the Constitution.[82] Seven years later, the Court in *Gonzales* declared valid a federal law similarly forbidding such procedures, announcing a holding seemingly overturning precedent.[83] Situated at the heart of this apparent jurisprudential discrepancy was the Court's evolving understanding and application of the undue burden standard.[84]

In *Stenberg*, the Court considered a Nebraska statute prohibiting the performance of a specific method of terminating a pregnancy, the partial birth abortion.[85] Whereas the narrow interpretation of the statute advocated by the dissent and the Attorney General asserted that the legislature sought to ban

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77 *See, e.g.*, *Gonzales*, 550 U.S. at 147–67; *Stenberg*, 530 U.S. at 938–46.

78 *See e.g.*, Freeman, *supra* note 16, at 314–15; Metzger, *supra* note 16, at 2037; Valerie J. Pacer, *Salvaging the Undue Burden Standard—Is it a Lost Cause? The Undue Burden Standard and Fundamental Rights Analysis*, 73 WASH. U. L.Q. 295, 295 (1995).

79 *See* Metzger, *supra* note 16, at 2037–38.

80 *See* id.

81 *See* Bridges, *supra* note 27, at 1288; Foley, *supra* note 23, at 154.

82 *See Stenberg*, 530 U.S. at 922.

83 *See Gonzales*, 550 U.S. at 132–33.

84 *See* Bridges, *supra* note 27, at 1288; Foley, *supra* note 23, at 154.

85 *See Stenberg*, 530 U.S. at 922–23.

one specific procedure, the Court concluded that the law could potentially apply to a broad range of abortion methods.[86] Consequently, any physician performing a D & E procedure, a technique commonly utilized in second trimester pre-viability abortions, could be subject to prosecution and imprisonment.[87] According to the Court, this result represented an undue burden upon a woman's right to elect to end her pregnancy, characterizing the Nebraska statute as unconstitutional.[88] Furthermore, as the state failed to prove that the absence of a health exception would never jeopardize the safety of women, the Court concluded that the outright statutory ban on the D & X procedure—a distinct operation also known as an intact D & E procedure—created a significant and impermissible health risk.[89]

Conversely, Justice Kennedy's dissent maintained that the majority improperly applied *Casey*'s standard and its "assurance that the State's constitutional position in the realm of promoting respect for life [was] more than marginal."[90] Justice Kennedy asserted that Nebraska intended to differentiate between D & E and D & X procedures in legislation banning only the latter method, and that its legitimate interest in preserving human life entitled the state to do so; therefore, he declared that the majority's refusal to distinguish amongst the procedures disregarded the state's right to declare a moral difference between the two as recognized in *Casey*.[91] Justice Kennedy further deemed the majority's reading of *Casey* to mandate the inclusion of a health exception a basic misreading of the precedent.[92] Likewise, in a separate dissent, Justice Thomas stressed that the Court's decision was irreconcilable with that of *Casey*, noting that "the majority opinion [gave] the lie to the promise of *Casey* that regulations that do no more than express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose."[93] Thus, the decision in *Stenberg* only added to the debate surrounding the appropriate use and meaning of the undue burden standard.[94]

Likewise, in *Gonzales*, abortion providers challenged the constitutional validity of the Partial-Birth Abortion Act of 2003, a federal measure comparable to the state law deemed invalid in *Stenberg*.[95] Citing the canon of constitutional avoidance—a principle of requiring interpreters to construe statutory language in a manner consistent with the supreme law of the land—the

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86 *See id.* at 938–45.

87 *See id*. at 944.

88 *See id.* at 946.

89 *See id.* at 937–38.

90 *Id.* at 964 (Kennedy, J., dissenting).

91 *See Stenberg*, 530 U.S. at 962–63 (Kennedy, J., dissenting).

92 *See id.* at 964.

93 *Id.* at 982–83 (Thomas, J., dissenting) (citing *Casey*, 505 U.S. at 877).

94 *See* David M. Smolin, *Fourteenth Amendment Unenumerated Rights Jurisprudence: An Essay in Response to* Stenberg v. Carhart, 24 HARV. J.L. & PUB. POL'Y 815, 816 (2001).

95 *See Gonzales*, 550 U.S. at 132–33.

Court first determined that the most reasonable reading of the Act indicated that it was sufficiently narrow to distinguish the banned procedure from other allowable abortion methods.[96] Further, based upon the majority's interpretation of the test formulated in *Casey*, the Court ultimately concluded:

> [w]here it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn.[97]

Thus, in applying rational basis review to the purpose and effects test, the Court reasoned that the availability of alternative procedures illustrated a balance between governmental interests and the rights of women seeking abortions (despite the absence of a health exception).[98] Finally, holding that the law would not burden a large fraction of women choosing to have an abortion, the Court validated the legislation.[99]

Once again, the dissent insisted that this decision was contrary to both *Casey* and *Stenberg*; as Justice Ginsburg declared, "[r]etreating from prior rulings that abortion restrictions cannot be imposed absent an exception safeguarding a woman's health, the Court [upheld] an Act that surely would not survive under the close scrutiny that previously attended state-decreed limitations on a woman's reproductive choices."[100] Not only did the majority's decision go against precedent affirming the necessity of a health exception, she argued, but it also blurred the line between "pre" and "post" viability, inevitably obscuring a woman's right to choose as this liberty was often based upon pregnancy stage.[101] Finally, Justice Ginsburg deemed the notion that the contested legislation advanced any legitimate state interest absurd, implying that the absence of a rational relationship between governmental goals and the purpose for which the statute was drawn signified the existence of an undue burden.[102] Therefore, this opinion further exhibited the need for clarification and uniformity in applying and understanding the undue burden standard.[103]

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96 *See id.* at 153–54.

97 *Id.* at 158.

98 *See id.* at 158–60.

99 *See id.* at 167–68.

100 *Id.* at 171 (Ginsburg, J., dissenting).

101 *See Gonzales*, 550 U.S. at 186.

102 *See id.* at 191.

103 *See* Jenny K. Jarrard, Comment, *The Failed Purpose Prong: Women's Right to Choose in Theory, Not in Fact, Under the Undue Burden Standard*, 18 LEWIS & CLARK L. REV. 469, 495 (2014).

