WHOLE WOMAN’S HEALTH V. HELLERSTEDT

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Whole Woman’s Health v. Hellerstedt
136 S. Ct. 2292 (2016)

I. INTRODUCTION

The Fourteenth Amendment of the United States Constitution holds that no State shall “deprive any person of life, liberty, or property without due process of the law.”1 In Planned Parenthood v. Casey, the Court cited Justice Brandeis’ opinion in Whitney v. California, which held that “the Due Process Clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure.”2 The Due Process Clause is not restricted to nor found in other guarantees enumerated in the Constitution; rather, it is a “rational continuum” which protects against arbitrary and unnecessary restraints or burdens placed upon the individual by the government.3 There has always existed a large degree of disagreement on the issue of abortion, and of the deeply personal issues or consequences connected to the decision to terminate a pregnancy; these debates have little bearing on the role of the Court—a role which is to “define the liberty of all.”4 Thus, the constitutional protection of a woman’s choice to terminate her pregnancy originates from the Due Process Clause of the Fourteenth Amendment.5

In the 1992 case Planned Parenthood v. Casey, a plurality of the Supreme Court of the United States affirmed the 1973 ruling in Roe v. Wade of the constitutional right to have an abortion; however, the Casey Court adopted the “undue burden” standard, ultimately changing the standard for the constitutionality of abortion restrictions.6 The Court held that if the primary purpose of a state’s legislative or regulatory scheme “is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability,”7 an undue burden on a woman’s right to decide to have an abortion exists and the provision of a law is constitutionally invalid.8 While the state has a legitimate interest in promoting life or some other rational goal, a statute is nevertheless unconstitutional if the effect of the impugned statute or regulation creates an obstacle to a woman’s free

1. U.S. CONST. amend. XIV.
3. Id. at 848 (citing Poe v. Ullman, 367 U.S. 497, 543 (1961)).
4. Id. at 850.
5. Id. at 846 (See Roe v. Wade, 410 U.S. 113, 129 (1973)).
6. Id. at 879.
8. Whole Woman’s Health, 136 S. Ct. at 2300 (citing Casey, 505 U.S. at 878).
choice.9 The Court in *Casey* held that “[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the [constitutional] right.”10

Twenty years later, in *Whole Woman’s Health v. Hellerstedt*, the Supreme Court was presented with the issue of whether two provisions of Texas House Bill 2 (hereinafter “H.B. 2”) violated a woman’s right to abortion.11 The Court applied the undue burden test utilized in *Casey* to H.B. 2 and determined that the two provisions in question were in violation of the Due Process Clause of the Fourteenth Amendment; the first provision held to be unconstitutional was the so-called admitting-privileges requirement, and the second provision held to be unconstitutional was in respect of necessary clinic upgrades to meet surgical-center requirements.12 Thus, *Whole Woman’s Health* is a monumental case, as the Court enumerated specific state action that constitutes an undue burden on abortion access to women.13 Although the Court in *Roe* identified that “[a] State has a legitimate interest in seeing to it that abortion . . . is performed under circumstances that insure maximum safety for the patient,”14 the Court in *Whole Woman’s Health* explored the proper balance between a woman’s safety and a woman’s choice.15

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

In July 2013, Texas enacted H.B. 2, which placed restrictions on abortion clinics operating within the state.16 The first provision amended a Texas law that had “previously required an abortion facility to maintain a written protocol for ‘managing medical emergencies and the transfer of patients requiring further emergency care to a hospital.’”17 The provision stated, “[a] physician performing or inducing an abortion . . . must, on the date the abortion is performed or induced, have active admitting privileges at a hospital that . . . is located not further than 30 miles from the location at which the abortion is performed or induced” (hereinafter “admitting-privileges requirement”).18 The second provision stated, “the minimum standards for an abortion facility must be equivalent to the minimum

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11. *Id.* at 2300.
12. *Id.* (citing *Casey*, 505 U.S. at 878).
17. *Id.* at 2300 (citing 38 TEX. REG. 6546 (2013)).
18. TEX. HEALTH & SAFETY CODE ANN. § 171.0031(a) (West through the end of the 2015 Regular Session of the 84th Legislature).
standards adopted under [the Texas Health and Safety Code section] for ambulatory surgical centers” (hereinafter “surgical-center requirement”). Before the law took effect, a group of Texas abortion providers sought facial invalidation of the admitting-privileges provision, and in October 2013, the District Court granted an injunction, but three days later the United States Court of Appeals for the Fifth Circuit vacated the injunction and the provision took effect. A petition for certiorari to the Supreme Court was not filed.

One week after the Fifth Circuit’s decision, a group of abortion providers, some of whom were plaintiffs in the previous case, filed suit in Federal District Court. The plaintiffs sought injunctions preventing the enforcement of the admitting-privileges provision, and the surgical-center provisions across Texas, claiming that the provisions violated the Fourteenth Amendment, as interpreted in *Casey*. The District Court held the two provisions created an undue burden and restricted access to women seeking “previability” abortions, and found such provisions would force many abortion clinics in the State of Texas to close. In June 2015, Texas appealed, and the United States Court of Appeals for the Fifth Circuit found the admitting-privilege and surgical-center provisions of H.B. 2, with minor exceptions, to be constitutional, therefore reversing the District Court’s holding, and allowing the provisions to take effect.

