FACING FACTS: THE NEW ERA OF ABORTION CONFLICT AFTER *WHOLE WOMAN'S HEALTH*

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INTRODUCTION

Combined with the election of a Congress and President opposed to abortion, the Supreme Court's most recent blockbuster abortion decision, *Whole Woman's Health v. Hellerstedt*,[1] has introduced unprecedented uncertainty into abortion jurisprudence.[2] In a five-to-three decision, the Supreme Court not only struck down Texas's HB2 but also significantly strengthened the undue burden test applied to any abortion regulation.[3] The Court's decision will force supporters of abortion restrictions to have more (and more convincing) evidence of the benefits and burdens created by a law to demonstrate its constitutionality.[4] On the other hand, the election of Donald Trump sparked a wave of new antiabortion laws, many of which focused on protecting fetal dignity or fetal life.[5] Will *Whole*

1. 136 S. Ct. 2292 (2016).

2. For discussion of the impact of *Whole Woman's Health*, see, for example, Erwin Chemerinsky, *A New Era for Abortion Rights?*, CNN (June 27, 2016, 6:52 PM), http://www.cnn.com/2016/06/27/opinions/scotus-abortion-ruling-chemerinsky; Lyle Denniston, *Opinion Analysis: Abortion Rights Reemerge Strongly*, SCOTUSBLOG (June 27, 2016, 3:07 PM), http://www.scotusblog.com/2016/06/opinion-analysis-abortion-rights-reemerge-strongly; Hannah Levintova, *Here's Why Today's Supreme Court Decision on Abortion Is So Important*, MOTHER JONES (June 27, 2016, 3:58 PM), http://www.motherjones.com/politics/2016/06/supreme-court-abortion-texas-undue-burden-requirements-unconstitutional/; O. Carter Snead, *For SCOTUS, a New Era of Judicial Interference*, CNN (June 28, 2016, 12:21 PM), http://www.cnn.com/2016/06/28/opinions/abortion-distortion-whole-womans-health-carter-snead.

3. *See Whole Woman's Health,* 136 S. Ct. at 2292.

4. *See id.* at 2309–10.

5. On the laws introduced since Trump's election, see, for example, Jessie Balmert, *Ohio Governor Vetoes 'Heartbeat' Abortion Bill, but Passes 20-Week Ban,* USA TODAY (Dec. 14, 2016, 4:20 PM), http://www.usatoday.com/story/news/nation-now/2016/12/13/ohio-governor-vetoes-heartbeat-abortion-bill-but-passes-20-week-ban/95389734; Ariane De Vogue, *How Trump's Election Reignites the Abortion Wars*, CNN (Dec. 14, 2016, 8:39 AM), http://www.cnn.com/2016/12/14/politics/trump-abortion-supreme-court/index.html; Max Greenwood, *Kentucky Lawmakers Pass 20-week Abortion Ban*, HILL (Jan. 7, 2017, 5:09 PM), http://thehill.com/blogs/blog-briefing-room/news/313193-kentucky-lawmakers-pass-20-week-abortion-ban; Bradford Richardson, *Kentucky Becomes 19th State to Ban Abortions After 20 Weeks into Pregnancy*, WASH.

Woman's Health serve as a barrier to the new antiabortion regulations?

To get a sense of where the abortion debate is going next, this Article looks to the lost history of the undue burden test and the wars it has sparked over the facts of abortion. This history illuminates several dangers that may face supporters of abortion rights in spite of the sweeping victory in *Whole Woman's Health*. First, the procedural protections put in place for women making a factual case for abortion access have since transformed into obstacles.[6] For example, judicial bypass, the protection created for minors proving facts about their families and maturity, soon became one of the stumbling blocks for younger women seeking to terminate their pregnancies.[7] Second, factual arguments rejected by the courts and by expert bodies had, and may once again have, a surprising political afterlife.[8] Raised in the context of the undue burden test, arguments about the psychological and physical harm that abortion caused in women often did not convince the courts, or even an antiabortion Surgeon General.[9] Nevertheless, because these arguments eventually caught on politically, politicians and judges began concluding that the answer to factual questions was simply too unclear for the courts to strike down abortion restrictions.[10]

TIMES (Jan. 11, 2017), http://www.washingtontimes.com/news/2017/jan/11/kentucky-becomes-19th-state-ban-abortion-after-20-/; Jason Slotkin, *Ohio Gov. Kasich Signs 20-Week Abortion Limit, Rejects 'Heartbeat Bill*,*'* NPR (Dec. 13, 2016, 7:25 PM), http://www.npr.org/sections/thetwo-way/2016/12/13/505457437/ohio-gov-kasich-signs-20-week-abortion-limit-rejects-heartbeat-bill.

6. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 899 (1992) (holding that "[e]xcept in a medical emergency, an unemancipated young woman under 18 may not obtain an abortion unless she and one of her parents (or guardian) provides informed consent").

7. *See* Rachel Rebouché, *Parental Involvement Laws and New Governance*, 34 HARV. J.L. & GENDER 175, 188–96 (2011) (noting disparities in the availability of reliable information, the obstacles of cost and travel, and the lack of accessibility for marginalized populations).

8. *Compare* Stenberg v. Carhart, 530 U.S. 914, 934 (2000) (holding Nebraska's factual argument that the intact dilation and extraction method (D&X) for partial-birth abortion was only necessary to preserve maternal life was irrelevant), *and* A Woman's Choice—E. Side Women's Clinic v. Newman, 305 F.3d 684, 694 (7th Cir. 2002) (stating that "the trial judge's factual findings in this case are based on a faulty study by biased researchers who operated in a vacuum of speculation"), *with* Gonzales v. Carhart, 550 U.S. 124, 162–63 (2007) (providing legislators power to regulate abortion procedures where there is medical uncertainty as to the facts).

9. *See* C. Everett Koop, *The US Surgeon General on the Health Effects of Abortion*, 15 POPULATION & DEV. REV. 172, 173–75 (1989) (reprinting Surgeon General C. Everett Koop's January 1989 letter to President Reagan detailing a comprehensive psychological and physical health evaluation of abortion).

10. Kate Greasley, *Taking Abortion Rights Seriously:* Whole Woman's Health v. Hellerstedt, 80 MOD. L. REV. 325, 330–33 (2017) (noting courts' willingness to defer to legislative interpretations when faced with unclear health justifications for abortion restrictions).

In the context of the undue burden test, what appear to be factual questions are in fact terms of art. Scientific uncertainty, a term that figures centrally in *Gonzales v. Carhart*,[11] requires more definition from the Court. Rather than simply clarifying that the undue burden test requires a balancing of the benefits and burdens of an abortion law, the Court should offer more guidance about how lower courts can reach a factual conclusion about the questions of health and access surrounding abortion. *Carhart* allows lawmakers to regulate abortion when a scientific or medical question remains uncertain but does not explain what gives rise to uncertainty in the first place.[12] Indeed, the Court sometimes seems to treat a matter as uncertain when there is a strong scientific consensus but the mere possibility of future harm cannot be ruled out.[13]

Uncertainty of this kind is an inevitable feature of scientific inquiry, no matter how well established a theory has become.[14] Instead of recognizing uncertainty whenever a fact could change or be disproven, the Court should instead establish that uncertainty comes into play only if a factual proposition cannot be established by a preponderance of the evidence. Defining uncertainty differently will effectively give legislators the ability to regulate abortion at will. Such a result obviously stands in tension with the balance that *Planned Parenthood of Southeastern Pennsylvania v. Casey*[15] created.

This Article unfolds in three parts. Part I begins with an overview of *Whole Woman's Health* and the new possibilities for conflict that the decision has created. Part II begins by putting the war over the facts in historical context. This Part maps out the rise of an undue burden test in the early 1980s, tracking how the test became hopelessly tangled with the question of whether abortion harms women. This Part also shows how a factual claim rejected by the Supreme Court remained politically relevant and eventually took hold in constitutional jurisprudence. Part III tells the story of a different series of factual wars surrounding minors and abortion. The factual ambiguity surrounding minors' family situation or maturity gave rise to a judicial bypass procedure that at first

11. 550 U.S. 124 (2007); *see id.* at 129–30.

12. *See id.* at 164 (stating that "[m]edical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts").

13. *See id.*

14. *See, e.g.*, Heidi Li Feldman, *Science and Uncertainty in Mass Exposure Litigation*, 74 TEX. L. REV. 1, 16, 42 (1995) (describing the fluidity of scientific inquiry and attitudes towards uncertainty within empirical communities); David Kriebel, *How Much Evidence Is Enough?: Conventions of Causal Inference*, 72 L. & CONT. PROB. 121, 129 (2009) ("[I]n the real world, there will always be many uncertainties in the science.").

15. 505 U.S. 833 (1992).

promised meaningful protection.[16] However, within several years, pro-choice attorneys began to view bypass procedures as one of the primary problems facing their cause.[17] Drawing on the recent history of struggles around the undue burden test, Part IV explores some of the problems that will likely arise after *Whole Woman's Health* and proposes solutions to address them.

I. *WHOLE WOMAN'S HEALTH* AND THE NEW FIGHT OVER THE FACTS

In the lead-up to the Court's decision in *Whole Woman's Health*, it seemed possible that *Casey*'s undue burden test would not be long for this world. The Supreme Court's latest major decision, *Gonzales v. Carhart*, had not only upheld the federal Partial Birth Abortion Ban Act but also suggested that the undue burden test required substantial deference to state legislative judgments about scientific facts.[18] If *Carhart* controlled the outcome, the Supreme Court might show similar deference to Texas lawmakers.

Whole Woman's Health instead opened a new chapter in abortion jurisprudence. The case involved a challenge to two parts of Texas's HB2, a law passed in 2013.[19] The law first required any physician performing an abortion to have admitting privileges at a hospital within thirty miles of the abortion facility.[20] It also mandated that clinics comply with state regulations governing ambulatory surgical centers.[21] In December 2013, pursuant to these provisions, the state introduced comprehensive regulations that applied only to abortion clinics, including those that had been in operation before HB2 passed.[22] It seemed exceedingly unlikely that most abortion clinics had the resources to comply with the law, given that the changes required by HB2 would cost roughly $3 million for new clinics and between $600,000 and $1 million for existing facilities.[23]

In 2013, a group of Texas abortion providers challenged several provisions of HB2, including the admitting-privileges requirement.[24]

16. S*ee generally* Rebouché, *supra* note 7 (detailing the history and evolution of judicial bypass laws).

17. *See* NAT'L ABORTION FED'N, TEENAGE WOMEN, ABORTION, AND THE LAW (2003), https://5aa1b2xfmfh2e2mk03kk8rsx-wpengine.netdna-ssl.com/wp-content/uploads/teenage_women.pdf (noting that judicial bypass procedures curtail abortion access by limiting communication within families and forcing minors to navigate the legal system in an emotionally charged environment).

18. *See Carhart*, 550 U.S. at 163.

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

20. *See* TEX. HEALTH & SAFETY CODE ANN. § 171.0031(a)(1)(A) (West 2017); 25 TEX. ADMIN. CODE §§ 139.53(c)(1), 139.56(a)(1) (2017).

21. *See* HEALTH & SAFETY § 245.010(a); 25 TEX. ADMIN. CODE § 139.40.

22. *See* 25 TEX. ADMIN. CODE §§ 135.4, 135.6, 139.40.

23. *See* Brief for Petitioners at 7–8, *Whole Woman's Health*, 136 S. Ct. 2292 (No. 15-247).

24. *See* Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 951 F. Supp. 2d 891, 895–96 (W.D. Tex. 2013).

Following a trial on the merits, the district court issued an order and judgment holding the requirement unconstitutional.[25] In May 2014, the Fifth Circuit reversed, finding insufficient evidence that the admitting privileges law would create an undue burden under *Casey*.[26] After the adoption of the December 2013 regulations and the impact of the admitting privileges requirement on existing clinics, the *Whole Woman's Health* petitioners filed suit, challenging both the admitting-privileges and ambulatory-surgical-center measures.[27] At the conclusion of an extensive trial on the merits, the district court concluded that both provisions created an undue burden[28] and the Fifth Circuit again reversed.[29]

The Supreme Court's decision in *Whole Woman's Health* took many by surprise. A five-to-three majority struck down both parts of HB2 and suggested that the undue burden test would provide more meaningful protection than many had previously believed.[30] After concluding that the petitioners' claim was not barred by res judicata, Justice Breyer's majority took up the proper application of the undue burden test:

> The first part of the Court of Appeals' test may be read to imply that a district court should not consider the existence or nonexistence of medical benefits when determining whether a regulation of abortion constitutes an undue burden. The rule announced in *Casey*, however, requires that courts consider the burdens a law imposes together with the benefits those laws confer.[31]

The Court insisted that this kind of balancing was a common feature of abortion jurisprudence after *Casey,* discussing the analysis of a spousal-notification and parental-involvement provision in *Casey* and the evaluation of a ban on dilation-and-extraction ("D&E") abortion in *Carhart.*[32] The Court not only considered the impact of a law on abortion access but also the value, if any, that the law achieved.[33] *Whole Woman's Health* held that a similar balancing must be employed for any regulation of abortion.[34]

25. *See id.* at 896–97.

26. *See* Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 748 F.3d 583, 587–88 (5th Cir. 2014).

27. *See* Brief for Petitioners, *supra* note 23 at 2–3.

28. *See* Whole Woman's Health v. Lakey, 46 F. Supp. 3d 673, 678 (W.D. Tex. 2014).

29. *See* Whole Woman's Health v. Hellerstedt, 790 F.3d 563, 567 (5th Cir. 2015), *cert. granted*, 136 S. Ct. 499 (2015).

30. *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2299, 2311, 2315 (2016).

31. *Id.* at 2309.

32. *See id.*

33. *See id.*

34. *See id.*

The decision also reconfirmed that the courts, rather than legislatures, will be the ones deciding whether a burden is undue.[35] As the Court made clear, trial judges should weigh evidence on the subject independently rather than accepting legislative judgments at face value.[36] *Whole Woman's Health* further suggested that *Carhart* in no way contradicted this ruling.[37] Recognizing the weight *Carhart* gave to Congress's findings, the Court emphasized that the Texas legislature that passed HB2 had made no findings at all.[38] Moreover, as *Whole Woman's Health* framed it, *Carhart* took legislative findings into account but did not blindly rely on them.[39] Indeed, the Court reasoned that the ultimate conclusion as to whether a law created an undue burden had always remained with a court considering "the evidence in the record."[40]

To be sure, *Whole Woman's Health* leaves some questions open. The Court showed considerable deference to the trial court's evaluation of the record, asking whether there was "adequate legal and factual support for the District Court's conclusion[s]."[41] It is not obvious how the Court would respond to a lower court that had deferred to state legislators or looked less closely at the record.

Nevertheless, *Whole Woman's Health* sheds some light on what defines an undue burden. First, the Court emphasized that there must be some meaningful evidence that a law actually serves its stated purpose.[42] The majority opinion combed through the record evidence considered by the trial court.[43] Highlighting peer-reviewed studies, amicus briefs from medical organizations, and expert testimony at trial, the Court found ample support for the trial court's conclusion that HB2 had no real health benefits.[44] The Court also looked to amicus curiae briefs in determining that HB2 had an impermissible effect.[45]

The contrast between the majority opinion and Justice Alito's dissent also tells us something about what those challenging a law will not likely have to prove. Alito did not believe that the petitioners had convincingly shown that clinics closed because of HB2.[46] Whereas Alito would have required those challenging a law to rule out other explanations, like a decline in demand for abortion services or the aging of the existing provider population, the

35. *See id.* at 2309–10.
36. *See id.* at 2310.
37. *See id.*
38. *See id.*
39. *See id.*
40. *Id.*
41. *Id.* at 2311.
42. *See id.* at 2309–16.
43. *See id.* at 2310–17.
44. *See id.* at 2311–16.
45. *See id.* at 2312–13.
46. *See id.* at 2343–46 (Alito, J., dissenting).

majority did not make such proof essential to an undue burden analysis.[47] Alito also demanded concrete proof that existing facilities could not have adapted to meet the demand created by HB2, a requirement not laid out in the majority opinion.[48] In contrast to Alito's approach, the majority emphasized the importance of record evidence, the decision of the trial court, and the relevance of amicus briefs and common sense.[49]

The Court's decision will make litigation about the undue burden test a war over the facts.[50] Justice Thomas took issue with the idea that the standard required either a consideration of the benefits achieved by a law or any heightened scrutiny whatsoever, but no one joined him.[51] The other Justices fought primarily over what it would take to prove an undue burden, particularly when it came to abortion access.[52] In the lead-up to *Whole Woman's Health*, pro-choice groups carefully compiled factual records as part of challenges to abortion statutes.[53] Now, antiabortion groups defending statutes in court will have to take the same kind of care in justifying it constitutionally.

Most commentators saw the Court's new focus on the facts as an unmitigated success for supporters of abortion rights.[54] After all, the justices refused to gut the undue burden test, rejected the idea of automatic deference to legislators, and required proof that an abortion law that claimed to protect women's health actually did so.[55]

47. *See id.*

48. *See id.* at 2343, 2346–49.

49. *See id.* at 2310–17 (majority opinion).