B. *Evolution of the Standard*

Among academics and legal scholars alike, a general consensus regarding the need to strengthen the undue burden standard enunciated in *Casey*—providing additional guidance concerning the proper use and meaning of the test—developed over time.[104] Indeed, the standard was often described as impotent and "woefully anemic."[105] As seen in both *Stenberg* and *Gonzales*, the inherent frailty of the undue burden framework leads to erratic and often conflicting results in the employment of the test; this is not only true of Supreme Court jurisprudence, but also produces varied outcomes across state, district, and circuit courts.[106]

In endeavoring to identify the source of such inconsistencies and potential areas for improvement, some have pointed to the failure of the Court in *Casey* to define the "purpose" prong and the resulting inability of subsequent courts to properly apply (or even attempt to apply) this component of the two-tiered test.[107] As such, the judiciary has found it difficult to identify acceptable legislative purposes, to measure the degree of legitimacy necessary to justify the restriction of abortion, and to grant the appropriate level of deference to the intentions of the state legislature.[108] Others have drawn attention to a fundamental transformation in the reading of *Casey* and in the standards of judicial review applied to abortion restrictions.[109] For instance, Professor Elizabeth Price Foley chronicled the evolution from *Roe*'s strict scrutiny, to the undue burden standard adopted in *Casey*, to *Gonzales*' undue burden "plus" (utilizing rational basis review and enhanced legislative deference), and, finally, to undue burden "minus" as witnessed in the Court's 2016 decision in *Whole Woman's Health*.[110]

III. *WHOLE WOMAN'S HEALTH* & THE CLARIFICATION OF THE UNDUE BURDEN STANDARD

> We conclude that neither of these provisions confers medical benefits sufficient to justify the burdens upon access that each imposes. Each places a substantial obstacle in the path of women

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104 *See, e.g.*, Freeman, *supra* note 16, at 314–16; Metzger, *supra* note 16, at 2033–35; Wharton, Frietsche & Kolbert, *supra* note 16, at 353–54.

105 Bridges, *supra* note 27, at 1293–94.

106 *See* Jarrard, *supra* note 103, at 472; Paul C. Quast, Note, *Respecting Legislators and Rejecting Baselines: Rebalancing* Casey, 90 NOTRE DAME L. REV. 913, 915 (2014).

107 *See, e.g.*, Lucy E. Hill, Note, *Seeking Liberty's Refuge: Analyzing Legislative Purpose Under* Casey*'s Undue Burden Standard*, 81 FORDHAM L. REV. 365, 369 (2012); Jarrard, *supra* note 103, at 472.

108 *See* Hill, *supra* note 107, at 369.

109 *See, e.g.*, Foley, *supra* note 23, at 154; Wharton, Frietsche & Kolbert, *supra* note 16, at 323.

110 *See* Foley, *supra* note 23, at 154.

> seeking a previability abortion, each constitutes an undue burden on abortion access . . . and each violates the Federal Constitution.[111]

In the Supreme Court's most comprehensive pronouncement with respect to the restriction of abortion since *Casey*, five justices voted to strike down both contested provisions of Texas House Bill 2.[112] In so doing, the Court interpreted, refined, and applied the undue burden standard.[113]

A. *Facts, Issues, & Procedural History*

H.B. 2 prohibited abortion procedures performed at or after twenty weeks of pregnancy, compelled physicians to obtain admitting privileges at a hospital no further than thirty miles from the facility, and mandated that such locations meet the licensing standards established for ambulatory surgical centers.[114] Before the new law went into effect, the district court granted an injunction requested by state abortion providers, deeming the admitting-privileges provision facially invalid based upon the absence of a rational relationship to a legitimate government interest in promoting women's health.[115] However, the Fifth Circuit vacated this injunction and subsequently upheld the provision, concluding that the "if the admitting-privileges regulation burden[ed] abortion access by diminishing the number of doctors who will perform abortions and requiring women to travel farther, the burden [did] not fall on the vast majority of Texas women seeking abortions."[116]

Many of the same abortion providers joined their colleagues in initiating a second action praying for an injunction barring the enforcement of both the admitting-privileges and surgical-center provisions.[117] The district court found that such requirements would create a constitutionally impermissible obstacle and an "undue burden on a woman seeking a previability abortion by restricting access to previously available legal facilities."[118] Once again, the Fifth Circuit stayed the lower court's injunction—a decision vacated two weeks later by the Supreme Court—and ultimately found both provisions constitutional.[119] The battle for the rights of Texas women then returned to

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

112 *See* Adam Liptak, *Supreme Court Strikes Down Texas Abortion Restrictions*, N.Y. TIMES (June 27, 2016), http://www.nytimes.com/2016/06/28/us/supreme-court-texas-abortion.html?_r=0.

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

114 *See* TEX. HEALTH & SAFETY CODE ANN. §§ 171.0031(a), 171.044, 245.010(a) (West 2013).

115 *See Abbott*, 951 F. Supp. 2d at 909 (W.D. Tex. 2013).

116 Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 748 F.3d 583, 600 (5th Cir. 2014). *See also* Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 734 F.3d 406, 419 (5th Cir. 2013).

117 *See Lakey*, 46 F. Supp. 3d at 677.

118 *Id.* at 687–88.