In a 5-3 decision authored by Justice Breyer, the Supreme Court of the United States ruled that a pre-enforcement facial challenge of the admitting-privileges requirement did not have a res judicata effect, nor did the prior suit preclude a challenge to the surgical-center requirement. The Court held that the admitting-privileges requirement violated the Fourteenth Amendment, as no evidence of health benefits for the women was presented. Since the requirements would require the closure of nearly half of the clinics operating in Texas, the record before the District Court contained ample evidence to support the Court’s conclusion that the effects

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19. TEX. HEALTH & SAFETY CODE ANN. § 245.010(a) (West through the end of the 2015 Regular Session of the 84th Legislature).
21. *Id.* at 2301.
22. *Id.*
23. *Id.*
25. *Whole Woman’s Health*, 136 S. Ct. at 2303 (citing *Whole Women’s Health v. Cole*, 790 F.3d 598 (5th Cir. 2015)).
26. *Id.* at 2304.
27. *Id.* at 2308.
28. *Id.* at 2313 (citing *Casey*, 505 U.S.at 895 (an undue burden is found when a substantial obstacle impedes on a large number of a woman’s choice)).
Lastly, the Court found the surgical-center requirement violated the Fourteenth Amendment because evidence established that it was unnecessary and would reduce the number of legally functioning clinics in Texas to about seven.30

III. COURT’S DECISION AND RATIONALE

A. Majority Opinion by Justice Breyer

On June 27, 2016, Justice Breyer delivered the opinion of the Court, in which Justice Kennedy, Justice Ginsburg, Justice Sotomayor and Justice Kagan joined.31 Justice Ginsburg, who concurred only in the judgment, wrote separately to emphasize her view that targeted regulation of abortion providers does little, if anything at all, to protect the health of women.32

In Part II of the opinion, before addressing the constitutional question, the Supreme Court first considered the Court of Appeals’ two procedural grounds for barring the petitioners’ constitutional challenges.33 Following an extensive discussion, the Court reversed the lower court’s decision and held that although some petitioners had previously brought a facial challenge to the admitting-privileges requirement in Abbott and were unsuccessful, “res judicata neither bars petitioners’ challenges to the admitting privileges requirement nor prevents us from awarding facial relief.”34

The Court held that the proven consequences of H.B. 2 had changed substantially since Abbott was decided.35 The Court supported its argument with the Restatement (Second) of Judgments § 24, Comment f (1980), which states, where “important human values—such as the lawfulness of continuing personal disability or restraint—are at stake, even a slight change of circumstances may afford a sufficient basis for concluding that a second action may be brought.”36 Here, a large number of clinics had closed, whereas no clinics had yet done so when Abbott was argued and decided, and as such, a new claim existed that was not precluded.37 The Court also reasoned that under Rule 54(c) of the Federal Rules of Civil Procedure, a

29. Id.
30. Whole Woman’s Health, 136 S. Ct. at 2318.
31. Id. at 2299.
32. Id. at 2321 (Ginsburg, J., concurring) (citing Planned Parenthood of Wis., Inc. v. Schimel, 806 F.3d 908, 921 (7th Cir. 2015)).
33. Whole Woman’s Health, 136 S. Ct. at 2304.
34. Id.
35. Id. at 2306.
36. Id. at 2305 (citing RESTATEMENT (SECOND) OF JUDGMENTS § 24, cmt. f (1980)).
37. Id. at 2306-07 (citing Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 748 F.3d 583, 598 (5th Cir. 2014)).
“final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.”

The Court found nothing wrong with the District Court awarding more relief than the parties requested or briefed.

Furthermore, the Court held that petitioners did not have to bring their surgical-center provision challenge in Abbott, as the lower court ruled, and allowed the claim to be brought forth. The Court reasoned that the two challenged provisions of H.B. 2 are individual and distinct, and that they serve two functions. The approach that the Fifth Circuit used “would require treating every statutory enactment as a single transaction which a given party would only be able to challenge one time, in one lawsuit, in order to avoid the effects of claim preclusion.” The Supreme Court ruled that the Court of Appeals’ procedural rulings were incorrect for the reasons noted.

In Part III of the opinion, the Court analyzed the undue burden standard as articulated in Roe and applied in Casey. The Court held that the Court of Appeals’ interpretation of the first part of the standard was incorrect where it implied that the existence or non-existence of medical benefits should not be considered when deciding if a regulation of abortion constitutes an undue burden. The Court instead held that burdens which laws impose on abortion access should be considered together with the benefits of those laws.

Next, the Supreme Court found the Court of Appeals’ test was “wrong to equate the judicial review applicable to the regulation of a constitutionally protected personal liberty with less strict review applicable where, for example, economic legislation is at issue.” In contrast, the Court found the Casey standard more appropriate when it “ask[ed] courts to consider whether any burden imposed on abortion is ‘undue.’”

Lastly, the Supreme Court held that legislatures must resolve questions of medical uncertainty and not the courts. The Court reasoned that
considerable weight of evidence and judicial proceedings should be used when determining the constitutionality of laws regulating abortions.\textsuperscript{50}

In Part IV of the opinion, the Court supported the District Court’s holding that H.B. 2’s admitting-privileges requirement imposed an undue burden on a woman’s right to have an abortion.\textsuperscript{51} The Court found that although the purpose of the admitting-privileges requirement was to help ensure women had quick and efficient access to hospitals should any problems arise during the abortion procedure, there was no significant health-related problems that the new law purported to remedy.\textsuperscript{52} When questioned directly, Texas was unable to identify a single instance when the new requirement would have provided women with better treatment during the abortion process.\textsuperscript{53}

Moreover, the Court found that a significant number of abortion clinics were closing due to this requirement as “hospitals often condition admitting privileges on reaching a certain number of admissions per year,” and that due to the relative safety of the procedure, doctors who worked at clinics and performed abortions were not admitting enough patients to nearby hospitals to maintain their admitting privileges.\textsuperscript{54} Further—the clinic closures resulted in: fewer doctors available, longer wait times, and, most notably, the driving distances for women more than 150 miles from a provider increased from 86,000 to 400,000.\textsuperscript{55} These burdens, taken together with the virtual absence of any health benefit, led the Court to the “undue burden” conclusion that H.B. 2 is no more effective than the preexisting Texas law.\textsuperscript{56}