50. *See, e.g.*, David Gans, *Symposium: No More Rubber-Stamping State Regulation of Abortion*, SCOTUSBLOG (June 27, 2016, 5:15 PM), http://www.scotusblog.com/2016/06/symposium-no-more-rubber-stamping-state-regulation-of-abortion/; Mary Ziegler, *The Supreme Court's Texas Abortion Ruling Reignites a Battle Over Facts*, WASH. POST (June 28, 2016), https://www.washingtonpost.com/posteverything/wp/2016/06/28/the-supreme-courts-texas-abortion-ruling-reignites-a-battle-over-facts/.

51. *See Whole Woman's Health*, 136 S. Ct. at 2321–30 (Thomas, J., dissenting).

52. *See id.* at 2309–16.

53. On the research supporting the attack on HB2, see, for example, Mary Tuma, *An Undue Burden: Supremes Vindicate Pro-Choice Texans*, AUSTIN CHRON. (July 1, 2016), https://www.austinchronicle.com/news/2016-07-01/an-undue-burden-supremes-vindicate-pro-choice-texans/; Paul J. Weber, *Research Findings a Factor in Texas Abortion Ruling*, AMARILLO GLOBE-NEWS (July 21, 2016, 1:11 AM), http://amarillo.com/news/local-news/2016-06-29/research-findings-factor-texas-abortion-ruling.

54. *See, e.g.*, Denniston, *supra* note 2; Jessica Pieklo, *Symposium: Abortion Rights Come Out of the Shadow*, SCOTUSBLOG (June 27, 2016, 9:00 PM), http://www.scotusblog.com/2016/06/symposium-abortion-rights-come-out-of-the-shadow/.

55. *See Whole Woman's Health*, 136 S. Ct. at 2309–16.

Nevertheless, the course of abortion law after *Whole Woman's Health* seems hard to predict. In the decades after *Casey*, the Supreme Court has handed down a grand total of two abortion decisions.[56] Throughout this time, the meaning of the undue burden test has remained up in the air. It is far too early to tell how the new reading set out in *Whole Woman's Health* will play out in practice.

To understand what is coming next, this Article turns to the history of the idea of an undue burden test in the abortion context. Similar constitutional rules apply across doctrinal boundaries. With respect to abortion, however, the undue burden test caught scholarly attention primarily after the Court's formal decision in *Casey*.

Nevertheless, the idea had a long and tangled history that began well before *Casey*—one that sheds light on the course of abortion doctrine after *Whole Woman's Health*. Part II tells the story of the first major antiabortion push for an undue burden test in the Supreme Court. Abortion opponents hoped that by focusing on questions of fact, the movement could find an opening with a Court that seemed otherwise committed to abortion rights. Part II then uses this history to explore one of the potential traps facing supporters of abortion rights after *Whole Woman's Health*. Factual or scientific claims that failed to convince experts or courts continued to have a political punch. Recognizing a lack of clear support for their factual arguments, abortion opponents instead insisted that there was too much uncertainty surrounding the impact of abortion on women for lawmakers to sit idly by.[57] This scientific-uncertainty argument eventually caught on with courts and lawmakers.[58]

II. WOMAN-PROTECTIVE ARGUMENTS AND THE INVENTION OF THE UNDUE BURDEN TEST

When abortion opponents first turned to the undue burden test, their strategy quickly became entangled with claims involving the harm abortion did to women.[59] Activists, like researcher Vincent Rue, had been pressing similar claims for some time, but, starting in the 1980s, the undue burden idea became an important new vehicle

56. *See generally* Gonzales v. Carhart, 550 U.S. 124 (2007); Stenberg v. Carhart, 530 U.S. 914 (2000).

57. *See* AMS. UNITED FOR LIFE, WOMEN'S HEALTH DEFENSE ACT: MODEL LEGISLATION AND POLICY GUIDE FOR THE 2016 LEGISLATIVE YEAR 1–2 (2015).

58. *See* Greasley, *supra* note 10, at 331–33; *Fourteenth Amendment—Due Process Clause—Undue Burden*—Whole Woman's Health v. Hellerstedt, 130 HARV. L. REV. 397, 405–06 (2016).

59. *See* Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Argument*, 57 DUKE L.J. 1641, 1668–76 (2008) (detailing the history of the woman-protective antiabortion argument).

for them.[60] Recognizing that the Court had used undue burden rhetoric in decisions *upholding* abortion restrictions, activists saw the potential for lowering the scrutiny given abortion regulations.[61] These activists argued that abortion regulations could not be unconstitutional if they benefitted women.[62] Given the risks abortion supposedly created for women, those in favor of life argued that informed-consent laws should pass muster because of the advantage these statutes provided for women.[63]

The battle over informed-consent laws quickly evolved into a fight over the facts about abortion and women. In the litigation of *City of Akron v. Akron Center for Reproductive Health, Inc.* (*Akron I*),[64] groups on both sides offered evidence about how abortion affected women.[65] But even after the Supreme Court decisively rejected informed-consent laws and the factual arguments supporting them,[66] pro-life groups continued to push them politically.[67] The idea of a post-abortion syndrome attracted so much momentum that Surgeon General C. Edward Koop undertook an official study of post-abortion syndrome.[68] After Koop, a longstanding member of the antiabortion movement, also found that there was not enough evidence to support the existence of post-abortion trauma,[69] related arguments lived on. Movement members transformed a lack of factual support for their claims into scientific uncertainty.[70] Scientific uncertainty, in turn, became a justification for action on the part of lawmakers and deference on the part of the courts.[71]

The story of the relationship between the undue burden test and woman-protective claims showcases some of the problems that might arise again after *Whole Woman's Health*. In spite of a lack of factual support and the skepticism of the Supreme Court, abortion opponents made progress by repackaging a lack of evidence as a

60. *See id.* at 1657–58; *see also* Mary Ziegler, *Liberty and the Politics of Balance: The Undue Burden Test After* Casey/Hellerstedt, 52 HARV. C.R.-C.L. L. REV. 421, 439–41 (2017).

61. *See* Ziegler, *supra* note 60, at 437–43.

62. *See id.* at 442.

63. *See id.* at 443–44.

64. (*Akron I*), 462 U.S. 416 (1983).

65. *See* Ziegler, *supra* note 60, at 443–44.

66. *Akron I*, 462 U.S. at 449. *But see* Greasley, *supra* note 10, at 337.

67. *See, e.g.*, Michael J. New, *Analyzing the Effect of Anti-Abortion U.S. State Legislation in the Post*-Casey *Era*, 11 ST. POL. & POL'Y Q. 28, 29, 31, 35 (2011) (discussing the increasing number of states that have enacted informed-consent laws since the ruling in *Casey*).

68. *See* Siegel, *supra* note 59, at 1662–63 n.76.

69. *See* Koop, *supra* note 9, at 172–74.

70. *See* Victor Rosenblum & Thomas J. Marzen, *Strategies for Reversing* Roe v. Wade *Through the Courts*, *in* ABORTION AND THE CONSTITUTION: REVERSING *ROE V. WADE* THROUGH THE COURTS 197 (Dennis Horan et al. eds., 1987).

71. *See* Greasley, *supra* note 10, at 331–33.

justification for preemptive legislative action and further research.[72] This idea of uncertainty had surprising staying power, and its ascendancy offers a cautionary tale for activists navigating the aftermath of *Whole Woman's Health*.

A. Akron I *and the Antiabortion Undue Burden Test*

Abortion opponents first turned to a version of the undue burden test as the result of frustration with existing strategies.[73] As early as the 1960s, activists in organizations like the National Right to Life Committee ("NRLC") and Americans United for Life ("AUL") prioritized a right to life and equal treatment for fetal life that advocates identified with the Declaration of Independence and the Fourteenth Amendment.[74] AUL's Declaration of Purpose repeated the movement's claims about equal treatment, committing "to impress upon all the dignity and worth of each individual life, whatever the state or circumstance, especially the innocent, the incompetent, the impaired, the impoverished, the aged, and all others who are weak and disadvantaged."[75]

After the *Roe v. Wade*[76] decision, activists remained dedicated to this idea of the Constitution. In February 1973, for example, NRLC hosted a strategy meeting to craft a response to *Roe*.[77] By the time of the gathering, most state pro-life affiliates had held local meetings about how to draft an ideal constitutional amendment.[78] A clear majority favored a proposal centered on the right to life.[79] As one member put it, amendments that would simply overrule *Roe* and let the states regulate abortion were at best "a back pocket option."[80]

Hopes initially ran high for a constitutional amendment, but, in spite of considering several alternative constitutional proposals, Congress failed to act on any of them.[81] By 1977, many activists'

72. DAVID REARDON, ABORTED WOMEN: SILENT NO MORE 103 (1987).

73. *See, e.g.*, PHILLIP JENKINS, DECADE OF NIGHTMARES: THE END OF THE SIXTIES AND THE MAKING OF EIGHTIES AMERICA 187 (2006) (discussing pro-life activists frustration with lack of success); H.L. POHLMAN, CONSTITUTIONAL DEBATE IN ACTION: CIVIL RIGHTS & LIBERTIES 113 (2d ed. 2005) (discussing the level of burden needed to create a compelling state interest).

74. *See, e.g.*, MARY ZIEGLER, AFTER *ROE*: THE LOST HISTORY OF THE ABORTION DEBATE 15, 28, 37–45 (2015).

75. Declaration of Purpose from Americans United for Life (1971) (Americans United for Life Collection, Executive File, Concordia Seminary, Lutheran Church-Missouri Synod, St. Louis, Mo.).

76. 410 U.S. 113 (1973).

77. *See* NLRC Strategy Meeting, Minutes Folder (Feb. 4, 1973), *in* THE NRLC PAPERS (Box 4, Gerald Ford Mem'l Library, Univ. of Mich.).

78. *See id.*

79. *See id.*

80. NAT'L COMM. FOR A HUMAN LIFE AMENDMENT, HUMAN LIFE AMENDMENT: MAJOR TEXTS 1, https://www.humanlifeactioncenter.org/sites/default/files/HLAmajortexts.pdf (last visited Nov. 27, 2017).

81. *See id.* at 1–3.

frustration with the pace of change was impossible to miss.[82] In 1975 and 1976, two congressional subcommittees held hearings on antiabortion amendments.[83] The first time, the amendments failed when a majority of committee members opposed any of the proposals put before Congress.[84] In 1976, Senator Jesse Helms, a North Carolina Republican, moved for the full Senate to consider a personhood amendment, and, by a narrow vote, the Senate tabled his motion.[85] In 1977, after a full week of hearings, no serious step was taken to bring any amendment up for a vote.[86]

Convinced that it would be impossible to amend the Constitution, abortion opponents became desperate for an alternative. First, many considered the idea of a constitutional convention, popularly referred to in movement circles as a "con-con."[87] By 1977, nine states had passed legislation calling for a convention, but for many the hope that the movement would seriously pursue it was already dead.[88] That January, following the movement's annual March for Life, NRLC, the nation's preeminent pro-life group, held a meeting to hear the best arguments for and against con-con.[89] New Jersey attorney Robert Mauro and Fran Watson—the woman who had led single-issue, pro-life candidate Ellen McCormack's presidential campaign—argued that a constitutional convention would "pressure Congress into enacting a Human Life Amendment proposal."[90] Those opposed to the strategy responded that "the attempted pursuit of [con-con] provides Congress with an excellent opportunity to 'duck the issue' entirely, until the holding and convening of a convention, which could take ten to twenty years."[91] After the debate, the NRLC Board of Directors unanimously passed a resolution rejecting the call for a constitutional convention.[92] Those frustrated with Congress's inaction would have to look somewhere else.

82. JUDITH A. BAER, HISTORICAL AND MULTICULTURAL ENCYCLOPEDIA OF WOMEN'S RIGHTS IN THE UNITED STATES 18 (2002).

83. *See id.*

84. *See id.*

85. *See id.*

86. *See id.*

87. *See, e.g.*, ZIEGLER, *supra* note 74, at 78.

88. *See* William Robbins, *Abortion Foes Look* to *Ultimate Victory*, N.Y. TIMES, June 19, 1977, at 24; *see, e.g.*, *Massachusetts Is the Ninth State to Seek a Convention on the Issue of Abortion*, N.Y. TIMES, June 9, 1977, at 88; *Pro-Abortion Groups Rallying*, N.Y. TIMES, June 8, 1975, at 83 (elaborating on the arguments made in favor of or against a constitutional convention).

89. *See, e.g.*, National Right to Life Committee Rejects Constitutional Convention Call (Jan. 31, 1977), *in* EDWARD GOLDEN PAPERS 2–3 (Box 3, Folder 1, Coll. of the Holy Cross Archives & Inventory Collection).

90. *Id.* at 1–3.

91. *Id.*

92. *See id.*

In Akron, Robert Destro, Alan Segedy, and a group of other prolifers hoped that a more ambitious incremental statute would do the trick.[93] In some ways, the Akron ordinance was nothing new. Working in the courts, AUL and NRLC had worked to chip away at *Roe v. Wade* since the mid-1970s.[94] In *Maher v. Roe*,[95] *Poelker v. Doe*,[96] and *Beal v. Doe*,[97] the Court had upheld a variety of local laws banning the use of public facilities and funding for abortion.[98]

Significantly, the *Maher* court used undue burden language that abortion opponents would later try to make into a doctrinal alternative to strict scrutiny.[99] The *Maher* court distinguished the Texas abortion ban struck down in *Roe v. Wade*, explaining that there was no absolute constitutional bar to abortion regulations.[100] "[T]he right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy," the *Maher* court explained.[101] "It implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds."[102] In the context of abortions for poor women, the Court held that poverty stemmed not from anything that the government had done but from broader political, economic, and legal forces, and women had no constitutional right to expect financial support from the government.[103]

For abortion opponents, *Maher* raised intriguing new constitutional possibilities. The Court suggested that some abortion restrictions could withstand a constitutional challenge.[104] The trick for abortion opponents was to figure out just how much latitude they had.

Planned Parenthood of Central Missouri v. Danforth[105] offered clues about what abortion opponents could try first. That case involved a multirestriction Missouri statute requiring everything from informed consent to parental involvement.[106] When *Danforth*

93. On Segedy and Destro's involvement, see, for example, LEE EPSTEIN & JOSEPH F. KOBYLKA, THE SUPREME COURT AND LEGAL CHANGE: ABORTION AND THE DEATH PENALTY 367 (2000); Tracie A. Thomas, *Back to the Future: Regulation in the First Term*, 29 WIS. J.L. GENDER & SOC'Y 47, 47–53 (2014).

94. *See* ZIEGLER, *supra* note 74, at 59–70.

95. 432 U.S. 519 (1977).

96. 432 U.S. 464 (1977).

97. 432 U.S. 438 (1977)

98. *See Poelker*, 432 U.S. at 521–22; *Maher*, 432 U.S. at 473–74; *Beal*, 432 U.S. at 447.

99. *See Maher*, 432 U.S. at 472–73.

100. *See id.*

101. *Id.* at 473–74.

102. *Id.* at 474.

103. *See id.*

104. *See id.*

105. 428 U.S. 52 (1976).

106. *See id.* at 56.

came down in 1976, the Court defied expectations by upholding part of the Missouri law.[107] The provision passed on by the Court required a woman to certify in writing that her decision to terminate a pregnancy had been informed.[108] Recognizing that Missouri did not require similar consent for any other surgical procedure, the Court nonetheless upheld the regulation.[109] "The decision to abort, indeed, is an important and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences," Justice Blackmun wrote.[110] "The woman is the one primarily concerned, and her awareness of the decision and its significance may be assured, constitutionally, by the State to the extent of requiring her prior written consent."[111]

Even before the decision of *Maher,* the leaders of a local NRLC affiliate petitioned the Akron City Council to introduce incremental restrictions similar to those upheld in *Akron I*.[112] After the city council declined, local pro-life supporters regrouped and proposed a more comprehensive ordinance, this time seeking to build on both *Danforth* and *Maher*.[113] *Danforth* suggested that the Court might favor regulations that theoretically helped women, particularly some kind of informed-consent provision.

To build momentum, Destro and Segedy authored a multi-restriction law, but local activists saw the issue of informed consent as the most promising.[114] Local organizers created an independent group, Citizens for Informed Consent, to promote a new strategy that would take advantage of the opening created by *Danforth* and *Maher*.[115] The ordinance would provide information geared toward discouraging women from having abortions.[116] Better yet, the law would create a platform for pro-lifers to try the same arguments before the courts and the nation.[117] Jane Hubbard, the president of Akron Right to Life, insisted that the law's aim was "to ensure that a woman who decides to abort her child will have . . . scientifically and medically accurate information: that the child she aborts is alive and growing, and the procedure may cause her physical or psychological harm."[118] Martin Weinberger, the head of Citizens for

107. *See id.* at 67.
108. *See id.* at 65–66.
109. *See id.* at 65–68.
110. *Id.*
111. *Id.*
112. *See* Thomas, *supra* note 93, at 53–54.
113. *See id.*
114. *See, e.g.*, Reginald Stuart, *Akron Divided by Heated Abortion Debate*, N.Y. TIMES, Feb. 1, 1978, at A10; Nick Thimmesch, *Akron Abortion Proposal Could Fuel the National Debate*, CHI. TRIB., Jan. 25, 1978, at B2.
115. *See, e.g.*, Stuart, *supra* note 114; Thimmesch, *supra* note 114.
116. *See, e.g.*, Stuart, *supra* note 114; Thimmesch, *supra* note 114.
117. *See, e.g.*, Stuart, *supra* note 114; Thimmesch, *supra* note 114.
118. Jane Hubbard, Letter to the Editor, *Should City Monitor Abortion*?, AKRON BEACON J., Nov. 21, 1977, at A6.

