RURAL WOMEN AND DEVELOPMENTS IN THE UNDUE BURDEN ANALYSIS: THE EFFECT OF *WHOLE WOMAN'S HEALTH V. HELLERSTEDT*

Hannah Haksgaard[*]

ABSTRACT

Rural women face unique challenges in accessing abortions. The undue burden analysis announced in Planned Parenthood of Southeastern Pennsylvania v. Casey *is a fact-intensive inquiry into the impact any particular restriction has on women's access to abortion. Twenty-four years after the undue burden test was announced in* Casey*, the Supreme Court provided guidance to lower courts on the undue burden test in* Whole Woman's Health v. Hellerstedt*. This Article analyzes the Supreme Court's holding in* Whole Woman's Health *and its effect on rural women. Because rurality and distance were central to the Supreme Court's reasoning in* Whole Woman's Health*, the opinion provides substantial direction to lower courts grappling with rural women's access to abortions.* Whole Woman's Health *includes both broad statements and limiting language, meaning reasonable jurists will likely disagree on the opinion's impact in certain factual situations. However, I conclude that reading* Whole Woman's Health *in the context of rural women will require lower courts to seriously consider the unique burdens faced by rural women in accessing abortions. As such, this Article closes with a discussion of how* Whole Woman's Health *will change legislative and litigation strategy when rural women's access to abortions is at issue.*

* Assistant Professor of Law, University of South Dakota School of Law. BA, University of Kentucky, 2009; JD, University of California, Berkeley, School of Law, 2012. For helpful conversations and comments, I thank Lisa Pruitt, Wendy Hess, and Alesdair Ittelson; for excellent research assistance, I thank Jordyn Bangasser and Julia Wessel. I am also grateful for the comments and suggestions I received at the junior faculty workshop at the University of South Dakota School of Law. Finally, I thank the editors and staff at the Drake Law Review for their excellent editorial assistance.

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I. INTRODUCTION

Rural[1] women[2] face unique challenges.[3] This Article discusses one troubling barrier faced by rural women: access to health care in general and abortion services in particular.[4] In 2013, Texas passed an omnibus abortion

1. In this Article, I use the word "rural" in its geographic sense, not in a social sense. *See* Lisa R. Pruitt, *Gender, Geography & Rural Justice*, 23 BERKELEY J. GENDER L. & JUST. 338, 343 (2008) [hereinafter Pruitt, *Gender, Geography & Rural Justice*] ("Some think of rural places simply as sparsely populated areas, but the term also carries social and cultural connotations. Long-time rural residents might, for example, characterize rurality as a 'way of life.'"). My discussion of the term starts with how the U.S. Census Bureau defines "rural" as encompassing "all population, housing, and territory not included within an urban area." *2010 Census Urban and Rural Classification and Urban Area Criteria*, U.S. CENSUS BUREAU, https://www.census.gov/geo/reference/ua/urban-rural-2010.html (last visited Mar. 28, 2017). In addition to sparsely populated areas, I include nonmetropolitan communities that may have a sizeable population but are located far away from metropolitan areas that provide services. *See* Pruitt, *Gender, Geography & Rural Justice*, *supra*, at 345 (discussing different categories of communities).

2. Throughout this Article, I describe individuals who seek abortions as "women." While I employ this linguistic shorthand because the vast majority of individuals seeking abortions are cisgender women, it is important to note that such a label may appear to erase the experience of transgender men or other gender-nonconforming people from the discussion of abortion access. My use of the term "women" in this Article is a conscious choice, but much of my discussion applies equally to all individuals, male, female, or gender-nonconforming, who seek abortions. For further discussion of transgender men and abortion access, see Cheryl Chastine, *Cisgender Women Aren't the Only People Who Seek Abortions, and Activists' Language Should Reflect That*, REWIRE (Mar. 18, 2015, 12:09 PM), https://rewire.news/article/2015/03/18/cisgender-women-arent-people-seek-abortions-activists-language-reflect/, and Katha Pollitt, *Who Has Abortions?*, NATION (Mar. 13, 2015), https://www.thenation.com/article/who-has-abortions/. For a discussion of the unique barriers faced by gender-nonconforming individuals living in rural areas, see generally Bud Jerke, *Queer Ruralism*, 34 HARV. J.L. & GENDER 259 (2011) (discussing barriers to health care, education, and political access). More analysis should be given to gender-nonconforming individuals who are living in rural areas and what specific barriers they face in accessing abortion; however, that subject is outside of the parameters of the present Article.

3. *See* Lisa R. Pruitt, *Toward A Feminist Theory of the Rural*, 2007 UTAH L. REV. 421, 426–38 (2007) [hereinafter Pruitt, *Toward a Feminist Theory of the Rural*] (discussing political, economic, and structural disadvantages faced by rural women).

4. *See id.* at 434, 458–83 (discussing rural women's access to abortion and how "transportation challenges put . . . rural residents at a disadvantage for getting access to . . . health care").

bill[5] that closed clinics in rural and remote[6] parts of the state, forcing women seeking abortions to make multiple round trips to urban centers in order to receive health care.[7] These provisions were challenged and wound up before the Supreme Court.[8] In *Whole Woman's Health v. Hellerstedt*,[9] decided on June 27, 2016, the Supreme Court[10] held unconstitutional the portions of

5. H.B. 2, 83d Leg., 2d Sess. (Tex. 2013).

6. By remote I mean population centers that are too large to be considered rural, yet not large enough to necessarily have abortion providers and other services. For example, the Texas cities of El Paso and McAllen would fall into the category of remote, but not necessarily rural, areas. *See, e.g.*, Maya Cueva, *At Texas Clinic, 2 Women Explain What Changed Their Minds on Abortion*, NPR (Mar. 1, 2017), http://www.npr.org/2017/03/01/517988090/at-texas-clinic-2-women-explain-what-changed-their-minds-on-abortion ("[The McAllen clinic] is the last remaining abortion clinic in the entire 1,800-square-mile region known as the Rio Grande Valley.").

7. *See* Madeline M. Gomez, *More than Mileage: The Preconditions of Travel and the Real Burdens of H.B. 2*, 33 COLUM. J. GENDER & L. 49, 50–51 (2016).

8. Whole Woman's Health v. Cole, 136 S. Ct. 499, 499 (2015) (granting the petition for writ of certiorari).

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

10. Justice Stephen Breyer authored the opinion of the Court, and was joined by Justices Anthony Kennedy, Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan. *Id.* Justice Ginsburg filed a concurring opinion; Justice Clarence Thomas filed a dissenting opinion; and Justice Samuel Alito filed a dissenting opinion, joined by the Chief Justice and Justice Thomas. *Id.* at 2299. Only eight Justices participated because the case was decided after the death of Justice Antonin Scalia and before a replacement had been confirmed. *See id.* at 2299 ("BREYER, J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, SOTOMAYOR, and KAGAN JJ., joined. GINSBURG, J., filed a concurring opinion. THOMAS, J., filed a dissenting opinion. ALITO, J., filed a dissenting opinion, in which ROBERTS, C.J., and THOMAS, J., joined."). Justice Scalia, as the Justice in charge of overseeing the Fifth Circuit, took part in the early stages of the case, including a petition for an injunction. Becca Aaronson, *Abortion Providers Ask SCOTUS to Reinstate Injunction*, TEX. TRIB. (Nov. 12, 2013), https://www.texastribune.org/2013/11/12/after-court-ruling-abortion-providers-ending-servi/ [hereinafter Aaronson, *Abortion Providers*]; Becca Aaronson, *SCOTUS Won't Intervene in Texas Abortion Case*, TEX. TRIB. (Nov. 19, 2013), https://www.texastribune.org/2013/11/19/justice-scalia-texas-abortion-case/ [hereinafter Aaronson, *SCOTUS Won't Intervene*]. Justice Scalia did not hear oral arguments, which were presented on March 2, 2016. *See* Transcript of Oral Argument at 1, Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016) (No. 15-274) (taking place after Justice Scalia's death). Though Justice Scalia's seat had been empty since his death in February 2016, President Donald J. Trump nominated Judge Neil Gorsuch to the Supreme Court in January 2017. Julie Hirschfeld Davis & Mark Landler, *Trump Nominates Neil Gorsuch to the Supreme Court*, N.Y. TIMES (Jan. 31, 2017), https://www.nytimes.com/2017/01/31/us/politics/supreme-court-nominee-trump.html?_r=0. Judge Gorsuch was confirmed by the Senate on April 7, 2017. Adam Liptak & Matt Flegenheimer, *Neil*

Texas's omnibus abortion bill that regulated abortion clinics.[11] *Whole Woman's Health* not only provides guidance on the general constitutional test for abortion restrictions, but also speaks to the constitutional relevance of distance and rurality on women's access to abortion.[12] Unlike Supreme Court decisions in other key cases, such as *Roe v. Wade* (which famously established a constitutional privacy right to abortion)[13] and *Planned Parenthood of Southeastern Pennsylvania v. Casey* (a case "decided at a delicate moment when pressures to overturn *Roe* were dangerously strong"[14] that provides the constitutional test for determining the constitutionality of abortion restrictions),[15] the decision in *Whole Woman's Health* takes seriously the burdens faced by rural women in accessing abortions under the maze of contemporary state laws aimed at burdening women's access.[16] Although *Whole Woman's Health* addresses rural women directly, it includes both broad statements and limiting language about the relevance of travel and distance to the constitutional analysis.[17] Reasonable jurists will apply *Whole Woman's Health* in different ways; however, *Whole Woman's Health* will *require* courts to take seriously the burdens faced by rural women.[18]

In *Casey*, litigators argued that some women, including rural women, faced larger barriers in accessing abortion; however, the Court rejected this analysis. After *Casey*, litigators fell away from arguing that many of the abortion regulations have the greatest impact on women who live farthest from the major metropolitan areas where abortion providers tend to be located, and for the most part, courts failed to take rurality into account in analyzing the burdens faced by women.[19] The litigation in *Whole Woman's*

Gorsuch Confirmed by Senate as Supreme Court Justice, N.Y. TIMES (Apr. 7, 2017), https://www.nytimes.com/2017/04/07/us/politics/neil-gorsuch-supreme-court.html?_r=0.

11. *Whole Woman's Health*, 136 S. Ct. at 2300; *see also* Whole Woman's Health v. Hellerstedt, 833 F.3d 565, 567 (5th Cir. 2016) (enjoining, on order from the Supreme Court, enforcement of section 171.0031(a)(1) of the Texas Health and Safety Code and the second sentence of section 245.010(a) of the Texas Health and Safety Code).

12. *Whole Woman's Health*, 136 S. Ct. at 2309–10, 2320.

13. Roe v. Wade, 410 U.S. 113, 154 (1973).

14. Macarena Sáez, *Commentary on* Planned Parenthood of Southeastern Pennsylvania v. Casey, *in* FEMINIST JUDGMENTS 364 (Kathryn M. Stanchi, et al., eds., 2016). *See generally* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

15. *Casey*, 505 U.S. at 877.

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

17. *See infra* Part IV.

18. *See infra* Part V.

19. *See infra* Parts II.A, III (discussing the *Casey* litigators' focus on rural women in comparison to the litigators in *Whole Woman's Health* who generally focused more on

Health was different, and most importantly, the Supreme Court's opinion in *Whole Woman's Health* was different. For the first time, the Supreme Court struck down abortion restrictions because, in part, those restrictions burdened rural women's access to abortion.[20]

This Article provides focused analysis on rural women and their treatment in the *Whole Woman's Health* decision. Lisa Pruitt and Marta Vanegas have extensively analyzed the role of rurality in the lower court decisions as the Texas legislation worked its way to the Supreme Court.[21] Since *Whole Woman's Health* was issued, other commentators have analyzed *Whole Woman's Health* as imposing a mechanical cost–benefit analysis;[22] as increasing the factual inquiry into the state justification for regulations targeted at abortion clinics and for regulations targeted at women's choices;[23] as ignoring the burdens faced by poor women;[24] as impacting, in particular,

urban overcrowding than the barrier of distance faced by rural women).

20. *See infra* Part III (discussing the relevance of distance and travel to the Supreme Court's constitutional analysis); *see also* Pruitt, *Toward a Feminist Theory of the Rural*, *supra* note 3, at 458 (noting that considerations of rural women and travel distance "ha[d] not led to success in securing a less restricted abortion right").

21. Lisa R. Pruitt & Marta R. Vanegas, *Urbanormativity, Spatial Privilege, and Judicial Blind Spots in Abortion Law*, 30 BERKELEY J. GENDER, L. & JUST. 76, 122–50 (2015); *see also* Hailey K. Flynn, Note, *A Postal Code Lottery: Unequal Access to Abortion Services in the United States and Northern Ireland*, 39 FORDHAM INT'L L.J. 629, 677–78 (2016) (discussing distance and travel time in relation to Texas's House Bill 2).

22. *Fourteenth Amendment—Due Process Clause—Undue Burden*—Whole Woman's Health v. Hellerstedt, 130 HARV. L. REV. 397, 404 (2016). This article mentions distance three times in describing the Court's opinion, and provides a single reference to rural women in a footnote. *Id.* at 399 n.22. The article fails to discuss or analyze rural women. *See id.*

23. Linda Greenhouse & Reva B. Siegel, *The Difference a Whole Woman Makes: Protection for the Abortion Right After* Whole Woman's Health, 126 YALE L.J. FORUM 149, 156 (2016) [hereinafter Greenhouse & Siegel, *The Difference a Whole Woman Makes*]. Greenhouse and Siegel mention driving distance in their article, acknowledging "[t]he Court recognizes that, especially when considered in combination with other burdens, increased driving distances may count as a constitutionally cognizable obstacle to women's exercise of their rights." *Id.* at 162 (citing Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2312 (2016)). However, the article goes no further into analyzing distance and rurality. *Id.*

24. April Shaw, *How Race-Selective and Sex-Selective Bans on Abortion Expose the Color-Coded Dimensions of the Right to Abortion and Deficiencies in Constitutional Protections for Women of Color*, 40 N.Y.U. REV. L. & SOC. CHANGE 545, 557 (2016). Shaw does an intersectional analysis of abortion access focusing on women of color. *Id.* at 547–48.

immigrant women;[25] and as creating an "undue burden minus" constitutional test.[26] Scholars have long argued that specific groups of women, frequently women burdened by multiple axes of oppression, are most impacted by abortion regulations.[27] After *Casey*, there was an immediate recognition that "the undue burden standard has a disparate impact upon low-income women, women in rural areas, women of color, and young or battered women, because such women typically have the least resources to overcome the procedural hurdles tolerated under the undue burden standard."[28] I take seriously this general proposition: some women are more impacted by abortion regulations than others. My specific focus, in contrast to the focus of most commentators, is on rural women.[29] To that extent, this Article builds on the work done by Pruitt and Vanegas in their analysis of the lower court litigation.[30] This Article adds a missing piece to the reactions by scholars and the press to the Supreme Court's decision in *Whole Woman's*

25. Gomez, *supra* note 7, at 51.

26. *See* Elizabeth Price Foley, *Whole Woman's Health and the Supreme Court's Kaleidoscopic Review of Constitutional Rights*, 2015–2016 CATO SUP. CT. REV. 153, 175 ("I think of *Whole Woman's Health* as 'undue burden minus,' meaning that it took away *Gonzales's* deference to legislative judgment in the fact of factual uncertainty and gave more power to judges—particularly district court judges—to overtly substitute their own judgment for that of the legislature.").

27. For example, in 1971 Alan Charles and Susan Alexander articulated a Fourteenth Amendment Equal Protection argument against abortion regulations, arguing poor women and women of color face a disparate impact under such regulations. Alan Charles & Susan Alexander, *Abortions for Poor and Nonwhite Women: A Denial of Equal Protection?*, 23 HASTINGS L.J. 147, 148 (1971).

28. 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, 310 (1995); *see* Sylvia A. Law, *Abortion Compromise—Inevitable and Impossible*, 1992 U. ILL. L. REV. 921, 931 (noting expected impact on the most vulnerable women, including poor, unsophisticated, young, and rural women).

29. I say most, not all, because Lisa Pruitt has written substantially on rural women's access to abortion. *See*, *e.g.*, Pruitt, *Gender, Geography & Rural Justice*, *supra* note 1; Pruitt, *Toward a Feminist Theory of the Rural*, *supra* note 3; Pruitt & Vanegas, *supra* note 21; Sáez, *supra* note 14, at 365–83 (rewriting *Casey* in a feminist frame). Few other authors discuss rural women. Gomez, *supra* note 7, discusses distance and rurality in her analysis of *Whole Woman's Health*, but focuses on barriers faced by Latina immigrants and seems to consider rurality as incidental to immigration status. Beth A. Burkstrand-Reid, *The Invisible Woman: Availability and Culpability in Reproductive Health Jurisprudence*, 81 U. COLO. L. REV. 97, 113 (2010), discusses how courts should take rurality into account in analyzing the barriers faced by women in accessing reproductive health care.

30. *See* Pruitt & Vanegas, *supra* note 21, at 87–88.