119 *See* Whole Woman's Health v. Lakey, 135 S. Ct. 399 (2014); *Cole*, 790 F.3d at 567.

the Supreme Court and achieved final resolution in a decision declaring that both requirements violated the Federal Constitution under the standard adopted in *Casey*.[120]

B. *Majority Holding & Reasoning*

Justice Breyer, delivering the opinion of the Court, first addressed the issue of claim preclusion.[121] Rejecting the assertion that the petitioners' unsuccessful pre-enforcement facial challenge to H.B. 2 represented the very same claim as their post-enforcement as-applied challenge, the Court dismantled the Fifth Circuit's conclusion that the abortion providers were barred from presenting their constitutional challenges on procedural grounds.[122] Before considering the merits of the petitioners' claims, the majority noted that "[w]hen individuals claim that a particular statute will produce serious constitutionally relevant adverse consequences before they have occurred—and when the courts doubt their likely occurrence—the factual difference that those adverse consequences *have in fact occurred* can make all the difference."[123]Proceeding to a discussion of the relevant legal standard—the undue burden test—the Court examined the Fifth Circuit's application of *Casey*.[124] Reasoning that the appellate court's articulation of the test improperly failed to factor the existence or nonexistence of medical benefits into its purpose and effects analysis, the Court held that "[t]he rule announced in *Casey* . . . requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer."[125] Moreover, the majority concluded that the appellate court erred in its interpretation of the standard of judicial review mandated by the undue burden test, incorrectly declaring state law constitutional if reasonably related to, or designed to further, a legitimate state interest.[126] In utilizing a degree of scrutiny less strict than that established by the *Casey* rule, the Court held that the Fifth Circuit wrongfully likened the level of insulation protecting the constitutional right to choose abortion with that applicable to economic legislation.[127] Finally, noting that legislative findings prompting the enactment of H.B. 2 were not included in the text of the measure, the majority ruled that the district court gave proper weight to evidence contained in the judicial record and was not compelled to blindly defer to the asserted aims of the legislature in interpreting the law.[128]

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120 *See Whole Woman's Health*, 136 S. Ct. at 2300; *Casey*, 505 U.S. at 878 (plurality opinion).
121 *See Whole Woman's Health*, 136 S. Ct. at 2304–09.
122 *See id.* at 2305.
123 *Id.* at 2306.
124 *See id.* at 2309–10.
125 *Id.* at 2309.
126 *See id*.
127 *See Whole Woman's Health*, 136 S. Ct. at 2309.
128 *See id.* at 2310.

Applying its own understanding of the undue burden standard, the Court affirmed the findings of the district court, invalidating both the admitting-privileges and surgical-center provisions of H.B. 2.[129] With regard to the admitting-privileges requirement, the Court cited several imperative factors supporting the lower court's undue burden conclusion.[130] As enforcement of the provision resulted in the widespread closure of state clinics, the Court found that the effects of this regulation—fewer available doctors, longer waiting times, increased crowding, and augmented driving distances to clinics—were positioned as substantial obstacles to a woman's choice.[131] Furthermore, because abortion in the Texas prior to the passage of H.B. 2 was extremely safe and contributed to virtually no deaths or serious complications, the majority found that the new statute aimed to cure a nonexistent health problem.[132] In fact, the state could not reference a single case in which the admitting-privileges requirement would have led to improved medical care when asked present such evidence at oral argument.[133]

Similarly, the majority "agree[d] with the District Court that the surgical-center requirement, like the admitting-privileges requirement, provide[d] few, if any, health benefits for women, pose[d] a substantial obstacle to women seeking abortions, and constitute[d] an 'undue burden' on their constitutional right to do so."[134] In particular, the Court characterized many of the building standards as inappropriate and unnecessary when applied to abortion procedures, their vague relationship to patient safety casting such requirements as inherently arbitrary.[135] Furthermore, noting that the annual number of abortions performed at the seven or eight remaining state facilities would increase by a factor of five, the majority found that the surgical-center provision compelled significant clinic expansions and costs in order to meet the amplified physical demand.[136] Ultimately, considering the significant burdens imposed on abortion access together with the near-complete absence of health benefits conferred by the law, the Court reversed the holding of the Fifth Circuit and finally put an end to the debate over H.B. 2.[137]

C. *Concurring Opinion*

Based upon overwhelming evidence concerning the general safety of abortion procedures, Justice Ginsburg's concise concurrence reasoned that

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129 *See id.* at 2318.
130 *See id.* at 2313.
131 *See id.*
132 *See id.* at 2311.
133 *See Whole Woman's Health*, 136 S. Ct. at 2311–12.
134 *Id.* at 2318.
135 *See id.* at 2315–16.
136 *See id.* at 2317.
137 *See id.* at 2320.

"Targeted Regulation of Abortion Providers ("TRAP") laws like H.B. 2 that 'do little or nothing for health, but rather strew impediments to abortion,' cannot survive judicial inspection."[138] As such, Justice Ginsburg asserted that the provisions of H.B. 2 would not survive even rational basis review, let alone the standard of heightened scrutiny embraced by the majority.[139]

D. *Dissenting Opinions*

Justice Thomas's dissent declared that the majority flouted rules of res judicata in order to protect the abortion right, "ignor[ing] compelling evidence that Texas' law imposes no unconstitutional burden, and disregard[ing] basic principles of the severability doctrine."[140] Justice Thomas also worried that the Court's decision set a dangerous precedent, overruling *Casey* and *Gonzales* by requiring and applying a standard more rigorous than rational basis review.[141] Citing the legal principles of claim preclusion and severability, Justice Alito likewise contended that the Court abandoned its customary neutrality in favor of personal biases, refusing to apply established law to a controversial issue.[142]

IV. ANALYSIS: FURTHER REFINING THE UNDUE BURDEN STANDARD

The cursory discussion of the undue burden standard presented in *Whole Woman's Health* does not offer adequate guidance as to the proper meaning and application of the relevant test. Justice Breyer's opinion was inherently vague and focused upon detailing the manner in which the Fifth Circuit's interpretation of the standard was incorrect, rather than providing a framework for the proper use of the test.[143] Given the highly contentious nature of the case, such distinct focus on the facts was to be expected as the Court likely avoided the pronouncement of broad holdings impacting all future abortion restrictions in order to secure necessary votes and attain a majority; however, the Court's failure to set forth a clear structure in *Whole Woman's Health* is problematic because experience has demonstrated the imperative need to further clarify the undue burden standard.[144]

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138 *Id.* at 2321 (Ginsburg, J., concurring) (quoting Planned Parenthood of Wis., Inc. v. Schimel, 806 F.3d 908, 921 (7th Cir. 2015)).

139 *See Whole Woman's Health*, 136 S. Ct. at 2321 (Ginsburg, J., concurring).

140 *Id.* (Thomas, J., dissenting).

141 *See id.* at 2326.

142 *See id.* at 2353 (Alito, J., dissenting).