Informed Consent, a group backing the law, reinforced this point.[119] "We are not trying to cause guilt feelings," he told the *New York Times*.[120] "All we're giving them are the biological facts."[121]

Abortion-rights supporters recognized that a different kind of strategy would be needed to defuse the threat posed by the ordinance. Cheryl Swain, a feminist from Akron, told the media that the ordinance rested on false information about the circumstances confronting many women.[122] Mentioning the children for whom it was hard to find an adoptive family, Swain attacked the other side for refusing "to accept certain facts."[123]

Swain had communicated with state and national abortion-rights organizations to coordinate opposition to the statute. Recognizing that pro-lifers planned to use the statute as a "national precedent," Swain told Jane Hodgson, a Minnesota obstetrician-gynecologist and leading figure in the movement, that the ordinance would "severely limit the availability of abortion as well as psychologically intimidate pregnant women."[124] Hodgson had gained national attention after performing an illegal abortion in 1970, facing criminal charges, pleading guilty, and serving a thirty-day sentence.[125]

Hodgson ultimately traveled to Akron to testify against the ordinance. In her testimony before the City Council, she focused on the inaccuracy of the information women were required to hear, labeling the proposed law "medically unnecessary."[126] Item by item, she tried to refute the factual arguments supporting the ordinance.[127] "Psychological studies have failed to show any more effects from abortion such as depression and suicide than would occur from compulsory child bearing," she asserted.[128] Hodgson also offered advice to lawmakers on how to separate real from inaccurate evidence.[129] She advised Council Members to rely on organizations

119. *See, e.g.*, Stuart, *supra* note 114.
120. *Id.*
121. *Id.*
122. *See id.*
123. *Id.*
124. Letter from Cheryl Swain to Jane Hodgson (Nov. 23, 1977), *in* THE JANE HODGSON PAPERS (Box 15, Akron Folder, Minn. Historical Soc'y).
125. On Hodgson's role in the movement, see, for example, CAROLE JOFFE, DOCTORS OF CONSCIENCE: THE STRUGGLE TO PROVIDE ABORTION BEFORE AND AFTER *ROE V. WADE* 8–26 (1995); LESLIE J. REAGAN, DANGEROUS PREGNANCIES: MOTHERS, DISABILITIES, AND ABORTION IN MODERN AMERICA 170–79 (2010).
126. Jane Hodgson, Testimony Presented to the Akron City Council Re: Proposed Regulations Governing Abortion Clinics 2 (Feb. 4, 1978) *in* THE JANE HODGSON PAPERS, *supra* note 124.
127. *See id.* at 3–6.
128. *Id.* at 6.
129. *See id.* at 3.

of experts, like the American Public Health Association, in discovering where the truth lie.[130]

Hodgson testified before the hundreds who crowded hearings on the ordinance, many of whom had traveled from out of state.[131] While two of the hearings focused on constitutional issues, two others addressed the psychological aftermath of abortion and the scientific accuracy of the laws.[132] When Dr. John Willke, an Ohio native and leading figure in NRLC, showed slides of an actual abortion, obstetricians attending the hearing walked out in protest.[133] Weinberger appeared on a national NBC program debating Linda Parenti, an Akron obstetrician.[134] The message sent by these performances was clear: pro-life activists, and not exclusively physicians, claimed the status of experts and equals.

The Akron debate gave rise to a new approach to pro-life incrementalism. For several years, attorneys working with AUL and NRLC had envisioned a sneak attack on *Roe v. Wade*.[135] Arguing that more and more restrictions did not clash with the abortion right recognized in 1973, pro-lifers could whittle away constitutional protections until nothing was left.[136] But how could the movement convince politicians, activists, and judges that *Roe* would allow any regulation? In Akron, pro-lifers identified one possible answer. Instead of talking about the meaning of the Constitution, the movement could create uncertainty about the facts surrounding abortion. In particular, abortion opponents could leverage the idea of informed consent to assert that abortion hurt women.

At the end of February, when the City Council passed the ordinance by a seven-to-six vote, other states and cities rushed to pass similar ordinances.[137] In the same period, the American Civil Liberties Union ("ACLU") tried to translate Hodgson and Swain's factual arguments into claims about the Constitution.[138] In 1974, the organization had launched the Reproductive Freedom Project ("RFP"), and by the late 1970s, the RFP had distinguished itself as the preeminent litigator of abortion cases.[139]

130. *See id.*

131. *See* Thomas, *supra* note 93, at 56–57.

132. *See id.*

133. *See, e.g.*, *id.* at 57 (citing Jean Peters, *Policing of Abortion Clinics Debated*, AKRON BEACON J., Feb. 5, 1978, at A1).

134. *See, e.g.*, Thomas, *supra* note 93, at 58.

135. On pro-life incrementalism, see, for example, ZIEGLER, *supra* note 74, at 49–78.

136. *See id.*

137. On the passage of the Akron ordinance, see, for example, *Around the Nation: Abortion Control Law Is Postponed in Akron*, N.Y. TIMES, Apr. 28, 1978, at A16.

138. *See id.*

139. *See, e.g.*, EPSTEIN & KOBYLKA, *supra* note 93, at 206–07; ZIEGLER, *supra* note 74, at 208.

As ACLU attorneys recognized, the constitutionality of the Akron ordinance and others like it had become tied up with factual questions about what abortion meant for women. During trials in Akron and Louisiana, ACLU attorneys put on expert testimony about the justification for and effect of such laws.[140] In Louisiana, ACLU attorney Judy Levin asked physicians to weigh in on how the state's law would affect abortion access, particularly for young, poor women.[141] During the Akron hearings, ACLU attorneys shone a light on the credentials of their expert witnesses, including one who had won a Nobel Prize in the physiology of medicine.[142]

Following the trial, Judge Leroy Contie struck down parts of the Akron ordinance and upheld several others, including a requirement that abortions after the first trimester be performed in a hospital.[143] In 1981, the Sixth Circuit reversed this decision in part, concluding that the certain sections of the ordinance were unconstitutional.[144] Lawyers for the city initially seemed inclined to give up but, to the surprise of many, asked the Supreme Court to hear the case in the fall of 1981.[145]

B. Pro-Lifers Adopt an Undue Burden Test

The threat to abortion access posed by the Akron ordinance was clear. The hospital restriction worried activists who recognized that abortion practice had moved out of hospitals and into freestanding clinics.[146] In 1973, more than half of all abortions took place in hospitals.[147] By 1980, only twenty-two percent were performed in hospitals, and the number continued to decline.[148] In the same period, improvements in care allowed clinics to provide safe abortions at a lower cost.[149] Roy Lucas, one of the attorneys to litigate *Roe*, wrote his colleagues that "[t]he worst outcome in 1983 could be a decision allowing extensive overregulation of abortion clinics and banning second trimester abortions except in a few

140. On the Louisiana law, see *Judge to Determine Fate of Louisiana Abortion Law Soon*, N.Y. TIMES, Dec. 26, 1978, at B15. On the Akron strategy, see Thomas, *supra* note 93, at 66–67 n.163.

141. *See Judge to Determine Fate of Louisiana Abortion Law Soon*, *supra* note 140.

142. *See* Thomas, *supra* note 93, at 66–67 n.163.

143. *See* Akron Ctr. for Reprod. Health v. City of Akron, 479 F. Supp. 1172, 1201–08 (N.D. Ohio 1979), *aff'd in part, rev'd in part*, 651 F.2d 1198 (6th Cir. 1981), *aff'd in part, rev'd in part*, 462 U.S. 416 (1983).

144. *See* Akron Ctr. for Reprod. Health v. City of Akron, 651 F.2d 1198, 1205–11 (6th Cir. 1981).

145. *See* Thomas, *supra* note 93, at 68–69.

146. *See* Stanley K. Henshaw et al., *Abortion Services in the United States, 1981 and 1982*, 16 FAM. PLAN. PERSP. 119, 119–27 (1984).

147. *See id.* at 123.

148. *See id.*

149. *See id.* at 124.

hospitals."[150] Requiring abortions to be performed in hospitals after the first trimester might effectively eliminate access.

Abortion-rights amici joined the ACLU in highlighting the undue burden the ordinance placed on physicians.[151] For example, an amicus curiae brief submitted by the National Abortion Rights Action League ("NARAL") and the American Public Health Association pointed to statistics by the Center for Disease Control, physician testimony, and peer-reviewed scholarship to undermine the factual assertions outlined in the informed-consent provision, a measure that the brief described as "especially burdensome."[152]

For abortion opponents, the fortunes of the pro-life movement's constitutional proposals in Congress made the need for a savvy litigation strategy more apparent. Working with Rex Lee from the Reagan Administration and AUL attorneys, Destro and Segedy offered the Court a different way of thinking about abortion doctrine.[153] "The initial question posed on review before this Court," they wrote, "is whether the state's interest in maternal health and wellbeing is such that it may regulate abortion in a reasonable manner which is not unduly burdensome, even during the first trimester of pregnancy."[154]

The City of Akron argued that *Maher* had already established the undue burden test as controlling.[155] In *Akron I,* however, abortion opponents hoped to do much more with the test. First, lawyers argued that it applied to any abortion restriction, not just those involving minors or funding.[156] As importantly, pro-lifers hoped that the undue burden test would be a vehicle for claims about the facts, particularly those concerning women and abortion. "In *Roe v. Wade* and *Doe v. Bolton*, the Court prohibited the state from regulating doctors only in ways which burden the woman's fundamental right to decide," explained AUL attorney Dolores Horan in a brief for Feminists for Life.[157] "It is impossible for the state to burden the woman's right to decide by requiring that she be

150. Letter from Roy Lucas to Robert McCoy (June 30, 1982), *in* THE JANE HODGSON PAPERS, *supra* note 124.

151. *See* Summary of Akron Amicus Curiae Brief 4–5 (1983), *in* THE JANE HODGSON PAPERS, *supra* note 124.

152. *Id.*

153. *See* Brief for the United States as Amicus Curiae Supporting Petitioners at 1–6, *Akron I*, 462 U.S. 416 (1983) (Nos. 81-746, 81-1172); *see also* Meaghan Winter, Roe v. Wade *Was Lost in 1992*, SLATE (Mar. 27, 2016, 8:02 PM), http://www.slate.com/articles/double_x/cover_story/2016/03/how_the_undue_burden_concept_eroded_roe_v_wade.html. For Destro and Segedy's argument, see *infra* note 154 and accompanying text.

154. Brief for Petitioner City of Akron at 19, *Akron I*, 462 U.S. 416 (Nos. 81-746, 81-1172).

155. *See id.* at 27.

156. *See id.* at 25–27, 41–43.

157. *See* Brief of Feminists for Life as Amicus Curiae Supporting Petitioner at 8, *Akron I*, 462 U.S. 416 (Nos. 81-746, 81-1172).

given factual information which, in fact, enhances her ability to decide."[158]

As Horan's argument suggested, AUL and other pro-life groups insisted that the Court could identify an undue burden only if an abortion restriction harmed women.[159] And whether a law hurt women depended on the answer to factual questions. Did abortion hurt or help women? When and how, if at all, could it be dangerous? Was the information outlined in the Akron ordinance accurate or inaccurate? Pro-life attorneys urged the Court to look far beyond a right to choose abortion.[160] If the undue burden test applied, the question became whether given the best information available, women should make that choice at all.[161]

The Supreme Court decided *Akron I* in the summer of 1983, striking down the entire ordinance by a vote of six to three.[162] However, the decision also exposed a fault line running through the Court about the meaning of an undue burden.[163] The majority seemed to treat an undue burden as compatible with some form of heightened constitutional scrutiny.[164] In analyzing the informed-consent provision, for example, the majority stressed that "[t]he validity of an informed consent requirement . . . rests on the State's interest in protecting the health of the pregnant woman."[165] After expressing concern about the "straitjacket" the law forced on physicians, the Court concluded that the factual premises of the law were too flawed for women to derive any benefit from it.[166] Parts of the law, like a measure stating that human life began at conception, struck the Court as a way of deterring women from terminating their pregnancies.[167] Mostly, however, the law troubled the Court because it was "speculative" and factually "dubious."[168] The Court particularly took issue with the description of abortion's impact on women.[169] The law's list of the "numerous possible physical and psychological complications of abortion" was nothing more than a

158. *Id.*

159. *See id.*; *see also* Brief of Americans United for Life as Amicus Curiae Supporting Petitioner at 16–18, *Akron I*, 462 U.S. 416 (Nos. 81-746, 81-1172); Brief for Petitioner City of Akron, *supra* note 154, at 54–56.

160. *See* Brief of Americans United for Life as Amicus Curiae Supporting Petitioner, *supra* note 159

161. *See* Brief of Feminists for Life as Amicus Curiae Supporting Petitioner, *supra* note 157.

162. *See Akron I*, 462 U.S. at 432–52.

163. *See id.* at 432–75.

164. *Id.* at 462–63.

165. *Id.* at 443.

166. *Id.* at 443–44.

167. *See id.*

168. *Id.*

169. *See id.* at 443–45.

"'parade of horribles' intended to suggest that abortion is a particularly dangerous procedure."[170]

The majority also transformed the idea of an undue burden that pro-lifers had articulated. In discussing the requirement that all second-trimester abortions take place in hospitals, the Court held that Akron had "imposed a heavy, and unnecessary, burden on women's access to a relatively inexpensive, otherwise accessible, and safe abortion procedure."[171] From that standpoint, undue burden analysis required careful consideration of the benefits and burdens of a law.

Justice Sandra Day O'Connor, Reagan's first nominee to the Court, framed the undue burden test—and the potential risk of abortion for women—in a very different light. Writing for three other justices, O'Connor rejected *Roe's* trimester framework as factually flawed, based on changing medical technology and best practices.[172] As an alternative, O'Connor concluded that all regulations be subject to a less protective undue burden test.[173] The dissent suggested that courts would find an undue burden "for the most part in situations involving absolute obstacles or severe limitations on the abortion decision."[174] O'Connor also seemed open to arguments involving women's health. "[J]ust because the State has a compelling interest in ensuring maternal safety [later in pregnancy]," O'Connor wrote, "it simply does not follow that the State has no interest before that point that justifies state regulation to ensure that first-trimester abortions are performed as safely as possible."[175]

C. Activists Try to Pin Down the Meaning of the Undue Burden Test

Akron I put the undue burden test at the heart of conflict about abortion. At first, lawyers on opposing sides of the abortion question debated what the use of undue burden language by the majority and the dissent would mean for the future of abortion doctrine.[176] Pro-lifers took O'Connor's dissent as inspiration for a new strategy.[177] The problem, as these activists saw it, was that abortion opponents did not yet have enough evidence to generate uncertainty about the

170. *Id.*
171. *Id.* at 438.
172. *See id.* at 456 (O'Connor, J., dissenting).
173. *See id.* at 462–64.
174. *Id.* at 464.
175. *Id.* at 460.
176. *See* ZIEGLER, *supra* note 74, at 340–41.
177. *See* Marcia Chambers, *Advocates for the Right to Life*, N.Y. TIMES (Dec. 16, 1984), http://www.nytimes.com/1984/12/16/magazine/advocates-for-the-right-to-life.html.

safety of abortion for women.[178] Rather than discussing constitutional law in the abstract, movement members debated how to create scientific doubt in the political arena.[179] This tactic would later pay off.[180] Even as the courts remained skeptical of woman-protective arguments, they took on new importance.

By contrast, within the pro-choice movement, the Court's use of undue burden language sparked considerable confusion.[181] Some believed that the undue burden standard could be synonymous with strict—or at least heightened—scrutiny.[182] Others, particularly in NARAL, believed that any Reagan nominee would read the facts in a way that gutted abortion rights.[183] For these activists, the only solution was to ensure that no more Republican nominees joined the Court.[184]

By the late 1980s, the risks of a fact-driven debate had become plain to supporters of abortion rights.[185] Abortion opponents popularized arguments about fetal pain and post-abortion regret in spite of a lack of evidence supporting their position.[186] Although neither side focused on the undue burden test, hoping the Court would more clearly decide the fate of *Roe*, the factual arguments once surrounding the test remained a core aspect of the conflict.[187]

178. *See* Herschel W. Lawson et al., *Abortion Surveillance, United States, 1984–1985*, CTRS. FOR DISEASE CONTROL & PREVENTION (Sept. 9, 1989), https://www.cdc.gov/Mmwr/preview/mmwrhtml/00001467.htm (reporting "0.8 deaths per 100,000 legally induced abortions" in 1984).

179. *See* Rosenblum & Marzen, *supra* note 70.

180. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 872 (1992) ("Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage [a woman] to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy . . . .").