Health: a focus on rural women and their ability to access abortions. There is no question that *Whole Woman's Health* changes the way courts must determine the constitutionality of abortion restrictions.[31] The open question, rather, is how lower courts will apply *Whole Woman's Health* in the face of varying state legislative barriers to abortion access.[32]

Because it is important to start with the jurisprudential background of *Whole Woman's Health*, I start my analysis by looking at the jurisprudence of constitutional limitations on abortion restrictions through the lens of rural analysis.[33] Accordingly, Part II examines the law governing abortion restrictions, focusing on what *Casey* and its progeny have said about rural women's access to abortion. After articulating the abortion jurisprudence through a critical rural lens, I turn my attention to the legislative and litigation history of the case which became *Whole Woman's Health*.[34] Because the constitutional test for determining the validity of abortion restrictions is fact intensive, the Supreme Court's opinion in *Whole Woman's Health* cannot be analyzed in a vacuum.[35] Rather, it is important to understand the legislative history and district court factual findings.[36] And because the Supreme Court corrected the Fifth Circuit on so many individual legal issues in the *Whole Woman's Health* case, it is also important to understand the legal analysis articulated by the Fifth Circuit.[37]

After exploring the legal and factual background of the case with rural women in mind, Part III of this Article explores how *Whole Woman's Health*

31. *See* Foley, *supra* note 266, at 154 ("Within the span of 43 years—from 1973 to 2016—the level of review that the Supreme Court has applied to abortion regulations has shifted from strict scrutiny [*Roe v. Wade*], to undue burden [*Casey*], to undue burden 'plus' (with a dose of legislative deference) [*Carhart*], to undue burden 'minus' (without the deference) [*Whole Woman's Health*].").

32. *See infra* Part IV (discussing the anticipated impact of *Whole Woman's Health* in different types of states).

33. *See infra* Part II. For an example of such rural-focused gender analysis, *see* Pruitt, *Gender, Geography & Rural Justice*, *supra* note 1.

34. *See infra* Part III. This Article's analysis of the lower court decisions builds on the work of Pruitt & Vanegas, *supra* note 21, at 122–42, who analyzed the lower court decisions in the litigation before the Supreme Court decided *Whole Woman's Health.*

35. Foley, *supra* note 266, at 161 (criticizing the undue burden standard for being so "amorphous and fact-sensitive as to become . . . inherently legislative in nature").

36. *See* Whole Woman's Health v. Lakey, 46 F. Supp. 3d 673, 678 (W.D. Tex. 2014), *aff'd in part*, *vacated in part*, *rev'd in part sub nom.* Whole Woman's Health v. Cole, 790 F.3d 563 (5th Cir. 2015), *modified*, 790 F.3d 598 (5th Cir. 2015), *rev'd and remanded sub nom.* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016).

37. *Cole*, 790 F.3d at 563–98.

reformed the undue burden test established in *Casey*. *Whole Woman's Health* is the first time the Supreme Court has explicitly reinterpreted the *Casey* analysis and provided substantial further instruction on application of the undue burden test.[38] *Whole Woman's Health* changes abortion litigation across the board, but this description and analysis of the opinion focuses on the portions relevant to rural women.[39] Finally, Part IV of this Article identifies and explores the implications of *Whole Woman's Health* for rural women and rural states. *Whole Woman's Health* will potentially have a major impact on the ability of women to access abortions and on the ability of states to limit that access.[40] My analysis focuses specifically on rural women and rural states, adding an important, but unfortunately missing, piece of analysis to the discussion of *Whole Woman's Health*.[41]

II. THE CONSTITUTIONAL TEST FOR ABORTION RESTRICTIONS THROUGH A RURAL LENS

A. Casey's *Undue Burden Standard*

Although *Roe v. Wade* no longer provides the controlling test for judging the constitutionality of abortion restrictions, the 1973 case is fundamental to understanding how abortion restrictions are analyzed under the Constitution. The *Roe v. Wade* framework has now been modified multiple times, but the ultimate holding—that a woman has a constitutional right to access abortion—has been affirmed.[42] *Roe v. Wade* established, for the first time, that women have a constitutional right to terminate pregnancies under certain circumstances.[43] The Supreme Court located the constitutional privacy right in the Fourteenth Amendment's Due Process Clause and required courts to balance that privacy right against state police power.[44] *Roe v. Wade* established that states have a legitimate interest in

38. *See infra* Part III.

39. *See infra* Part III.

40. *See infra* Part IV.

41. *See infra* Part V.

42. *See* Linda Greenhouse & Reva B. Siegel, Casey *and the Clinic Closings: When "Protecting Health" Obstructs Choice*, 125 YALE L.J. 1428, 1432 (2016) [hereinafter Greenhouse & Siegel, Casey *and the Clinic Closings*] ("*Casey* both modified *and* affirmed *Roe*.").

43. Roe v. Wade, 410 U.S. 113, 153 (1973).

44. *Id.* ("The right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions of state action, as we feel it is, . . . is broad enough to encompass a woman's decision whether or not to terminate her

maximizing the safety of patients.[45] In the context of abortion, the state interest in protecting women's health was legitimized.[46] But not all of *Roe v. Wade* survives, including its strong protection for doctor–patient relationships, which was laid out in *Roe v. Wade*'s companion case *Doe v. Bolton*.[47] *Bolton* invalidated an abortion regulation because it was "unduly restrictive of the patient's rights."[48] *Bolton* also required that restrictions on women's access to abortion be sufficiently deferential to physician judgment.[49] Of final relevance to this analysis, *Roe v. Wade* famously established the trimester framework that provided the constitutional test for abortion restrictions[50] until 1992 when *Casey* dismantled much of *Roe v. Wade*.[51] *Casey* may not have become as (in)famous as *Roe v. Wade*, but *Casey* carries more import today because *Casey* established the controlling test for

pregnancy."); James Bopp, Jr., *Will There Be a Constitutional Right to Abortion After the Reconsideration of* Roe v. Wade*?*, 15 J. CONTEMP. L. 131, 132 (1989) ("[T]he United States Supreme Court found a right to abortion encompassed in the right of privacy . . . . This decision ended a half-decade campaign in law review articles and court cases to establish the existence of the right to abortion in various provisions of the Constitution."); Foley, *supra* note 26, at 156 ("[T]he *Roe* majority's use of strict scrutiny . . . require[d] 'the conscious weighing of competing factors . . . .'") (citing *Roe v. Wade*, 410 U.S. at 173).

45. *Roe v. Wade*, 410 U.S. at 162 ("We repeat, however, that the State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman . . . .").

46. *Id. Roe v. Wade* famously situated abortion jurisprudence in a trimester framework, which is most frequently referenced with relation to when the state's interest in potential life becomes compelling. *Id.* at 163. However, the trimester framework was also integral to the constitutional question of how much interest a state has in the health of a pregnant woman. *Id.* The Court noted that the state's interest in the health of pregnant women increased at the end of the first trimester because "until the end of the first trimester mortality in abortion may be less than mortality in childbirth." *Id.* Accordingly, under the *Roe v. Wade* framework, states could more heavily regulate abortion after the end of the first trimester to the extent that the regulation "reasonably relate[d] to the preservation and protection" of women's health. *Id.* Even today, the state interest in protecting women's health survives. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2310 (2016) (noting the protection of women's health is a "constitutionally acceptable objective").

47. Doe v. Bolton, 410 U.S. 179, 197 (1973).

48. *Id.* at 198 (holding unconstitutional Georgia's requirement of a hospital abortion committee because, in part, the committee interfered with a physician's ability to prescribe treatment for a patient).

49. *Id.* at 199.

50. *Roe v. Wade*, 410 U.S. at 162–64.

51. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 873 (1992) (rejecting the trimester framework of *Roe v. Wade*).

determining the constitutionality of abortion restrictions.[52]

When the Supreme Court granted a writ of certiorari in the *Casey* litigation, pro-choice proponents were concerned that no constitutional right to abortion would survive the decision.[53] The right did survive, but was drastically changed.[54] *Casey* changed the *Roe v. Wade* framework in any number of ways.[55] For the purposes of this Article, the relevant legal change is the test used to determine the constitutionality of laws that infringe on a woman's ability to access abortion before viability.[56] For laws falling short of

52. *See id.* at 876 (establishing and describing the undue burden test).

53. GLORIA FELDT, THE WAR ON CHOICE 128 (2004) ("In 1992, when *Planned Parenthood of Southeastern Pennsylvania v. Casey* went to the U.S. Supreme Court, pro-choice supporters worried that the new majority on the Court might take the opportunity of using its review of the case to overturn *Roe*."); *see also* Bopp, *supra* note 44, at 135–36 (discussing, generally, the concerns about the *Roe v. Wade* constitutional analysis and framework in the years before *Casey*); Earl M. Maltz, *Abortion, Precedent, and the Constitution: A Comment on Planned Parenthood of Southeast Pennsylvania v. Casey*, 68 NOTRE DAME L. REV. 11, 18 (1992) ("*Casey* created great excitement among both pro-choice and pro-life groups."); Sáez, *supra* note 14, at 361 ("*Casey* came as a surprise to conservatives and liberals."); Linda J. Wharton et al., *Preserving the Core of* Roe*: Reflections on* Planned Parenthood v. Casey, 18 YALE J.L. & FEMINISM 317, 319 (2006).

54. For one discussion of the change between *Roe v. Wade* and *Casey*, see Foley, *supra* note 266, at 153, 155–66. Two Justices, Justice Harry Blackmun (the author of the *Roe v. Wade* majority opinion) and Justice John Paul Stevens, voted to reaffirm the strict scrutiny standard from *Roe v. Wade*. *Casey*, 505 U.S. at 923 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part); *id.* at 920 (Stevens, J., concurring in part and dissenting in part). Four justices, Chief Justice William Rehnquist, Justice Byron White, Justice Antonin Scalia, and Justice Clarence Thomas, would have overruled *Roe v. Wade*. *Id.* at 944 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). Therefore, the undue burden test was endorsed by only three Justices: Justice Sandra Day O'Connor, Justice Anthony Kennedy, and Justice David Souter. *Id.* at 843–44 (opinion of O'Connor, Kennedy, and Souter, JJ.). "Under the logic that the greater includes the lesser, [t]he tri-authored plurality opinion—embracing the undue burden standard—generally has been accepted as representing the Court's standard of review for the constitutionality of abortion regulations." Foley, *supra* note 26, at 157–58.

55. Paul Benjamin Linton, Planned Parenthood v. Casey*: The Flight from Reason in the Supreme Court*, 13 ST. LOUIS U. PUB. L. REV. 15, 36 (1993) (identifying differences between *Roe v. Wade* and *Casey*, including: theory, source, nature of right, weight of countervailing interests, requirement of "fit," standard of review, and division of pregnancy).

56. The relevance of a viability determination was also created in *Casey* where the Supreme Court, while maintaining the "essential holding" of *Roe v. Wade*, established a new framework which is situated around the viability of a fetus. *Casey*, 505 U.S. at 846.

a ban on abortion, *Casey* declared a new standard: the undue burden test.[57] The majority explained the undue burden test is 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."[58] The undue burden test is, without question, more lenient than the strict scrutiny standard used in *Roe v. Wade*.[59] Importantly for the new wave of anti-abortion legislation, *Casey* also whittled away the *Roe v. Wade* protections regarding the doctor–patient relationship.[60]

After the *Casey* opinion came out, there was universal agreement that *Casey* left states in a better position to regulate abortion.[61] The *Casey*

57. *Id.* at 874 (citing Justice O'Connor's prior discussions of the undue burden test, in, *inter alia*, Webster v. Reprod. Health Servs., 492 U.S. 490, 530 (1989) (O'Connor, J., concurring in part and concurring in the judgment), and Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 828 (1986) (O'Connor, J., dissenting), *overruled by Casey*, 505 U.S. at 883).

58. *Id.* at 877.

59. *See id.* at 923 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) (citations omitted) (advocating for continued application of *Roe v. Wade*'s strict scrutiny standard and discussing the relaxed undue burden standard); Greenhouse & Siegel, Casey *and the Clinic Closings*, *supra* note 42, at 1431 ("*Casey* was crafted by moderates responding to concerns raised both by those who wanted to overturn *Roe v. Wade* and those who wanted to preserve constitutional protections for the abortion right.").

60. *See Casey*, 505 U.S. at 884 (analyzing informed consent provisions and holding "[w]hatever constitutional status the doctor-patient relation may have as a general matter, in the [abortion] context it is derivative of the woman's position"). This holding notably steps back from the strong protections established in *Doe v. Bolton*, 410 U.S. 179 (1973), where the Court broadly defined the medical judgment which insulated women and their physicians from state intervention. *See id.* at 192 ("We agree . . . that the medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment. And it is room that operates for the benefit, not the disadvantage, of the pregnant woman."). Even before *Casey,* the Supreme Court had stepped back from the *Doe v. Bolton* doctorpatient protections. *See* Whalen v. Roe, 429 U.S. 589, 604–05 & n.33 (1977) (holding a doctor's right to administer medical care is of no "greater strength than his patient's right to receive care").

61. *See, e.g.*, Greenhouse & Siegel, Casey *and the Clinic Closings*, *supra* note 42, at 1431 ("The framework [the *Casey* plurality] crafted allowed states more latitude to restrict abortion in the interest of protecting potential life, but only as long as women could make the ultimate decision whether to continue a pregnancy."); Linton, *supra* note 55, at 34–35 (explaining the changes between *Roe v. Wade* and *Casey* and articulating that *Casey* "downgrades" the state interests from "compelling" to "legitimate" and "substantial").

opinion was not a real "win" for either side: *Casey* was "decried by both pro- and anti-choice forces as unsatisfactory and unworkable."[62] Pro-choice advocates were frustrated and worried that the legal test for judging the constitutionality of abortion restrictions had been weakened.[63] Pro-life advocates had been hopeful that the Supreme Court would entirely overrule *Roe v. Wade*.[64] There was also immediate recognition that weakened legal protection under the *Casey* undue burden test would "hit[] hardest those women who are most vulnerable, i.e. the poor, the unsophisticated, the young, and women who live in rural areas."[65]

Casey is not only important in the general sense that it established the governing test for judging the constitutional viability of abortion restrictions, but it is also important for the specific topic of this Article: the application of the undue burden test when distance and rurality limit women's access to abortion. A total of five provisions of the Pennsylvania Abortion Control Act of 1982 were challenged before the Supreme Court in *Casey*.[66] Further

62. Teresa L. Scott, Note, *Burying the Dead: The Case Against Revival of Pre-*Roe *and Pre-*Casey *Abortion Statutes in a Post-*Casey *World*, 19 N.Y.U. REV. L. & SOC. CHANGE 355, 355 (1992) ("The *Casey* decision failed to provide a clear and workable standard and instead created confusion, anger, and hope among proponents and opponents of choice such that the debate over the fate of *Roe* will continue."); *see* FELDT, *supra* note 53, at 128 ("[The Supreme Court's] decision in *Casey* did pave the way for states to create many new obstacles to obtaining abortions . . . .").

63. *See, e.g.*, Law, *supra* note 28, at 931 ("From a pro-choice point of view, one plausible assessment of the *Casey* decision is that it represents the worst of all possible worlds."). For pro-choice advocates, the fear turned out to be true because "*Casey*'s 'undue burden' test has fostered extensive encroachments on women's personal privacy." Caitlin E. Borgmann, *Abortion, the Undue Burden Standard, and the Evisceration of Women's Privacy*, 16 WM. & MARY J. WOMEN & L. 291, 291 (2010).

64. *See, e.g.*, James Bopp, Jr., *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 3 BYU J. PUB. L. 181, 200 (1989) (criticizing *Roe v. Wade* and advocating for the Supreme Court to overturn the decision); Linton, *supra* note 55, at 102 (criticizing *Casey* for failing to overturn *Roe v. Wade* and arguing *Roe v. Wade* was retained, not for any valid legal reason, but because the Supreme Court desired legalized abortion).

65. Law, *supra* note 28, at 931; Pacer, *supra* note 28, at 310 (discussing the disparate impact of the undue burden standard on poor, rural, nonwhite, young, and battered women).

66. *See* Abortion Control Act, No. 1982-138, § 1, 1982 Pa. Laws 476, 476–93 (codified as amended at 18 PA. STAT. AND CONS. STAT. ANN. §§ 3201–3220 (West 2017)), *invalidated in part by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 844 (1992). Section 3205 required informed consent and a 24-hour waiting period. *Id.* § 3205. Section 3206 required parental consent for a minor to obtain an abortion, but included a judicial bypass procedure. *Id.* § 3206. Section 3209 required a married woman to inform her

examination of two of the five provisions is in order: the spousal-notification requirement and the 24-hour informed consent waiting period.