143 *See id.* at 2309–10 (majority opinion).

144 *See, e.g.*, Freeman, *supra* note 16, at 279; Metzger, *supra* note 16, at 2026; Wharton, Frietsche & Kolbert, *supra* note 16, at 322.

A. *The Inadequacy of the Court's Reasoning*

The portion of the majority opinion dedicated to the elucidation of the undue burden standard comprises only two of sixty-one pages of the Court's decision in *Whole Woman's Health*.[145] Within this brief explanation and the application thereof that followed, the Court undoubtedly fortified and refined the undue burden standard.[146] On the other hand, it is also clear that there remains room for additional clarification and strengthening of the test in the future.

In describing the proper application of the undue burden standard, the Court condemned the Fifth Circuit's interpretation of the *Casey* test.[147] While the appellate court's analysis of the challenged regulation neglected to account for the existence or nonexistence of medical benefits, the Court affirmed that the rule in *Casey* established a balancing test mandating consideration of the burdens imposed alongside the benefits of such legislation.[148] This attack on the reasoning of the lower court seemed to touch upon the effects prong of the undue burden standard, requiring a balanced assessment of both the positive and negative impact on abortion access levied by the contested measure.[149] Relatedly, the majority confirmed that the district court correctly gave significant weight to evidence of the measure's purpose and effects contained in the judicial record, maintaining that the dispositive deference to legislative findings of intent advocated by the appellate court was improper and unnecessary.[150] Finally, the majority indicated that the view that a law is constitutional if "'it is reasonably related to (or designed to further) a legitimate state interest'" was incorrect, rejecting the rational basis review previously applied to the purpose prong.[151]

Although the Court apparently employed both components of the two-tiered test in examining the challenged law, the rationale and methodology utilized in doing so was not specifically detailed in the opinion. For instance, when applying the purpose prong of the test, the Court noted that both the admitting-privileges and surgical-center requirements were unnecessary and did not serve their intended goals before describing evidence from the record supporting such conclusions.[152] Consequently, the majority seemed to adopt the approach established in a 1999 case evaluating the purpose of a Louisiana

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145 *See Whole Woman's Health*, 136 S. Ct. at 2309–10.
146 *See id.* at 2309.
147 *See id.*
148 *See id.*
149 *See* Metzger, *supra* note 16, at 2030.
150 *See Whole Woman's Health*, 136 S. Ct. at 2310.
151 *Id.* at 2309 (quoting *Cole*, 790 F.3d at 572 ().
152 *See id.* at 2311–18.

statute holding physicians liable in tort for damages resulting from the abortion procedure.[153] In *Okpalobi v. Foster*,[154] the Fifth Circuit determined that the judiciary's duty to grant deference to the government's stated intent did not require the court to accept this assertion on its face; rather, in conducting its own purpose inquiry, the court assessed whether a legislative purpose was a mere "sham" in considering "the language of the challenged act, its legislative history, the social and historical context of the legislation, or other legislation concerning the same subject matter as the challenged measure."[155]

The Court in *Whole Woman's Health* appeared to follow this methodology.[156] Though the majority recognized the presumed legitimacy of the state's interest in protecting female health, the justices also took the purpose analysis one step further in contemplating evidence revealing if the restriction was necessary and actually served to accomplish its asserted legislative purpose.[157] Nevertheless, the Court did not explicitly embrace the *Okpalobi* test—a solution for strengthening the undue burden standard advocated by author Lucy E. Hill—or even reference the case in its opinion.[158] Further, the Fifth Circuit actions preceding *Whole Woman's Health* also failed to cite the *Okpalobi* precedent; while the 1999 decision was later reversed on other grounds, the test outlined therein should have provided some measure of guidance as to how the appellate court would apply the purpose prong in future cases.[159]

In addition, while the Court seemed to reject the use of rational basis review in favor of the more rigorous intermediate scrutiny, it did not expressly state its intent to do so.[160] Specifically, the Court indicated that the Fifth Circuit's interpretation did not match that of *Casey* and was "wrong to equate the judicial review applicable to the regulation of a constitutionally protected personal liberty with the less strict review applicable where, for example, economic legislation is at issue."[161] Professor Foley noted that the Court's balancing of the risks and burdens associated with contested abortion restrictions and its lack of deference to legislative factual findings created a new standard that she termed "undue burden minus," stepping away from rational basis review and moving closer to *Roe*'s strict scrutiny.[162] In a similar

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153 Okpalobi v. Foster, 190 F.3d 337, 341 (5th Cir. 1999); *see also* Hill, *supra* note 107, at 395.

154 190 F.3d 337 (5th Cir. 1999).

155 *Id.* at 354. *See* Hill, *supra* note 107, at 395.

156 *See Whole Woman's Health*, 136 S. Ct. at 2311–18.

157 *See id.*

158 *See id.*; Hill, *supra* note 107, at 401–02.

159 *See Cole*, 790 F.3d 563; Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 748 F.3d 583 (5th Cir. 2014); Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 734 F.3d 406 (5th Cir. 2013); Hill, *supra* note 107, at 395 n. 306.

160 *See Whole Woman's Health*, 136 S. Ct. at 2309.

161 *Id.*

162 *See* Foley, *supra* note 23, at 175.

vein, Justice Thomas declared in his dissent that "[t]he majority's undue-burden test look[ed] far less like . . . post-*Casey* precedents and far more like the strict-scrutiny standard that *Casey* rejected."[163]

As previously noted, the undue burden standard was commonly understood as mandating that challenged abortion regulations be subjected to rational basis review.[164] This level of minimum scrutiny required only that courts decide whether the measure at issue was rationally related to a legitimate state interest.[165] Through recurrent use of terms such as "legitimate interest" or "legitimate end," the language of the plurality opinion in *Casey* suggested that this standard of review was appropriate in the application of the undue burden test.[166] Moreover, the conclusion of the Court in *Gonzales*—affirming that "[w]here it has a *rational basis* to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its *legitimate interests*"—supported this reading of the rule in *Casey*.[167]