181. *Compare* Memorandum from Janet Benshoof, ACLU Reprod. Freedom Project, The New Supreme Court Abortion Decision: A Legal Analysis with Questions & Answers 5 (July 18, 1983), *in* THE PAULI MURRAY PAPERS (Box 114, Folder 2040, Schlesinger Library, Harvard Univ.) (equating "undue burden" language with heightened scrutiny), *with* News Release, NARAL, NARAL's "40 More Years?" Campaign Focuses on Supreme Court (Sept. 11, 1984), *in* THE NARAL PAPERS (Second Accession, Box 218, Folder 18, Schlesinger Library, Harvard Univ.) (observing the potential for overturning *Roe* through the next president's Court nominees).

182. *See* Memorandum from Janet Benshoof, *supra* note 181.

183. *See* News Release, *supra* note 181.

184. *See* ZIEGLER, *supra* note 74, at 344.

185. *See* Betty Cuniberti & Elizabeth Mehren, *"Silent Scream": Abortion Film Stirs Friend, Foe*, L.A. TIMES (Aug. 8, 1985), http://articles.latimes.com/print/1985-08-08/news/mn-3283_1_silent-scream.

186. *See* Warren E. Leary, *Koop Challenged on Abortion Data*, N.Y. TIMES (Jan. 15, 1989), http://www.nytimes.com/1989/01/15/us/koop-challenged-on-abortion-data.html.

187. *Compare* Steven Baer, Report of the Education Division of Americans United for Life Legal Defense Fund w (1984), *in* THE MILDRED F. JEFFERSON PAPERS (Box 13, Folder 5, Schlesinger Library, Harvard Univ.) (noting the positive impact of well-researched facts upon AUL efforts), *with* Memorandum

Factual claims that seemed to have little scientific support could have profound political or emotional resonance. Later, because of their political power, these arguments would reshape the constitutional doctrine that supporters of abortion rights had so fiercely defended.[188]

Akron I created a platform for attorneys not ready to give up on the courts. The organization held a conference "to unite the movement around the relatively uncontroversial proposition, that the Court should reverse itself," an event during which AUL laid out strategies that would guide debate in the years to come.[189] AUL organized the conference in response to "Justice O'Connor's encouraging dissent plus the fact that most of the *Roe* majority would face the question of retirement following the 1984 presidential election."[190] Those assembled saw the most immediate promise in destabilizing the idea of fetal viability.[191] O'Connor's dissent had flagged the changing age of viability as one of the weaknesses of *Roe*'s trimester framework, and those at the AUL conference hoped to capitalize on it.[192]

However, AUL attorneys also hoped to revive the woman-protective arguments that the *Akron I* majority had found unconvincing. Movement leaders argued for the creation of research organizations that could collect proof that abortion hurt women and convince key decision makers, particularly politicians, that legal abortion did more harm than good.[193] Victor Rosenblum and Thomas Marzen of AUL laid out an alternative strategy closely linked to the undue burden test that O'Connor had articulated.[194] The movement might have more success promoting laws that supposedly benefitted women if pro-lifers could gather and popularize enough "favorable statistical data."[195] As the two explained:

> "Accepted medical practices" must change before barriers to reversal can be broken down; whether or not abortion is "acceptable" is determined by the view and customary practices of the very people who perform abortions. They are unwilling to increase the state's authority to regulate abortion.

from Janet Benshoof, *supra* note 181, at 3–5 (addressing how *Akron I* affected abortion policies).

188. *See* JOHANNA SCHOEN, ABORTION AFTER *ROE* 247 (2015).
189. Baer, *supra* note 187, at 1–3.
190. *Id.* at 1.
191. *See* Rosenblum & Marzen, *supra* note 70.
192. *See id.*
193. *See id.* at 200–01.
194. *See id.*
195. *Id.* at 201.

> A possible long-term approach to meeting this dilemma is the development of new sources for abortion data.[196]

Creating new research organizations would allow abortion opponents to more confidently make claims about the facts. As importantly, even if the courts did not buy the movement's factual claims, abortion opponents could work through politics to change what powerbrokers believed "accepted medical practices" to involve.

At first, supporters of abortion rights did not understand the threat posed by the factual claims abortion opponents continued to make.[197] Indeed, some believed that the undue burden standard embraced by the *Akron I* majority had put questionable factual claims off limits.[198] Janet Benshoof of the ACLU Reproductive Freedom Project believed that the Court's idea of an undue burden required heightened scrutiny.[199] She explained that, under *Akron I,* "a state may enact some regulations 'touching' on a woman's abortion right in the first trimester so long as the regulations have 'no significant impact' . . . and so long as they are justified by important health objectives."[200] By contrast, O'Connor would find "that the state has compelling interests . . . throughout pregnancy and would require that state interference 'infringe substantially' or 'heavily burden' a woman's right before triggering strict scrutiny."[201]

Benshoof suggested that the movement could work with the majority's idea of an undue burden by bringing forward more evidence of the real-world impact of restrictions on abortion access.[202] After all, the Court had been receptive to pro-choice testimony on medical realities and access.[203] Benshoof explained, "Any first trimester regulation which can be shown to impose a burden on the exercise of the abortion right [should be] invalid."[204]

By contrast, NARAL leaders believed that if the Court focused on the facts, abortion rights would not be safe unless Republicans were no longer putting Justices on the Court.[205] *Akron I* only solidified this strategy, inspiring a campaign called "40 More Years?"[206] NARAL leaders saw O'Connor's dissent as a sign of trouble and found no comfort in the vagueness of the undue burden standard.[207] While *Roe* had required strict judicial scrutiny for

196. *Id.*
197. *See* Memorandum from Gail Harmon & William S. Jordan to Nanette Falkenberg 4 (June 1984), *in* THE NARAL PAPERS, *supra* note 181.
198. *Id.*
199. *See* Memorandum from Janet Benshoof, *supra* note 181.
200. *Id.* at 2.
201. *Id.* at 5.
202. *See id.*
203. *See id.*
204. *Id.* at 15.
205. *See infra* note 206 and accompanying text.
206. *See, e.g.*, News Release, *supra* note 181.
207. *See infra* note 208 and accompanying text.

abortion regulations, the undue burden standard would create "substantial cost, delay, and/or emotional suffering."[208] The only way for the movement to protect abortion rights was to ensure that another O'Connor never joined the Supreme Court.[209] As NARAL explained: "The next President of the United States could likely decide whether abortion will be legal or whether it will be outlawed."[210]

The events of the next several years legitimized NARAL's concerns about what could go wrong in a war about the facts. First, supporters of abortion rights wrestled with a newly popular film, *The Silent Scream*, supposedly depicting fetal suffering during an abortion.[211] Sponsored by Crusade for Life, an antiabortion group, the film narrated the suction abortion of a twelve-week-old fetus.[212] With a voiceover by former NARAL leader Bernard Nathanson, the film claimed to depict "a child's mouth open in a silent scream"—the reaction of a child imminently threatened with extinction.[213]

While *The Silent Scream* traded in familiar pro-life images and arguments, the film attracted unprecedented attention, with screenings on high school and college campuses across the nation and an endorsement from President Ronald Reagan.[214] The waves made by the film seemed puzzling to those aware that the factual premises of the film were called into question. Indeed, the American Medical Association's Council on Scientific Affairs condemned the film and a pro-life response to it as "designed to solicit emotional reactions rather than to clarify scientific issues."[215] Feminists echoed these arguments about the facts.[216] Judy Goldsmith of the National Organization for Women ("NOW") emphasized that while *The Silent Scream* suggested that an unborn child suffered pain and

208. Memorandum from Gail Harmon & William S. Jordan to Nanette Falkenberg, *supra* note 197, at 3.

209. *See id.*

210. *See* Memorandum from Emily Tynes to NARAL Affiliates 1 (Sept. 6, 1984), *in* THE NARAL PAPERS, *supra* note 181.

211. *See, e.g.*, Paul Houston, *"Silent Scream" Called "Testament for Pro-Life:" White House Showcases Abortion Film*, L.A. TIMES (Feb. 13, 1985), http://articles.latimes.com/1985-02-13/news/mn-4582_1_silent-scream.

212. *Id.*

213. Sandy Johnson, *"Graphic in the Extreme": Anti-Abortion Doctor Plans Follow-Up Film*, L.A. TIMES (Dec. 5,1985), http://articles.latimes.com/print/1985-12-05/entertainment/ca-599_1_saline-abortion; *see also* Stephen Chapman, *Abortion and "Silent Scream,"* CHI. TRIB. (Mar. 17, 1985), http://articles.chicagotribune.com/1985-03-17/news/8501150835_1_fetus-dr-bernard-nathanson-abortion.

214. *See, e.g.*, Bertrand Marotte, *Group Will Use Film in Fight over Abortion*, GLOBE & MAIL, Apr. 1, 1985, at 16.

215. *See* Elizabeth Mehren, *Medical Group Cites Flaws in "Silent Scream," Response*, L.A. TIMES (Dec. 3, 1985), http://articles.latimes.com/print/1985-12-03/news/vw-12959_1_silent-scream.

216. Houston, *supra* note 211.

fought abortion, "embryologists say that neural pathways are not developed until the 24th week."[217]

Pro-lifers responded to questions about the film's accuracy by arguing for fetal-protective policies in the face of scientific uncertainty.[218] Movement leaders cited a 1980 article in the *British Medical Journal* and a handful of other sources suggesting that the fetus might feel pain.[219] In fact, Bernard Nathanson, the narrator of *The Silent Scream,* became pro-life despite a career spent performing abortions because "the accumulating scientific evidence . . . finally won [him] over."[220] Even if the movement could not eliminate any doubt about the accuracy of the film, uncertainty militated in favor of protecting life.[221] As one op-ed put it, "We don't know exactly what the fetus feels because it can't tell us."[222] In the face of this uncertainty, Americans should connect emotionally with the fetus and give the benefit of the doubt to policies that would protect it.

The Silent Scream forced feminists to recognize that they could lose a war about the facts even if medical evidence seemed to be on their side. In a February 1985 letter to Judy Goldsmith, NARAL leader Nanette Falkenberg wondered how activists could overcome the "sense of powerlessness and frustration among our supporters and other pro-choice individuals."[223] Falkenberg recognized that *The Silent Scream* had relied on factual arguments to connect emotionally with viewers, many of whom did not seem concerned with the accuracy of the film. As Falkenberg explained, the pro-choice movement could make progress only if it "recapture[d] the emotional side of the issue."[224]

Feminists faced a similar problem when dealing with increasingly prominent arguments about post-abortion trauma. These claims had first gained attention in the early 1980s, when Vincent Rue, a psychologist and the director of the Sir Thomas More Clinics of Southern California, testified before Congress.[225] Rue

217. *Id.*

218. Chapman, *supra* note 213.

219. *See id.*

220. Elizabeth Mehren & Betty Cuniberti, *He's the Force Behind "The Silent Scream" Film: Doctor Who Performed Thousands of Abortions Narrates, Promotes Right-to-Life Sonogram Movie*, L.A. TIMES (Aug. 8, 1985), http://articles.latimes.com/print/1985-08-08/news/vw-3552_1_silent-scream.

221. Chapman, *supra* note 213.

222. *Id.*

223. Mary Ziegler, *Reproducing Rights: Reconsidering the Costs of Constitutional Discourse*, 28 YALE J.L. & FEMINISM 103, 111 (2016) (citing Letter from Nanette Falkenberg to Judy Goldsmith (Feb. 1, 1985) (on file with the Schlesinger Library, Harvard University)).

224. *Id.*

225. *See Constitutional Amendments Relating to Abortion: Hearings on S.J. Res. 18, S.J. Res. 19, and S.J. Res. 110 Before the Subcomm. on the Constitution*

believed that abortion "emasculate[d] males" and ensured that women who terminated their pregnancies would experience trauma for the rest of their lives.[226] "It is superfluous to ask whether patients experience guilt," he testified.[227] "[I]t is axiomatic that they will."[228] Over the next several years, Rue and his colleagues would tie this reasoning to the emerging concept of post-traumatic stress disorder, a recently developed concept.[229] New support groups, including Project Rachel, a Catholic organization, and Women Exploited by Abortion ("WEBA"), spread this reasoning, giving form to the experiences of women who believed their abortions to be a mistake.[230]

In the mid-1980s, psychologist David Reardon collected the stories of WEBA veterans and published *Aborted Women: Silent No More*.[231] Although his strategy received a mixed reception from mainstream antiabortion groups,[232] Reardon's plan closely resembled the one described by AUL lawyers earlier in the 1980s: movement leaders could collect enough evidence to generate scientific uncertainty.[233] Reardon made the emotional case for limiting abortion.[234] If abortion might hurt women, then why should it be so available, at least without further research? "[T]he American 'experiment' with abortion has yet to gain any comprehensive data," Reardon argued.[235] "The abortion industry has everything to gain by withholding data, and nothing to lose."[236]

As Reardon's arguments spread more widely within the antiabortion movement, his idea of generating uncertainty soon

of the S. Comm. on the Judiciary, 97th Cong. 329–39 (1981) (statement of Vincent Rue).

226. *Id.* at 330–31.

227. *Id.*

228. *Id.* at 332.

229. *See Abortion and Family Relations: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 97th Cong. 337, 357–59 (1981) (statement of Vincent Rue) (describing the alleged psychological consequences of abortion on women); *see also* Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Argument*, 57 DUKE L.J. 1641, 1652–53 (2008).

230. On the founding and early years of Project Rachel, see, for example, CYNTHIA BURACK, TOUGH LOVE: SEXUALITY, COMPASSION, AND THE CHRISTIAN RIGHT 76 (2014); ELLIE LEE, ABORTION, MOTHERHOOD, AND MENTAL HEALTH: MEDICALIZING REPRODUCTION IN THE UNITED STATES AND GREAT BRITAIN 24 (2003). On the founding and early years of WEBA, see, for example, SARA DIAMOND, SPIRITUAL WARFARE: THE POLITICS OF THE CHRISTIAN RIGHT 97 (1990); PAUL SAURETTE & KELLY GORDON, THE CHANGING VOICE OF THE ANTIABORTION MOVEMENT: THE RISE OF PRO-WOMAN RHETORIC IN CANADA AND THE UNITED STATES 113 (2016).

231. *See* DAVID REARDON, ABORTED WOMEN: SILENT NO MORE (1987).

232. *Id.*

233. *See infra* notes 239, 242 and accompanying text.

234. REARDON, *supra* note 231.

235. *Id.*

236. *Id.* at 103.

received a hearing at the highest political levels.[237] Reagan's advisors Dinesh D'Souza and Gary Bauer asked Surgeon General Koop to issue a report concluding that abortion traumatized women.[238] As early as 1987, Reardon wrote to Koop, presenting his upcoming report as an opportunity to "launch [the] nation into a new era of debate, one based not on fetus versus woman rhetoric, but rather on the facts of what abortion does to women alone."[239] Reardon also reassured Koop that the state of the evidence should be no obstacle to his plan of attack.[240] What mattered was that abortion opponents had created enough uncertainty to make a "prima facie case for restricting abortion on public health grounds."[241]

By July 1988, Reardon had heard word that Koop was worried that there was not enough proof of post-abortion trauma for any firm conclusions to be drawn.[242] In his correspondence with Koop, Reardon emphasized his agreement with the idea that "there is insufficient data to project any sort of figure as to how many women are suffering from PAS [post-abortion syndrome]."[243] However, as Reardon saw it, "The mere potential for such a problem . . . is a potent argument for expanding our efforts to understand the aftereffects of abortion."[244]

Reardon's arguments ultimately failed to convince Koop.[245] In a 1989 letter that leaked to the press, Koop told President Reagan that "the available scientific evidence about the psychological sequelae of abortion simply cannot support the pre-conceived beliefs of those who are pro-life or pro-choice."[246] By the time Koop had made his statement, both allies in the White House and members of the Court had found the evidence of post-abortion harm wanting. However, any celebration for pro-choice groups was premature. Over the next decade, as antiabortion groups found political reason to emphasize woman-protective arguments, claims about post-

237. *See, e.g.*, CHRIS MOONEY, THE REPUBLICAN WAR ON SCIENCE 46–47 (2005).

238. *See, e.g.*, *id.*; *see also* Siegel, *supra* note 59, at 1662–63.

239. Letter from David Reardon to C. Everett Koop, U.S. Surgeon Gen. (Sept. 14, 1987) (on file with author).

240. *See id.*

241. *Id.*

242. *See* Letter from David Reardon to C. Everett Koop, U.S. Surgeon Gen. (July 1, 1988) (on file with author).

243. *Id.*

244. *Id.*

245. *See, e.g.*, Siegel, *supra* note 59, at 1663–64.