Casey's holding on the spousal-notification requirement is fundamental to how courts calculate the burden under the undue burden test.[67] This provision did not have a disproportionate impact on rural women, but it did contribute to the legal uncertainty about how many women must be burdened before a provision is unconstitutional.[68] The Pennsylvania law required all married women to notify their husbands before obtaining an abortion.[69] The district court found that "[t]he vast majority of women consult their husbands prior to deciding to terminate their pregnancy," but some women do not inform husbands for fear of domestic violence.[70] The district court discussed marital rape and concluded that approximately 1 percent of women seeking abortions are married and would not otherwise inform their husbands.[71] The Supreme Court took seriously the threat of intimate partner violence faced by 1 percent of women seeking abortions in Pennsylvania.[72] The Supreme Court found the threat of violence would act as a deterrent, and thus an undue burden on women's constitutional right to access abortions.[73] The spousal-notification requirement analysis is particularly important because only 1 percent of women were impacted, yet the Supreme Court found the requirement to be an undue burden and struck down that portion of the law.[74]

husband before obtaining an abortion. *Id.* § 3209. Sections 3207(b), 3214(a), and 3214(f) imposed reporting requirements on abortion facilities. *Id.* §§ 3207(b), 3214(a), 3214(f). *See also* Greenhouse & Siegel, Casey *and the Clinic Closings*, *supra* note 42, at 1438–44 (discussing the Supreme Court's analysis of various provisions of Pennsylvania's Abortion Control Act of 1982).

67. *See Casey*, 505 U.S. at 887–98 (citations omitted) (analyzing the spousal-notification provision).

68. *See* Greenhouse & Siegel, Casey *and the Clinic Closings*, *supra* note 42, at 1441.

69. *Casey*, 505 U.S. at 887.

70. *Id.* at 888, 893 (citing the district court decision).

71. *Id.* at 894.

72. *See id.* at 894–95 (rejecting the argument that the spousal-notification requirement "imposes almost no burden at all for the vast majority of women seeking abortions").

73. *Id.* at 891–94 (recounting the district court findings on domestic violence and concluding the spousal-notification requirement will "impose a substantial obstacle" for "a significant number of women").

74. *See id.* at 893–94 (ruling 7–2 to strike down this portion of the Pennsylvania law).

The second relevant provision from *Casey* is the 24-hour informed consent waiting period.[75] Pennsylvania, like many other states,[76] reacted to *Roe v. Wade* by passing laws that regulated abortion.[77] Pennsylvania joined a number of other states in requiring a mandatory waiting period, [78] and in 1982, instituted legislation that included a 24-hour waiting period.[79] After that law was struck down, Pennsylvania's legislation again imposed a mandatory 24-hour waiting period.[80] That 24-hour waiting period was challenged in the *Casey* litigation, where the Third Circuit found: even though the 24-hour waiting period "may result in delays considerably longer than 24 hours," and even though "the burden of an additional trip to the clinic falls most heavily on battered wives," the waiting period was constitutional.[81] The Third Circuit reasoned that minors needing to receive permission for an abortion incurred a delay while going through the judicial bypass procedure, and because that delay was not unconstitutional, neither was a delay impacting all women.[82] The Supreme Court affirmed and found no undue burden from the 24-hour waiting period requirement, even though the Court was made aware that the 24-hour waiting period would have a detrimental impact on young, rural, low-income women.[83] The parties and amici discussed various groups of women who would be particularly impacted by the Pennsylvania restrictions; one of those groups was rural

75. *See id.* at 881–87 (finding Pennsylvania's 24-hour waiting period is not an undue burden).

76. *An Overview of Abortion Laws*, GUTTMACHER INST., https://www.guttmacher.org/state-policy/explore/overview-abortion-laws (last updated Apr. 1, 2017) (enumerating state laws enacted to regulate abortion following *Roe v. Wade*).

77. In Pennsylvania, the *Roe v. Wade* reaction bill was the Abortion Control Act of 1974. Abortion Control Act, No. 209, 1974 Pa. Laws 639 (repealed 1982).

78. *See An Overview of Abortion Laws*, *supra* note 76.

79. Abortion Control Act, No. 1982-138, § 1, 1982 Pa. Laws 476, 476–93 (codified as amended at 18 PA. STAT. AND CONS. STAT. ANN. §§ 3201–3220 (West 2017)), *invalidated in part by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 844 (1992). The bill required that a pregnant woman wait a mandatory minimum of 24 hours after giving her consent to the abortion and before undergoing the abortion procedure. *Id.*

80. *See* H.B. 64, 1989 Gen. Asemb. (Pa. 1989); H.B. 668, 1987 Gen. Assemb. (Pa. 1987); Thornburgh v. Am. Coll. of Obstetricians and Gynecologists, 476 U.S. 747, 828 (1986) (O'Connor, J., dissenting), *overruled by Casey*, 505 U.S. at 883.

81. Planned Parenthood of Se. Pa. v. Casey, 947 F.2d 682, 706 (3d Cir. 1991), *aff'd in part, rev'd in part*, 505 U.S. 833 (1992).

82. *Id.*

83. *See Casey*, 505 U.S. at 887 ("[W]e are not convinced that the 24-hour waiting period constitutes an undue burden.").

women.[84] The brief for the petitioners pointed out the impact on young, rural, low-income women.[85] The brief discussed long travel times, overnight stays, and increased costs to rural women.[86] The plaintiff and amicus briefs

84. Brief for Petitioners and Cross-Respondents, *Casey*, 505 U.S. 833 (Nos. 91-744, 91-902), 1992 WL 12006398, at *15 ("*Roe*'s demise will be most devastating for low-income, young, rural, or battered women, who are too vulnerable to overcome state-imposed obstacles."); Brief for Am. Psychological Ass'n as Amicus Curiae Supporting Petitioners, *Casey*, 505 U.S. 833 (Nos. 91-744, 91-902), 1992 WL 12006399, at *28–29 ("In many geographic areas of the country, women live long distances, even hundreds of miles, from the nearest abortion provider. Research has shown that the greater the distance from a provider, the less likely a woman is to gain access to the abortion service. The lack of local services can result in numerous difficulties for women seeking an abortion: travel expenses, overnight lodging, loss of pay, and jeopardized privacy because of absence from work and/or home for a significant period of time."); Brief for NAACP Legal Def. & Educ. Fund, Inc. et al. as Amici Curiae Supporting Planned Parenthood of Se. Pa., *Casey*, 505 U.S. 833 (Nos. 91-744, 91-902), 1992 WL 12006401, at *17 ("Any analysis of whether a law that regulates or restricts the provision of abortions burdens the right to privacy must include an examination of the law's burden on poor women for the simple reason that they, too, are guaranteed the constitutional right to privacy.").

85. Brief for Petitioners and Cross-Respondents, *supra* note 84, at *15 ("*Roe*'s demise will be most devastating for low-income, young, rural, or battered women, who are too vulnerable to overcome state-imposed obstacles."); *see also* Brief for Representative Don Edwards et al. as Amici Curiae Supporting Petitioners, *Casey*, 505 U.S. 833 (Nos. 91-744, 91-902), 1992 WL 12006400 at *26–28 ("Other burdensome restrictions on access to pre-viability abortions, short of an outright ban, would have the practical effect of withdrawing the right recognized in *Roe* from millions of poor and rural women. . . . In the end, there will not be separate policies on abortion for women living in different states as much as there will be separate policies for women of different social and economic status. Women who are unable to travel elsewhere will be returned to the darkness of the pre-*Roe* era: whiskey as an anesthetic; doctors who are sometimes marginal or unlicensed practitioners, sometimes alcoholic, sometimes sexually abusive; unsanitary conditions; incompetent treatment; infection, hemorrhage, disfigurement and even death."). A group of historians reminded the Court:

> In the first half of the twentieth century, a two-tiered abortion system emerged in which quality of medical care depended on the class, race, age and residence of the woman. Poor and rural women obtained illegal abortions performed by people (including some physicians) willing to defy the law out of sympathy for the woman or for the fee. More privileged women pressed private physicians for legal abortions and many obtained them.

Brief of 250 American Historians as Amici Curiae Supporting Planned Parenthood of Se. Pa., *Casey*, 505 U.S. 833 (Nos. 91-744, 91-902), 1992 WL 12006403, at *24; *see also* Pruitt & Vanegas, *supra* note 21, at 114.

86. Brief for Petitioners and Cross-Respondents, *supra* note 84, at *10; *see also* Pruitt & Vanegas, *supra* note 21, at 114.

provided the Supreme Court with evidence and analysis which established that rural women (especially poor, rural women) faced particular burdens under the Pennsylvania statutory scheme.[87]

Despite the discussion of rural women in the briefs, the Justices in *Casey* "used the word 'rural' only once in 168 pages of" text.[88] "The Court concluded that while the increased cost, delay, and inconvenience to women might *make it difficult* for them to get abortions, it would not actually *deter* them from doing so."[89] The Supreme Court, in its analysis of the 24-hour waiting period, "effectively converted the requirement of a substantial obstacle into an insurmountable encumbrance."[90] In other words, there was something about the "grit and determination" of rural women which made the *Casey* Court, and many other subsequent courts, believe the burdens faced by rural women do not rise to the level of unconstitutional, undue burdens.[91] Even though in its analysis of the spousal-notification requirement the Court focused on married women who would not have otherwise informed their husbands, the Court did not focus on burdened groups in its discussion of the 24-hour waiting period.[92] In fact, the Court dismissed the "'particularly burdensome' effects of the waiting period on some women."[93] The Court recognized the burden of a 24-hour waiting period fell most heavily on certain groups of women—presumably the poor, rural, and young women as argued in the briefs—but did not believe that burden constituted an undue burden, even on the groups "most burdened by it."[94]

After the Supreme Court issued the *Casey* opinion, three major interpretive questions remained.[95] The first: What exactly is an undue

87. Pruitt & Vanegas, *supra* note 21, at 114. For an alternative *Casey* opinion that takes rurality and feminism into account, *see* Sáez, *supra* note 14, at 365–83.

88. Pruitt & Vanegas, *supra* note 21, at 115; *see Casey*, 505 U.S. at 937 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) (using the word "rural" in his discussion of the district court's factual findings).

89. Pruitt & Vanegas, *supra* note 21, at 115 (first emphasis added).

90. *Id.*

91. *See id.* at 106.

92. *Compare Casey*, 505 U.S. at 894–95, *with id.* at 881–87 (opinion of O'Connor, Kennedy, and Souter, JJ.).

93. *Id.* at 886–87.

94. *Id.* at 887. Justice Stevens criticized the plurality for failing to defer to the factual findings of the district court. *Id.* at 920–21 (Stevens, J., concurring in part and dissenting in part).

95. I identify three questions left open after *Casey*. However, it is worth mentioning

burden? The *Casey* Court defined undue burden as a shorthand for "a substantial obstacle in the path of a woman seeking an abortion."[96] Activists on both sides thought the definition was too vague.[97] The second outstanding issue: To whom should the undue burden test be applied? Debate centered around whether a restriction would be held invalid if it burdened every woman's access to abortion, or only a certain class of women's access to abortion.[98] The third outstanding issue: How much should courts defer to legislative factual findings? These questions, and their interpretations at the federal circuit court level, have plagued women's access to abortion for the last quarter century.[99]

B. *Aftereffects of* Casey

As a general matter, the Roberts Court and the federal circuit courts of appeal have interpreted *Casey*'s undue burden test to allow for increased legislative interference with women's ability to access abortions.[100] The

that, in the aftermath of *Casey*, many other questions were discussed. At the time, *Casey* was criticized for being unclear on various grounds. A student summarized the scholarly predictions concerning the application of *Casey*'s undue burden analysis and noted the following concerns: (1) lack of methodology would make the undue burden test unworkable; (2) the inconsistent methods used in *Casey* would confuse the lower courts; and (3) abortion litigation would increase. Ruth Burdick, Note, *The* Casey *Undue Burden Standard: Problems Predicted and Encountered, and the Split Over the* Salerno *Test*, 23 HASTINGS CONST. L.Q. 825, 840–42 (1996). Burdick also collected predicted problems resulting from the judicial discretion inherent in *Casey*'s undue burden test. *Id.* at 842–43.

96. *Casey*, 505 U.S. at 877.

97. *See, e.g.*, Gillian E. Metzger, *Unburdening the Undue Burden Standard: Orienting* Casey *in Constitutional Jurisprudence*, 94 COLUM. L. REV. 2025, 2025 (1994) ("[T]he extent of this [Constitutional] protection [for abortion access] was left in doubt as a result of the Court's failure to provide methods for determining when an undue burden on abortion exists.").

98. *See, e.g.*, Wharton et al., *supra* note 53, at 385.

99. *See* FELDT, *supra* note 53, 128–30 (criticizing legislative action following *Casey*); Greenhouse & Siegel, Casey *and the Clinic Closings*, *supra* note 42, at 1431–32 (discussing circuit splits on level of deference post-*Casey*).

100. Since Chief Justice Roberts assumed his role in 2005, the Supreme Court has heard few abortion cases. In *Ayotee v. Planned Parenthood of Northern New England*, 546 U.S. 320, 328 (2006), the Court approved of narrow remedies when an abortion restriction could violate a minor's constitutional right to abortion. In *Scheidler v. National Organization for Women, Inc.*, 547 U.S. 9, 23 (2006), the Court, in response to a class action by nonprofits, strictly construed the Hobbs Act to deny the plaintiffs' their requested injunction against certain protesting outside of abortion clinics. Finally, the Court decided the two cases discussed extensively in this paper: *Gonzales v. Carhart*, 550

Supreme Court, from *Roe v. Wade* to the present, has allowed an "ever-shifting standard of judicial review for abortion cases"[101] leading to contradictions between cases.[102]

Of these three interpretive questions, the question of deference to legislatures has received the most attention from the Supreme Court.[103] In 2000, the Supreme Court, without "revisit[ing] th[e] legal principles" established in *Roe v. Wade* and *Casey*, struck down a state statute banning "partial-birth abortions" but failing to provide an exception for the preservation of a woman's life or health.[104] Only seven years later, the Supreme Court upheld as constitutional a federal ban on partial-birth abortions in *Gonzales v. Carhart*.[105] *Carhart* did not purport to change the *Casey* undue burden test.[106] The dissent, however, accused the Court of failing to "take *Casey* . . . seriously."[107] Despite leaving intact the *Casey* holding and analysis, *Carhart* notably augmented the level of deference courts owed to legislatures.[108] In *Carhart*, the Supreme Court "refer[red] to

U.S. 124 (2007), and *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). The sample size of cases is small, but notably only in *Whole Woman's Health* has the Roberts Court ruled in favor of abortion providers.

The federal circuit courts have generally been lenient in the application of the undue burden test during this time. However, not all circuits have been so. For example, the Seventh and Ninth Circuits have required judges to conduct factual findings into perceived health benefits and weigh those benefits against the burden imposed by state regulation. Planned Parenthood of Ariz. Inc. v. Humble, 753 F.3d 905, 914 (9th Cir. 2014); Planned Parenthood of Wis. v. Van Hollen, 738 F.3d 786, 798 (7th Cir. 2013).

101. Foley, *supra* note 26, at 154.

102. Greenhouse & Siegel, Casey *and the Clinic Closings*, *supra* note 42, at 1431–32 (discussing circuit splits on the level of deference because of uncertainty about whether *Casey* and *Carhart* require courts to examine whether health-justified policies actually benefit health, or whether there is judicial deference to legislatures).

103. *See supra* Part II.A. (discussing three major interpretive questions left open after the *Casey* opinion).

104. Stenberg v. Carhart, 530 U.S. 914, 921, 929–30 (2000).

105. *Gonzales v. Carhart*, 550 U.S. at 132.

106. *Id.* at 145 (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992)) (recounting the central holding of *Casey*). Two Justices concurred to reiterate that "the Court's abortion jurisprudence, including *Casey* and *Roe v. Wade*, . . . has no basis in the Constitution." *Id.* at 169 (Thomas, J., concurring).

107. *Id.* at 170 (Ginsburg, J., dissenting).

108. *See* Foley, *supra* note 26, at 166 ("*Casey*'s undue burden standard took on a distinctly deferential cast in *Gonzales v. Carhart* . . . ."); Greenhouse & Siegel, Casey *and the Clinic Closings*, *supra* note 42, at 1468 ("In *Carhart*, the Court does employ a form of deference—though not rational-basis review that swallows or supplants *Casey*'s undue

the District Courts' exhaustive opinions in [their] own discussion of abortion procedures," but did not defer to the exhaustive fact-findings conducted by the district courts.[109] Instead, the Supreme Court deferred to the "factual findings" made by Congress, even while acknowledging "some recitations in the Act [were] factually incorrect."[110] Although *Carhart* reads as very deferential, the Supreme Court assured that "[t]he Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake" and "[u]ncritical deference to Congress' factual findings in these cases is inappropriate."[111] Despite some limiting language, *Carhart* appeared to "water[] down" the *Casey* undue burden test, creating a test "approaching something akin to rational basis review."[112]

Carhart was about the "interest of the Government in protecting the life of the fetus that may become a child,"[113] not about other legitimate state interests, such as protecting the health of women.[114] Despite the narrow government interest at stake in *Carhart*, circuit courts reacted to *Carhart* by changing the level of deference in all abortion cases.[115] State laws have limited women's access to abortion in many ways, but the most relevant example of the impact of *Carhart* and strengthened judicial deference is the post-*Casey* intrusion into medical decision-making. States justify intrusion into medical decision-making as promoting public health and increasing the safety of abortion procedures.[116] Opponents of abortion restriction argue the

burden framework.").