However, numerous authors have contended that an inconsistent level of review has been applied to the second tier of the undue burden analysis; whereas the, Fifth, Eighth Circuits, and Tenth have traditionally utilized heightened scrutiny in assessing purpose-based claims, their counterparts in the Fourth and Seventh Circuits often employ rational basis review.[168] Therefore, various legal academics have proposed strengthening the undue burden framework by accepting a more rigorous standard of judicial review.[169] For instance, Professor R. Randall Kelso argued that the finding of an undue burden should trigger the strict scrutiny utilized in *Roe* while a "less-than-undue burden" must prompt the use of a balancing test more severe than rationality review.[170] Similarly, Lucy E. Hill contended abortion restrictions must survive intermediate scrutiny—a moderate level of judicial review demanding that valid regulations be substantially related to an important state interest—an approach more consistent with Supreme Court precedent and due process jurisprudence.[171] Finally, Emma Freeman applied a stricter standard known as "'rational basis with bite,'" a threshold inquiry for the purpose and effects test searching for an adequate connection between the legislative ends and means in examining a contested statute.[172]

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163 *Whole Woman's Health*, 136 S. Ct. at 2326 (Thomas, J., dissenting).

164 *See supra* notes 59–64 and accompanying text.

165 *See, e.g.*, Freeman, *supra* note 16, at 282; Hill, *supra* note 107, at 371.

166 *See Casey*, 505 U.S. at 870, 877 (plurality opinion); Freeman, *supra* note 16, at 292–93.

167 *Gonzales*, 550 U.S. at 158 (emphasis added).

168 *See* Hill, *supra* note 107, at 365, 391–99.

169 *See, e.g.*, Freeman, *supra* note 16, at 280; Hill, *supra* note 107, at 365; R. Randall Kelso, *The Structure of* Planned Parenthood v. Casey *Abortion Rights Law: Strict Scrutiny for Substantial Obstacles on Abortion Choice and Otherwise Reasonableness Balancing*, 34 QUINNIPIAC L. REV. 75, 79–80 (2015).

170 *See* Kelso, *supra* note 169, at 79.

171 *See* Hill, *supra* note 107, at 402–03.

172 *See* Freeman, *supra* note 16, at 280.

The Court in *Whole Woman's Health* heeded this advice in apparently rejecting the utilization of rational basis review in the undue burden analysis.[173] In refusing to defer to the findings of the Texas legislature regarding its intent to protect woman's health and preserve fetal life, the majority sought a more substantial connection between such asserted goals and the contested provisions of H.B. 2.[174] Once again, although the Court seemed to adopt intermediate scrutiny as the appropriate standard for judicial review of abortion restrictions and to abandon the traditional rational basis review, the majority did not explicitly state as much in its opinion.[175] Thus, the Court's failure to set out a clear framework for the proper application and meaning of the undue burden standard will likely lead to future inconsistencies and the potential overturning of this decision strengthening the protection of the fundamental abortion right.

B. *A Potential Solution*

On November 30, 2016, three major advocacy groups—the American Civil Liberties Union, Center for Reproductive Rights, and Planned Parenthood—joined forces in simultaneously filing legal challenges to restrictive abortion legislation in three states.[176] The Alaska lawsuit targets regulations prohibiting abortion in outpatient health centers after the first trimester and mandating that clinics be equipped for major surgery, some of which have been in place for forty years.[177] In North Carolina, the groups claim that the state's ban on the procedure after twenty weeks of pregnancy except in the case of medical emergency prevents physicians from caring for patients until they are in immediate danger of death or major health issues.[178] Finally, much like the Texas legislation struck down in *Whole Woman's Health*, the contested Missouri law requires doctors performing abortions to obtain hospital admitting privileges and stipulates that the procedure only be performed in ambulatory surgical centers.[179]

Across the nation, additional states have enacted measures similarly seeking to constrain this constitutional right; for instance, Ohio Governor

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

174 *See id.* at 2325–26 (Thomas, J., dissenting).

175 *See id.* at 2309–10 (majority opinion).

176 *See* Jaweer Brown, *The ACLU, Center for Reproductive Rights, and Planned Parenthood Have Leveled a Coordinated Legal Strike on Restrictive Abortion Laws in Three States*, AM. CIV. LIBERTIES UNION: SPEAK FREELY (Nov. 30, 2016, 10:30 AM), https://www.aclu.org/blog/speak-freely/aclu-center-reproductive-rights-and-planned-parenthood-have-leveled-coordinated.

177 *See id.*; Katie Zezima, *Planned Parenthood, ACLU Challenge Abortion Laws in Three States*, WASH. POST (Nov. 30, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/11/30/planned-parenthood-aclu-challenge-abortion-laws-in-three-states/.

178 *See* Brown, *supra* note 176.

179 *See* Zezima, *supra* note 177.

John Kasich recently approved a law forbidding abortion following twenty weeks of gestation only after vetoing a "heartbeat bill" barring the procedure at around six weeks.[180] As these burgeoning restrictions will or are likely to come before the courts in the very near future, the urgent need for further clarification and guidance concerning the undue burden standard has become increasingly apparent and important. The ensuing discussion explores two unique approaches to this issue, the former relying on the passage of federal legislation codifying the intermediate standard of scrutiny applicable to abortion regulations and the latter outlining a model of the ideal undue burden analysis that future courts must imitate.[181]

1. A Legislative Approach

As the Court appears reluctant to establish an unambiguous and definite undue burden standard, another solution must be reached in order to avoid such imminent confusion and disorder. Consequently, it seems that legislative action will be necessary to ensure consistency in the application of the newly-fortified test, thereby circumventing the judiciary's irregular employment of the rule established in *Casey*.[182] Currently, fifteen states' constitutions—including Florida, Massachusetts, New Jersey, and Vermont—offer additional protections of the right to choose abortion not found in the national law of the land.[183] Accordingly, these provisions would serve to protect access to reproductive healthcare services in the event that *Roe* or *Whole Woman's Health* is overturned.[184] The proliferation of state constitutional protections may also indicate a growing openness to and need for federal legislation safeguarding a woman's freedom to terminate a pregnancy.