246. Letter from C. Everett Koop, U.S. Surgeon Gen., to President Ronald Reagan (Jan. 9, 1989) (on file with author).

abortion trauma made progress in state legislatures, Congress, and the courts.[247]

D. Woman-Protective Arguments Make Progress

As Reva Siegel has shown, abortion opponents in the late 1980s and early 1990s faced a perfect storm: the election of Bill Clinton, a pro-choice President, the radicalization of the clinic-blockade movement, and the murder of abortion providers and clinic staff.[248] These circumstances convinced abortion opponents to change their argumentative strategy. At an AUL conference for state legislators, Laurie Ann Ramsey summarized the results of market research on the image of the antiabortion movement: "[W]e are also seen as extremist . . . violent, intolerant, and unconcerned about women, the homeless, and the poor."[249] "The [movement's] focus on the unborn child neglects . . . the mother," Mary Ellen Jensen, a public-relations specialist at AUL explained at the time.[250] "Communicating greater concern for the woman . . . must be one of the objectives."[251]

The Supreme Court's decision in *Casey* only intensified the movement's interest in woman-protective arguments.[252] Antiabortion amici emphasized the risk of post-abortion trauma in several amicus briefs.[253] The Rutherford Foundation justified Pennsylvania's spousal-notification provision as a necessary protection for women against post-abortion regret.[254] The conservative National Legal Foundation also drew on Rue's testimony at trial to claim that the Pennsylvania informed-consent law would prevent post-abortion regret.[255]

The evidentiary foundation for these arguments seemed weak. Pennsylvania had relied almost exclusively on Dr. Rue's testimony in supporting several provisions of the statute, but the trial court had not found Rue to be credible, citing his potential bias, his lack of

247. *See, e.g.*, Jennie Suk, *The Trajectory of Trauma: Bodies and Minds of Abortion Discourse*, 110 COLUM. L. REV., 1193, 1231–33 (2010) (discussing the increasing prevalence of post-abortion trauma arguments).

248. *See* Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under* Casey/Carhart, 117 YALE L.J. 1694, 1714–15 (2008).

249. Laurie Ann Ramsey, Ams. United for Life Legislative Conference, How Public Opinion Polls Should Guide Pro-Life Strategy (1991), 4, *in* THE MILDRED JEFFERSON PAPERS, *supra* note 187.

250. Mary Ellen Jensen, How Public Opinion Polls Should Guide Pro-Life Strategy 5 (1989), *in* THE MILDRED F. JEFFERSON PAPERS (Box 13, Folder 6, Schlesinger Library, Harvard Univ.).

251. *Id.*

253. *See, e.g.*, Siegel, *supra* note 59, at 1664–68 (illustrating the shift towards woman-protective arguments post Casey by antiabortion proponents).

253. *See infra* notes 254, 255 and accompanying text.

254. Brief Amici Curiae of the Rutherford Institute et al. at 8, *Casey*, 505 U.S. 833 (Nos. 91-744, 91-902).

255. *See* Brief Amicus Curiae of the National Legal Foundation at 13–14, *Casey*, 505 U.S. 833 (Nos. 91-744, 91-902).

experience with informed consent procedures, and his "lack . . . of academic qualifications and scientific credentials."[256] Nevertheless, the *Casey* plurality responded to the *possibility* that women could suffer regret after an abortion:

> It cannot be questioned that psychological well-being is a facet of health. Nor can it be doubted that most women considering an abortion would deem the impact on the fetus relevant, if not dispositive, to the decision. In attempting to ensure that a woman apprehend the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed.[257]

The Court responded to perceived uncertainty about post-abortion regret. By raising the possibility that women suffered trauma after an abortion, abortion opponents provided a sufficient justification for informed-consent restrictions.[258] The government could act to "reduc[e] the risk" of "devastating psychological consequences."[259]

Casey energized abortion opponents who hoped to use the same scientific-uncertainty argument to convince state legislators. Paige Cunningham of AUL announced "a major rhetorical shift" in the organization's agenda, one focused on "right to know laws" patterned on *Casey*.[260] "We must help people understand that abortion hurts women too," she insisted.[261] By the fall of 1993, the organization had announced a major fifteen-year plan.[262] "Our first goal is to shatter the myth that abortion helps women," the framers of the plan explained.[263] Right-to-know laws were a stirring success. By 2013, twenty-two states had introduced such statutes.[264] The questionable evidence of post-abortion regret did nothing to slow the momentum of related laws in the courts or the legislatures.

256. Planned Parenthood Se. Pa. v. Casey, 744 F. Supp. 1323, 1332–33 (E.D. Pa. 1990).

257. *Casey*, 505 U.S. at 882.

258. *See id.* at 883 ("[R]equiring that the woman be informed of the availability of information relating to fetal development . . . is a reasonable measure to ensure an informed choice . . . .").

259. *Id.* at 882.

260. AUL Board Meeting Minutes 4 (Apr. 24, 1993), *in* THE MILDRED F. JEFFERSON PAPERS, *supra* note 187.

261. *Id.* at 3.

262. *See* AUL Board Meeting Minutes 3 (Oct. 20, 1993), *in* THE MILDRED F. JEFFERSON PAPERS, *supra* note 187.

263. *Id.*

264. *See Counseling and Waiting Periods for Abortion*, GUTTMACHER INST., (Sept. 1, 2017), https://www.guttmacher.org/state-policy/explore/counseling-and-waiting-periods-abortion.

By 2007, the potential impact of regret claims on the Supreme Court seemed impossible to deny. In *Gonzales v. Carhart*, the Court relied heavily on a brief emphasizing affidavits collected by Operation Outcry, a group closely associated with WEBA and Reardon.[265] *Carhart* acknowledged that the evidentiary foundation for post-abortion trauma syndrome was weak.[266] The quality or quantity of proof did nothing to change the Court's decision.[267] "While we find no reliable data to measure the phenomenon," the Court explained, "it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained."[268] Anecdotal evidence or even common sense was enough to convince the Court that women regretted abortions, regardless of weighty medical evidence to the contrary.[269] "It is self-evident," the Court reasoned, "that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns . . . that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child."[270]

The strategy that helped to produce *Carhart* illuminates some of the potential risks awaiting the pro-choice movement in the aftermath of *Whole Woman's Health*. When medical experts and even judges question the caliber of evidence supporting an abortion restriction, the justification for a law can remain politically resonant. When it came to woman-protective arguments, pro-lifers made progress by creating what they defined as scientific uncertainty, producing new evidence and reframing existing proof.[271] By weaving an emotional appeal into their factual arguments, abortion opponents sometimes overcame the doubt surrounding their medical claims.[272] The same problem could arise after *Whole Woman's Health*.

Part III draws on the history of the undue burden test to explore a different risk that may trouble supporters of abortion rights after *Whole Woman's Health*. Starting in the late 1970s, the Supreme Court applied an undue burden analysis to regulations

265. Gonzales v. Carhart, 550 U.S. 124, 159 (2007).

266. *See id.* (explaining that the Court had found "no reliable data to measure the phenomenon").

267. *See id.*

268. *Id.*

269. *See id.* ("While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained.").

270. *Id.* at 159–60.

271. *See e.g.*, Joëlle Anne Moreno, *Extralegal Supreme Court Policy-Making*, 24 WM. & MARY BILL RTS. J., 451, 516–17 (2015) (stating that "exaggerated uncertainty about maternal medical risks are frequently advanced to restrict abortion access").

272. *Id.* at 509.

involving minors.[273] From the early 1980s to the early 1990s, parental-involvement laws preoccupied those on either side of the abortion conflict.[274] The rules set out by the Court invited opposing activists to fight about the facts surrounding young women's decision to terminate their pregnancy: their family circumstances, their maturity, and their capacity to make decisions.[275]

While supporters of abortion rights collected evidence about the prevalence of domestic violence and the psychological capability of minors, pro-lifers issued an emotional appeal to parents who believed that they would do the best for their children.[276] This strategy paid off, in spite of the questionable accuracy of the picture many Americans had of the American family.[277] Because they enjoyed so much discretion, trial judges defined maturity as they wished and sometimes refused to hear judicial bypass cases at all.[278] The procedural protections designed to protect minors' rights soon became an obstacle.[279]

III. THE UNDUE BURDEN TEST, MINORS, AND PROCEDURAL HURDLES

The abortion rights of minors became a second real test of the meaning of an unconstitutional undue burden on a woman's right to choose abortion.[280] The Supreme Court first confronted the issue in 1979, but cases involving minors' rights returned to the Court several times in the decade that followed. As Linda Greenhouse wrote in 1980, the outcome of these cases "[depended] on the views that the Justices . . . [held] of American family life."[281]

This Part explores the war over the facts of family life and adolescent maturity launched by the undue burden test in cases involving adolescents. In 1979, in *Bellotti v. Baird* (*Bellotti II*),[282] the Court set forth new procedural protections for minors: states could require minors to involve their parents only if the states

273. Bellotti v. Baird (*Bellotti II*), 443 U.S. 622, 647 (1979) (stating that a parental consent statute would impose an undue burden on a minor's right to seek an abortion).

274. *See e.g.*, Nicole Phillis, *When Sixteen Ain't So Sweet: Rethinking the Regulation of Adolescent Sexuality*, 17 MICH. J. GENDER & L. 271, 281–82 (2011) (discussing parental consent provisions with judicial bypass and that the holding in *Casey* did not impose an undue burden on the abortion right).

275. *Id.* at 281.

276. *Id.* at 292 ("[I]f a minor female seeks to terminate her pregnancy, she is . . . presumed so immature as to require either parental or judicial approval of her decision.").

277. *See* Wendy-Adele Humphrey, *Two-Stepping Around a Minor's Constitutional Right to Abortion*, 38 CARDOZO L. REV. 1769, 1783–85 (2017).

278. *See id.* at 1786–92.

279. *See id.* at 1805–07.

280. *See Bellotti II*, 443 U.S. 622, 639–40 (1979).

281. Linda Greenhouse, *This Time, an Abortion Case Involves the Whole Family*, N.Y. TIMES, Oct. 12, 1980, at E8.

282. 443 U.S. 622 (1979).

provided a judicial bypass procedure.[283] Minors would have access to the courts to prove either that they were mature enough to make the abortion decision themselves or that terminating the pregnancy would still be in their best interests.[284] The Part first explores the response of each opposing social movement to this standard. Over time, as this Part shows next, pro-lifers convinced a variety of lawmakers, including those who defined themselves as supporters of abortion rights, to endorse parental-involvement laws. The conditions in local courts also created powerful obstacles for minors, even if a bypass procedure were in place.

As this Part shows, the impact of factual struggles on the Court's jurisprudence was mixed. By the 1990s, the Court seemed receptive to feminists' factual arguments about abusive and dysfunctional families.[285] However, the Court refused to acknowledge the real-world impact of the many bypass laws, assuming the good faith and compliance of trial judges, even in politically charged circumstances.[286] Left to find the facts about an undue burden, judges could make abortion impossible for minors to access.

A. The Creation of an Undue Burden Test for Minors

The Supreme Court first set out an undue burden test for minors in *Bellotti II*, a case involving a 1974 Massachusetts law requiring unmarried minors to obtain the consent of both parents before obtaining an abortion.[287] Under the law, minors could circumvent this requirement only if one parent had passed away or if a judge found good cause in a hearing.[288] The Court had already sent the case back to the Massachusetts Supreme Judicial Court once for clarification of the statute's meaning,[289] and in 1979, the Court issued its second decision in the case.[290]

At first, parties on both sides of the issue focused on abstract constitutional principles rather than the details of American family life.[291] Robert Destro of the Catholic League for Religious and Civil

283. *See id.* at 643.

284. *See id.* at 643–44.

285. *See* Hodgson v. Minnesota, 497 U.S. 417, 450 (1990) ("The record reveals that in the thousands of dysfunctional families affected by this [abortion] statute, the two-parent notice requirement proved positively harmful to the minor and her family.").

286. *See* Ohio v. Akron Ctr. for Reprod. Health (*Akron II*), 497 U.S. 502, 515–17 (1990).

287. *See Bellotti II*, 443 U.S. at 625.

288. *See id.*

289. *See* Bellotti v. Baird, 428 U.S. 132, 133–34, 151 (1976).

290. *See Bellotti II*, 443 U.S. at 643.

291. *See* Brief for Catholic League for Religious and Civil Rights et al. as Amici Curiae Supporting Appellants at 6–9, *Bellotti II*, 443 U.S. 622 (No. 78-329); Motion for Leave to File Brief and Annexed Brief for Planned Parenthood

Rights emphasized that the state was protecting the constitutional rights of parents to "control, educate, nurture and guide the actions of their minor children."[292] According to Destro, minors had no countervailing right sufficient to outweigh parents' fundamental rights.[293] The Planned Parenthood Federation of America responded that the Massachusetts law constituted an impermissible "de facto veto" and violated the principles of the Equal Protection Clause by favoring minors who carried their pregnancies to term over those who chose abortion.[294]

The *Bellotti II* Court seemed receptive to some of Destro's constitutional arguments. The Court emphasized legitimate "concern with the vulnerability of [minors]," recognition that minors "often lack . . . experience, perspective, and judgment," and "the guiding role of parents in the upbringing of their children."[295] In spite of the Court's attention to these concerns, the majority still found that the rights of minors and adult women were somewhat similar.[296] Minors could face the same adverse consequences as adults because of an unintended pregnancy.[297] For this reason, the Court found that states would "unduly burden" a minor's abortion rights unless the law guaranteed a bypass procedure permitting a minor to show "(1) that she is mature enough and well enough informed to make her abortion decision, . . . or (2) that . . . the desired abortion would be in her best interests."[298]

The abortion-rights movement recognized that *Bellotti II* would not put an end to struggles over minors' rights. Janet Benshoof celebrated the victory in the case but worried that "the abortion decision can be singled out and treated differently from other medical decisions allowed minors."[299] Benshoof argued that after *Bellotti II*, "any . . . future statute would have to be challenged, with a detailed factual showing how the required court or administrative procedure is 'unduly burdensome' and, as applied, an 'absolute, and possibly arbitrary, veto.'"[300]

Federation of America, Inc. et al. as Amici Curiae Supporting Appellees at 14, *Bellotti II*, 443 U.S. 622 (Nos. 78-329, 78-330).

292. Brief for Catholic League for Religious and Civil Rights et al. as Amici Curiae Supporting Appellants, *supra* note 291, at 4.

293. *See id.*

294. *See* Motion for Leave to File Brief and Annexed Brief for Planned Parenthood Federation of America, Inc. et al. as Amici Curiae Supporting Appellees, *supra* note 291, at 23–24.

295. *Bellotti II,* 443 U.S. at 634–35, 637.

296. *See id.* at 642–43.

297. *See id.*

298. *Id.* at 643–44 (footnote omitted).

299. Letter from Janet Benshoof & Judith Levin, Reprod. Freedom Project, to Affiliate Dirs., Women's Rights Liaisons & Lawyers 5 (July 16, 1979) (on file with the Minnesota Historical Society).

300. *Id.* at 6.

The issue of minors' abortion rights returned to the Court the following year.[301] In the lead-up to the case, abortion providers tried to establish that the picture of parents given in *Bellotti II* was extremely unrealistic.[302] As one provider explained of involvement laws, "I have been impressed by the wide range of family situations this law impacts."[303]

In the Court, at least at first, these factual arguments did not define the terms of the conflict. The Court considered a Utah case, *H.L. v. Matheson*,[304] involving a minor still living at home with her parents.[305] The Utah law required physicians to "[n]otify, if possible" the parents or guardian of a minor before performing an abortion.[306] A physician told H.L., the petitioner in the case, that an abortion would be in her best medical interest but refused to terminate her pregnancy without notifying her parents.[307] H.L. brought a class-action suit on behalf of herself and others in her position.[308]

AUL lawyers asserted that even if parents prevented their children from having abortions, their actions did not constitute state action, and the state law encouraging parental involvement did not either.[309] Planned Parenthood departed from the abstract arguments that had dominated earlier litigation, incorporating factual arguments into their analysis of an undue burden.[310] The group cited studies demonstrating "parental reactions to a minor daughter's pregnancy can often range from hostility, guilt, and anger to outright abuse."[311]

However, *Matheson* seemed unlikely to be a major case. H.L. was challenging the constitutionality of the law on its face, but the Court could easily resolve the case by looking at the facts of her own situation: she lived at home, depended on her parents, and had made no claim concerning either her maturity or the dysfunction of her family.[312] The Court chose to resolve the case in this way. In a

301. *See* H.L. v. Matheson, 450 U.S. 398, 399–400 (1981).

302. *See* Memorandum from Renee Ward, Co-Dir., Midwest Health Ctr. for Women, to Family Planning Colleague 1 (Aug. 10, 1981) (on file with the Minnesota Historical Society).

303. *Id.*

304. 450 U.S. 398 (1981).

305. *See id.* at 400.

306. UTAH CODE ANN. § 76-7-304 (LexisNexis 1978).

307. *See Matheson*, 450 U.S. at 400.

308. *See id.* at 401.

309. *See* Brief for Americans United for Life as Amici Curiae Supporting Appellees at 5–8, *Matheson*, 450 U.S. 398 (No. 79-5903).

310. *See* Brief for Planned Parenthood Federation of America, Inc. et al. as Amici Curiae Supporting Appellant at 16–21, *Matheson*, 450 U.S. 398 (No. 79-5903).

311. *Id.* at 16.