Lastly, the Court addressed and dismissed the dissent’s argument that clinics may have closed for reasons unrelated to the provisions of H.B. 2.\textsuperscript{57} The Court found that the petitioners “satisfied their burden to present evidence of causation by presenting direct testimony as well as plausible inferences to be drawn from the timing of the clinic closures.”\textsuperscript{58} In concluding this point, the Court found that the dissent incorrectly speculated that H.B. 2 may have targeted unsafe clinics, that an extra layer of regulation would not have deterred the type of “determined wrongdoers”

\begin{flushright}
\textsuperscript{50} Id.
\textsuperscript{51} Id. at 2310-11.
\textsuperscript{52} Id. at 2311; Brief for Respondents at 32-37, Whole Woman’s Health v. Hellerstedt, 136 S. Ct. 2292 (2016) (No. 15-274).
\textsuperscript{53} Whole Woman’s Health, 136 S. Ct. at 2312 (quoting Brief for Society of Hospital Medicine et al. as Amici Curiae at 11, Whole Woman’s Health v. Hellerstedt, 136 S. Ct. 2292 (2016) (No. 15-274)).
\textsuperscript{54} Id.
\textsuperscript{55} Id. at 2313 (citing Lakey, 46 F. Supp. 3d at 681).
\textsuperscript{56} Id. at 2314; see Casey, 505 U.S. at 885-87).
\textsuperscript{57} Id. at 2313.
\textsuperscript{58} Whole Woman’s Health, 136 S. Ct. at 2313.
\end{flushright}
contemplated by the dissent, and that the actions contemplated by the dissent were already covered by existing Texas law.  

In Part V of the opinion, the Court supported the District Court’s holding that the second challenged provision, H.B. 2’s surgical-center requirement, provided no further health benefits for women and it posed a substantial obstacle to women seeking an abortion, and therefore is considered to be an undue burden.  

The Court found that making clinics comply with the surgical-center standards provided no benefits to patients as almost all complications arise after the patient has left the clinic, and that the upgrades required would leave only seven or eight clinics operating in the State of Texas.  

Decreasing the amount of clinics would mean that clinics which were providing 14,000 abortions annually would now take on upwards of 70,000 abortions annually.  

The Court noted that “common sense suggests that, more often than not, a physical facility that satisfies a certain physical demand will not be able to meet five times that demand without expanding or otherwise incurring significant costs.”

The dissent argued that many facilities operate under full capacity and clinics would be able to handle the increase in patients or could increase the capacity.  

In regard to this argument, the Court responded that not only are medical facilities already known for their lengthy wait-times, while operating under capacity, but the amount of closed facilities due to the admitting-privileges requirement would mean a decrease in the number of available physicians that facilities could hire.

What the Court found fundamental was that Texas sought to make women travel long distances to facilities that will likely lack personal attention, emotional support, and security in the ability to have serious conversations with doctors.  

The Court attributed the potential decline in quality of care to the fully taxed facilities operating beyond capacity because of the closure of facilities due to the surgical-center requirements, which poses a substantial obstacle to women seeking abortions and constitutes an undue burden.

In Part VI of the opinion, the Court “consider[ed] three additional arguments Texas ma[de] and deem[ed] none persuasive.”  

First, Texas

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59. Id. at 2314.  
60. Id. at 2315; see Lakey, 46 F. Supp. 3d at 684.  
61. Id. at 2316; see Lakey, 46 F. Supp. 3d at 682.  
62. Id. at 2316 (citing Cole, 790 F.3d at 589-90).  
63. Whole Woman’s Health, 136 S. Ct. at 2317.  
64. Id.  
65. Id.  
66. Id. at 2318; see Lakey, 46 F. Supp. 3d at 682.  
67. Id. at 2318; see Lakey, 46 F. Supp. 3d at 682.  
68. Whole Woman’s Health, 136 S. Ct. at 2318.
argued that H.B. 2’s severability clause precluded invalidation of the two challenged provisions as Texas argued that if a court finds any portion to be invalid, the portion can be severed and the rest of the Act will not be affected.69 The Court found that even though an attempt of a severability clause existed, it does not mean the Court must apply partial measures when it has been found that the provisions were facially unconstitutional.70

Second, Texas does not view the two provisions as substantial obstacles, which are compulsory requirements that must be met in order to satisfy the undue burden standard.71 Texas explains that H.B. 2 provisions only apply to certain women of reproductive age, which would not be a “large fraction” as required by Casey.72 The Court reasoned that in this case, as in Casey, “the relevant denominator is ‘those [women] for whom [the provision] is an actual rather than an irrelevant restriction.’”73

Lastly, Texas cites Simonpoulous v. Virginia,74 where the Court upheld a surgical-center requirement applicable to second-trimester abortions.75 Unlike Simonpoulous, the provisions before the Court in the instant case apply to all abortions and, moreover, Casey clarified ‘viability’ as the relevant point on limiting a woman’s access to abortion, rather than the trimester framework.76

**B. Concurring Opinion by Justice Ginsburg**

In a short concurring opinion, Justice Ginsburg expressed how safe and low the complication rates of abortions are and to find that the argument or justification that H.B. 2 could protect women is beyond belief.77 Furthermore, Justice Ginsburg argued that many procedures unrelated to abortions are performed in the United States that are far more dangerous, including childbirth itself, yet are not subjected to neither admitting-privilege requirements nor surgical-center requirements.78 In closing, Justice Ginsburg stated that H.B. 2’s provisions are unnecessary, as they do nothing for a woman’s health and unfairly subject women to difficult pathways to obtaining abortions.79