109. *Carhart*, 550 U.S. at 134, 141. By the time the Supreme Court decided *Carhart*, three different district courts had conducted fact-finding on the federal partial-birth abortion ban. *Id.* at 134.

110. *Id.* at 165.

111. *Id.* at 165–66.

112. Foley, *supra* note 26, at 169.

113. *Carhart*, 550 U.S. at 146.

114. Foley, *supra* note 26, at 168 ("The legislature, in other words, enacted the PBABA to pursue various legitimate ends, including expressing respect for the dignity of human life and protecting the integrity and ethics of the medical profession.").

115. *See* Greenhouse & Siegel, Casey *and the Clinic Closings*, *supra* note 42, at 1433–34 (discussing the Fifth Circuit's inappropriate judicial deference to Texas's legislation aimed at shutting down abortion clinics in the name of promoting women's health).

116. For example, telehealth bans have been justified as increasing women's health. *Utah Moves to Restrict Abortions by Telemedicine*, MHEALTH INTELLIGENCE (Jan. 31, 2017), http://mhealthintelligence.com/news/utah-moves-to-restrict-abortions-by-telemedicine. Life-justified restrictions similarly intrude into the doctor–patient relationship. *See* Jordan Smith, *Kentucky's New Fetal Pain Law, Like Most Abortion Restrictions, Is Based on Junk Science*, INTERCEPT (Jan. 22, 2017),

real motive behind laws that intrude into doctor–patient decision-making is hindering abortion access, not improving women's health.[117]

One strategy used by states trying to restrict abortion by intruding into medical decision-making has been to target abortion providers with onerous facility regulations.[118] These regulations are known as Targeted Regulation of Abortion Providers (TRAP) laws.[119] TRAP laws are defined as laws that single out abortion providers and subject those providers to any number of requirements.[120] These requirements can be wide ranging and often include medical, administrative, or facility requirements.[121] Although most TRAP laws are justified as having health benefits for women seeking abortions, [122] not all can claim this justification.[123] For example, in 2016 Alabama passed a law prohibiting the state health department from issuing or renewing operating licenses for abortion clinics located near certain public schools.[124]

It is indisputable that TRAP laws hamper women's access to abortion: TRAP laws purposefully override medical judgment and discretion; TRAP laws increase the costs of operating a clinic; and, most importantly for this Article, TRAP laws disproportionately impact rural women. Rural women are particularly impacted because the clinics most likely to be unable to meet the TRAP requirements are those in the smallest population centers.[125] In conjunction with forcing the closure of rural clinics, states compound access problems by restricting some forms of telemedicine for consulting about

https://theintercept.com/2017/01/22/kentuckys-new-fetal-pain-law-like-most-abortion-restrictions-is-based-on-junk-science/.

117. *See, e.g.*, Smith, *supra* note 116 (arguing there is no demonstrable benefit of the Kentucky fetal pain law).

118. *See* Greenhouse & Siegel, Casey *and the Clinic Closings*, *supra* note 42, at 1446 ("[TRAP] regulations impose requirements on abortion providers that are not imposed on other medical practices of similar or even greater risk.").

119. *Id.* at 1432.

120. *Id.* at 1446.

121. *Id.*

122. *See, e.g.*, *A Simple Example of Why Abortion Clinic Inspections are Necessary*, PRO-LIFE ACTION LEAGUE (Oct. 30, 2013), https://prolifeaction.org/2013/ppyork/ (articulating a pro-life justification for TRAP laws).

123. *See* Greenhouse & Siegel, Casey *and the Clinic Closings*, *supra* note 42, at 1444–46.

124. S.B. 205, 2016 Reg. Sess. § (1)(b) (Ala. 2016).

125. *See* Pruitt & Vanegas, *supra* note 21, at 118 (describing types of TRAP laws and concluding they "result in clinic closures, placing providers farther from or entirely out of reach of many women").

abortion.[126] One tactic, used by 19 states, is prohibiting physicians from providing information to women remotely and receiving women's informed consent remotely via telemedicine.[127] In 2016 alone, at least three states took action to limit the use of telemedicine.[128] Indiana prohibited informed consent counseling from taking place via phone.[129] Because Indiana has an 18-hour waiting period, women must now make two physical trips to an abortion provider.[130] Kentucky now requires that informed consent counseling take place either in person or via real-time visual telehealth services, effectively banning consultation via phone.[131] South Carolina prohibited the use of telemedicine services for the provision of medication abortion.[132] 2017 has already seen the introduction of a similar bill in Utah.[133]

TRAP laws have generally been upheld under *Casey*'s undue burden standard.[134] Until the litigation involving Texas's 2013 omnibus abortion bill, courts, litigants, and commentators generally failed to discuss the impact TRAP laws have specifically on rural women.[135] Until recently, "[i]n the abortion context as in several others, the law has turned a blind eye to the very real plight of the rural populace, especially those with the fewest resources."[136] Although courts have not been discussing rural women's particular barriers to abortion access, they should be. Generally, the burden on a woman's constitutional right to choose abortion increases in proportion to the woman's distance from an abortion provider. Other known factors

126. Greenhouse & Siegel, Casey *and the Clinic Closings*, *supra* note 42, at 1446 (noting states' health and safety laws often "single out abortion in . . . telemedicine").

127. *Utah Moves to Restrict Abortions by Telemedicine*, *supra* note 116.

128. S.C. CODE ANN. § 40-47-37(C)(6) (West 2017); H.B. 1337, 119th Gen. Assemb., 2d Reg. Sess., § 1.1(a)(1) (Ind. 2016); S.R. 4, 2016 Leg., 16th Reg. Sess. (Ky. 2016).

129. H.B. 1337, § 1.1(a)(1).

130. *See id.*

131. S.R. 4.

132. S.C. CODE ANN. § 40-47-37(C)(6) (West 2017). South Carolina allowed for telemedicine services to be used in the future if approved by the state board of medicine. *Id.*

133. *Utah Moves to Restrict Abortions by Telemedicine*, *supra* note 116.

134. *See* Pruitt & Vanegas, *supra* note 21, at 85.

135. *See id.* at 79 ("What is infrequently acknowledged in academic literature and only slightly more often noted in recent media coverage is that [abortion] regulations . . . have a dramatic impact on women who live farthest from major metropolitan areas.").

136. Pruitt, *Toward a Feminist Theory of the Rural*, *supra* note 3, at 459–60; *cf.* Greenville Women's Clinic v. Bryant, 222 F.3d 157, 202 (4th Cir. 2000) (Hamilton, J., dissenting) (noting urban bias of majority and finding an undue burden based on the "plight and effect on" women "residing in rural" South Carolina).

which impact women's access to abortion include: lack of access to reliable transportation, low-income status, inflexible work schedule, and lack of access to child care.[137] Notably, these factors are associated with rural life.[138] Rural women, therefore, fall at the intersection of multiple barriers to abortion access.[139]

Any discussion of rural women is incomplete without recognizing the particularly onerous barriers faced by Native American women. Native American women are uniquely disadvantaged when it comes to abortion access.[140] Rural Native American women face high levels of sexual assault and low socioeconomic status.[141] Uniquely, many Native American women receive their health care through Indian Health Services (IHS), which is largely banned from providing abortions.[142] The Hyde Amendment bans the use of public funds for abortion except in limited circumstances.[143] Now, the Hyde Amendment covers health care provided by the IHS and accordingly limits services the IHS can provide to Native American women.[144] Native American women are, therefore, put between a rock and a hard place. Women either must travel long distances to reach an abortion clinic, or must meet the strict requirements of the Hyde Amendment.[145] Because of the Hyde Amendment, the IHS can only provide an abortion if the IHS

137. Pruitt, *Toward a Feminist Theory of the Rural*, *supra* note 3, at 433–37 (outlining structural disadvantages faced by rural women). Many poor, urban women face similar burdens, my focus on rural women is not meant to make light of burdens faced by any other group of women.

138. *Id*. at 433–37.

139. *See generally* Gomez, *supra* note 7 (discussing intersectionality for rural Latina women).

140. Pruitt & Vanegas, *supra* note 21, at 94.

141. PATRICIA TJADEN & NANCY THOENNES, EXTENT, NATURE, AND CONSEQUENCES OF RAPE VICTIMIZATION: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 1 (Jan. 2006), https://www.ncjrs.gov/pdffiles1/nij/210346.pdf ("NVAWS found that lifetime rape prevalence varies significantly by race and ethnicity. American Indian/Alaska Native women reported significantly higher rates of rape victimization over their lifetime than did women from all other racial and ethnic backgrounds (except Asian/Pacific Islander, of whom too few victims were in the study to reliably estimate rape prevalence)."); Pruitt & Vanegas, *supra* note 21, at 94.

142. Laurie Nsiah-Jefferson, *Reproductive Laws, Women of Color, and Low-Income Women*, 11 WOMEN'S RTS. L. REP. 15, 17–18 (1989).

143. CRISTINA PAGE, HOW THE PRO-CHOICE MOVEMENT SAVED AMERICA 61 (2006).

144. Nsiah-Jefferson, *supra* note 142, at 17–18.

145. *See id.*

physician "certifies" that the woman's life would be in danger due to carrying the fetus full term.[146] In total, "the low socioeconomic status of Native American women," combined with the ban on federally funded abortions, "create[s] a de facto prohibition of abortion for indigenous women."[147]

The discussion of rural women, and especially rural Native American women, requires an intersectional analysis.[148] "Intersectionality posits that the traditional conceptualizations of oppression within society . . . do not act independently of one another."[149] While intersectionality is now widely recognized by scholars, rurality is frequently missing from intersectional analysis. For example, the only law school casebook on reproductive rights defines intersectionality to include oppression "such as racism, sexism, classism, homophobia, transphobia, and other forms of bigotry."[150] Missing in this definition, and in the intersectional analysis conducted by most scholars and courts, is the inclusion of rurality as a burden.[151] Intersectionality should inform the constitutional analysis of abortion restrictions, but intersectionality must be defined to include rural women.

This is not to say TRAP laws have been the only legislative strategy aimed at decreasing the number of women choosing abortion. Since *Casey* decreased the level of constitutional scrutiny, states have enacted any number of measures. These have included waiting periods, counseling scripts, required ultrasounds, and even total bans previability.[152] Some of

146. *Indian Health Manual* § 3-13.14(B)(1), INDIAN HEALTH SERV. https://www.ihs.gov/IHM/index.cfm?module=dsp_ihm_pc_p3c13#3-13.14 (last visited Apr. 8, 2017).

147. Pruitt & Vanegas, *supra* note 21, at 94.

148. The term "intersectionality" grew out of groundbreaking work by Kimberle Crenshaw. Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimnation Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140 (1989); *see also* Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 589 (1990) (describing intersectionality).

149. MELISSA MURRAY & KRISTIN LUKER, CASES ON REPRODUCTIVE RIGHTS AND JUSTICE vi (Robert C. Clark et al. eds., 2015).

150. *Id.*

151. *See* sources cited *supra* notes 22–26.

152. Rachel Benson Gold & Elizabeth Nash, *TRAP Laws Gain Political Traction While Abortion Clinics—and the Women They Serve—Pay the Price*, GUTTMACHER INST. (June 25, 2013), https://www.guttmacher.org/gpr/2013/06/trap-laws-gain-political-traction-while-abortion-clinics-and-women-they-serve-pay-price; *see also* Calvin Freiburger, *Nearly 50 Pro-Life State Laws Passed in 2015*, LIVE ACTION NEWS (December 8, 2015), http://liveactionnews.org/nearly-50-pro-life-state-laws-passed-in-

these laws, such as those imposing increasingly-long informed consent waiting periods, have a disproportionate impact on rural women.[153] Despite the multitude of reasons courts should take seriously the barriers faced by rural women in accessing abortion, the federal circuit courts have, thus far, failed to take note of these barriers.[154] The federal circuit courts have consistently denied and dismissed the significance of spatial and socioeconomic obstacles faced by rural women.[155] The failure of the federal courts to recognize the burdens faced by rural women leads into my discussion of Texas's recent litigation. As described below, although the district court found rural barriers relevant, the Fifth Circuit, in analyzing Texas's omnibus abortion bill, followed the general trend among federal appellate courts of failing to find burdens faced by rural women rise to the level of undue burdens.[156] The Supreme Court, however, ultimately found relevant the particular burdens faced by rural women.[157]

III. HISTORY OF *WHOLE WOMAN'S HEALTH V. HELLERSTEDT*

Twenty-one years after *Casey*, in the midst of general antipathy by federal courts toward the constitutional right of women to access abortions, Texas pushed the abortion-restriction envelope even further.[158] During the summer of 2013, the Texas legislature debated an omnibus abortion bill.[159] This Article will refer to the Texas legislation, as the courts have, as House Bill 2.[160] The same omnibus abortion bill was introduced into the Texas Senate as Senate Bill 5.[161] Senator Wendy Davis, D-Fort Worth, gained

2015/.

153. Pruitt, *Toward a Feminist Theory of the Rural*, *supra* note 3, at 463–67. Pruitt also discusses how rural minors fare when states have parental consent laws with judicial bypass because the process lacks anonymity in small towns. *Id.* at 478–82.

154. *Id.* at 467.

155. *Id.* at 467–69.

156. *See infra* Part III (analyzing the litigation of House Bill 2); *see also* Pruitt & Vanegas, *supra* note 21, at 142 (discussing the House Bill 2 litigation and the failure of the Fifth Circuit to find rurality constitutionally relevant).

157. *See infra* Part IV (discussing the Supreme Court's opinion and analyzing the role of distance and rurality in the constitutional analysis).

158. *See* H.B. 2, 83d Leg., 2d Sess. (Tex. 2013).

159. H.B. 2.

160. *See, e.g.*, Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2300 (2016) (referring to the omnibus abortion bill as "House Bill 2").

161. S.B. 5, 83d Leg., 1st Sess. (Tex. 2013).

national media attention for filibustering Senate Bill 5 in June 2013.[162] Although Senator Davis was successful in running out the clock on the first special senate session, Governor Rick Perry called a second special senate session for a vote on Senate Bill 5.[163] At this second special session, the abortion bill passed.[164] Governor Perry, "surrounded by pro-life legislators and supporters," signed House Bill 2 into law on July 18, 2013.[165]

The Supreme Court ultimately declared unconstitutional two provisions of House Bill 2.[166] Those two provisions were: an admitting-privileges requirement which required doctors performing abortions to have hospital admitting privileges within 30 miles of the abortion facility, and an ambulatory-surgical-center requirement which required all abortions—surgical abortions and drug-induced abortions—to be performed in facilities which met the state standards for ambulatory surgical centers.[167] In addition to the provisions considered by the Supreme Court, House Bill 2 also banned abortion at 20 weeks postfertilization.[168] In doing so, Texas recognized the state had a compelling interest in protecting fetuses from pain.[169] Finally, House Bill 2 required physicians administering abortion-inducing drugs to give all doses of the drugs in person.[170] This provision altered the standard medical practice of allowing women to take the second dose of the oral abortifacient medicine at home.[171] Even though the Supreme Court

162. Aaron Blake, *Perry Signs Texas Abortion Bill Into Law*, WASH. POST (July 18, 2013), https://www.washingtonpost.com/news/post-politics/wp/2013/07/18/perry-signs-texas-abortion-bill-into-law/ ("The bill was the subject of considerable debate and protests in recent weeks, with state Sen. Wendy Davis (D) creating national headlines by successfully filibustering it for about 11 hours.").

163. *Id.*

164. *Id.*

165. Elizabeth Graham, *Perry Signs Pro-Life Omnibus Bill, HB 2, Into Law*, TEX. RIGHT TO LIFE (July 18, 2013), https://www.texasrighttolife.com/perry-signs-pro-life-omnibus-bill-hb-2-into-law/.

166. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2300 (2016).

167. TEX. HEALTH & SAFETY CODE ANN. § 171.0031(a) (West 2017); *id.* § 245.010(a), *invalidated by Whole Woman's Health*, 136 S. Ct. 2292; *Whole Woman's Health*, 136 S. Ct. at 2300.

168. H.B. 2, 83d Leg., 2d Sess. § 1(a)(4) (Tex. 2013).

169. *Id*. at § 1(a)(2).

170. *Id*. at § 3; *see* Morgan Smith et al., *Abortion Bill Finally Bound for Perry's Desk*, TEX. TRIB. (July 13, 2013, 12:17 AM), https://www.texastribune.org/2013/07/13/texas-abortion-regulations-debate-nears-climax/ (discussing the necessity of multiple trips to the doctor for those who receive the abortifacient drug RU-486).

171. H.B. 2 § 3(a)(4); *see* Smith et al., *supra* note 170.

ultimately declared portions of House Bill 2 unconstitutional, "[e]ven just partial implementation of [House Bill] 2 caused a significant reduction in the number of abortion clinics in [Texas]."[172]

Importantly—and somewhat out of character with most new abortion restrictions—the Texas Legislature failed to include in House Bill 2 the specific state interests fulfilled by the ambulatory-surgical-center and admitting-privileges requirements.[173] It is a striking omission because in *Carhart*, the Supreme Court found relevant "[t]he Act's purposes [that were] set forth in recitals preceding its operative provisions."[174] Because the Texas legislature failed to recite the purposes of House Bill 2 in the legislation itself, the legislative debate is helpful in understanding why these two particular provisions garnered support.