312. *See Matheson*, 450 U.S. at 405–07.

six-to-three decision, the Court upheld the Utah law.[313] First, Chief Justice Warren Burger's majority opinion held that H.L. did not have the standing to challenge the law on its face because the lower court had made no finding that she was mature or emancipated.[314] As applied to H.L., the Court found no constitutional problem with the law.[315] Second, the majority emphasized that Utah required only that parents be notified, ensuring that neither judges nor parents could functionally veto a minor's decision.[316]

After *Matheson*, those on opposing sides geared up for another fight about parental-involvement laws, this time working to collect evidence to support their claims about an undue burden. At first, abortion opponents focused on other kinds of restrictions, including the defense of laws involving spousal involvement.[317] However, the Court's 1983 decision in *Akron I* encouraged abortion opponents to return to a successful strategy involving parental involvement. *Akron I* also invalidated a provision requiring physicians to obtain the consent of one of the parents of unmarried minors under the age of fifteen.[318] The ordinance made an exception for minors obtaining a court order authorizing the abortion.[319] The city had argued that the law could be interpreted to require the bypass procedure outlined in *Bellotti II*.[320] Given that the law was a city ordinance rather than a state statute, the Court held that the ordinance was not "reasonably susceptible of being construed to create an opportunity for case-by-case evaluations of the maturity of pregnant minors."[321]

However, as abortion opponents recognized, *Akron I* left the door open for laws requiring parental notification.[322] The Court had said nothing about the kind of law upheld in *Matheson* or laws requiring notification, rather than consent.[323] It took only a few years before parental-involvement cases came back to the Court.[324] Both sides worked on *Hodgson v. Minnesota*,[325] a case involving a Minnesota parental-notification law. Subsection 2 of the statute required a minor to wait forty-eight hours after notifying both her

313. *See id.* at 413.
314. *See id.* at 406–07.
315. *See id.* at 413.
316. *See id.* at 409.
317. *See, e.g.*, Pamela Black, *Abortion Affects Men Too*, N.Y. TIMES, Mar. 28, 1982, at SM76; Georgia Dulles, *Court to Weigh Value of Unwanted Lives*, N.Y. TIMES, Apr. 12, 1982, at B6; *Husband Challenges Wife's Right to Abortion*, 12 OFF OUR BACKS 13 (Nov. 1982).
318. *Akron I*, 462 U.S. 416, 439–40 (1983).
319. *See id.*
320. *See id.*
321. *Id.*
322. *See id.*
323. *See id.*
324. *See* Hodgson v. Minnesota, 497 U.S. 417 (1990).
325. 497 U.S. 417 (1990).

parents, while subsection 6 allowed for a bypass for mature minors.[326] A group of plaintiffs challenged the law in 1981, and the case came to trial in 1986.[327] Benshoof and the ACLU saw *Hodgson* as particularly important because it was the first as-applied challenge to a notification law.[328]

The case also gave litigators on both sides the chance to try their factual claims involving an undue burden on minors.[329] Benshoof and her colleagues put on extensive evidence to make their case, including "several weeks of testimony from single parents, abortion clinic staff, minors, physicians, reproductive epidemiologists, psychologists, psychiatrists, state court judges, guardians, and public defenders."[330] Benshoof's witnesses emphasized evidence about minors' maturity and the family situations of those too afraid to tell their parents.[331] Clinic staff testified about

> the wide variety of dysfunctional and compelling family circumstances which lead their patients to seek an abortion without notice to one or both parents, such as violence in the family, a mentally or terminally ill parent, incest, fear of being thrown out of the home, vehement anti-abortion beliefs of the parents, no relationship with the non-custodial parent, and the like.[332]

An expert witness testified that informing an abusive parent about abortion might trigger physical abuse on the part of a batterer.[333] Dr. Stanley Henshaw of the Guttmacher Institute argued that the law might deter minors from either talking to their parents or seeking an abortion, ensuring that many teenagers had riskier procedures later in pregnancy.[334] Dr. Gary Melton of the American Psychological Association concluded that mature minors would be more likely to seek an abortion without notifying their parents.[335] "[S]eparation from parents and developing a sense of personal privacy are critical to adolescent development," he testified.[336]

326. *See* MINN. STAT. §§ 144.343(2), (6) (1988).
327. For the district court's decision, see *Hodgson*, 497 U.S. at 429–30.
328. *See* Letter from Janet Benshoof & Rachel Pine to ACLU Board et al., Re: Trial of Hodgson v. State of Minnesota 1 (Mar. 24, 1986), *in* THE JANE HODGSON PAPERS, *supra* note 124.
329. *See id.*
330. *See id.* at 3.
331. *Id.*
332. *Id.*
333. *See id.*
334. *See id.*
335. *See id.*
336. *Id.*

Supported by pro-life litigators, the state put on a very short and not entirely convincing case.[337] Outside of court, however, abortion opponents soon made a compelling political case for notification laws.[338] Maura Quinlan of AUL told the media that notification laws had lowered rates of teenage pregnancy.[339] She argued that minors would avoid having sex if they knew that abortion was not easily available.[340] In such circumstances, laws would not create an undue burden but would in fact "have a beneficial effect."[341]

Clearly, the ACLU saw a victory in *Hodgson* as a vindication of a strategy based on facts, while abortion opponents appealed to parents' ideas about how they would raise their own children.[342] As Benshoof explained:

> A "win" which would render the *Hodgson* case a landmark in the area of minors' rights would require Judge Alsop to find that the parental notification statute is premised on anti-abortion animus and antiquated notions about teenagers and family which are wholly unsupported by empirical evidence.[343]

The same year that the Court decided *Hodgson*, the justices also heard another case involving minors' rights, *Ohio v. Akron Center for Reproductive Health* (*Akron II*).[344] That case involved an Ohio law requiring physicians to notify minors' parents before performing an abortion.[345] The law also set forth certain exceptions, including a bypass measure for those threatened with "physical, sexual, or emotional abuse."[346]

The litigation of *Hodgson* and *Akron II* put on display each movement's arguments about the facts of abortion. In *Hodgson,* abortion-rights supporters' argument highlighted how delays, a lack of confidentiality, the threat of abuse, and procedural hurdles made abortion effectively off-limits for most minors.[347] The petitioners' brief argued that invasive bypass procedures and notice requirements discouraged minors insofar as "concerns about privacy

337. *See id.*

338. *See infra* note 346 and accompanying text.

339. *See* David G. Savage, *Supreme Court Takes Up Role of Parents in Abortion*, L.A. TIMES, Nov. 3, 1987, at 1. For more on the organization's strategy, see Felicity Barringer, *After Long Decline, Teen Births Are Up*, N.Y. TIMES, Aug. 17, 1989, at 14; Linda Greenhouse, *Battle on Abortion Turns to Rights of Teenagers*, N.Y. TIMES, July 16, 1989, at A1.

340. *See* Savage, *supra* note 339.

341. *Id.*

342. *See* Benshoof & Pine, *supra* note 328, at 5.

343. *Id.*

344. 497 U.S. 502 (1990).

345. *See id.* at 502–05.

346. *See* OHIO REV. CODE ANN. §§ 2151.85, 2505.073 (LexisNexis 2017).

347. *See* Brief for Appellees at 12–16, Hodgson v. Minnesota, 497 U.S. 417 (1990) (No. 88-1125).

dictate when, how and *if* a pregnant teenager will seek help."[348] The petitioners also stressed that minors increasingly pushed abortions into the second trimester because of the lengthy delays involved in going through a bypass procedure or securing consent.[349] The petitioners also emphasized the realities of many minors' family situations:

> Minor plaintiffs testified that their decisions not to tell one or both of their parents . . . were due to: the psychiatric or physical illness of a parent; chemical abuse and dependency on the part of a parent; the anti-abortion stance of a parent; the likelihood of a verbally, physically, or sexually abusive response by a parent or the fact that the minor was not in contact with the parent.[350]

Groups like Focus on the Family and David Reardon's Elliott Institute responded that parental involvement would prevent minors from suffering the worst psychological trauma that could result from abortion.[351] Focus on the Family stressed that minors disproportionately experienced physical and psychological injuries as the result of an abortion.[352] The group argued that forced parental involvement would help minors make more balanced and supported decisions.[353] More importantly, Focus on the Family insisted that parents protected minors from manipulative abortion providers.[354] "The bottom line," the group argued, "is that vulnerable adolescents are exploited either consciously by abortion providers or unknowingly by the teenage peers who are equally uninformed."[355]

Reardon's Elliott Institute also highlighted the vulnerabilities of minors, particularly those seeking abortions. "[W]ithout parental notification," the brief contended, "present law acts as a one way funnel which allows parents to pressure their daughters into abortions, yet prevents those parents who would support childbirth from helping their daughters."[356] An amicus brief by the American

348. Brief for Petitioners at 6–18, *Hodgson*, 497 U.S. 417 (No. 88-1125).

349. *See id.* at 8.

350. *Id.* at 17–18.

351. Brief for the Elliot Institute for Social Sciences Research, and the American Academy of Medical Ethics as Amicus Curiae Supporting Respondents at 10–12, *Hodgson*, 497 U.S. 417 (No. 88-1125); Brief for Focus on the Family & Family Research Council as Amici Curiae Supporting Respondents at 10–13, *Hodgson*, 497 U.S. 417 (No. 88-1125).

352. *See* Brief for Focus on the Family & Family Research Council as Amici Curiae Supporting Respondents, *supra* note 351.

353. *See id.* at 14–15.

354. *See id.* at 17–21.

355. *Id.* at 21.

356. Brief for the Elliott Institute for Social Sciences Research and the American Academy of Medical Ethics as Amicus Curiae Supporting Respondents, *supra* note 351, at 10.

Psychological Association and other mental health organizations disputed these assertions, maintaining that forced parental consultation did nothing to help minors, psychologically or otherwise.[357]

In *Akron II,* pro-choice attorneys also made a very different factual case against notification laws—one centered on the flaws of the very procedural protections that were supposed to protect minors.[358] First, Ohio created a complex pleading process seemingly calculated to trip up minors already scared of the prospect of going to court.[359] As importantly, the discretion given to trial judges could become a serious problem for minors.[360] "Standards of maturity or best interests are 'imprecise substantive standards that leave determinations unusually open to the subjective values of the judge,'" the brief argued.[361] Because the law required a minor to prove her maturity or best interests by clear and convincing evidence, Ohio had invited judges to inject their personal prejudices into the proceedings.[362]

Moreover, the petitioners also expressed concern that the Ohio procedure denied minors the anonymity they needed to feel comfortable.[363] Given the timing of the procedure set out by the state, minors would almost inevitably have to sign complaints and otherwise reveal their identities to judges and other court staff.[364] Even though these officials were sworn to keep information about a minor's identity secret, a minor would hesitate before taking a step that would erode their anonymity so much.[365] "Requiring the minor to relinquish her privacy before a host of strangers in order to secure it against her parents undermines the very constitutional right the bypass is meant to protect," the brief argued.[366]

The Court's decisions in *Hodgson* and *Akron II* made clear the limited power of the impressive evidence compiled by supporters of abortion rights. In a fractured plurality opinion, *Hodgson* struck down one of the key provisions of the Minnesota notification law.[367] While upholding the forty-eight-hour waiting period, the Court held that the two-parent requirement was unconstitutional, relying on

357. *See* Brief for American Psychological Ass'n et al. as Amici Curiae Supporting Petitioners at 16–27, Hodgson v. Minnesota, 497 U.S. 417 (No. 88-1125) (1990).

358. *See* Brief for Appellees at 3–39, *Akron II*, 497 U.S. 502 (1990) (No. 88-805).

359. *See id.* at 16–19.

360. *See id.* at 19–21.

361. *Id.* at 21 (quoting Santosky v. Kramer, 455 U.S. 745, 762 (1982)).

362. *See id.* at 19–22.

363. *See id.* at 28–30.

364. *See id.* at 29–30.

365. *See id.*

366. *Id.* at 30.

367. *See* Hodgson v. Minnesota, 497 U.S. 417, 418, 449–52 (1990).

the factual arguments made by feminist attorneys.[368] Although the majority reasoned that a judicial-bypass provision written in the law cured the constitutional objection to the two-parent requirement, *Hodgson* noted that in functional families, one parent would either logically tell the other or have good reason not to do so, even absent a two-parent requirement.[369] Justices O'Connor and Stevens both emphasized the risk of abuse faced by so many minors.[370] As Stevens explained, "The record reveals that in the thousands of dysfunctional families affected by this statute, the two-parent notice requirement proved positively harmful to the minor and her family."[371]

Akron II showed that the Court was far less receptive to complaints about the reality of any bypass procedure, much less the one adopted by Ohio. The Court concluded that concerns about confidentiality were misplaced, even if minors would not seek an abortion because they feared disclosure.[372] Nor did the Court find it problematic that minors would have to make their case by clear and convincing evidence.[373] Since some bypass procedures could be ex parte, the state had reason to require more proof from minors seeking an abortion.[374] The confusing pleading forms seemed easy enough to navigate that the Court found no constitutional defect in their required use.[375]

Hodgson and *Akron II* reinforced existing concerns about the politics of parental-involvement laws. Inside of the courtroom, concerns about the procedural protections established for minors' benefit fell on deaf ears.[376] If the reality and theory of bypass procedures did not match, that alone did not render a law unconstitutional.[377] Outside of court, even the factual arguments that had convinced the *Hodgson* plurality seemed to accomplish very little.[378] After the Supreme Court decided *Webster v. Reproductive*

368. *See id.* at 448–53.
369. *See id.* at 450–51, 455.
370. *See id.* at 450–51, 460.
371. *Id.* at 450.
372. *See Akron II*, 497 U.S. 502, 512–13 (1990).
373. *See id.* at 515–18.
374. *See id.* at 515–16.
375. *See id.* at 516–17.
376. Rebouché, *supra* note 7, at 198–99 (noting that despite testimony from judges that the requirements of parental involvement laws were burdensome on minors, the Supreme Court disagreed with the district court's holding that parental involvement laws were unconstitutional).
377. *See, e.g.*, Hodgson v. Minnesota, 497 U.S. 417, 461–64 (1990) (Marshall, J., dissenting) (explaining that the judicial bypass option for the two-parent notification requirement is unconstitutional because it substantially burdens a woman's right to privacy by forcing a minor to either notify both parents or seek permission from a judge).
378. *See id.* at 450–51 (describing the ways in which two-parent notification disserves the state interest of protecting and assisting the minor); *see also* Brief

Health Services[379] in 1989, abortion-rights supporters feared that the Court would soon overrule *Roe*.[380] Activists responded by introducing protective legislation, particularly the federal Freedom of Choice Act ("FOCA").[381] By March 1990, pro-choice activists recognized that FOCA would go nowhere unless it created a clear exception for parental-involvement laws.[382]

Hodgson and *Akron II* convinced pro-choice groups to take their case against notification laws to the public. The National Abortion Federation ("NAF") and the National Women's Law Center ("NWLC") began a public-relations campaign designed to expose the flaws of notification statutes.[383] The groups emphasized familiar arguments about the realities of abuse in families.[384] However, the organizations also played up the harm caused by bypass procedures themselves.[385] Rather than protecting women, these laws resulted in "unfettered discretion and bias," "cause[d] substantial delays," and "unnecessarily impose[d] a frightening and traumatic experience on young women."[386] NAF and the NWLC provided evidence of state judges who either refused to hear cases or did so for political reasons.[387] The organizations highlighted the lack of confidentiality particularly plaguing minors in small towns.[388] Even terms like "maturity" had no consistent meaning, allowing for almost unlimited latitude for those making decisions.[389]

for American Psychological Ass'n et al. as Amici Curiae Supporting Petitioners, *supra* note 357, at 12–14.

379. 492 U.S. 490 (1989).

380. On the fear in the period that *Roe* would be overruled, see, for example, Letter from Kitty Kolbert & Lynn Paltrow to Nadine Strosser et al., Re: *Casey* Campaign (Dec. 24, 1991), *in* THE KATHRYN KOLBERT PAPERS (Box 1, Folder 1, Barnard Coll.); *see also* Letter from Kitty Kolbert & Linda Wharton to *Planned Parenthood v. Casey* Work Team (Dec. 10, 1991), *in* THE KATHRYN KOLBERT PAPERS, *supra*.

381. MARK A. GRABER, RETHINKING ABORTION: EQUAL CHOICE, THE CONSTITUTION, AND REPRODUCTIVE POLITICS 134–37 (1999); THE POLITICS OF PREGNANCY: POLICY DILEMMAS IN THE MATERNAL-FETAL RELATIONSHIP 43–44 (Janna C. Merrick & Robert H. Blank eds., 2014); *see, e.g.*, SUZANNE STAGGENBORG, THE PRO-CHOICE MOVEMENT: ORGANIZATION AND ACTIVISM IN THE ABORTION CONFLICT 141 (1991) (discussing the campaign for the Freedom of Choice Act).

382. *See Freedom of Choice Act in Peril*, N.Y. TIMES (July 17, 1993), http://www.nytimes.com/1993/07/17/opinion/freedom-of-choice-act-in-peril.html.

383. *See* Nat'l Abortion Fed'n & Nat'l Women's Law Ctr., *The Judicial Bypass Procedure Fails to Protect Young Women* (1990) (on file in The Feminist Women's Health Ctr. Records, Box 63, Parental Notification Talking Points, Bingham Library, Duke Univ.).

384. *See id.* at 1–2.

385. *See id.* at 2–3.