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69. Id. at 2318; see Brief for Respondents at 50-52, Whole Woman’s Health v. Hellerstedt, 136 S. Ct. 2292 (2016) (No. 15-274).
70. Id. at 2319.
71. Id.
72. Id. at 2319 (citing Casey, 505 U.S. at 894-95).
73. Whole Woman’s Health, 136 S. Ct. at 2319 (quoting Casey, 505 U.S. at 894-95).
75. Whole Woman’s Health, 136 S. Ct. at 2320.
76. Id.; see generally Simonpoulous, 462 U.S. at 506).
77. Whole Woman’s Health, 136 S. Ct. at 2320-21 (Ginsburg, J., concurring) (citing Schimel, 806 F.3d at 912).
78. Id. at 2320 (Ginsburg, J., concurring); see Schimel, 806 F.3d at 921-22.
79. Id. at 2321; see Schimel, 806 F.3d at 921.
C. Dissenting Opinion by Justice Thomas

Justice Thomas dissented, arguing that the majority decision not only exemplifies the Court’s tendency to bend the rules when abortion is the issue, but also “creates an abortion exception to ordinary rules of res judicata, ignores compelling evidence that Texas’ law imposes no unconstitutional burden and disregards basic principles of the severability doctrine.” Initially, in Part I, Justice Thomas criticized the case as one which should never have been brought in front of the Supreme Court, given that for most of the Nation’s history, cases could not be brought by third parties in order to vindicate the rights of another. Justice Thomas sternly noted that the Court has been especially willing to relax the rules specifically for due process rights as they related to abortion:

[...there is no surer sign that our jurisprudence has gone off the rails than this: After creating a constitutional right to abortion because ‘it involve[s] the most intimate and personal choices a person may make . . .”, the Court has created special rules that cede its enforcement to others.]

In Part II, Justice Thomas stated that the Court misinterpreted the undue burden standard in Casey in three ways. First, Justice Thomas argued that Casey did not intend to balance the benefits and burdens of provisions; rather, the Court in Casey evaluated the provisions posed for undue burden without weighing the benefits. Second, by discarding the opinion that “legislatures, and not courts, must resolve questions of medical uncertainty,” the majority abandoned the traditional rule in Casey of respecting deference to legislatures’ decisions related to areas of medical uncertainty. Lastly, he argued that the majority overruled an outcome of Casey “by requiring laws to have more than a rational basis [to act] even if they do not substantially impede access to abortion.” Therefore, although the amount is unknown, the level of state’s interest must now be greater

80. Whole Woman’s Health, 136 S. Ct. at 2321 (Thomas, J., dissenting) (citing Stenberg v. Carhart, 530 U.S. 914, 954 (2000) (Scalia, J., dissenting)).
81. Id. at 2321.
82. Id. at 2321-22.
83. Id. at 2323 (citing Casey, 505 U.S. at 851) (majority opinion).
84. Whole Woman’s Health, 136 S. Ct. at 2323 (Thomas, J., dissenting).
85. Id. at 2323-24.
86. Id. at 2324 (citing Casey, 505 U.S. at 885-87).
87. Id. at 2325.
88. Id.
than a basic “rational basis,” which has inflamed to a level never used before.\textsuperscript{89}

Further, in Part III, Justice Thomas rejected the majority’s undue burden test as it is “a made-up test”\textsuperscript{90} and resembles the strict-scrutiny standard that \textit{Casey} explicitly rejected, under which only the utmost convincing rationales justified restrictions or provisions on abortion.\textsuperscript{91} Justice Thomas believes the Court should only adopt policy preferences which balance constitutional rights and interests\textsuperscript{92} and abandon any other tinkering with the levels of scrutiny to achieve its desired result.\textsuperscript{93}

Lastly, in Part IV, Justice Thomas respectfully dissented, identifying that the Court has “simultaneously transformed judicially created rights like the right to abortion into preferred constitutional rights, while disfavoring many of the rights actually enumerated in the Constitution.”\textsuperscript{94} Justice Thomas reasoned that the Court is not to favor some rights over others, which has occurred with abortion,\textsuperscript{95} and argued that, instead the Court is to abide by one set of rules, namely the Constitution, rather than creating policy-driven value judgments.\textsuperscript{96}

\textbf{D. Dissenting Opinion by Justice Alito}

Justice Alito, joined by Chief Justice Roberts and Justice Thomas, dissented.\textsuperscript{97} Justice Alito criticized the majority for abandoning their neutral views and well-established law when abortion is brought before the Court.\textsuperscript{98} In Part I, he argued that the Court has created an unprecedented exception to res judicata, where one may relitigate their invalid constitutional claim if new and better supporting evidence\textsuperscript{99} is later produced, which, he argued, is entirely contrary to the Nation’s case law,\textsuperscript{100} the first Restatement of Judgments and the rules of the Restatement (Second) of Judgment.\textsuperscript{101} Justice Alito saw no possible reasoning for the relitigation of the admitting privileges provision, unless at the time of prior

\textsuperscript{89} Whole Woman’s Health, 136 S. Ct. at 2325 (Thomas, J., dissenting).
\textsuperscript{90} Id. at 2327 (citing United States v. Virginia, 518 U.S. 515, 570 (1996) (Scalia, J., dissenting)).
\textsuperscript{91} Id. at 2326; see \textit{Casey}, 505 U.S. at 871, 874-75 (plurality opinion).
\textsuperscript{92} Id. at 2328.
\textsuperscript{93} Whole Woman’s Health, 136 S. Ct. at 2327 (Thomas, J., dissenting).
\textsuperscript{94} Id. at 2329.
\textsuperscript{95} See id.
\textsuperscript{96} Id. at 2329-30.
\textsuperscript{97} Id. at 2330 (Alito, J., dissenting).
\textsuperscript{98} See Whole Woman’s Health, 136 S. Ct. at 2330 (Alito, J., dissenting).
\textsuperscript{99} Id. at 2337.
\textsuperscript{100} Id. at 2335 (citations omitted).
\textsuperscript{101} Id. at 2339-40.
litigation it was unable to be shown what effects the law would have,\textsuperscript{102} which was not the case since the plaintiffs had a full and fair opportunity to litigate their claim.\textsuperscript{103}