Medical expert testimony during the Senate session "argued that the abortion regulations in [House Bill 2] would endanger women by requiring the use of outdated medical protocols and decreasing access to legal abortion services."[175] Senator Davis insisted the primary objectives of the bill were related to "political primaries and making sure you're feeding the red meat of the people who will be voting in those primaries" rather than to "making women safe."[176] The "yes" votes focused on preserving fetal life after 20 weeks, the medically disputed time at which a fetus is capable of feeling pain.[177] Former Pennsylvania Senator Rick Santorum (R) exhibited his support for House Bill 2 by travelling to Austin the week of the Senate hearing, explaining that "Texas is the center of the pro-life movement right now."[178] After the legislation was approved by the Senate, then-Lieutenant

172. Gomez, *supra* note 7, at 50.

173. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2310 (2016) ("Unlike in *Gonzales*, the relevant statute here does not set forth any legislative findings. Rather, one is left to infer that the legislature sought to further a constitutionally acceptable objective (namely, protecting women's health).").

174. Gonzales v. Carhart, 550 U.S. 124, 156 (2007).

175. Becca Aaronson, *Dewhurst Tweet on Abortion Bill Raises Eyebrows*, TEX. TRIB. (June 19, 2013), https://www.texastribune.org/2013/06/19/dewhurst-tweet-praising-abortion-bill-raises-eyebr/ [hereinafter Aaronson, *Dewhurst Tweet*].

176. *Id.* (quoting Senator Davis).

177. Manny Fernandez, *Abortion Restrictions Become Law in Texas, but Opponents Will Press Fight*, N.Y. TIMES (Jul. 18, 2013), http://www.nytimes.com/2013/07/19/us/perry-signs-texas-abortion-restrictions-into-law.html.

178. Rachel Weiner, *Texas State Senate Passes Abortion Restrictions*, WASH. POST (July 13, 2013), https://www.washingtonpost.com/politics/texas-bill-restricting-abortion-moves-forward-in-state-senate/2013/07/12/971e4cb2-eb30-11e2-a301-

Governor David Henry Dewhurst stated that House Bill 2 "protect[s] women's health."[179] Maureen Ferguson, a senior policy adviser with The Catholic Association, opined that House Bill 2 "protect[ed] women and pre-born children who feel pain during an abortion."[180]

In September 2013, before the bill took effect, a group of abortion providers filed an action in federal court raising a facial challenge to the admitting-privileges provision and the medical abortion restriction provision.[181] The district court found House Bill 2's admitting-privileges provision and medical-abortion-restriction provision unconstitutional in part and granted an injunction that prohibited those provisions from going into effect.[182] The Fifth Circuit determined the state had a substantial likelihood of success on the merits of the admitting-privileges provision and vacated the injunction on that portion of House Bill 2.[183] The Fifth Circuit granted a partial stay pending appeal on the injunction pertaining to the medical-abortion-restriction provision.[184] The providers asked the Supreme Court to vacate the Fifth Circuit's stay of the injunction; a split Supreme Court affirmed the Fifth Circuit's stay of the injunction.[185]

ea5a8116d211_story.html?utm_term=.08d881e8b117 (quoting Senator Santorum).

179. Aaronson, *Dewhurst Tweet*, *supra* note 175 (quoting Lieutenant Governor Dewhurst). Lieutenant Governor Dewhurst also publicly promoted House Bill 2 because it would close the majority of abortion clinics in Texas. *See* Greenhouse & Siegel, *The Difference a Whole Woman Makes*, *supra* note 23, at 153 (reviewing Lieutenant Governor Dewhurst's tweets).

180. Weiner, *supra* note 178 (quoting Maureen Ferguson).

181. Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 951 F. Supp. 2d 891, 895–96 (W.D. Tex. 2013), *rev'd in part*, 748 F.3d 583 (5th Cir. 2014).

182. *Id.* at 896–97, 909. A complete rural analysis of the district court's opinion can be found at Pruitt & Vanegas, *supra* note 21, at 123–26.

183. Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 734 F.3d 406, 416 (5th Cir. 2013). A complete rural analysis of the Fifth Circuit's opinion can be found at Pruitt & Vanegas, *supra* note 21, at 126–33 ("[The Fifth Circuit's] analysis of the stay revealed dismissive attitudes toward the substantial obstacle created by a requirement of traveling hundreds of miles.").

184. *Abbott*, 734 F.3d at 419.

185. Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 134 S. Ct. 506, 506 (2013). The Supreme Court voted 5–4 to leave the stay of the injunction in place. *Id.* Two opinions were written. *Id.* at 506–07. Justice Scalia wrote a concurrence, which was joined by Justices Thomas and Alito. *Id.* at 506 (Scalia, J., concurring). Justice Breyer wrote a dissent which was joined by Justices Ginsburg, Sotomayor, and Kagan and would have reinstated the district court's injunction pending appeal. *Id.* at 509 (Breyer, J., dissenting).

After the Fifth Circuit vacated the injunction, the admitting-privileges provision and the provision about drug-induced abortions went into effect in November 2013.[186] The Fifth Circuit issued an opinion on the merits in 2014, holding the district court erred in finding a "large fraction" of women faced an undue burden and erred in applying the rational basis test.[187] The Fifth Circuit ruled in favor of the state except that the admitting privileges required could not be enforced against "abortion providers who timely applied for admitting privileges . . . but [were] awaiting a response."[188] The providers did not file a petition for writ of certiorari following their loss before the Fifth Circuit. The providers petitioned for rehearing en banc, which the Fifth Circuit denied.[189] Judge James L. Dennis dissented from the court's denial of rehearing en banc, arguing the Fifth Circuit erred by applying a rational basis test instead of the undue burden test as required by *Casey*.[190] Judge Dennis focused, in large part, on women in remote areas of Texas who would have to travel long distances.[191]

Two weeks after the Fifth Circuit opinion was issued, a set of providers, some new and some who had been involved in the first litigation, filed the lawsuit that ultimately wound up at the Supreme Court as *Whole Woman's Health v. Hellerstedt*.[192] This second lawsuit raised two challenges to House

186. *See* Aaronson, *Abortion Providers*, *supra* note 10 ("The 5th Circuit Court of Appeals on Thursday lifted a lower court's injunction, allowing the state to implement two provisions in House Bill 2 that require abortion providers to obtain hospital admitting privileges nearby the facility and follow federal guidelines, rather than a common, evidence-based protocol, when administering drug-induced abortions."); Aaronson, *SCOTUS Won't Intervene*, *supra* note 10.

187. Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 748 F.3d 583, 597 (5th Cir. 2014).

188. *Id.* at 605.

189. Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 769 F.3d 330, 331 (5th Cir. 2014).

190. *Id.* at 331 (Dennis, J., dissenting).

191. *Id.* Judge Dennis used the word "travel" 44 times in his dissent, *id.* at 342–66 & n.12, n.16, the word "distance" 17 times, *id.* at 345–66, and the word "rural" twice, *id.* at 341, 364. The use of the word rural is deceptively low because Judge Dennis focused on the remote areas of Texas, such as the panhandle (a word he used six times *Id.* at 347–66 & n.12), and the burden faced by women in those areas. *Id.* The analysis takes into account rurality, but does not use the language.

192. Whole Woman's Health v. Lakey, 46 F. Supp. 3d 673, 678 (W.D. Tex. 2014), *aff'd in part, vacated in part*, *rev'd in part sub nom*. Whole Woman's Health v. Cole, 790 F.3d 563 (5th Cir. 2015), *modified*, 790 F.3d 598 (5th Cir. 2015), *rev'd and remanded sub nom*. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016).

Bill 2. First, the lawsuit raised a constitutional challenge to the admitting-privileges provision as applied to physicians at the abortion clinics in McAllen, which is a remote city at the Mexican border in eastern Texas, and El Paso, which is a remote city at the Mexican border in western Texas.[193] Second, the lawsuit raised a facial constitutional challenge to the ambulatory-surgical-center requirement throughout all of Texas.[194] Both legal challenges raised in the second lawsuit were Fourteenth Amendment challenges under the undue burden test as established in *Casey*.[195]

The district court conducted a bench trial and issued a number of factual findings.[196] Relevant to the issue of rural women's access to abortion are the following factual findings made by the district court. The district court found that Texas had 5.4 million women of reproductive age spread over nearly 280,000 square miles.[197] The district court noted that before House Bill 2 went into effect, there were more than 40 abortion facilities operating in Texas.[198] However, once all of the House Bill 2 restrictions were implemented, only seven or eight abortion-providing facilities would remain open.[199] Those seven or eight facilities would all be located in urban areas.[200] In particular, the surviving facilities would be located in Houston, Austin,

193. *Lakey*, 46 F. Supp. 3d at 678 ("Now, Whole Woman's Health and Lynn challenge the admitting-privileges requirement as applied to an abortion facility operated by Whole Woman's Health in McAllen, Texas (the 'McAllen clinic'). Nova Health Systems and Richter challenge the admitting-privileges requirement as applied to an abortion facility operated by Nova Health Systems in El Paso, Texas (the 'El Paso clinic')."). The U.S. Census estimates that as of July 1, 2015, McAllen had a population of 140,269 and El Paso had a population of 681,124. *QuickFacts: El Paso City, Texas*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/table/PST045216/4824000 (last visited Apr. 2, 2017); *QuickFacts: McAllen City, Texas*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/table/PST045215/4845384 (last visited Apr. 2, 2017). "There used to be another abortion clinic about 35 miles from the one in McAllen, but it closed because of . . . House Bill 2." Cueva, *supra* note 6. That clinic never reopened even though the relevant portions of House Bill 2 were found unconstitutional. *Id.*

194. *Lakey*, 46 F. Supp. 3d at 678 ("All Plaintiffs challenge the ambulatory-surgical-center requirement on its face and as applied to the provision of medication abortion; Whole Woman's Health and Lynn challenge the ambulatory-surgical-center requirement as applied to the McAllen Clinic; and Nova Health Systems and Richter challenge the ambulatory-surgical-center requirement as applied to the El Paso Clinic.").

195. *Id.* at 678–80.

196. *Id.* at 678–87.

197. *Id.* at 681.

198. *Id.*

199. *Id.*

200. *Id.*

San Antonio, and the Dallas–Ft. Worth urban area.[201] The impact of these closures would have been that, in Texas, 2 million women of reproductive age would be living more than 50 miles away from the nearest abortion provider; 1.3 million women of reproductive age would be living more than 100 miles away; 900,000 women of reproductive age would be living more than 150 miles away; and 750,000 women of reproductive age would be living more than 200 miles away.[202] Notably, the district court concluded that "[t]he act's two requirements erect a particularly high barrier for poor, rural, or disadvantaged women."[203]

In addition to the factual findings about distance, rurality, and intersectionality, the district court issued factual findings about the safety of abortions.[204] The district court concluded that women's health and safety were not advanced by the two challenged provisions.[205] The district court found rurality was relevant to whether House Bill 2 would pass constitutional muster.[206] The district court additionally found both the admitting-privileges requirement and the ambulatory-surgical-center requirement had a greater impact on poor, rural women.[207] Notably, the district court looked at the combination of those two TRAP laws and evaluated the practical concerns faced by rural women; for example, child care and transportation.[208] After applying the *Casey* undue burden test, the district court enjoined enforcement of both challenged provisions.[209]

The State of Texas filed an appeal.[210] Texas sought a stay of the district court's injunction pending appeal.[211] The Fifth Circuit stayed the district court's injunction until the case could be decided on the merits.[212] When

201. *Id.*; *see also* Gomez, *supra* note 7, at 50–51 (discussing closures caused by partial implementation of House Bill 2 in comparison to the anticipated effect of full implementation).

202. *Lakey*, 46 F. Supp. 3d at 681.

203. *Id.* at 683.

204. *See id.* at 684.

205. *Id.*

206. *Id.* at 683; *see infra* Part IV (discussing the Supreme Court's reliance on factual findings made by the district court in the House Bill 2 litigation).

207. *Lakey*, 46 F. Supp. 3d at 683–84.

208. *Id.* at 683.

209. *Id.* at 687.

210. Whole Woman's Health v. Lakey, 769 F.3d 285, 289 (5th Cir. 2014), *vacated in part*, 135 S. Ct. 399 (2014).

211. *Id.*

212. *Id.* at 305 ("IT IS ORDERED that Appellants' opposed motion for stay

discussing the undue burden caused by clinic closures, the Fifth Circuit criticized the district court for using a "significant number" test instead of the "large fraction" test from *Casey* or the "no set of circumstances" test previously applied by the Fifth Circuit, and for balancing the burdens created by House Bill 2 against the benefits.[213] The Fifth Circuit made two particularly troubling assertions: first, that the plaintiffs had to show the urban clinics were deluged with rural women instead of focusing on the rural women having to travel; and, second, that travel times were not an undue burden, based solely on *Casey*'s 24-hour waiting-period holding.[214] The providers thereafter appealed to the Supreme Court. The Supreme Court reversed the Fifth Circuit and largely enjoined both provisions.[215]

The Fifth Circuit then took up the appeal on its merits. The Fifth Circuit ruled against the providers for two reasons. First, the Fifth Circuit found the lawsuit was barred by res judicata.[216] The Fifth Circuit also ruled against the petitioners in the alternative on the merits of the Fourteenth Amendment claims.[217] The Fifth Circuit reasoned (1) both requirements raised the medical standard of care for women; and (2) the petitioners had failed to show either provision imposed an undue burden on a large fraction of women.[218]

The Fifth Circuit's opinion reveals prevailing judicial understandings of rurality, which have appropriately been called "gross misunderstandings."[219] Federal circuit judges display a profound lack of appreciation for the burdens created by rural spatiality and how those burdens are aggravated by abortion regulations that close clinics. Federal circuit judges tend to *be* from urban areas and *work* in urban areas, evincing an urban perspective on distance.[220] Certainly, the backgrounds and cities of

pending appeal is GRANTED, in part, and DENIED, in part, and that the district court's injunction orders are STAYED until the final disposition of this appeal, in accordance with this opinion.").

213. *Id.* at 295–96.

214. *Id.* at 303.

215. *Lakey*, 135 S. Ct. at 399.

216. Whole Woman's Health v. Cole, 790 F.3d 563, 581 (5th Cir. 2015), *modified*, 790 F.3d 598 (5th Cir. 2015), *rev'd and remanded sub nom.* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016).

217. *Id.* at 583.

218. *Id.* at 584, 588.

219. Pruitt & Vanegas, *supra* note 21, at 87.

220. *Id.* at 100–01.

residence of most court of appeals judges likely makes rural disadvantages abstract.[221] Just like in *Casey,* where the Supreme Court suggested rural women would make their way to abortion facilities regardless of facing substantial burdens, spatial privilege may contribute to urban judges thinking that if women really want an abortion, they can and will make it happen.[222] An easy example is transportation needs. The lack of transportation in rural areas is probably a mere abstraction for an urban judge who lives in a location where public transportation is a reality.[223] The same is not true in rural areas, certainly when women face multiple trips to an abortion provider, each of which could be upwards of several hundred miles.[224]

By concluding rural Texas women did not face an undue burden in

221. *Id.* at 104.

222. *See id.* at 106.

223. *See id.* at 130–31 (discussing the questions asked by Judge Edith Jones at the Fifth Circuit oral arguments).