386. *Id.*

387. *See id.*

388. *See id.*

389. *See id.*

By 1991, however, NARAL research confirmed that no amount of factual evidence could change some politicians' and voters' views of parental-involvement issues.[390] Writing to Kate Michelman and Loretta Ucelli of NOW, Harrison Hickman summarized the findings of his market study as follows:

> Simply stated, when left to their own devices, voters do not think of these attempts to mandate parental involvement in a minor's abortion decision as "abortion issues" in the strictest sense. Rather, these issues are viewed much more as a matter concerning parenting . . . . In part, the fact of a teenager facing an unwanted pregnancy is taken as evidence of parents' having lost control of their daughters' lives or having been bad parents . . . . In an even deeper sense, this represents more than a simple loss of control: it represents the daughter's passage into adulthood and the ultimate loss of parental authority.[391]

Hickman outlined several strategies that might improve the situation: Activists could emphasize "the higher birth rates, more second trimester abortions, and . . . abuse and even suicide or murder" that could result from notification laws.[392] Alternatively, movement leaders could play to Americans' concerns about government interference, re-framing the issue as state, rather than parental, involvement.[393] Feminists could even draw attention away from parental-involvement laws altogether.[394] "This issue is just a smokescreen," Hickman explained.[395] "Those raising it want to prohibit all abortions. They are starting with the most vulnerable young women."[396]

However, NARAL leaders recognized that these arguments might not do any more to change public perception of the facts of parental-involvement laws than the claims that had come before.[397] Hickman admitted that the market research disclosed an almost "universal supposition that the girl [seeking an abortion] comes from a healthy home with loving parents."[398] This belief undercut most attempts to present factual evidence to the contrary. "When asked to confront the young girl facing this dilemma in their minds' eye,

390. *See* Letter from Harrison Hickman to Loretta Ucelli & Kate Michelman, Re: Parental Consent/Notification Update (Feb. 12, 1991) (on file in The Feminist Women's Health Ctr. Records, Box 63, Parental Notification Talking Points, Bingham Library, Duke Univ.).
391. *Id.* at 2–3.
392. *Id.*
393. *See id.* at 3.
394. *See id.*
395. *See id.*
396. *Id.* at 1.
397. *See id.* at 2.
398. *Id.*

voters admit thinking of her as their daughter or their niece," Hickman explained.[399]

The history of debates about what counted as an undue burden on a minor's right to choose abortion may offer an important insight into what could come after the Court's decision in *Whole Woman's Health*. Part IV turns to this question.

IV. THE RISKS OF *WHOLE WOMAN'S HEALTH*

To many commentators, *Whole Woman's Health* was the most devastating setback for the antiabortion movement in decades.[400] The Court's decision made the undue burden test a far more effective protection for abortion rights and struck down laws very similar to those on the books in many states.[401] The Court also seemed far less deferential to the claims of fact made by legislators in support of Texas's HB2.[402] Texas and its allies had certainly argued that admitting-privilege and ambulatory-surgical-center laws not only protected women's health but also put an end to abusive practices in clinics.[403] Rather than accepting these assertions, the Court demanded real evidence of the effects and benefits achieved from abortion laws.[404]

Since the 2016 presidential election, lawmakers have introduced a wide variety of antiabortion laws that will test the meaning of *Whole Woman's Health*.[405] Donald Trump originally pledged to introduce legislation to defund Planned Parenthood on the campaign trail and, as President, supports a ban on abortion after the twentieth week of pregnancy.[406] Trump also promised to nominate abortion opponents to the federal bench.[407]

399. *Id.*

400. On the perception that abortion opponents suffered a major setback in *Whole Woman's Health*, see, for example, Erik Eckholm, *Anti-Abortion Group Presses Ahead Despite Recent Supreme Court Ruling*, N.Y. TIMES (July 9, 2016), http://www.nytimes.com/2016/07/10/us/anti-abortion-group-supreme-court-ruling.html?_r=0; Carol Tobias, *A Setback that Settles Nothing: Opposing View*, USA TODAY (June 27, 2016, 6:47 PM), http://usat.ly/296fAZk.

401. On the strengthening of the undue burden test in *Whole Woman's Health*, see, for example, Michael Dorf, *Symposium: The Wages of Waging Guerilla War on Abortion*, SCOTUSBLOG (June 27, 2016, 5:12 PM), http://www.scotusblog.com/2016/06/symposium-the-wages-of-guerrilla-warfare-against-abortion/; Gans, *supra* note 50; Pieklo, *supra* note 54.

402. *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2309–11 (2016).

403. *See id.* at 2311.

404. *See id.* at 2311–12.

405. *See* De Vogue, *supra* note 5.

406. On the pledges that Trump made during the campaign, see Mike DeBonis & Jenna Johnson, *With Trump's Backing, House Approves Ban on Abortion after 20 Weeks of Pregnancy*, WASH. POST (Oct. 3, 2017), https://www.washingtonpost.com/powerpost/with-trumps-backing-house-approves-ban-on-abortion-after-20-weeks-of-pregnancy/2017/10/03/95c64786-a86c-11e7-b3aa-c0e2e1d41e38_story.html?utm_term=.599877919629; Letter

Trump's election emboldened legislators opposed to abortion. Ohio legislators passed a law banning abortion when a fetal heartbeat can be detected—often as early as the sixth week of pregnancy.[408] Although Governor John Kasich ultimately vetoed the bill, Ohio still became one of more than a dozen states to pass laws banning abortion after the twentieth week of pregnancy.[409] Texas introduced abortion regulations of its own, requiring clinics to cremate or bury fetal remains and defunding Planned Parenthood.[410]

In light of the Court's decision in *Whole Woman's Health*, how will these laws fare in the courts? To be sure, Trump's pledge to transform the courts will take time to fulfill, and in the past, Presidents have done poorly when predicting how a justice will vote when legal abortion is on the line.[411] Nevertheless, the history of earlier debates about the undue burden test offers a cautionary tale about what *Whole Woman's Health* could mean in the near term. In the past, similar wars about the facts have set unexpected traps for those who appeared to have won in court.[412] One potential problem involves the political power of certain factual claims, even those that seem to have little evidentiary basis. In the past, abortion-rights

from Donald J. Trump, Republican Presidential Candidate, to Pro-Life Leader (Sept. 2016), https://www.sba-list.org/wp-content/uploads/2016/09/Trump-Letter-on
-ProLife-Coalition.pdf.

407. *See* DeBonis & Johnson, *supra* note 406.

408. On the heartbeat ban passed in Ohio, see Balmert, *supra* note 5; Slotkin, *supra* note 5.

409. On the rise of twenty-week bans, see, for example, Balmert, *supra* note 5.

410. On the fetal-remains law in Texas, see, for example, Molly Redden, *Texas Measure Requiring Burial of Fetal Remains May Herald Wave of Similar Laws*, GUARDIAN (Dec. 19, 2016), https://www.theguardian.com/us-news/2016/dec/19/texas-fetal-remains-burial-cremation-law; Samantha Schmidt, *After Months of Controversy, Texas Will Require Aborted Fetuses to Be Cremated or Buried*, WASH. POST: MORNING MIX (Nov. 29, 2016), https://www.washingtonpost.com/news/morning-mix/wp/2016/11/29/despite-months-of-outcry-texas-will-require-aborted-fetustes-to-be-cremated-or-buried/?utm_term=.cbd81f72ec99; Liam Stack, *Texas Will Require Burial of Aborted Fetuses*, N.Y. TIMES (Nov. 30, 2016), https://nyti.ms/2gkyRaR. On Texas's defunding of Planned Parenthood, see, for example, Alexis Ura, *Texas Officially Kicking Planned Parenthood Out of Medicaid*, WASH. POST: POST NATION (Dec. 20, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/12/20/texas-officially-kicking-planned-parenthood-out-of-medicaid/?utm_term=.a3d02120972b.

411. *See* Gregory Dickinson, Note, *One Justice, Two Justice, Red Justice, Blue Justice: Dissecting the Role of Political Ideology in Supreme Court Nominations*, 2017 U. ILL. L. REV. 345, 356–57 (2017).

412. *See* Peter M. Ladwein, Note, *Discerning the Meaning of* Gonzales v. Carhart*: The End of the Physician Veto and the Resulting Change in Abortion Jurisprudence*, 83 NOTRE DAME L. REV. 1847, 1879 (2008) (tracking the reconfiguration of the "undue burden" test).

activists arguing over the undue burden test collected a substantial amount of evidence on questions central to abortion doctrine at the time.[413] Did women suffer enough regret to justify informed-consent or related restrictions on abortion? Did a meaningful number of minors have good reason to believe it was dangerous or unwise to tell their parents about abortion?

In answering these questions, supporters of abortion rights looked to expert testimony, published studies, data collected from clinics, and conclusions drawn by major professional organizations.[414] In spite of these efforts, some dubious factual arguments took on a life of their own. Arguments connecting abortion to psychological and physical trauma for women did not catch on in the medical community or convince even allies in the Reagan administration.[415]

Just the same, abortion opponents successfully used related claims to convince state legislators and even courts of the merits of their position.[416] Pro-lifers repackaged a lack of convincing evidence as a sign of scientific uncertainty.[417] These activists relied on the emotional pull of individual testimonies, insisting that even the possibility of harm was enough to justify harsh new regulations.[418] This understanding of scientific uncertainty took on a prominent role in constitutional advocacy and even made its way to the Supreme Court. *Carhart* made this argument an official part of constitutional doctrine.[419] *Carhart* illustrates how savvy movements can change a dearth of factual evidence into an effective constitutional argument in their favor.

After *Whole Woman's Health*, similar risks remain. The Court's decision did not directly mention *Carhart*'s idea of factual uncertainty, much less call for its rejection.[420] Nor did the Court officially close the door on woman-protective claims.[421] Indeed, the majority in *Whole Woman's Health* often highlighted particular problems with HB2, including the lack of legislative findings

413. *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2311 (2016) (displaying the types of facts collected and used to influence the Supreme Court's decisions on abortion rights cases).

414. *Id.*

415. *See* Ronald Turner, Gonzales v. Carhart *and the Court's "Women's Regret" Rationale*, 43 WAKE FOREST L. REV. 1, 23–25 (2008) (emphasizing that even President Reagan's Surgeon General, C. Everett Koop, did not find reliable evidence that abortion caused trauma for women).

416. Harper Jean Tobin, *Confronting Misinformation on Abortion: Informed Consent, Deference, and Fetal Pain Laws*, 17 COLUM. J. GENDER & L. 111, 143–49 (2008).

417. *Id.*

418. *Id.* at 113–14.

419. Gonzales v. Carhart, 550 U.S. 124, 163–64 (2007).

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

421. *See id.*

supporting it.[422] The kinds of claims about women's health made in support of HB2 might not fade away in spite of the Court's decision. Calling for more convincing proof seems to close the door on arguments for which there is no convincing evidence.

If the past offers any example, however, it is far too soon to count out woman-protective arguments of this kind. These arguments may resonate emotionally with politicians and voters unconcerned with their evidentiary pedigree. Moreover, the Court could still define the answer to a particular question as scientifically uncertain. The idea of uncertainty set out in *Carhart* has no clear meaning. As importantly, the idea of certainty that has informed political and legal debates about workplace safety, global warming, and ozone depletion barely resembles conventional scientific understandings.[423]

Particularly in the context of climate change, opponents of legislation have successfully relied on the "politics of doubt."[424] As one study explains, "If enough doubt can be raised about the relevant scientific findings, regulation can be avoided or delayed for years or even decades."[425] However, scientific inquiry rarely produces any firm proof or uncertainty.[426] Instead, as most textbooks instruct, scientists seek to nullify hypotheses.[427] Proving a hypothesis does not establish its truth beyond any question; rather, a positive result involves evidentiary support for a proposition.[428] More often, the evidence on a particular point is inherently ambiguous.[429]

Requiring definitive proof is a clever way of justifying almost any abortion restriction, particularly since reaching the point of absolute scientific certainty will likely be impossible.[430] Neither

422. *See id.* at 2311.

423. *See, e.g.*, ANDREW DRESSLER & EDWARD PARSONS, THE SCIENCE AND POLITICS OF GLOBAL CLIMATE CHANGE: A GUIDE TO THE DEBATE 176 (2006); NAOMI ORESTES & ERIK M. CONWAY, MERCHANTS OF DOUBT: HOW A HANDFUL OF SCIENTISTS OBSCURED THE TRUTH ON ISSUES FROM TOBACCO SMOKE TO GLOBAL WARMING 5–6 (2011).

424. ORESTES & CONWAY, *supra* note 423; William R. Freudenberg & Violetta Muselli, *Reexamining Climate Change Debates: Scientific Disagreement or Scientific Certainty Argumentation Methods (SCAMs)?*, 57 AM. BEHAV. SCIENTIST 777, 777–95 (2013).

425. Freudenberg & Muselli, *supra* note 424, at 777.

426. *See, e.g.*, Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 590 (1993) (recognizing that "arguably there are no certainties in science").

427. *See, e.g.*, ROBERT NOLA & HOWARD SANKEY, THEORIES OF SCIENTIFIC METHOD: AN INTRODUCTION 72 (2007).

428. *See, e.g.*, Freudenberg & Muselli, *supra* note 424, at 781.

429. *See id.*

430. For more on related strategies involving the production of doubt, see, for example, David Michaels, *Manufactured Uncertainty: Protecting Public Health in the Age of Contested Science and Product Defense*, 1076 ANN. N.Y. ACAD. SCI. 149, 149–62 (2006); Ulrika Olausson, *Global Warming—Global*

Carhart nor *Whole Woman's Health* tells us anything about when or if the Court will allow for regulation in uncertain circumstances.

The history of debates about the undue burden test discloses a second risk that could crop up in the aftermath of *Whole Woman's Health*. Even if the Supreme Court does not slant doctrine in a way that favors more regulation of abortion, factual questions are often resolved by lower courts facing political challenges of their own.[431] In the case of parental-involvement laws, the Court created judicial-bypass procedures to ensure that minors could meaningfully exercise their rights.[432] Bypass procedures turned on two core concepts, the maturity and best interests of minors.[433] However, as more states passed parental-consultation laws, these procedures became an obstacle to minors seeking to terminate their pregnancies.[434] The fact-intensive, discretionary inquiries involved in bypass procedures were often insulated from appellate review.[435] Some judges avoided taking bypass cases, guaranteeing that minors had to travel outside of their town or county to get a court hearing.[436] In practice, bypass procedures sometimes became the problem rather than the solution.

Supporters of abortion rights understood the problems with the bypass procedures on the books in some states, but convincing the Court of the shortcomings of the very protections the Justices had created proved impossible.[437] Pro-choice attorneys had some luck establishing the importance of exceptions for minors in abusive or dysfunctional families.[438] But when it came time to demonstrate that minors' struggles to access abortion stemmed partly from the bypass procedure itself, the Court balked.[439]

Similar dangers could arise after *Whole Woman's Health*. The new touchstones of the Court's analysis, the benefits and burdens created by a law, will be factual matters decided by trial courts. The Court reviewed the district court's findings in the case itself quite

Responsibility?: Media Frames of Collective Action and Scientific Certainty, 18 PUB. UNDERSTANDING SCI. 421, 421–36 (2009).

431. ABBEY MARR, JUDICIAL BYPASS PROCEDURES: UNDUE BURDENS FOR YOUNG PEOPLE SEEKING SAFE ABORTION CARE, ADVOCATES FOR YOUTH (2015), http://www.advocatesforyouth.org/storage/advfy/documents/Factsheets/judicial%20bypass%20procedures.pdf.

432. Carol Sanger, *Decisional Dignity: Teenage Abortion, Bypass Hearings, and the Misuse of Law*, 18 COLUM. J. GENDER & L. 409, 422 (2009).

433. *Id.* at 429.

434. MARR, *supra* note 431.

435. *Id.*

436. *Id.*

437. *Id.*

438. Planned Parenthood of Blue Ridge v. Camblos, 155 F.3d 352, 367 (4th Cir. 1998) (stating that "[a] parental notice statute . . . that excepts from its requirements notice to the abusive or neglectful parent . . . indisputably furthers legitimate and important state interests").

439. Sanger, *supra* note 432, at 450.

deferentially.[440] Whatever protections the Court intended in *Whole Woman's Health* may not translate in practice, particularly in jurisdictions with a history of narrowing abortion rights.

It is easy to see how some courts could apply *Whole Woman's Health* to uphold of the new antiabortion regulations. AUL's model twenty-week ban, the Women's Health Defense Act, relies on two factual justifications: the supposed "pain felt by an unborn child during a late-term abortion" and the higher mortality risks that the organization links to abortion after the twentieth week of pregnancy.[441] Although the *Whole Woman's Health* Court recognized in dicta that abortions are generally safe, AUL can cite medical literature documenting that the risks associated with abortions increase beyond the first trimester.[442] The timing and nature of fetal pain is also contested.[443] A 2005 study published in the *Journal of the American Medical Association* concluded that fetal perception of pain is unlikely before the third trimester, but emphasized that evidence on the subject was limited.[444] As recently as 2013, the American College of Obstetricians and Gynecologists ("ACOG") has emphasized that no new evidence has challenged the results of the 2005 study.[445]

Nevertheless, pro-lifers can take advantage of remaining uncertainty on the question of fetal pain. At the state and federal level, the organization sponsors laws that ban abortion after twenty weeks,[446] the time that NRLC argues that "unborn children are capable of experiencing pain."[447] Together with Doctors on Fetal Pain,[448] an antiabortion organization focused on the issue, NLRC relies on a variety of peer-reviewed studies.[449] The authors of these studies have questioned whether their research supports the

440. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2311–13 (2016).

441. AMS. UNITED FOR LIFE, *supra* note 57.

442. On the comparably higher rates of complications in the second trimester, see, for example, Daniel Grossman et al., *Complications After Second Trimester Surgical and Medical Abortions*, 16 REPROD. HEALTH MATTERS 173, 173–82 (2008).