In Part II, Justice Alito addressed the application of claim preclusion to H.B. 2, chiefly the surgical-center provision.\textsuperscript{104} Justice Alito stated the Court incorrectly addressed the H.B. 2 provisions as separate and distinct (and therefore splitting the claims), while the petitioners, and Justice Alito himself, view the transaction as a single unit that should not be split following appropriately, § 24 of the Second Restatement.\textsuperscript{105} Justice Alito reasoned that the two provisions are closely enough related as they both execute regulations on abortion clinics, justified for the protection of women’s health whom are seeking abortions, both impose the same burden, and both are attacked by the petitioners as a single package.\textsuperscript{106} The two provisions “form a convenient trial unit,”\textsuperscript{107} should not have been split, and therefore the surgical-center provision, like the admitting-privileges provision, should have been precluded.\textsuperscript{108}

In Part III, Justice Alito argued that even if the claims were not precluded, the petitioners did not meet their burden to prove that the provisions had an unconstitutional impact, that is, an undue burden, on a large fraction of Texas women.\textsuperscript{109} Justice Alito stated that the petitioners relied on two loose inferences that the undue burden was placed on a large fraction of Texas women.\textsuperscript{110} The first inference, with notably no evidence to support it,\textsuperscript{111} was that the petitioners attributed the number of abortion clinics that closed after the enactment of H.B. 2 to the implementation of the two provisions.\textsuperscript{112} Justice Alito acknowledged that H.B. 2 intended to close unsafe clinics, but he presented four alternative reasons as to why clinics have closed.\textsuperscript{113} The second inference Justice Alito found was that the number of abortions performed each year at closed clinics was well below the total number of abortions, and, therefore, the clinics could not meet the demands of women in the state, failing, however, to provide any evidence of actual capacity of clinics.\textsuperscript{114} The petitioners put on evidence in the earlier

\begin{thebibliography}{113}
\bibitem{102} Id.
\bibitem{103} \textit{Whole Woman’s Health}, 136 S. Ct. at 2330 (Alito, J., dissenting).
\bibitem{104} Id. at 2340.
\bibitem{105} Id. (citing \textit{RESTATEMENT (SECOND) OF JUDGMENTS} § 24 (1980)).
\bibitem{106} Id. at 2341.
\bibitem{107} \textit{RESTATEMENT (SECOND) OF JUDGMENTS} § 24 (1980).
\bibitem{108} \textit{Whole Woman’s Health}, 136 S. Ct. at 2342 (Alito, J., dissenting).
\bibitem{109} Id. at 2343.
\bibitem{110} Id.
\bibitem{111} See id. at 2344.
\bibitem{112} Id. at 2343.
\bibitem{113} See \textit{Whole Woman’s Health}, 136 S. Ct. at 2344 (Alito, J., dissenting).
\bibitem{114} Id. at 2348-49.
\end{thebibliography}
case that suggested the provision had no effect on capacity, and Justice Alito found no reason as to why they were unable to, or chose not to here.\footnote{115}

In Part IV, Justice Alito went so far as to state that even if res judicata did not apply or H.B. 2 did impose an undue burden, the Court was still incorrect to rule that the admitting-privileges provision and surgical-center provision must be enjoined in their entirety because of the severability clause.\footnote{116} Justice Alito reasoned that the admitting privileges clause is easy to apply; the “requirement must be upheld in every city in which its application does not pose an undue burden.”\footnote{117}

IV. Analysis

A. Introduction

In \textit{Casey}, the Supreme Court delivered a standard to govern the validity of laws that placed restrictions on abortions.\footnote{118} The standard examined whether a state abortion regulation has the “purpose or effect” of imposing an undue burden so that the provision “is to place a \textit{substantial obstacle} in the path of a woman seeking an abortion before the fetus attains viability.”\footnote{119} Following \textit{Casey}, “the Court has repeatedly embraced \textit{Casey’s} understanding of substantive due-process analysis as requiring courts to chart an evolving balance between individuals and the state.”\footnote{120} Notably, in \textit{Obergefell v. Hodges}, the Court answered \textit{Casey’s} plea for reasoned judgments and did away with efforts to limit due-process liberty by reducing it to historical manifestations.\footnote{121}

In \textit{Whole Woman’s Health}, the majority opinion upheld the role courts play in ensuring that states respect the constitutional principles of liberty, equality, and dignity.\footnote{122} This analysis focuses on these holdings, namely: (1) third-party standing issues (2) evaluating the role of claim preclusion in constitutional challenges;\footnote{123} and (3) examination and future application of the undue burden standard.\footnote{124}

\begin{thebibliography}{99}
\item[115] Id.
\item[116] Id. at 2350.
\item[117] Id.
\item[118] \textit{Whole Woman’s Health}, 136 S. Ct. at 2342-43 (Alito, J., dissenting) (citing Gonzales v. Carhart, 550 U.S. 124, 146 (2007)).
\item[119] \textit{Whole Woman’s Health}, 136 S. Ct. at 2300 (citing \textit{Casey}, 505 U.S. at 878).
\item[120] Metzger, supra note 15.
\item[121] Id.
\item[122] See generally \textit{Whole Woman’s Health}, 136 S. Ct. at 2292.
\item[123] See id. at 2304-09.
\item[124] See id. at 2309-18.
\end{thebibliography}
B. Discussion

1. Third-Party Standing

Up until the twentieth century, individuals could not challenge a statute to vindicate the rights of others. In the twentieth century, the Court began recognizing exceptions, while attaching limits for individuals who sued asserting third parties’ rights. Justice Thomas stated that the Court grants exceptions “only if the plaintiff ha[s] a ‘close relation to the third party’ and the third party face[s] a formidable ‘hindrance’ to asserting his own rights.”