224. Twenty-seven states require women to wait a specified amount of time between counseling and the abortion procedure. *Counseling and Waiting Periods for Abortion*, GUTTMACHER INST., https://www.guttmacher.org/state-policy/explore/counseling-and-waiting-periods-abortion (last updated Apr. 1, 2017). The most common length of time is 24 hours. *See id.* (Arizona, Georgia, Idaho, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Nebraska, North Dakota, Ohio, Pennsylvania, South Carolina, Texas, Virginia, West Virginia, and Wisconsin). Even a 24-hour period necessitates that women either stay near the abortion facility for one or more nights or make multiple trips. *See id.* Only Indiana requires a shorter period (18 hours), but recently amended its law to require the informed consent consultation to take place in person. *See id.*; H.B. 1337, 119th Gen. Assemb., 2d Reg. Sess. (Ind. 2016). Many states require waits longer than 24 hours. *Counseling and Waiting Periods for Abortion*, *supra*. Alabama, Arkansas, and Tennessee have 48-hour waiting periods. *Id.* Missouri, North Carolina, Oklahoma, South Dakota, and Utah have 72-hour waiting periods. *Id.* In addition to these states with established 72-hour waiting periods, in spring 2017 Iowa enacted a law, known as Senate File 471, that, among other things, imposed a 72-hour waiting period. IOWA CODE ANN. § 146A.1 (2017). Shortly after Governor Terry Branstad signed Senate File 471, the Iowa Supreme Court granted a request for temporary injunction of the law. William Petroski, *Iowa Supreme Court Halts State's New Abortion Restrictions*, DES MOINES REGISTER (May 5, 2017), http://www.desmoinesregister.com/story/news/politics/2017/05/05/iowa-supreme-court-halts-new-iowa-abortion-restrictions/311454001/. The litigation over Senate File 471 is currently pending in front of the Polk County District Court. Planned Parenthood of the Heartland v. Terry Branstad ex rel. State of Iowa, No. 17–0708, slip op. at 2 (Iowa May 9, 2017); Chelsea Keenan, *Iowa Abortion Law Requiring 72-Hour Waiting Period Sent Back to District Court*, THE COURIER, May 10, 2017, http://wcfcourier.com/news/local/govt-and-politics/iowa-abortion-law-requiring--hour-waiting-period-sent-back/article_13e8ba35-d8aa-5d40-809d-bec3b0d83dba.html.

accessing abortion, the Fifth Circuit, just like the Texas legislature, further burdened the already-disadvantaged group of rural women.[225] By refusing to acknowledge the burdens faced by rural women, courts make the disadvantage of distance worse. The "grit and determination" rural women display in getting to an abortion provider in an urban area should not be the basis of a court's undue burden analysis.[226] Instead of taking seriously the reality that rural women were burdened by the travel increases caused by House Bill 2, the Fifth Circuit conducted a legal analysis that excluded any discussion of rural women from the constitutional analysis.[227] The Fifth Circuit managed to exclude rural women from the constitutional analysis by looking at women as a whole, not the rural women actually impacted by House Bill 2.[228] This is a common pattern for post-*Casey* appellate decisions. *Casey* caused this problem in its analysis of the spousal-notification provision of the Pennsylvania law.[229] *Casey* found the spousal-notification provision to be an undue burden because it impacted a large fraction of women seeking abortion.[230] Based on this language, the percentage of women impacted by any particular regulation thus became a relevant court inquiry.

In the House Bill 2 litigation, the Fifth Circuit purported to use the large fraction standard (which comes from *Casey*) and then immediately turned that standard into a requirement that all women face an undue burden (which has no basis in Supreme Court abortion jurisprudence).[231] The Fifth Circuit concluded that the impact on 1 million women (17 percent of Texas women of reproductive age) who saw an increase of 150 miles in

225. *See* Whole Woman's Health v. Cole, 790 F.3d 563, 596 n.44 (5th Cir. 2015), *modified*, 790 F.3d 598 (5th Cir. 2015), *rev'd and remanded sub nom*. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016).

226. *See* Pruitt & Vanegas, *supra* note 21, at 106.

227. *See Cole*, 790 F.3d at 586.

228. *Id.* Rural women were not the *only* women that would have been disproportionately impacted by House Bill 2 going into full effect. *See* Shaw, *supra* note 24, at 557.

229. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 887–98 (1992).

230. *Id.* at 895; *see also* Linton, *supra* note 55, at 70–71 (discussing complications from *Casey*'s large fraction analysis).

231. *Cole*, 790 F.3d at 586, 588. The only potential explanation for the Fifth Circuit's analysis is an improper reliance on the dissenters in *Casey*. The dissenters disagreed with the plurality finding the 1 percent of women in domestic abuse situations faced an undue burden. *Casey*, 505 U.S. at 972–73 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). The dissenters argued that under a facial challenge a burden could only be unconstitutionally undue if it operated unconstitutionally on all women. *Id.*

one-way travel did not create an undue burden because other women in Texas (most of whom live in urban areas where clinics would still be open) were not impacted.[232] In all its opinions about House Bill 2, the Fifth Circuit did several concerning things. First, the Fifth Circuit dismissed the needs of rural women and even remote nonrural women—for example, those women living in El Paso.[233] Second, the Fifth Circuit dismissed the 17 percent of "rural" women as insufficient to count as a burdened class.[234] This analysis is unapologetically urban-normative. The opinion clearly states that traveling 150 miles does not rise to the level of undue burden.[235] However, the opinion fails to the mention that 150 miles is a one-way trip and that two, three, or even four roundtrips may be required before a woman can obtain an abortion.[236]

The Fifth Circuit concluded by saying "*Casey* counsels against striking down a statute *solely* because women may have to travel *long distances* to obtain abortions."[237] This statement of law is questionable because *Casey* addressed only the factual question presented to it but did not express a general antipathy toward travel.[238] The Supreme Court granted certiorari and clarified the undue burden test.[239] The Supreme Court first disposed of the procedural arguments, reversing the Fifth Circuit on the res judicata holding.[240] The Supreme Court then took up the Fourteenth Amendment

232. *Cole*, 790 F.3d at 588.

233. *Id.* at 596–97; s*ee* Whole Woman's Health v. Lakey, 769 F.3d 285, 296 (5th Cir. 2014), *vacated in part*, 135 S. Ct. 399 (2014).

234. *Cole*, 790 F.3d at 586; *Lakey*, 769 F.3d at 298.

235. *Cole*, 790 F.3d at 594 (citing Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 748 F.3d 583, 598 (5th Cir. 2014)).

236. *See id.* (failing to recognize the necessity of multiple trips). The Texas legislative scheme pertaining to abortion procedures can require a woman to make up to four trips to the abortion clinic for a single abortion. For instance, a Texas woman living within 100 miles of the nearest abortion clinic must wait at least 24 hours between her mandatory ultrasound and her actual abortion in order for her consent to be considered "voluntary and informed." TEX. HEALTH & SAFETY CODE ANN. § 171.012(b) (West 2017). Both doses of the drug must be given in person. H.B. 2, 83d Leg., 2d Sess. § 3 (Tex. 2013); *see* Smith et al., *supra* note 170. Finally, after taking abortion-inducing drugs, the woman must have a follow-up appointment with her physician within 14 days. H.B. 2 § 171.063(e).

237. *Cole*, 790 F.3d at 593 (emphasis added) (quoting *Abbott*, 748 F.3d at 598).

238. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 *passim* (1992).

239. Whole Woman's Health v. Cole, 136 S. Ct. 499, 499 (2015).

240. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2304–09 (2016).

challenge on the merits.[241] The question presented to the Supreme Court was whether the requirements of House Bill 2, namely the ambulatory-surgical-center requirement and the hospital admitting-privileges requirement, withstand constitutional scrutiny under the *Casey* undue burden standard analysis.[242] The Supreme Court answered the question in the negative, and in so doing provided substantial guidance on the application of the undue burden standard in abortion cases, including for regulations which disproportionately impact rural women.

IV. *WHOLE WOMAN'S HEALTH* AND THE UNDUE BURDEN ANALYSIS

The Supreme Court modified *Casey*'s undue burden test in *Whole Woman's Health*. Part III explains the Fifth Circuit reasoning in such depth because the Supreme Court corrected the Fifth Circuit on so much of its analysis. *Whole Woman's Health*[243] is the first time since *Casey* that the Supreme Court has expressly interpreted the undue burden standard.[244] In *Whole Woman's Health*, the Court examined the admitting-privileges requirement and the ambulatory-surgical-center requirement of House Bill 2 and determined that both provisions placed a substantial obstacle on women seeking previability abortions, that both provisions constitute an undue burden on abortion access, and that both provisions violate the Fourteenth Amendment of the U.S. Constitution.[245]

Before addressing the legal issues, the Supreme Court recited many of the district court's factual findings.[246] Notably, the Supreme Court found relevant the factual findings of the district court about the burdens faced by rural women and the district court's intersectional analysis.[247] After reciting the factual findings of the district court, the Supreme Court turned to the

241. *Id.* at 2309–18.

242. *Id.* at 2300.

243. *Id.* at 2309–10.

244. *See id.* at 2300; Greenhouse & Siegel, *The Difference a Whole Woman Makes*, *supra* note 23, at 150 (outlining how *Whole Woman's Health* changes the *Casey* analysis).

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

246. *Id.* at 2301–03.

247. *Id.* at 2302. In fact, one of the three times the Supreme Court used the word rural was in quoting the district court for the proposition that the "two requirements erect a particularly high barrier for poor, rural, or disadvantaged women." *Id.* (quoting Whole Woman's Health v. Lakey, 46 F. Supp. 3d 673, 678 (W.D. Tex. 2014), *aff'd in part*, *vacated in part*, *rev'd in part sub nom*. Whole Woman's Health v. Cole, 790 F.3d 563 (5th Cir. 2015), *modified*, 790 F.3d 598 (5th Cir. 2015), *rev'd and remanded sub nom*. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016)).

questions that had been left open after *Casey*. As discussed in Part II.A., three major interpretive questions remained after *Casey*: (1) what qualified as an "undue burden"; (2) to whom the undue burden test should be applied; and (3) how much courts should defer to legislative factual findings.[248] The Supreme Court corrected the Fifth Circuit on all three of these issues.[249] In doing so, the Supreme Court interpreted the constitutional test for abortion restrictions and provided guidance to lower courts on judging the constitutionality of TRAP laws.

On the first question, regarding how to define an undue burden, the Supreme Court explicitly required a balancing test.[250] The Fifth Circuit had interpreted *Carhart* to reject a balancing test in abortion cases.[251] Correcting the Fifth Circuit on this, in *Whole Woman's Health* the Supreme Court held the *Casey* undue burden analysis requires courts to consider the burdens a law imposes on abortions *along with* the benefits.[252] In other words, a balancing test is appropriate.[253] The Supreme Court criticized the Fifth Circuit for applying too deferential a standard.[254] The Fifth Circuit failed to actually apply the undue burden standard and instead used a rational basis review.[255] In doing so, the Fifth Circuit flaunted the protections in *Casey* by ruling "[u]nder our precedent, we have no authority by which to turn

248. See discussion *supra* Part II.A.

249. *Whole Woman's Health*, 136 S. Ct. at 2309–10, 2320.

250. *Id.* at 2309.

251. Whole Woman's Health v. Cole, 790 F.3d 563, 586 (5th Cir. 2015) ("[T]he district court also weighed the burdens and medical efficacy of these two requirements. . . . We disagree with . . . the district court's approach."), *modified*, 790 F.3d 598 (5th Cir. 2015), *rev'd and remanded sub nom. Whole Woman's Health*, 136 S. Ct. 2292 (2016).

252. *Whole Woman's Health*, 136 S. Ct. at 2309 (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 887–98 (1992) (opinion of the court)); *id.* (citing *Casey*, 505 U.S. at 899–01 (opinion of O'Connor, Kennedy, and Souter, JJ.)); *see also* Greenhouse & Siegel, Casey *and the Clinic Closings*, *supra* note 42, at 1433 (discussing the undue burden standard before *Whole Woman's Health* and pointing out the undue burden framework requires examining both "a law's purpose and its effects").

253. Although the *Whole Woman's Health* majority stated that *Casey* "requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer," 136 S. Ct. at 2309 (citations omitted), Foley argues this balancing test originates not from the controlling plurality opinion in *Casey*, but rather from Justice Stevens's concurrence. Foley, *supra* note 26, at 172 (citing *Casey*, 505 U.S. at 920 (Stevens, J., concurring in part and dissenting in part)).

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

255. *Cole*, 790 F.3d at 587.

rational basis into strict scrutiny under the guise of the undue burden inquiry."[256] The Supreme Court made clear the Fifth Circuit test was inappropriate because the *Casey* undue burden test is much stricter than a rational basis analysis.[257]

On the second question, regarding to what class of women the courts should apply the undue burden analysis, the Supreme Court provided guidance on choosing the category of relevant women. In determining whether enough women faced an undue burden because of House Bill 2, the Fifth Circuit committed two errors. First, the Fifth Circuit stated, "In the abortion context, it is unclear whether a facial challenge requires showing that the law is invalid in all applications (the general test applied in other circumstances) or only in a large fraction of the cases in which the law is relevant (the test applied in *Casey*)."[258] Although there was not much uncertainty, *Whole Woman's Health* put to rest any uncertainty that existed: *Casey*'s large fraction analysis remains good law.[259] The Fifth Circuit then stated the governing constitutional test to determine what constitutes a large fraction is a large fraction of *all* reproductive-age women as the denominator of women.[260] The Fifth Circuit rejected the argument that rural women were impacted by the clinic closures; rather, the Fifth Circuit reasoned that because House Bill 2 "applies to all abortion providers and facilities in Texas . . . all women of reproductive age or women who might seek an abortion [are] the denominator."[261]

The Supreme Court in *Whole Woman's Health* specifically rejected a large fraction of all women of reproductive age as the proper denominator.[262] In other words, all women cannot be the default denominator in calculating

256. *Id.* at 587 (quoting Whole Woman's Health v. Lakey, 769 F.3d 285, 297 (5th Cir. 2014)). What the Fifth Circuit seemed to ignore is the near-unanimous view that undue burden is a *sui generis* standard of review somewhere between strict scrutiny and rational basis. *See, e.g.*, Foley, *supra* note 26, at 176 (noting the *Casey* plurality's "embrace of a new, *sui generis* 'undue burden' standard for analyzing the constitutionality of abortion laws").

257. *Whole Woman's Health*, 136 S. Ct. at 2309–10 (citing *Cole*, 790 F.3d at 587).

258. *Cole*, 790 F.3d at 586 (citing Gonzales v. Carhart, 550 U.S. 124, 167 (2007)); Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 748 F.3d 583, 600 (5th Cir. 2014)).

259. *Whole Woman's Health*, 136 S. Ct. at 2320.

260. *Cole*, 790 F.3d at 589 (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 894–95 (1992)).

261. *Id.*

262. *Whole Woman's Health*, 136 S. Ct. at 2320.

whether a large fraction of women are burdened by a regulation.[263] The Supreme Court reaffirmed that the relevant denominator is "those [women] for whom [the provision] is an actual rather than an irrelevant restriction."[264] This follows from prior Supreme Court precedent. In *Casey*, the Supreme Court referred to the 1 percent of women facing intimate partner violence to be "a significant number."[265] In *Carhart*, the Supreme Court used the language, "a large fraction of relevant cases."[266]

The *Whole Woman's Health* opinion still does not tell lower courts what fraction amounts to a large fraction once the appropriate denominator is applied. *Whole Woman's Health* clarifies how a court must choose a denominator group, but does not specify what percentage of that denominator group must be impacted by the particular abortion restriction.[267] The opinion is not without its flaws on this topic. First, there are valid concerns about focusing on a large fraction of women: the calculation ignores that "[t]he most vulnerable groups are unlikely to be significant enough to become a 'large percentage' of women."[268] Second, the Supreme Court does not fully explain what a large fraction means and fails to provide any percentage range as a guide to lower courts.[269] However, if courts properly define the denominator group (women whose access is actually affected), the fraction of women is likely to be large in most cases. Finally, on the third question, regarding the level of deference due to legislative findings, the Supreme Court backed away from the high level of deference given to Congress by *Carhart*.[270]

Important to the Fifth Circuit ruling was the factual determination of whether the admitting-privileges provision and the ambulatory-surgical-

263. *See id.*

264. *Id.* (alterations in original) (quoting *Casey*, 505 U.S. at 895).

265. *Casey*, 505 U.S. at 891–94; *see also* Fargo Women's Health Org. v. Schafer, 507 U.S. 1013, 1014 (1993) (O'Connor, J., concurring) ("[W]e did not require petitioners to show that the provision would be invalid in *all* circumstances. Rather, we made clear that a law . . . is invalid, if, 'in a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion.'" (second alteration in original)).

266. Gonzales v. Carhart, 550 U.S. 124, 167–68 (2007) (citing *Casey*, 505 U.S. at 895 (opinion of O'Connor, Kennedy, and Souter, JJ.)).

267. *See Whole Woman's Health*, 136 S. Ct. at 2320.

268. Sáez, *supra* note 14, at 363.

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

270. *See supra* Part II.B. (discussing legislative deference in *Carhart*).

center requirements of House Bill 2 benefited the health of women.[271] The district court found no medical basis for the provisions, but the Fifth Circuit reversed.[272] The Fifth Circuit said legislatures, not courts, must resolve questions of medical uncertainty, and the district court abused its discretion in failing to defer to the legislature.[273] The Supreme Court corrected the Fifth Circuit on this issue. The Supreme Court clarified that federal courts may review fact-finding of lawmakers under a "deferential standard," but the courts cannot place "dispositive weight" on those legislative findings.[274] Accordingly, the district court was correct to make factual findings of the actual medical necessity of the provisions of House Bill 2.[275] In doing so, the Supreme Court stepped back from *Carhart*, the opinion which explicitly allowed "state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty."[276] *Whole Woman's Health* requires district courts to determine if legislation actually has health benefits.[277] Of course, *Carhart* was about the state's interest in potential human life and *Whole Woman's Health* was about the state's interest in women's health.[278] There remains an open question in abortion jurisprudence whether the Supreme Court—and lower federal courts—will read these two cases together, or will continue to apply *Carhart* to potential-life rationales and *Whole Woman's Health* to health rationales.[279]

Whole Woman's Health will be understood as an important case in abortion jurisprudence because the opinion clarifies multiple outstanding

271. Whole Woman's Health v. Cole, 790 F.3d 563, 584 (5th Cir. 2015), *modified*, 790 F.3d 598 (5th Cir. 2015), *rev'd and remanded sub nom. Whole Woman's Health*, 136 S. Ct. 2292.