443. Susan Lee et al., *Fetal Pain: A Systematic Multidisciplinary Review of the Evidence*, 294 J. AM. MED. ASS'N 947, 947–54 (2005).

444. *Id.*

445. *See* Press Release, Am. Cong. of Obstetricians & Gynecologists, Facts Are Important: Fetal Pain (July 2013), https://www.acog.org/-/media/Departments/Government-Relations-and-Outreach/FactAreImportFetalPain.pdf.

446. AMS. UNITED FOR LIFE, *supra* note 57.

447. NAT'L RIGHT TO LIFE COMM., INC., PAIN CAPABLE UNBORN CHILD PROTECTION ACT 1 (Jan. 9, 2017), http://www.nrlc.org/uploads/stateleg/PCUCPAfactsheet.pdf.

448. On the position of Doctors on Fetal Pain, see generally DOCTORS ON FETAL PAIN, FETAL PAIN: THE EVIDENCE (2011), http://www.doctorsonfetalpain.com/wp-content/uploads/2013/02/Fetal-Pain-The-Evidence-Feb-2013.pdf.

449. *See* NAT'L RIGHT TO LIFE COMM., INC., *supra* note 447.

conclusions drawn by abortion opponents.[450] But because the measurement of pain is subjective, it is hard to settle on a single indicator of when pain is possible.[451] While ACOG emphasizes that the experience of pain depends on the development of the cerebral cortex,[452] a sophisticated part of the brain that would allow for the perception of pain, abortion opponents stress that pain receptors are present in the brain as early as twenty weeks.[453]

In *Stenberg v. Carhart*, the Court noted that it was "inappropriate for the Judicial Branch to provide an exhaustive list of state interests implicated by abortion."[454] While the *Whole Woman's Health* Court viewed woman-protective laws skeptically, the Court did nothing to foreclose the recognition of new interests in the unborn child or address what level of proof would enable the state to act.[455] "While some dispute the capacity of the 20-week unborn child to experience pain," Missouri Right to Life, a Missouri-based pro-life organization, asserts, "Justice Kennedy's opinion for the Court in [*Carhart*] makes clear that medical unanimity is not required in order for legislatures to make and act on determinations of medical fact."[456]

Other states plan to introduce more onerous and controversial informed consent requirements.[457] One bill stresses the claim that medication abortions can be reversed.[458] Another proposal recommends that lawmakers "enhance their informed consent laws by requiring information on fetal pain, the availability of ultrasounds, [and] the link between abortion and breast cancer ('ABC link')."[459] Although AUL admits that the connection between breast cancer and abortion is "hotly disputed," the organization maintains that enough "[s]tudies reveal [an] . . . increased risk of

450. *See, e.g.*, Pam Belluck, *Complex Science at Issue in Politics of Fetal Pain*, N.Y. TIMES (Sept. 16, 2013), http://www.nytimes.com/2013/09/17/health/complex-science-at-issue-in-politics-of-fetal-pain.html.

451. *See, e.g.*, Sara G. Miller, *Do Fetuses Feel Pain? What the Science Says*, LIVE SCI. (May 17, 2016, 5:22 PM), http://www.livescience.com/54774-fetal-pain-anesthesia.html.

452. *See, e.g.*, *id.*

453. *See, e.g.*, DOCTORS ON FETAL PAIN, *supra* note 448.

454. Stenberg v. Carhart, 530 U.S. 914, 961 (2000) (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992)).

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

456. Mo. Right to Life, Testimony of Missouri Right to Life in Support of HB 213, at 2 (Feb. 9, 2011), http://missourilife.org/legislation/2011/testimony/house/2011%20TESTIMONY%20OF%20MISSOURI%20RIGHT%20TO%20LIFE%20IN%20SUPPORT%20OF%20HB%20213%20WITH%20RESERVATION.doc.

457. Paul Stam, *Woman's Right to Know Act: A Legislative History*, 28 ISSUES L. & MED. 3, 49 (2012).

458. *See* H.B. 62, 2017 Gen. Assemb., Sess. 2017 (N.C. 2017).

459. AMS. UNITED FOR LIFE, supra note 57.

[b]reast cancer as a result of the loss of a protective effect of a first full-term pregnancy."[460]

Contested findings of fact are also at the center of the campaign for bans on D&E, the most common second-trimester abortion procedure.[461] Such laws have passed in handful of states.[462] The case made for so-called dismemberment laws relies on disputed factual assertions.[463] NLRC emphasizes that D&E procedures—the most widely-used method that is commonly believed to be safe—do not "have wide support in the medical community" and are "never medically necessary to preserve the life of a mother in acute medical emergencies."[464] NRLC also claims that the law protects fetal life from "feel[ing] the pain of being ripped apart."[465]

These arguments do not command widespread agreement. In its description of D&E, ACOG states that "[a]bortion is a low-risk procedure," even later in pregnancy.[466] The Guttmacher Institute acknowledges that a D&E is the procedure "most commonly used [for abortion] in the second trimester."[467] Arguing that the medical community as a whole rejects D&E seems implausible, but movement members have less trouble arguing that the legitimacy of D&Es are disputed, given the position of organizations that oppose use of the procedure like the American Association of Pro-Life Obstetricians and Gynecologists.[468]

Nor is it obvious that a D&E (or any abortion procedure) is never necessary to save a woman's life. ACOG has concluded that

460. *Health Risks of Abortion*, AMS. UNITED FOR LIFE, http://www.aul.org/health-risks-of-abortion/ (last visited Nov. 27, 2017).

461. *Compare* Sarah Terzo, *Former Abortionist: Abortion is Never Medically Necessary to Save the Life of the Mother*, LIVE ACTION (Oct. 21, 2016, 10:53 AM), https://www.liveaction.org/news/former-abortionist-abortion-is-never-medically-necessary-to-save-the-life-of-the-mother/ (arguing that abortion is never medically necessary to save a woman's life), *with* Kim Painter, *Doctors Say Abortions Do Sometimes Save Women's Lives*, USA TODAY (Oct. 19, 2012, 7:31 PM), http://www.usatoday.com/story/news/nation/2012/10/19/abortion-mother-life-walsh/1644839/ (noting that abortion is sometimes required to save a woman's life).

462. *See Bans on Specific Abortion Methods Used After the First Trimester,* GUTTMACHER INST., https://www.guttmacher.org/state-policy/explore/bans-specific-abortion-methods-used-after-first-trimester (last updated Oct. 1, 2017).

463. *Compare* Terzo, *supra* note 461, *with* Painter, *supra* note 461.

464. NAT'L RIGHT TO LIFE COMM., INC., TALKING POINTS: UNBORN CHILD PROTECTION FROM DISMEMBERMENT ABORTION ACT 4 (2015), http://www.nrlc.org/uploads/stateleg/DismembermentFAQJan15.pdf.

465. *Id.* at 2.

466. *Induced Abortion*, AM. CONG. OBSTETRICIANS & GYNECOLOGISTS (May 2015), http://www.acog.org/Patients/FAQs/Induced-Abortion.

467. Megan K. Donovan, *D&E Abortion Bans: The Implications of Banning the Most-Common Second Trimester Procedure*, GUTTMACHER INST. (Feb. 21, 2017), https://www.guttmacher.org/gpr/2017/02/de-abortion-bans-implications-banning-most-common-second-trimester-procedure.

468. *See, e.g., About Us*, PROLIFE OBGYNS, http://aaplog.org/about-us/ (last visited Nov. 27, 2017).

abortion is sometimes required to save a woman's life, including in cases of heart failure, severe infections, and grave cases of pre-eclampsia.[469] Again, however, pro-life physicians and medical professionals challenge the conclusion that women would ever die if they did not terminate their pregnancies.[470] The Court's willingness to treat certain facts as uncertain has convinced NRLC leaders that dismemberment bans are more than "just another doomed attempt to reverse *Roe v. Wade*."[471] The organization claims that states passing such legislation simply advance the interests that "the Court recognized in [*Carhart*], that states have a separate and independent compelling interest in fostering respect for life by protecting the unborn child from death by dismemberment abortion . . . and 'in protecting the integrity of the medical profession with passage of this law.'"[472]

What of the woman-protective legislation sponsored by AUL? The organization might take hope from the distinctions drawn between *Carhart* and *Whole Woman's Health*, particularly the lack of legislative findings supporting HB2. *Whole Woman's Health* certainly cast doubt on the Court's openness to any woman-protective legislation. As AUL's handbook suggests, the best chance of defending such laws before the Court after *Whole Woman's Health* depends on *Carhart*. AUL explains, "[T]he Court has held that legislative bodies enjoy wide discretion to enact regulations where there is medical uncertainty as to the safety of abortion procedures, both surgical and chemical."[473]

If serious risks remain in the wake of *Whole Woman's Health*, what concrete steps could supporters of abortion rights take to mitigate the dangers involved? This Part next turns to this question.

A. Defining Certainty

The concept of scientific uncertainty is not unique to the Court's abortion doctrine. Other scholars have weighed in on the concept in the context of the admission of expert testimony under Federal Rule of Evidence 702.[474] While the Court's rules governing expert

469. *See, e.g.*, Painter, *supra* note 461.

470. *See, e.g.*, *id.*

471. NAT'L RIGHT TO LIFE COMM., INC., *supra* note 447.

472. *Id.*

473. AMS. UNITED FOR LIFE, WOMEN'S PROTECTION PROJECT 2 (2013), http://www.aul.org/wp-content/uploads/2014/01/WWP-full.pdf.

474. *See generally* PROJECT ON SCIENTIFIC KNOWLEDGE & PUB. POLICY, *DAUBERT*: THE MOST INFLUENTIAL SUPREME COURT RULING YOU'VE NEVER HEARD OF (2003), http://www.phil.vt.edu/dmayo/personal_website/PhilEvRelReg/Daubert-The-Most-Influential-Supreme-Court-Decision-You-ve-Never-Heard-Of-2003%201.pdf; David Bernstein, *Expert Witnesses, Adversarial Bias, and the (Partial) Failure of the* Daubert *Revolution*, 93 IOWA L. REV. 451, 454–55 (2008).

evidence have justifiably received their fair share of criticism,[475] it is worth recognizing that there are different kinds of uncertainty that can inform debate about abortion. Some uncertainty results from ignorance, when scientists and researchers have not yet raised a question at all or are unaware of what they do not yet know.[476] Other forms of uncertainty arise when scientists have become aware of the need to answer a question and have begun research to answer it.[477] Some degree of uncertainty will remain even after scientists can assign a probability or quantify the answer to a question.[478]

Moreover, the courts have a dubious record when it comes to dealing with scientific evidence. Rather than seeking to understand the state of scientific evidence, the Court should return to principles governing causation in civil and criminal cases. A fact should be considered uncertain when there is not yet a preponderance of scientific opinion supporting it. The benefit of the doubt given to lawmakers in *Carhart*[479] should not apply unless a factual proposition has not been studied or is subject to so much dispute that a preponderance standard could not be met.

Specifying a form of uncertainty should matter to the Court's analysis in abortion cases. What will be called category-three uncertainty—when researchers appear to have reached a consensus but could subsequently be proven wrong—should not justify greater legislative latitude in regulating abortion. As *Whole Woman's Health* confirmed, the decision to terminate a pregnancy still enjoys constitutional protection.[480] Allowing legislators to restrict abortion whenever a question remains open, regardless of the quantity or quality of evidence, will effectively permit lawmakers to restrict abortion as much as they wish. No matter how much evidence supports a particular hypothesis, there is at least a possibility that new evidence will disprove it. Defining the answer to a question as uncertain in these circumstances allows legislators to regulate abortion at will.

This is particularly true when the Court implicitly evaluates the threat of medical harm. Consider how this analysis operated in *Carhart*. The Court emphasized that, notwithstanding a lack of

475. Bernstein, *supra* note 474, at 452.

476. *See generally* SENSE ABOUT SCI., MAKING SENSE OF SCIENTIFIC UNCERTAINTY (2013), http://senseaboutscience.org/wp-content/uploads/2016/11/Makingsenseofuncertainty.pdf.

477. *See id.* at 7–8.

478. *See, e.g.*, Beth C. Bryant, *Adapting to Scientific Uncertainty: Law, Science, and Management in the Stellar Sea Lion Controversy*, 28 STAN. EVTL. L.J. 171, 208 (2009) ("If the goal is to reduce scientific uncertainty to the point that policy consensus is inevitable, it is likely to fail.").

479. *See* Gonzales v. Carhart, 550 U.S. 124, 163 (2007) ("The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty.").

480. *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2292–93 (2016).

meaningful evidence, lawmakers could act to address the very potential of health risks to women.[481] Unsurprisingly, this idea of uncertainty will always weigh in favor of whoever is invoking the possibility of harm, whether that injury involves fetal suffering or post-abortion harm. Lawmakers and courts express legitimate concern about the risk of physical injury, psychological trauma, or death.[482] However, allowing abortion restrictions whenever new evidence could theoretically change the scientific status quo will permit far more regulation than *Casey* intended. This should be particularly troubling when, as in *Carhart,* a medical question has been thoroughly researched and consensus has been established.[483] This understanding of uncertainty would undermine the delicate balance *Casey* and *Whole Woman's Health* struck.[484]

If the Court adopts this understanding of uncertainty, there would be no need to overrule *Casey* or *Carhart*. On certain occasions, the answer to a question may be genuinely open, and *Carhart*'s understanding of uncertainty,[485] if appropriately limited to these situations, may be far easier to reconcile with *Casey*'s balancing analysis.[486] For example, in certain instances (although admittedly few), legislators may identify a question that scientists have not yet asked. Alternatively, lawmakers might become aware of a question that scientists recognize as important but have just begun to research. To respect the commands of both *Casey* and *Carhart*, the Court should allow lawmakers more latitude only in these rare instances.

More clearly defining scientific uncertainty will help to check the influence of politically resonant but unsupported arguments. A better definition will also help to eliminate some of the discretionary decision making sometimes linked to the lower courts in the context of parental-involvement laws. More than anything, a better definition will do justice to the balance at the center of *Casey* and *Whole Woman's Health*. Lawmakers should not be able to unduly burden women's abortion rights by exploiting the concept of scientific uncertainty any more than they should be able to do so in other ways.

481. *See Carhart*, 550 U.S. at 159.

482. *See* Roe v. Wade, 410 U.S. 113, 137 (1973).

483. *See, e.g.*, Emily Hammond Meazell, *Scientific Avoidance: Toward a More Principled Review of Legislative Science,* 84 IND. L.J. 239, 279 (2009); *see also* John A. Robertson, *Science Disputes in Abortion Law*, 93 TEX. L. REV. 1849, 1858 (2015) (arguing that *Carhart* suggests that "when there is a difference of expert opinion, the Court will not weigh the credibility of experts on either side but will simply defer to the legislature, thus, easily satisfying a rational basis for legislation").

484. *See generally Whole Woman's Health*, 136 S. Ct. at 2292–93; Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

485. *See Carhart*, 550 U.S. at 129.

486. *See Casey*, 505 U.S. at 877–78.

CONCLUSION

The Court's decision in *Whole Woman's Health* unquestionably represents the biggest change in abortion doctrine in decades. But rather than giving either side a lasting advantage, the Court's decision will likely change the terms of the conflict. By recapturing the history of earlier struggles over the undue burden test, the Article highlights some of the problems that have defined earlier wars over the facts of abortion.

Even when supporters of abortion rights have built an impressive factual record supporting their position, the undue burden test has delivered uneven results.[487] Arguments about abortion's harmful impacts on women failed to convince the Supreme Court.[488] A bypass procedure established to allow minors to prove their maturity or detail difficult family situations became an obstacle when the politics of abortion made judges reluctant to hear bypass cases or allow minors to terminate their pregnancies.[489]

Doctrinally, the undue burden test has proven unpredictable partly because the Court has given so little guidance on the meaning of the concepts at the heart of analysis.[490] Minors' rights remained on shaky ground because the Court never clearly explained what defined a minor's maturity or best interests.[491] When it came to claims involving the harm abortion supposedly does to women, the Court went a step further, relying on a nebulous concept of scientific uncertainty that gave legislators significant latitude to restrict abortion.[492]

To make *Whole Woman's Health* a real turning point, supporters of abortion rights will have to define scientific uncertainty, reconcile *Carhart* and *Whole Woman's Health*, and make clear that trial courts do not have unlimited discretion in applying the undue burden test to record evidence. Otherwise, *Whole Woman's Health*, like *Casey*, will be remembered as a promise unfulfilled.

487. David L. Rosenthal, *Refocusing the Undue Burden Test: Inconsistent Interpretations Pose a Substantial Obstacle to Constitutional Legislation*, 31 ISSUES L. & MED. 3, 12 (2016).

488. *See Whole Woman's Health*, 136 S. Ct. at 2292, 2318.

489. SUELLYN SCARNECCHIA & JULIE KUNCE FIELD, JUDGING GIRLS: DECISION MAKING IN PARENTAL CONSENT TO ABORTION CASES 85 (1995).

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

491. *See Whole Woman's Health*, 136 S. Ct. at 2292, 2318.

491. SCARNECCHIA & FIELD, *supra* note 489, at 77–78.

492. AMS. UNITED FOR LIFE, *supra* note 473.