This potential measure could appropriately be modeled upon the Religious Freedom Restoration Act of 1993 ("RFRA").[185] Although the right to religious freedom—much like the liberty to choose abortion—is secured under the Federal Constitution, RFRA goes one step further in codifying the strict scrutiny judicial review applied to regulations impacting the exercise of one's faith.[186] Specifically, RFRA prohibits the government from imposing a substantial burden upon a person's exercise of sincerely held religious beliefs unless it can successfully demonstrate that the application of the burden

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180 *See* Emanuella Grinberg, *Ohio Governor Bans Abortions After 20 Weeks While Vetoing 'Heartbeat' Bill*, CNN (Dec. 14, 2016), http://www.cnn.com/2016/12/13/politics/ohio-abortion-bill-veto/.

181 *See infra* Parts IV.B.1 & IV.B.2.

182 *See, e.g.*, Wharton, Frietsche & Kolbert, *supra* note 16, at 353–54.

183 *See* NARAL PRO-CHOICE AM. & NARAL PRO-CHOICE AM. FOUND., WHO DECIDES? THE STATUS OF WOMEN'S REPRODUCTIVE RIGHTS IN THE UNITED STATES 11 (26th ed. 2017), https://www.prochoiceamerica.org/wp-content/uploads/2017/01/WhoDecides2017-DigitalEdition3.pdf.

184 *See id.*

185 *See* Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb-2000bb-4 (2012).

186 *See id.*

to that particular person "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[187]

Congressional concern surrounding the Court's decision in *Employment Division v. Smith*[188] prompted the enactment of RFRA.[189] The Court had effectively abandoned the long-standing principle that "governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest," holding that this standard was not required by the First Amendment.[190] The legislature sought to overturn this ruling, restoring strict scrutiny review and requiring a high threshold of proof before permitting state interference with the free exercise of religion.[191] In a similar manner, the need for national law safeguarding the abortion right is born of Court decisions—including those issued in *Roe*, *Casey*, and *Whole Woman's Health*—constantly altering the level of judicial review appropriately applied to measures restricting this freedom.[192]

RFRA's test of strict scrutiny has been widely applied in cases dealing with a topic closely related to abortion, birth control, and affords protection for all manner of religious exercise.[193] For example, in *Burwell v. Hobby Lobby Stores, Inc.*,[194] Christian business owners challenged the Patient Protection and Affordable Care Act of 2010 contraceptive mandate, arguing that the legislation substantially burdened their choice to operate their for-profit corporations in accordance with their religious beliefs.[195] As the Christian business owners sincerely believed that provision of the requisite coverage would facilitate abortions, the Court reasoned that government action demanding that they engage in this behavior seriously violated their religion and infringed upon RFRA protections.[196] Overall, the Court has essentially held that a substantial burden upon religious exercise results from any government action which compels adherents to alter their behavior, forces adherents to violate important aspects of their beliefs, or threatens adherents with severe economic or moral consequences.[197]

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187 *Id.* § 2000bb-1(b).

188 494 U.S. 872 (1990).

189 *See* Peter Steinfels, *Clinton Signs Law Protecting Religious Practices*, N.Y. TIMES (Nov. 16, 1993), http://www.nytimes.com/1993/11/17/us/clinton-signs-law-protecting-religious-practices.html.

190 *Smith*, 494 U.S. at 883.

191 *See* Steinfels, *supra* note 189.

192 *See Whole Woman's Health*, 136 S. Ct. at 2309–10; *Casey*, 505 U.S. at 877 (plurality opinion); *Roe*, 410 U.S. at 163–65.

193 *See, e.g.*, Zubik v. Burwell, 136 S. Ct. 1557, 1559 (2016) (per curiam); Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2759 (2014).

194 134 S. Ct. 2751 (2014).

195 *See id.* at 2775–76.

196 *See id.* at 2777.

197 *See, e.g.*, *id.* at 2780–83.; Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 717 (1981).

Federal legislation protecting the right to abortion would similarly produce such robust decisions. As the Court has firmly established the inherent importance of the state interest in protecting fetal life and maternal health, the application of strict scrutiny to abortion regulations would not be consistent with the undue burden analysis and historic precedent.[198] Alternatively, a measure safeguarding the freedom to choose abortion throughout the country would aptly codify the intermediate level of scrutiny mandating that restrictions be substantially related to an important state interest, a standard seemingly utilized in *Whole Woman's Health*.[199] Thus, in a manner similar to the RFRA precedent cited above, a court properly construing this proposed act would be forced to consider the economic impact of legislative constraints, as well as burden placed upon those forced to alter their behavior, in considering the constitutionality of laws targeting abortion access.[200] The principal distinction in this analogy lies in the balancing test as courts assessing an abortion restriction would be forced to grant greater deference to legislative intent and its relationship to the contested statute than would those considering a RFRA challenge.[201]

Simply putting this act in place would be an extremely consequential step in solidifying the undue burden standard and clarifying its proper meaning and application. Nonetheless, it must be remembered that, like RFRA, a national law codifying the abortion right would not necessarily represent the final word in this passionate debate and would certainly be subject to judicial interpretation, yielding varied statutory constructions.[202] Beginning with its constitutional underpinnings and foundation, Supreme Court decisions involving RFRA have underscored the measure's inherent weaknesses.[203] Notably, in *City of Boerne v. Flores*,[204] the Court held that the Act exceeded congressional power under the Enforcement Clause of the Fourteenth Amendment, affirming that "[t]he stringent test RFRA demands of state laws reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved."[205] As such, the Court decided that the imposition of the federal statute's requirements on the states was beyond the constitutional authority of the legislature, effectively terminating all RFRA claims involving state law.[206]

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198 *See, e.g.*, *Gonzales*, 550 U.S. at 158; *Casey*, 505 U.S. at 873–74 (plurality opinion).

199 *See Whole Woman's Health*, 136 S. Ct. at 2310–18; Freeman, *supra* note 16, at 282–84.

200 *See supra* notes 194–97 and accompanying text.

201 *See* Freeman, *supra* note 16, at 283–84.

202 *See* Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341, 343–44 (2010).

203 *See* Ira C. Lupu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L.J. 575, 585–86 (1998).

204 521 U.S. 507 (1997).