272. *Compare* Whole Woman's Health v. Lakey, 46 F. Supp. 3d 673, 678 (W.D. Tex. 2014), *aff'd in part*, *vacated in part*, *rev'd in part sub nom.* Whole Woman's Health v. Cole, 790 F.3d 563 (5th Cir. 2015), *modified*, 790 F.3d 598 (5th Cir. 2015), *rev'd and remanded sub nom. Whole Woman's Health*, 136 S. Ct. at 2292, *with Cole*, 790 F.3d at 575, 579.

273. *Cole*, 790 F.3d at 587 (citing Gonzales v. Carhart, 550 U.S. 124, 163 (2007)).

274. *Whole Woman's Health*, 136 S. Ct. at 2310 (citing *Carhart*, 550 U.S. at 165).

275. *See Cole*, 790 F.3d at 573 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 887 (1992)).

276. *Carhart*, 550 U.S. at 163.

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

278. *Compare Carhart*, 550 U.S. at 146, *with Whole Woman's Health*, 136 S. Ct. at 2310.

279. *See* Greenhouse & Siegel, Casey *and the Clinic Closings*, *supra* note 42, at 1431–32 (discussing deference from *Casey* to *Carhart* and how the type of regulation—health-justified or life-justified—may or may not change the constitutional test).

questions.[280] The point in this Article is narrower: *Whole Woman's Health* will be incredibly important for rural women and rural providers who challenge TRAP laws meant to hamper access to abortion for women in rural or remote areas. Although the Supreme Court was not explicit in its discussion of rurality, distance and rurality permeate the *Whole Woman's Health* opinion.[281] The Supreme Court discussed distance as part of the undue burden analysis and instructed lower courts not to ignore driving distances and decreased access faced by rural women.[282] This direction, however, was qualified by the Court's citation to *Casey*, and quotation of the following holding from *Casey*: "We recognize that increased driving distances do not always constitute an 'undue burden.'"[283] Accordingly, *Whole Woman's Health* reaffirms the *Casey* holding on distance.[284] Distance and rurality did not create an undue burden in *Casey* when the 24-hour waiting period was under consideration.[285] Because of the citation to and reinvigoration of *Casey*'s analysis on the relevance of distance, *Whole Woman's Health*'s impact on rural women is more limited than it could have been.

Even though *Whole Woman's Health* quotes *Casey* on the relevance of distance, *Whole Woman's Health* finds that, in the instance of Texas after House Bill 2, driving increases were an additional burden in combination with other burdens and weighed against any real health benefit, and were relevant to determining whether the burden on women was undue.[286] This recognition alone is a big step forward in the inclusion of rural women in the legal analysis of abortion restrictions.

280. *See* sources cited *supra* notes 173–212 (analyzing the Supreme Court's decision in *Whole Woman's Health*).

281. In the opinion, the Court uses the word "distance" five times. *Whole Woman's Health*, 136 S. Ct. at 1298, 2302, 2313, 2318. Additionally, the Court utilizes the word "rural" three times, *id.* at 2302, 2349, 2349 n.33, and the word "travel" three times, *id.* at 2318, 2349 & n.32.

282. *Id.* at 2313.

283. *Id.* (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 885–87 (1992) (opinion of O'Connor, Kennedy, and Souter, JJ.)).

284. *Id.*

285. *Casey*, 505 U.S. at 885–86 (discussing the district court's finding that women needing to travel long distances would be burdened by the waiting period, but concluding that, though "troubling," the barriers created by the waiting period did not constitute an undue burden).

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

V. APPLYING *WHOLE WOMAN'S HEALTH* IN RURAL AMERICA

Whole Woman's Health will likely have a substantial impact on the way abortion restrictions are litigated and how courts analyze constitutional claims. This impact will occur in many different ways and in many different types of cases. This Article's focus is narrowed to *Whole Woman's Health*'s influence on rural access to abortion. Abortion litigation is hard to clearly categorize: it can be divided based on the state interest at issue (for example, women's health versus dignity of potential life); it can be divided based on the target of the regulation (for example, abortion providers versus women); it can be divided based on the type of state (for example, a state with multiple abortion providers versus a state with a single provider); or it can be divided based on the women most impacted (for example, poor women versus rural women). Because courts can (and do) find these distinctions relevant in the application of precedent, my goal is to analyze the intersection of all of these divisions, keeping in mind the litigation strategies and battles rural women will likely face following *Whole Woman's Health*. I divide this analysis into two parts. First, I discuss the constitutionality of TRAP laws after *Whole Woman's Health*, and in doing so explore differences between states with many clinics and states with a single clinic. Second, I discuss potential differences in the constitutional test to be applied to abortion restrictions depending on the purported state interest at stake, and in doing so explore how some regulations burden rural women disproportionately.

The following discussion assumes the continued validity of *Roe v. Wade*, *Casey*, and *Whole Woman's Health*. Despite a general policy of following precedent, the continued validity of these cases is not necessarily assured. Although the Supreme Court now has a new Justice, there is no indication at this point in time that the Supreme Court will shift in any meaningful way on abortion jurisprudence. President Donald J. Trump nominated and the Senate confirmed now-Justice Neil Gorsuch to fill the vacancy left by Justice Scalia's death in February of 2016.[287] Justice Gorsuch is expected to vote similarly to Justice Scalia in privacy cases; accordingly, the replacement of Justice Scalia by a Republican president is less fraught than, say, the replacement of Justice O'Connor by a Republican president.[288] All of this is to say that, in the immediate future, the implications of *Whole Woman's Health* will play out in the lower federal courts and there is no

287. Davis & Landler, *supra* note 10; Liptak & Flegenheimer, *supra* note 10.

288. *See* PAGE, *supra* note 143, at 151–52 (discussing pro-choice concerns raised by the retirement of Justice O'Connor).

indication the Supreme Court will change the constitutional test for abortion restrictions.[289]

A. *TRAP Laws: States with Multiple Clinics Versus Single Clinics*

To begin, litigation of TRAP laws is different in states with many clinics (such as Texas with House Bill 2)[290] than in states with only one clinic (Kentucky, Mississippi, Missouri, North Dakota, South Dakota, West Virginia, and Wyoming).[291] All sorts of different states have shown an interest in and propensity toward regulating abortion clinics through TRAP laws.[292] Before *Whole Woman's Health*, many TRAP laws survived constitutional challenges.[293] However, since *Whole Woman's Health* was decided in 2016, courts have consistently struck down TRAP laws as unconstitutionally burdening women's access to abortion.[294] The constitutional questions about TRAP laws, however, will be different in a state like Texas with multiple clinics as compared to any of the states with only one clinic.

Many of the states imposing TRAP laws are similar to Texas: populated states with many abortion providers.[295] Those states have some leeway to shut down clinics through health-justified regulations.[296] *Whole Woman's Health* does not prohibit states from closing clinics, it merely limits the circumstances in which clinics can be constitutionally closed.[297] *Whole*

289. If a vacancy is created by the departure or death of any of the Justices who joined the majority of *Whole Woman's Health*, there stands a chance that *Roe v. Wade* will be overruled and the Supreme Court will change to a rational basis level of review.

290. *See* Catherine Pearson, *The List of States with Only One Abortion Provider Left Is Growing*, HUFFINGTON POST (Jan. 27, 2017), http://www.huffingtonpost.com/entry/the-list-of-states-with-only-one-abortion-provider-left-is-growing_us_588a43b7e4b0024605fe772d.

291. H.B. 2, 83d Leg., 2d Sess. (Tex. 2013).

292. *See Targeted Regulation of Abortion Providers*, GUTTMACHER INST., https://www.guttmacher.org/state-policy/explore/targeted-regulation-abortion-providers (last updated Apr. 1, 2017).

293. *See* Jonathan Will, Whole Woman's Health—*Some Preliminary Thoughts on Benefits, Purposes, and Fetal Status*, HARV. L. (June 29, 2016), https://blogs.harvard.edu/billofhealth/2016/06/29/whole-womans-health-some-preliminary-thoughts-on-benefits-purposes-and-fetal-status/.

294. *See, e.g.*, Capital Care Network of Toledo v. State of Ohio Dep't of Health, 58 N.E.3d 1207, 1217 (Ohio Ct. App. 2016).

295. *Targeted Regulation of Abortion Providers*, *supra* note 292.

296. Gold & Nash, *supra* note 152.

297. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2316 (2016).

Woman's Health establishes that if states limit providers to major metropolitan areas, like Texas did with House Bill 2, these laws will not survive judicial scrutiny if women in rural or isolated areas have trouble getting to those abortion clinics.[298] *Whole Woman's Health* makes clear that when a state tries to shut down clinics through TRAP laws, the state will have to justify the crowding at surviving clinics and the increased distance women must travel to reach those clinics.[299] For the Supreme Court, it was the combination of multiple barriers which rendered the admitting-privileges requirement and the surgical-center requirement unconstitutional.[300] But for the seven states with only one clinic, there is no question of overburdening the remaining clinics, it is a question of abortion access at all.[301] For example, before *Whole Woman's Health*, Mississippi had enacted an admitting-privileges requirement with which the sole abortion clinic in the state was unable to comply.[302] Although the Supreme Court has never held that each state is constitutionally required to allow at least one clinic to operate, most courts have held the Constitution so requires.[303] In the Mississippi litigation, the Fifth Circuit found that "the proper formulation of the undue burden analysis focuses solely on the effects within the regulating state—here, Mississippi" and did not include analyzing the availability of abortion in neighboring states.[304] The Supreme Court denied Mississippi's petition for writ of certiorari challenging the Fifth Circuit's holding in the case.[305]

Of course, the constitutional test is not only about how difficult it is for women to access an abortion; it requires weighing any burden on access against any legitimate state interest served by imposing the burden.[306] Accordingly, it may be that a state can use a TRAP law to shut down the last remaining abortion clinic if the health benefit is strong.[307] In both types of

298. *Id.* at 2302.

299. *Id.* at 2318.

300. *Id.* at 2313 ("[The driving distance] increases are but one additional burden, which, when taken together with others that the closings brought about, and when viewed in light of the virtual absence of any health benefit, lead us to conclude that the record adequately supports the District Court's 'undue burden' conclusion.").

301. Pearson, *supra* note 290.

302. Jackson Women's Health Org. v. Currier, 760 F.3d 448, 452 (5th Cir. 2014).

303. *Id.* at 457.

304. *Id.*

305. Currier v. Jackson Women's Health Org., 136 S. Ct. 2536, 2536 (2016).

306. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2309 (2016).

307. *See id.*

states—those with multiple clinics and those with one clinic—the fact-intensive balancing test articulated in *Whole Woman's Health* will force legislatures to justify TRAP laws that shut down clinics. Until the Supreme Court clearly establishes that every state must have an available abortion clinic, that evidentiary standard should be even higher in states with only one clinic. Although the states with only one clinic have large rural populations,[308] many states with multiple clinics also have large rural populations and women who would have to travel far distances to reach a clinic.[309] Accordingly, the burdens of distance and travel will certainly be relevant in both categories of states.

Whole Woman's Health follows a heavily criticized facet of *Casey*: that *Casey*'s undue burden test was too fact intensive, which, in the minds of some, created a test "so amorphous and fact-sensitive as to become not merely subjective . . . but inherently legislative in nature."[310] *Whole Woman's Health* retains the fact-intensive nature of the test, but changes the factual inquiry. The factual analysis of the undue burden test has changed because, post-*Whole Woman's Health*, the test includes a focus on meaningful medical interests.[311] Accordingly, the test requires that states passing TRAP laws provide better medical justifications.[312] The holding of *Whole Woman's Health* allows for constitutional increases in travel if those increases are weighed against valid medical state interests.[313] However, until states are able to come up with meaningful medical interests, any TRAP laws which shut down rural clinics will likely be found unconstitutional. Even TRAP laws that do not aim to close clinics, but simply aim to make abortion access more difficult (such as telemedicine bans), should face increased scrutiny under the renewed balancing of *Whole Woman's Health*. Because such bans are justified under the state's interest in increasing women's health,[314] the balancing test should be applied, and it is likely all courts will do so in light of clear directive from *Whole Woman's Health*. In these types of cases, the fact that certain TRAP laws increase travel for rural women will

308. *See* Pearson, *supra* note 290.

309. Pruitt & Vanegas, *supra* note 21, at 81–82.

310. Foley, *supra* note 26, at 161.

311. *See Fourteenth Amendment—Due Process Clause—Undue Burden*—Whole Woman's Health v. Hellerstedt, *supra* note 22, at 405.

312. Foley, *supra* note 26, at 161.

313. *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2318 (2016).

314. *See, e.g.*, *Utah Moves to Restrict Abortions by Telemedicine*, *supra* note 116 ("Ivory, who introduced a [telemedicine ban] last year that died in the Senate, said the amendment is a 'health and safety issue.'").

be a relevant court inquiry.

In total, states with rural populations, and especially states with only one clinic, will face more difficulty in burdening women's access to abortion through TRAP laws.[315] All TRAP laws are justified by increasing the health of women and accordingly fit squarely within the *Whole Woman's Health* framework.[316] The more complicated question post-*Whole Woman's Health* is discussed next: Does the strengthened balancing test apply with equal force to state legislation which is not based on promoting women's health?

B. *State Interests: Health-Justified Versus Life-Justified Restrictions*

Another way the abortion cases can be distinguished is by looking at the state interest furthered by any given regulation. The analysis, of course, begins with *Casey*, and "*Casey* applies the same undue burden framework to restrictions on abortion enacted in the interest of protecting both potential life and women's health."[317] After *Casey*, there is less clarity about whether the same test applies to all state justifications. Since *Casey*, the Supreme Court has decided very few substantive constitutional abortion challenges. In *Stenberg v. Carhart*, the justification for Nebraska's ban on partial-birth abortions was to express dignity for human life.[318] In *Gonzales v. Carhart*, the justification for the federal government's ban on partial-birth abortions was to express dignity for human life and to protect the medical profession.[319] In contrast, *Whole Woman's Health* addressed only a provider-focused law, purportedly based on protecting the health of women, through regulating the safety measures followed by providers.[320] *Whole Woman's Health* was not about the state's interest in expressing a preference for childbirth over abortion and was not about regulations aimed at encouraging women to choose birth.[321] Accordingly, the application of *Whole Woman's Health* to life-justified state restrictions is unpredictable.

The last time the Supreme Court examined a life-justified law was in *Carhart*, where the Court deferred to Congress's factual findings without

315. *See, e.g.*, Jackson Women's Health Org. v. Currier, 760 F.3d 448, 458 (5th Cir. 2014).

316. *See Fourteenth Amendment—Due Process Clause—Undue Burden*—Whole Woman's Health v. Hellerstedt, *supra* note 22, at 405.

317. Greenhouse & Siegel, Casey *and the Clinic Closings*, *supra* note 42, at 1444.

318. Stenberg v. Carhart, 530 U.S. 914, 962–63 (2000) (Kennedy, J., dissenting).

319. Gonzales v. Carhart, 550 U.S. 124, 157 (2007).

320. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2310 (2016).

321. *See id.* at 2300.

conducting the balancing test now required post-*Whole Woman's Health*.[322] Accordingly, lower courts will have to determine whether *Whole Woman's Health* has overruled *Carhart* or merely distinguished it. *Carhart* increased the level of legislative deference in the situation where the state was furthering "its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn."[323] If the deference analysis from *Carhart* remains good law in life-justified restrictions, *Whole Woman's Health* will have little impact on regulations imposed directly on women, as opposed to regulations imposed on providers.

This question is particularly poignant for women living in rural states, especially the rural states with only one provider.[324] Currently there are seven states—Kentucky, Mississippi, Missouri, North Dakota, South Dakota, West Virginia, and Wyoming—where only one abortion clinic remains open.[325] These states, and states with very few clinics, generally try to restrict abortion access through means other than TRAP laws.[326] These states already focus less on targeting providers in an attempt to force closures, but rather focus on targeting women directly.[327] Because of the focus taken by these states, and because "*Casey* permits government efforts to persuade a woman to choose childbirth beginning in the earliest stages of pregnancy," challenges to these types of state laws will function differently than TRAP challenges under *Whole Woman's Health*.[328] Challenges to these types of provisions will face difficulty, even under the *Whole Woman's Health* framework. Two particularly troublesome impacts of *Casey* carry

322. *See Carhart*, 550 U.S. at 165 ("Although we review congressional fact-finding under a deferential standard, we do not in the circumstances here place dispositive weight on Congress' findings.").

323. *Id.* at 158; *see also* Foley, *supra* note 26, at 168–69 (explaining the *Carhart* decision and describing it as an undue burden test plus "an extra dose of deference to the legislature on the means–end fit").

324. Pearson, *supra* note 290 (noting the "tremendous barriers that many women seeking an abortion already face . . . . [Including] there simply aren't enough clinics to serve [them].").

325. Pearson, *supra* note 290.

326. *See Federal and State Bans and Restrictions on Abortion*, PLANNED PARENTHOOD, http://plannedparenthoodaction.org/issues/abortion/federal-and-state-bans-and-restrictions-abortion (last visited Apr. 3, 2017).

327. *Cf. supra* notes 302–05 and accompanying text (discussing Mississippi's attempt to shut down the last remaining abortion clinic).