Justice Thomas stated that the only reason this case was before the Court was because “the Court has shown a particular willingness to undercut restrictions on third-party standing when the right to abortion is at stake.” Specifically, Justice Thomas believes the Court has erroneously been more forgiving when the cases involve abortion clinics and physicians asserting the substantive due process right of a woman to have an abortion. Justice Thomas found the majority inconsistent when the Court stated that the right to abortion is one of the most personal and intimate decisions central to personal autonomy, yet has created rules that allow for others to enforce this claim for an individual.

The general bar on third-party standing is simply a principle, subject to exceptions, and that bar is removed when it is believed that right-holders are unlikely to come forward to defend their own rights. Given the private nature of an abortion decision, and the potential publicity of a lawsuit, the incentive for women to come forward is rather unpleasant. Despite strong arguments for upholding standing law, the Singleton plurality found, as did the majorities in Eisenstadt, Griswold, Craig, and Powers, that a general principle is subject to exceptions and physicians and clinics bringing suit on behalf of women, is appropriate third-party standing. Since the decision in Singleton, doctors’ and clinics’ assertions of constitutional rights of both patients and hypothetical patients have been

125. See Whole Woman’s Health, 136 S. Ct. at 2322 (Thomas, J., dissenting).
126. See id. at 2322.
127. See id. (citing Powers v. Ohio, 499 U.S. 400, 411 (1991)).
128. See id.
129. See id.
131. See Dorf, supra note 130.
133. Wallace, supra note 132, at 1397.
accepted by the Court even when women have continued and successfully asserted their own rights before the Court.\footnote{134}{Whole Woman’s Health, 136 S. Ct. at 2322 (Thomas, J., dissenting).}

Although Justice Thomas appears to have a convincing argument that the Court seems to be more forgiving with third-party standing claims involving abortions, “[t]he Court has held that a party to a civil case has third-party standing to litigate the rights of prospective jurors and that a bar owner has third-party standing to litigate the rights of her customers.”\footnote{135}{Dorf, supra note 130.} It appears as though the Court has firmly established that abortion claims can be brought by clinics or physicians on behalf of women.\footnote{136}{Wallace, supra note 132.} Therefore, Justice Thomas’ claim that the Court has been more forgiving when it comes to this matter is not supported by countless third-party standing issues successfully argued before the Court.\footnote{137}{See Dorf, supra note 130.}

2. Evaluating the Role of Claim Preclusion

Undoubtedly, the majority and Justice Alito’s dissent disagree on the fundamental execution of claim preclusion as applied to both the admitting privileges requirement and the surgical-center requirement of H.B. 2.\footnote{138}{Id. at 2330 (Alito, J., dissenting).} The majority opinion, written by Justice Breyer, struck down both provisions, finding them in violation of a woman’s constitutional right to abortion.\footnote{139}{Whole Woman’s Health, 136 S. Ct. at 2300 (citing U.S. CONST. amend. XIV; Casey, 505 U.S. at 878).} A separate dissent, written by Justice Alito, argued that the Court should never have had the opportunity to address the substantive issues, as the operative facts presented in this case had been previously litigated.\footnote{140}{Id. at 2330 (Alito, J., dissenting).} Following Justice Alito’s reasoning, the doctrine of claim preclusion should have applied.\footnote{141}{See id. at 2340.}

This Court found that after provisions of a new law have been applied, the circumstances had changed enough so that a previously litigated and unsuccessful facial challenge on the same provisions may be brought before the court again.\footnote{142}{See Whole Woman’s Health, 136 S. Ct. at 2305.} The majority held that the unsuccessful facial challenge in Abbott occurred prior to the enforcement of the provisions and prior to many of the abortion clinics closing.\footnote{143}{Id. at 2306.} The majority reasoned that, here, the petitioners brought forth a challenge after the provisions had been enforced and after many clinics have been closed, evidencing a dissimilarity

\footnote{144}{Id. at 2330 (Alito, J., dissenting).}
that evidently excludes itself from the doctrine of claim preclusion.\textsuperscript{144} The majority mischaracterizes the judgment in \textit{Abbott} as an unsuccessful premature facial challenge, when instead the Court of Appeals held that the evidence in \textit{Abbott} was insufficient,\textsuperscript{145} and petitioners had the opportunity to seek review, yet chose not to.\textsuperscript{146}

The majority made an appealing argument that the claim in \textit{Abbott} was too speculative and that requiring litigants to challenge every single provision would be unreasonable.\textsuperscript{147} However, this statement misses the importance of the role that fundamental claim preclusion plays in the American legal system;\textsuperscript{148} unsuccessful previously litigated claims, extinguish claims that could have been brought in the first case.\textsuperscript{149} Again, it appears as if the Court is playing with the rules of civil procedure because of the substantive abortion claim.\textsuperscript{150} Justice Thomas undoubtedly agrees with Justice Alito’s argument that when abortion issues come before the Court, they “ream with procedural exceptions, as though the usual canons of construction were reversed.”\textsuperscript{151}

The Court found that claim preclusion did not bar challenges to the admitting-privileges requirement.\textsuperscript{152} The Court reasoned that new material facts were brought forth—facts relating to important human values that have the ability to produce a new claim.\textsuperscript{153} The majority failed to recognize that the first suit and the present claim “involve the very same ‘operative facts,’ namely, the enactment of the admitting privileges requirement, which according to the theory underlying petitioners’ facial claims, would have the exact same effect of causing abortion clinics to close.”\textsuperscript{154} Justice Alito’s dissent correctly describes the majority’s new material evidence as merely being brought before the Court as they now have “better evidence than they did at the time of the first case with respect to the number of clinics that would have to close as a result of the admitting privileges requirement.”\textsuperscript{155}