205 *Id.* at 533.

206 *See id.* at 536; Lupu, *supra* note 203, at 591.

Moreover, courts display wide variance in interpretation of the Act's essential terms: "religion" and "substantial burden."[207] For example, the Tenth Circuit refused to afford RFRA protections to a devotee of the Church of Marijuana, stressing that certain critical elements of "religion"—important writings, gathering places, ceremonies, and holidays—were absent from this organization.[208] Comparably, the Fourth Circuit found that the financial pressure parents faced in providing an aide for their son at his private religious school did not amount to a substantial burden for RFRA purposes simply because policy denying them governmental support caused the practice of their religious beliefs to become more expensive.[209] However, the Court in *Hobby Lobby* later held that a tax imposed upon the decision to exercise religious beliefs contrary to regulation, making it more costly for the plaintiffs to operate their businesses in line with their faith, qualified as a substantial burden under RFRA.[210] Therefore, RFRA jurisprudence demonstrates the likelihood that personal freedoms, whether related to religion or abortion, will remain subject to uncertain, inconsistent, and often degrading judicial discretion despite established statutory protections.[211] Perhaps future drafters of proposed federal law protecting the right to abortion will learn from RFRA's weaknesses and failures, ultimately producing legislation that will stand the test of time and of the discerning judiciary.[212]

2. A Judicial Approach

Although the enactment of federal legislation seems the ideal solution to cure the potential misreading and misapplication of the standard articulated in *Whole Woman's Health*, the contentious nature of abortion and the current political climate present conceivably insurmountable obstacles to the success of this proposal.[213] In any event, the final act would be the result of an inevitably bipartisan compromise unlikely to fully secure the abortion right for women across the country.[214] For now, courts are left to apply their own interpretations of the holding in *Whole Woman's Health* to individual considerations of contested abortion restrictions. Though the *Whole Woman's Health* undue burden test is not perfectly clear, it is important that courts conduct these interpretations in a way that adheres to the holding as accurately as possible.

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207 *See* Lupu, *supra* note 203, at 576, 593–94.

208 *See* United States v. Meyers, 95 F.3d 1475, 1482–84 (10th Cir. 1996).

209 *See* Goodall *by* Goodall v. Stafford Cty. Sch. Bd., 60 F.3d 168, 171–73 (4th Cir. 1995).

210 *See Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2779.

211 *See* Lupu, *supra* note 203, at 576.

212 *See id.* at 578–79.

213 *See* Edward Correia, *The Uneasy Case for a National Law on Abortion*, 5 AM. PROSPECT (1991), http://prospect.org/article/uneasy-case-national-law-abortion.

214 *See id.*

The Court has already provided some guidance concerning the proper understanding and use of the *Whole Woman's Health* standard of intermediate scrutiny, declining to hear two related cases from Mississippi and Wisconsin on June 28, 2016.[215] In *Jackson Women's Health Organization v. Currier*,[216] the Fifth Circuit held that a Mississippi statute requiring abortion providers to secure admitting and staff privileges at a local hospital—a provision forcing the closure of the state's only licensed clinic—imposed an undue burden on a woman's right to choose abortion and, therefore, was unconstitutional.[217] Likewise, the Seventh Circuit in *Planned Parenthood of Wisconsin, Inc. v. Schimel*[218] declared a state law imposing substantial fines on the performance of abortions by physicians without hospital admitting privileges to be in violation of the Federal Constitution, noting that "complications from an abortion are both rare and rarely dangerous."[219] The Court's extension of its holding in *Whole Woman's Health* across state lines in allowing these decisions to stand sent a clear message regarding the unconstitutionality of TRAP measures, leadings Alabama's attorney general to drop the appeal of a 2014 federal court decision similarly invalidating an admitting privileges mandate.[220]

Whereas precedent has likely established the general invalidity of admitting privileges requirements, it remains to be seen if the application of intermediate scrutiny to other forms of abortion regulation will exhibit comparable consistency. The district court opinion in *West Alabama Women's Center v. Miller*[221] serves as an exemplary model of the appropriate analysis and employment of this standard.[222] In that case, abortion and reproductive healthcare providers challenged an Alabama statute prohibiting the state Department of Public Health from issuing or renewing licenses for abortion clinics located within two thousand feet of a public school educating students in kindergarten through the eighth grade.[223] In addition, a second measure criminalized D & E procedures unless fetal demise was induced prior to the performance thereof.[224] In interpreting such legislation, the court first reviewed the applicable legal standards, observing that the undue burden test announced in *Whole Woman's Health* required the consideration of both the

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215 *See* Jess Bravin & Louise Radnofsky, *Supreme Court Denies Mississippi, Wisconsin Efforts to Reinstate Abortion Law*, WALL ST. J. (June 28, 2016), http://www.wsj.com/articles/supreme-court-denies-mississippi-wisconsin-efforts-to-reinstate-abortion-laws-1467124416.

216 760 F.3d 448 (5th Cir. 2014), *cert. denied*, 136 S. Ct. 2536 (2016).

217 *See id.* at 450, 459.

218 806 F.3d 908 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 2545 (2016).

219 *Id.* at 912.

220 *See* Planned Parenthood Se., Inc. v. Strange, 33 F. Supp. 3d 1330, 1336, 1380–81 (M.D. Ala. 2014); Bravin & Radnofsky, *supra* note 215.

221 217 F. Supp. 3d 1313 (M.D. Ala. 2016).

222 *See id.* at 1321–22.

223 *See id.* at 1318.