328. Greenhouse & Siegel, Casey *and the Clinic Closings*, *supra* note 42, at 1437, 1444.

great influence in this regard. First, although *Casey* meant to balance the right of states to persuade women to carry a pregnancy to term against the right of women to maintain dignity in reproductive choices, the states that target women directly fail to pay even lip service to the idea of women's dignity.[329] Second, *Casey* failed to provide guidance on the question of whether certain provisions, such as the 24-hour waiting period, could be undue burdens in some areas of the country, but not others.[330] These factors deserve closer attention.

Women have a constitutional right to access abortion, and that right includes maintaining dignity in doing so.[331] Since *Casey* approved of the 24-hour informed consent waiting period, states have taken advantage of the ruling to require various informed consent disclosures.[332] The state-mandated disclosures tend to include more information than what medical professionals would generally give.[333] Not surprisingly, "such abortion disclosure laws have come nearly exclusively from states with a legislature or electorate that does not support abortion rights."[334] Despite the continued legislation in this area, *Casey* purportedly limits the ways in which states may exercise their interest in protecting fetal life.[335] To the extent that states want to protect fetal life, they "must persuade women to choose motherhood by means that respect women's dignity."[336] *Whole Woman's Health* does not change this standard: House Bill 2 was not about protecting fetal life, it was about increasing the health and safety of women.[337] However, immediately in the wake of *Whole Woman's Health*, states reacted (knowing TRAP laws

329. *See, e.g.*, *id.* at 1472–73. Perhaps the most striking example is the requirement that women undergo a transvaginal ultrasound before being able to provide informed consent to an abortion procedure. *See* TEX. HEALTH & SAFETY CODE ANN. § 171.012 (West 2017); *id.*

330. *See* Burdick, *supra* note 95, at 839–40.

331. *See* Stenberg v. Carhart, 530 U.S. 914, 920 (2000) ("[M]illions fear that a law that forbids abortion would condemn many American women to lives that lack dignity . . . .").

332. *See* Erin Bernstein, *The Upside of Abortion Disclosure Laws*, 24 STAN. L. & POL'Y REV. 171, 179–81 (2013) (discussing the popularity of disclosure laws and their increased use and validity post-*Casey*).

333. *Id.* at 173.

334. *Id.*

335. *See* Greenhouse & Siegel, Casey *and the Clinic Closings, supra* note 42, at 1477.

336. *Id.* at 1478.

337. *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2300–01 (2016) (discussing that Texas offered evidence to the Fifth Circuit that the House Bill 2 requirements would decrease health risks to women seeking abortions).

would no longer meet success in the courts) by turning to laws expressing dignity for the fetus.[338]

"Before the ink on the Supreme Court's opinion in *Whole Woman's Health* was dry," Texas acted to require special disposition of fetal remains.[339] In the first judicial opinion about Texas's fetal remains law, the district court cited *Whole Woman's Health* for the proposition that, in abortion cases, there is a renewed focus on a balancing test.[340] The district court applied the balancing test from *Whole Woman's Health* to find Texas's scheme was likely unconstitutional.[341] I firmly believe this is the correct application of *Whole Woman's Health*; however, I question whether the conservative federal circuits will agree. Certainly, states focused on policies like a fetal remains law are attempting to value the dignity of fetal remains over the dignity and mental health of women seeking abortions.[342] As such, those states will likely argue that *Carhart* controls the outcome and *Whole Woman's Health* does not.[343] This approach subverts the holding of *Whole Woman's Health*, but federal circuit courts have shown a willingness to take the Supreme Court's directives lightly when applying the constitutional test for abortion restrictions.[344] In the long run, subversion of *Casey*'s requirement of providing women with dignity should be enforced, but states and federal circuit courts may not follow *Casey*'s directive in the short term.[345] The dignity of women may have a rural component to the extent that rural women suffer dignitary harms by having to wait longer for an abortion.

338. *See* Will Weissert, *Judge Asks if Texas Fetal Remains Rules Override Current Law*, BIG STORY (Jan. 4, 2017), http://bigstory.ap.org/article/7675367e4fa04511ab375d488457523e/judge-asks-if-texas-fetal-remains-rules-override-current.

339. Whole Woman's Health, Brookside Women's Med. Ctr. PA v. Hellerstedt, No. A-16-CA-1300-SS, 2017 WL 462400, at *1 (W.D. Tex. Jan. 27, 2017).

340. *Id.* at *7.

341. *Id.*

342. *C.f., e.g.*, *id.* at *4 (DS HS' final stated purpose for amending Texas' regulations regarding human waste disposal was "[t]o carry out its 'duty to protect public health in a manner that is consonant with the State's respect for life and dignity of the unborn[.]'" (quoting 41 Tex. Reg. 9709, 9709 (Dec. 18, 2016)).

343. *Compare* Gonzales v. Carhart, 550 U.S. 124, 158 (2007) (giving deference to the legislature when the state furthers its interest in promoting respect for the unborn child's life), *with* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2310 (2016) (applying the undue burden standard and stating that it is incorrect to assert that legislatures must resolve medical uncertainty questions instead of courts).

344. *See supra* Part III (discussing the Fifth Circuit's multiple misstatements and misapplications of precedent in the House Bill 2 litigation).

345. *See supra* Part II.B.

The second concern I mention—that *Casey* has been read by lower courts to legitimize all similar legislation—is even more alarming than a general failure to acknowledge the relevance of women's dignity. The failure by the *Casey* Court to focus on the particular facts present in Pennsylvania led lower courts across the country to find abortion restrictions constitutional simply because they mirrored the restrictions examined in *Casey*.[346] This methodology, however, is unsound.[347] To begin, the regulations upheld in *Casey* will burden some women more than others, and in many cases the differing burden level will depend upon the availability of abortion providers in the location where women live and work. At the time *Casey* was decided, Pennsylvania had 13 abortion clinics.[348] A 24-hour waiting period operates differently in a state with 13 clinics than it does in a similarly sized state with one clinic. At least two Supreme Court Justices have indicated disapproval of a methodology which assumes that any restriction deemed constitutional in *Casey* must be constitutional in other states. Justice O'Connor expressed such a position in response to an Eighth Circuit decision which failed to analyze how a North Dakota law operated.[349] Justice Souter approved of the idea "that litigants are free to challenge [restrictions similar to those in *Casey*] in other jurisdictions."[350] *Whole Woman's Health* should encourage courts to drop this approach because the Supreme Court focused on the combination of factors at play in Texas in striking down House Bill 2,[351] which follows the spirit of what *Casey* requires.

Whole Woman's Health reinvigorates the factual inquiry required by the federal courts and should encourage those courts to truly examine each abortion restriction *in the context of the relevant locality* instead of in the context of previously litigated cases.[352] Waiting periods may not cause an undue burden in Pennsylvania with its 13 abortion clinics, but they may cause an undue burden in Kentucky, Mississippi, Missouri, North Dakota,

346. Wharton et al., *supra* note 53, at 357.

347. *See id.* ("Most other courts, however, have made the mistake of mechanically imposing *Casey*'s result, rather than applying its undue burden analysis to assess these provisions.").

348. See Linda Greenhouse, *A Justice Removes the Last Barrier to Pennsylvania's Limits on Abortion*, N.Y. TIMES (Feb. 9, 1994), http://www.nytimes.com/1994/02/09/us/a-justice-removes-the-last-barrier-to-pennsylvania-s-limits-on-abortion.html.

349. Fargo Women's Health Org. v. Schafer, 507 U.S. 1013, 1013 (1993) (O'Connor, J., concurring); Wharton et al., *supra* note 53, at 359.

350. Planned Parenthood of Se. Pa. v. Casey, 510 U.S. 1309, 1313 (1994).

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

352. *See id.*

South Dakota, West Virginia, or Wyoming—all of which have only one abortion clinic[353] and a lot of square miles. It seems unlikely that additional clinics will open because of *Whole Woman's Health*, but if courts take seriously the balancing test and factual inquiry as used in *Whole Woman's Health*, it is possible that existing regulations focused on women will be found unconstitutional.

The most common travel-requiring regulation is that of informed consent waiting periods. As discussed above, courts have generally upheld waiting periods in light of *Casey*'s constitutional approval of Pennsylvania's 24-hour waiting period.[354] *Whole Woman's Health* did not invalidate *Casey*'s holding on this point, and in fact cited it as controlling law.[355] However, *Whole Woman's Health* positions required travel as a factor to be considered in weighing the difficulty of access against valid state justifications.[356] In fact, it appears that even states with strong pro-life lawmakers are concerned with the potentially unconstitutional impact of waiting periods on rural women. Both Texas and Louisiana include exceptions in the informed consent waiting periods for women traveling over certain distances.[357] States can continue to make access particularly difficult for rural women, but in order for those regulations to survive constitutional scrutiny, states will have to be better about justifying policies. *Whole Woman's Health* not only allows distance to be a part of the equation, but also requires a renewed focus on the balancing test.[358]

What *Whole Woman's Health* does make clear is that unnecessary health regulations are undue burdens.[359] The opinion appears to cover any health-justified restrictions on abortion, even those that are not TRAP laws.[360] Accordingly, the "evidence-based balancing" used by the Court in

353. *See* Pearson, *supra* note 290.

354. *See* Bernstein, *supra* note 332, at 173 n.17.

355. *Whole Woman's Health*, 136 S. Ct. at 2313 (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 883, 885–87 (1992) (opinion of O'Connor, Kennedy, and Souter, JJ.)).

356. *Id.*

357. TEX. HEALTH & SAFETY CODE ANN. § 171.012(a)(4) (West 2017) (providing exception for women who live 100 miles or more from the nearest abortion clinic); H.B. 386, 2016 Leg., Reg. Sess. (La. 2016) (providing exception for women who live 150 miles or more from the nearest abortion clinic).

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

359. *See* Greenhouse & Siegel, *The Difference a Whole Woman Makes*, *supra* note 23, at 161.

360. *Id.* at 162.

Whole Woman's Health should extend to any and all health-justified restrictions on abortion.[361] At times, it can be difficult to categorize a state interest because states passing abortion restrictions tend to value potential life over women's dignity. Accordingly, even restrictions which are articulated as health justified are thought of as potential-life justified. For example, some states require scientifically inaccurate warnings about abortion causing breast cancer, psychological harm, and even fetal pain.[362] These warnings, therefore, can be justified under different state interests but really are about expressing a preference for childbirth over abortion.

There is an argument to be made that the accuracy and relevance of these statements should be weighed against the burden created by the statements.[363] Courts may take this approach, or they may not, although doing so follows the balancing test as articulated in *Whole Woman's Health*. The state laws that require physicians to say or do certain things to women seeking abortions are a completely different category of abortion regulation than the TRAP laws at issue in *Whole Woman's Health*. States might have an easier time promoting justification for these women-focused, potential-life-justified laws than they do for TRAP laws. Accordingly, even if the stricter balancing test from *Whole Woman's Health* is applied to women-focused burdens, proving there is no evidence for the states' policies will be difficult.

VI. CONCLUSION

Whole Woman's Health v. Hellerstedt includes both broad statements and limiting language. The opinion's language, therefore, leaves open what lower courts will do. Reasonable jurists will reach opposite conclusions based on the fact-finding conducted in any particular case and by the reading of *Whole Woman's Health*.[364] This is inevitable without a clearer holding by the Supreme Court. However, *Whole Woman's Health* should encourage courts to take seriously the burdens faced by rural women in accessing abortion. In whole, states that are attempting to limit women's access to abortion will continue to do so, but those states need to ensure that any new laws have clearly established medical benefits.[365] *Whole Woman's Health*

361. *See id.* at 158.
362. *Id.* at 159–61.
363. *See id.* at 162.
364. *See supra* Part V.
365. *See supra* Part V.

renews the focus on litigation and holds states to a higher standard of evidence than most federal circuit courts had been requiring since *Carhart*.[366]

Women seeking access to abortions and abortion providers will continue to be faced with new and unique restrictions. Although the fight will continue, *Whole Woman's Health* should make the path to overturning burdensome regulations easier.[367] Two lessons are particularly worth pointing out. First, litigants should focus on the compounded problems faced by women at the intersection of different disadvantaged groups. In its analysis, the Supreme Court found intersectionality relevant.[368] In the House Bill 2 situation, the intersectional analysis focus was on poor, rural, immigrant women who faced multiple barriers to accessing abortion. The second lesson is that litigants should not shy away from focusing on rural women. The *Whole Woman's Health* plaintiffs focused less on rural women and more on the increased burden that would be faced by urban clinics.[369] Although the plaintiffs were ultimately successful, that success was due, in part, to the Court's serious consideration of the burdens on *rural* women (not just all women) facing increased wait times at the few remaining Texas clinics, which were clustered, of course, in the urban areas.[370] Rural women need not be erased from the litigation strategy as they have been in the past.

Whole Woman's Health is a partial victory for those who care about rural women's access to abortion. The opinion in *Whole Woman's Health* explicitly recognizes rural women and the burdens they face. However, *Whole Woman's Health* only situates the impact of rurality within the *Casey* framework that had already rejected travel time alone as an undue burden.[371] The reinforcement of this holding from *Casey* makes the fight harder for women. However, *Whole Woman's Health* not only clarifies outstanding questions from *Casey* but also requires courts to take the undue burden test more seriously, particularly as it applies to rural women and regulations that require rural women to travel increased distances.[372] *Whole Woman's Health* should also encourage legal scholars and commentators to include rural women in the discussion of abortion access. Currently, rural women are generally left out of discussions about abortion access. For example, Melissa

366. *See supra* Part III.
367. *See supra* Part V.
368. *See supra* Part IV.
369. *See supra* Part IV.
370. *See supra* Part IV.
371. *See supra* Part V.
372. *See supra* Part V.

Murray and Kristin Luker, authors of the only casebook on reproductive rights, reference rurality in passing seven times, including sources, throughout the 900-page text.[373] In the abortion section, spanning over 200 pages, the word "rural" is used twice:[374] first to note that 97 percent of all rural counties do not have an abortion provider,[375] and second to introduce a case where the "cumulative effects of abortion restrictions" may result in disproportionate barriers "for poor and rural women[] seeking abortion services."[376] Murray and Luker were right to include reference to rural women, but the barriers faced by rural women should be given more acknowledgement and not just referenced in passing. Following *Whole Woman's Health*, rural women's access to abortion belongs in the mainstream discussion of the constitutionality of abortion restrictions.

Ultimately, *Whole Woman's Health* will encourage courts to take seriously the burdens faced by rural women.[377] Because *Whole Woman's Health* increases the factual inquiry required to determine the constitutionality of abortion restrictions,[378] some concern with the fact-dependent test is warranted. *Whole Woman's Health* has already been criticized because of the renewed focus on factual determinations in abortion litigation because of a concern that ideologically driven district court judges may interpret facts in a way that puts women and providers in a bad situation.[379] Some concern about the power of district court judges may be

373. MURRAY & LUKER, *supra* note 149, at 215, 332, 517, 789, 791, 883. Notably, the casebook fails to cite to any of the rural-focused works by Lisa Pruitt.

374. *Id.* at 789 n.2, 791.

375. *Id.* at 789 n.2.

376. *Id.* at 791 (introducing McCormack v. Heideman, 694 F.3d 1004 (9th Cir. 2012)).

377. *See supra* Part V.

378. Greenhouse & Siegel, *The Difference a Whole Woman Makes, supra* note 23, at 156.

379. Foley, *supra* note 26, at 174 (arguing that the district court judge in the House Bill 2 litigation had "a strong opinion about abortion"). There is nothing in the record which particularly supports Foley's accusation that the judge's personal opinions about abortion infiltrated the factual finding in the case. *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2310 (2016) ("For a district court to give significant weight to evidence in the judicial record in these circumstances is consistent with this Courts case law. As we shall describe, the District Court did so here. It did not simply substitute its own judgment for that of the legislature. It considered the evidence in the record—including expert evidence, presented in stipulations, depositions, and testimony."). In fact, the Texas legislature did such a poor job of justifying health benefits and such a wonderful job of bragging about clinic closures, that it is difficult to imagine factual findings which did not point out that (1) there were few to no health benefits and (2)

warranted; however, an increased focus on factual findings will ultimately lead to more accountability for state legislatures who have, for quite a while, been able to pass non-medically-necessary provisions with impunity.[380] Giving federal courts permission to increase the factual inquiry into legislative purpose will help ensure that new abortion regulations are actually intended to reach permissible state interests, not simply burden women's constitutional right to access abortion. The long-term impact of *Whole Woman's Health* is yet to be seen, but it will certainly change the litigation strategy and chance of success for many women and providers seeking to overturn invasive and unnecessary state legislation. This is especially true when rural women face particularly disproportionate barriers to access.

clinics would be closing. The real point to be taken from Foley's argument is, perhaps, that a district court judge could *avoid* making sufficient factual findings in order to deprive appellate courts of a full record, which in turn would lead to a greater chance of upholding any particular abortion restriction. To criticize a district court judge for conducting a trial and issuing full factual findings seems to be misplaced criticism. Such activity should be encouraged.

380. *See supra* Part II.