With an adequate amount of supporting evidence, the majority’s holding is in violation of the underlying rationale of claim preclusion; parties may not

\begin{flushleft}
\textsuperscript{144} Id. at 2304-05.
\textsuperscript{145} Id. at 2335; see \textit{Abbott}, 748 F.3d at 598-99.
\textsuperscript{146} Id. at 2335.
\textsuperscript{147} Dorf, supra note 130.
\textsuperscript{148} \textit{Whole Woman’s Health}, 136 S. Ct. at 2331 (Alito, J., dissenting).
\textsuperscript{149} Id. at 2340.
\textsuperscript{151} Bachiochi, supra note 150.
\textsuperscript{152} See \textit{Whole Woman’s Health}, 136 S. Ct. at 2304.
\textsuperscript{153} See id. at 2305; see also \textit{Restatement (Second) of Judgments} § 24, cmt. f (1980).
\textsuperscript{154} \textit{Whole Woman’s Health}, 136 S. Ct. at 2333 (Alito, J., dissenting).
\textsuperscript{155} See id. at 2335.
\end{flushleft}
relitigate their case because they have gathered better evidence, or more bluntly, claim preclusion does not contain a “better evidence” exception.\(^{156}\)

The majority sought support of the Restatement (Second) of Judgments § 24, comment f, finding that new material facts can bring a previously litigated case before the court as a new claim, and it relied on previous Court holdings for support.\(^{157}\) Analyzing the Restatement (Second) of Judgments § 24, comment f, it is evident that new material should be brought forth only in limited circumstances, and the Restatement gives three hypothetical cases of limited circumstances—none of which appear to portray the presented situation in the case before the Court.\(^{158}\) Further, upon examination of the majority’s case support for Restatement (Second) of Judgments § 24, comment f, it has little, if any, weight to the question at issue; the cases presented fail to address claim preclusion, and if the cases do slightly reference claim preclusion,\(^{159}\) they “endorse the unremarkable proposition that a prior judgment does not preclude new claims based on acts occurring after the time of the first judgment.”\(^{160}\) Most notably, “[w]hen the highest court in the land relies upon a comment from the Second Restatement of Judgments, rather than its own precedent, you know the Justices are blazing a trail laid especially for abortion.”\(^{161}\) This is an issue that has presented itself time and time again “which must be chalked up to the Court’s inclination to bend the rules when any effort to limit abortion, or even speak in opposition to abortion, is at issue.”\(^{162}\)

Moreover, the majority held that the doctrine of claim preclusion does not prevent the parties from challenging the surgical-center requirement of H.B. 2 in this Court.\(^{163}\) The Court of Appeals for the Fifth Circuit recognized that the petitioners did not bring their claim in Abbott, but should have done so, because the surgical-center requirement and the admitting-privileges requirement arose from the same transaction, involved the same parties and facilities, were enacted at the same time, and there was

\(^{156}\) See id.; see, e.g., Torres v. Shalala, 48 F.3d 887, 894 (5th Cir. 1995) (“If simply submitting new evidence rendered a prior decision factually distinct, res judicata would cease to exist”); Geiger v. Foley Hoag LLP Retirement Plan, 521 F.3d 60, 66 (1st Cir. 2008) (claim preclusion “applies even if the litigant is prepared to present different evidence . . . in the second action”); International Union of Operating Engineers-Employers Constr. Industry Pension, Welfare and Training Trust Funds v. Karr, 994 F.2d 1426, 1430 (9th Cir. 1993) (new evidence may be presented, but that does not defeat the doctrine of res judicata).

\(^{157}\) See Whole Woman’s Health, 136 S. Ct. at 2305.

\(^{158}\) See id. at 2336-37 (emphasis added).


\(^{160}\) See Whole Woman’s Health, 136 S. Ct. at 2335.

\(^{161}\) Bachiochi, supra note 150.

\(^{162}\) Stenberg, 530 U.S. at 954.

\(^{163}\) Whole Woman’s Health, 136 S. Ct. at 2309.
a common nucleus of operative fact. Justice Breyer, writing for the majority, reasoned that “[t]he Court of Appeals failed, however, to take account of meaningful differences . . . [t]he surgical-center provision and the admitting-privileges provision are separate, distinct provisions . . . set[ting] forth two different, independent requirements with different enforcement dates.” Justice Breyer stated that the Court has never mandated that relating separate claims must be brought before the Court in a single suit, and if this were the case, it would encourage a “kitchen sink approach” which would only have detrimental effects on court proceedings.

In regard to “splitting” claims as the majority has demonstrably done here, the Second Restatement bars from litigation “any part of the transaction, or series of connected transactions, out of which the action arose.” It is evident that the two claims are closely related, as they are both provisions in H.B. 2 that the petitioners attack as a single package, arguing that the provisions enact new requirements onto abortion clinics, for the combined effect of closing down clinics. Therefore, unsuccessful previously litigated claims extinguish claims that could have been brought in the first case, and the doctrine of claim preclusion should apply.

The doctrine of claim preclusion is a foundational element in the American legal system. As stated in Baldwin v. Iowa State Traveling Men’s Asso., “[p]ublic policy dictates that there be an end of litigation[,] that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties.” The majority lacks precedent and patently disregards the well-founded doctrine of claim preclusion. Ironically, if the case had been decided on procedural grounds, punting the substantive issue into the near future, a Court with a new appointment may have used the opportunity to overturn the Casey/Gonzales v. Carhart compromise in favor of something more like Roe. Lastly, in regard to constitutional

164. See id. at 2307 (citing Cole, 790 F.3d at 581).
165. See id. at 2308.
166. Id.
167. Whole Woman’s Health, 136 S. Ct. at 2340 (Alito, J., dissenting) (citing RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1980)).
168. Id.
169. Id. at 2341; Brief for Petitioners at 40-44, Whole Woman’s Health v. Hellerstedt, 136 S. Ct. 2292 (2016) (No. 15-274).
170. See Whole Woman’s Health, 136 S. Ct. at 2340.
171. Id. at 2331.
173. Whole Woman’s Health, 136 S. Ct. at 2331 (Alito, J., dissenting).
174. Id. at 2332.
175. Bachiochi, supra note 150.
issues, the Court’s “refusal to apply well-established law in a neutral way is indefensible and will undermine public confidence in the Court as a fair and neutral arbiter.”