224 *See id*.

benefits and burdens on abortion access implicated by the law.[225] The court proceeded to apply this standard to each statute in separate, highly detailed sections of its opinion.[226]

Beginning its undue burden analysis by evaluating the governmental aims of the school proximity legislation, the court noted that "the State's interests [were] furthered by neither the law's means (the 2000-foot prohibition on clinics) nor its end (the relocation of the demonstrations)."[227] Indeed, the court affirmed that the measure was unlikely to provide any benefit to Alabama's asserted interests due to the high probability of continued protests near public schools and the absence of evidence in the record regarding parental concern over exposing children to the topic of abortion.[228]

The court next examined the burdens imposed upon women through the enforcement of the measure.[229] As the costs of relocation would compel the shuttering of two of the state's five abortion clinics, the court applied the holding of *Whole Woman's Health* to conclude that such financial concerns would prevent the establishment of more licensed facilities to the fill gap.[230] Consequently, the court reasoned that the burdens resulting from the law would be substantial and possibly insurmountable, preventing women from procuring an abortion in Alabama after fifteen weeks of pregnancy and forcing expectant mothers to travel significantly greater distances to obtain the procedure.[231] Moreover, it was improbable that the remaining clinics would be able to meet the physical demand for abortion in the state, meaning that women 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.'"[232] The court then conducted the balancing test prescribed by *Whole Woman's Health* in finalizing its undue burden analysis, confirming that the law did not confer benefits adequate to justify the burdens that it effectuated and, thus, constituted an unconstitutional and undue burden on abortion access.[233]

Correspondingly, the court followed this analytical format in considering the constitutional validity of the fetal demise law.[234] Assuming that the state aimed to advance its legitimate interests in respecting human life and promoting physician integrity through this legislation, the court ultimately found that the measure presented significant barriers to abortion access as the

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225 *See id.* at 1321–22 (citing *Whole Woman's Health*, 136 S. Ct. at 2309).

226 *See id.* at 1322–48.

227 *W. Ala. Women's Ctr.*, 217 F. Supp. 3d at 1323.

228 *See id.* at 1323–27.

229 *See id.* at 1327–32.

230 *See id.* at 1327–29 (citing *Whole Woman's Health*, 136 S. Ct. at 2318).

231 *See id.* at 1329–30.

232 *Id.* at 1331 (quoting *Whole Woman's Health*, 136 S. Ct. at 2318).

233 *See W. Ala. Women's Ctr.*, 217 F. Supp. 3d at 1332–33 (citing *Whole Woman's Health*, 136 S. Ct. at 2299).

234 *See id.* at 1336–37.

fetal demise methods were not feasible for use in the affected clinics.[235] The court described the undue burden imposed by each of the alternatives in great detail, observing that the pain, invasiveness, health risks, and unreliability associated with the procedures meant that such methods would be unavailable to women seeking abortions in Alabama.[236]

Finally, in performing the necessary balancing test, the court determined that "[t]he State's interests, although legitimate, [were] not sufficient to justify such a substantial obstacle to the constitutionally protected right to terminate a pregnancy before viability."[237] Accordingly, the court preliminarily enjoined the enforcement of both state statutes, utilizing the heightened standard of scrutiny articulated in *Whole Woman's Health* when conducting the undue burden analysis and evaluating governmental interests together with the rights of Alabama women.[238]

The efficacy of the district court's decision is grounded in its structure, clearly explaining the reasoning, evidence, and precedential support underpinning its conclusions at every stage of the undue burden analysis.[239] By examining the state's interests and the burdens imposed upon women in separate sections before comparing the two in a final balancing test section, the opinion demonstrated the logical progression of the court's rationale and highlighted the factors to be considered in the weighing governmental goals and women's rights.[240] Further, the balancing test exhibited adherence to the intermediate level of scrutiny announced in *Whole Woman's Health* in that the court refused to deem constitutional a law only reasonably related to or designed to further a legitimate state interest.[241] Instead, while the court recognized the state's interests in enforcing the fetal demise law as legitimate, it ultimately declared such benefits insufficient to justify the burden on abortion access, applying a test more akin to that requiring a substantial relationship to an important state interest.[242] Although the use of a heightened standard of review may have been more effective if the court had explicitly stated that it employed intermediate scrutiny and described what this entailed, both the structure and reasoning of this opinion perfectly reflected the evolution of the relevant test.

Absent codification of the elevated level of judicial review properly applicable to abortion restrictions post-*Whole Woman's Health*, the district court in *West Alabama Women's Center* provided an ideal example of the correct format and application of the undue burden analysis. In following this

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235 *See id.* at 1338–46.
236 *See id.*
237 *Id.* at 1347.
238 *See id.* at 1348.
239 *See W. Ala. Women's Ctr.*, 217 F. Supp. 3d at 1322–48.
240 *See id.*
241 *See id.* at 1347–48; *see also Whole Woman's Health*, 136 S. Ct. at 2310.
242 *See W. Ala. Women's Ctr.*, 217 F. Supp. 3d at 1346–47.

paradigmatic model, future courts will succeed in safeguarding the constitutional liberty to choose abortion for generations to come.

CONCLUSION

In the wake of the Court's decision in *Whole Woman's Health*, Wendy Davis observed that the demolishing of H.B. 2 was a victory—not only for herself, her former Democratic colleagues, abortion providers, and reproductive rights organizations—but also represented:

> vindication for the women who'd been left without care, who'd taken matters into their own hands and used alternative, unsafe means to terminate, who'd carried pregnancies to term, bearing children that they were ill-equipped to raise, and who'd traveled long distances and waited until later in their pregnancies to access care, enduring long wait times in one of the few back-logged clinics that remained.[243]

Even so, the fight over a woman's fundamental right to make reproductive health decisions is far from over. Both state and federal governments continue to pursue the enactment of regulations constraining this constitutional liberty; such laws aim to limit funding of abortion clinics, allow providers to refuse to participate in such procedures, and establish mandatory waiting periods and counseling requirements.[244] While the Court's decision in *Whole Woman's Health* further insulated the abortion right from attack by these restrictive measures, additional guidance and clarification—perhaps in the form of federal legislation safeguarding this liberty—is necessary to ensure the utmost protection of the essential freedom to choose and access abortion care.[245]

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243 Wendy Davis, *The Power to Prevail*, U.S. NEWS (June 28, 2016), http://www.usnews.com/opinion/articles/2016-06-28/wendy-davis-on-whole-womans-health-v-hellerstedt-and-abortion-rights.

244 *See An Overview of Abortion Laws*, GUTTMACHER INST. (Aug. 1, 2017), https://www.guttmacher.org/state-policy/explore/overview-abortion-laws.

245 *See Whole Woman's Health*, 136 S. Ct. at 2313, 2318.