3. Future Application of the Undue Burden Standard

The Court of Appeals for the Fifth Circuit has demonstrably rubber stamped state laws that would close abortion clinics across the state of Texas—an evident and inadequate execution of protecting woman’s rights through the Fourteenth Amendment. By finding H.B. 2 in violation of the Constitution, the Supreme Court furthered the notion that the “Constitution protects a woman’s right to choose abortion and . . . courts have an obligation to carefully review state regulation of abortion to ensure that it respects the Fourteenth Amendment’s guarantee of liberty for all.” Justice Breyer, writing for the majority, held that the undue burden standard, “requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer,” therefore, more than just rubber stamping state laws is needed to protect the rights of women.

The Court of Appeals for the Fifth Circuit held a state law “constitutional if (1) it does not have the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus; and (2) it is reasonably related to (or designed to further) a legitimate state interest.” The Court of Appeals is incorrect in this articulation, as the test may be read to imply that medical benefits should not be taken into consideration when considering whether an abortion regulation constitutes an undue burden; the Court of Appeals’ decision plainly deviates from the rule announced in Casey.

The undue burden test that Justice Breyer prescribed in the case at bar is not that of the Court rubber stamping legislators’ decisions; it requires the Court to take a more meaningful approach. With the undue benefit test, courts now will consider limitations of access, but also the benefits that the

176. Whole Woman’s Health, 136 S. Ct. at 2331.
178. Gans, supra note 177.
179. Whole Woman’s Health, 136 S. Ct. at 2310; see Casey, 505 U.S. at 887-98 (balancing the spousal notification provision).
180. See Gans, supra note 177.
181. Id. at 2309 (citing Cole, 790 F.3d at 572).
182. See id. at 2309.
regulations will impose. A meaningful approach will not abandon legislative findings (Justice Breyer indicated that the relevant statute in the case at bar did not set forth any legislative findings), but rather, the legislature now works together with the courts, who will retain the power to balance the benefits and burdens. Exemplifying this point, “[the district court] did not simply substitute its own judgment for that of the legislature . . . [rather] [t]he district court considered the evidence in the record—including expert evidence, presented in stipulations, depositions, and testimony . . . then weighed the asserted benefits against the burdens.” In comparison, Justice Thomas, writing in his dissent, argued that this was “a way that will surely mystify lower courts for years to come.” Rather, the undue burden standard will maintain the integrity of our courts, ensuring that both sides bring compelling, well-researched arguments before the courts, and therefore it will no longer lay in the hands of the legislature to ensure women’s rights are best protected.

It is evident that laws like H.B. 2 “are not the product of some new enthusiasm for promoting women’s health but of a resourceful anti-abortion movement.” Many other medical procedures are far more dangerous, but do not have restrictions imposed on them, such as the ones H.B. 2 imposes on the women of Texas; abortion notably being “one of the safest medical procedures performed in the United States.” The Court found that nothing in Texas’ record evidences their argument that “the new law advanced Texas’ legitimate interest in protecting women’s health,” rather, they impose substantial obstacles in the way of woman seeking an abortion, which in turn imposes an undue burden on this constitutionally protected right. The reanimation of the undue burden standard issued by the Court signals “trouble ahead for that approach [the undue burden], not only in

184. See Ziegler, supra note 183.  
185. See Whole Woman’s Health, 136 S. Ct. at 2309-10.  
186. See Ziegler, supra note 183.  
187. Whole Woman’s Health, 136 S. Ct. at 2310.  
188. Whole Woman’s Health, 136 S. Ct. at 2326 (Thomas, J., dissenting).  
189. See Ziegler, supra note 183.  
191. Whole Woman’s Health, 136 S. Ct. at 2320 (Ginsburg, J., concurring); see Schimel 806 F.3d at 921-22; see also Brief for Social Science Researchers as Amici Curiae at 9-11, Whole Woman’s Health v. Hellerstedt, 136 S. Ct. 2292 (2016) (No. 15-274) (comparing abortion statistics with other surgeries).  
192. Whole Woman’s Health, 136 S. Ct. at 2320 (quoting Brief for Social Science Researchers as Amici Curiae at 5-9, Whole Woman’s Health v. Hellerstedt, 136 S. Ct. 2292 (2016) (No. 15-274)).  
193. Id. at 2311.  
194. Id. at 2312.
Texas but in other states—including Oklahoma, Louisiana, and Wisconsin—where similar laws are currently blocked by lower courts.  

V. CONCLUSION

Twenty years after the landmark case, *Casey*, was decided, *Whole Woman’s Health* presented the Supreme Court with an opportunity to enumerate specific state action, which constitutes an undue burden on abortion access to women.  

The Court, finding H.B. 2 unconstitutional, correctly held that if the primary purpose of a state’s legislative or regulatory scheme “is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability,” an undue burden exists and the provision of a law is constitutionally invalid. Here, the undue burden standard will maintain the integrity of our courts, ensuring that both sides bring compelling, well-researched arguments before the courts, and therefore it will no longer lay in the hands of the legislature to ensure women’s rights are best protected.

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195. Talbot, supra note 190.
197. *Id.* at 2300 (quoting *Casey*, 505 U.S. at 878).
198. *Id.* (citing *Casey*, 505 U.S. at 878).
199. See Ziegler, supra note 183.