

**ON COMMONSENSE INFERENCES AND RADICAL  
INDETERMINACIES:  
THE MURKY FUTURE OF ABORTION LAW AFTER  
WHOLE WOMAN’S HEALTH**

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INTRODUCTION

On June 27, 2016, the United States Supreme Court handed down the most momentous decision on abortion rights in the past decade.<sup>1</sup> One

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1. Paige Winfield Cunningham, *Supreme Court Set to Hear Biggest Abortion Case in a Decade*, WASH. EXAMINER (Mar. 2, 2016, 12:01 AM), <http://www.washingtonexaminer.com/supreme-court-set-to-hear-biggest-abortion-case-in-a-decade/article/2584640>.

of the more anticipated and controversial cases of the Court's 2015–2016 term, *Whole Woman's Health v. Hellerstedt*, concerns the constitutionality of a recent Texas law that sought to further regulate abortion clinics within the state.<sup>2</sup> As many observers expected, the Court was deeply divided in its ruling, splitting five-to-three as it struck down two provisions of the Texas law.<sup>3</sup> But the level of division in *Whole Woman's Health*, and the form in which it manifested, reveals several important lessons.

The rift between the Justices in *Whole Woman's Health* is so far-reaching that Justice Clarence Thomas recommends in his dissenting opinion, "The Court should abandon the pretense that anything other than policy preferences underlies its balancing of constitutional rights and interests in any given case."<sup>4</sup> Although representing a remarkably bold and, some might say, nihilistic view of his peers' conduct, this view of judicial behavior has become a dominant—if not *the* dominant—view of the U.S. Supreme Court in contemporary political science scholarship. Increasingly, public opinion also reflects the view that on tendentious constitutional issues, the Court's opinions register as little more than personal political preferences. A recent Pew Research poll found that

[s]even-in-ten Americans (70%) say that in deciding cases, the [J]ustices of the Supreme Court "are often influenced by their own political views." Just 24% say they "generally put their political views aside" when deciding cases. The belief that [J]ustices are swayed by their own political views spans partisan and demographic groups.<sup>5</sup>

As we hope to show, the kaleidoscopic history of reproductive rights up to *Whole Woman's Health* implicates fundamental issues of judicial behavior, the composition (and decomposition) of constitutional rights, and the Court's political legitimacy following controversial constitutional decisions. In Part I of this Article, we begin by tracing the evolution of judicial skepticism in American legal thought. We start from the legal realist scholarship of the 1920s and 1930s,<sup>6</sup> move to critical legal studies scholarship in the 1980s,<sup>7</sup> and then arrive at legal attitudinalist

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2. See 136 S. Ct. 2292, 2300 (2016).

3. *Id.* at 2299.

4. *Id.* at 2328 (Thomas, J., dissenting).

5. PEW RESEARCH CTR., NEGATIVE VIEWS OF SUPREME COURT AT RECORD HIGH, DRIVEN BY REPUBLICAN DISSATISFACTION 3 (2015), <http://www.people-press.org/2015/07/29/negative-views-of-supreme-court-at-record-high-driven-by-republican-dissatisfaction/> (follow "Complete Report PDF" hyperlink).

6. Richard A. Posner, *Realism About Judges*, 105 NW. U. L. REV. 577, 578 (2011).

7. Alan Hunt, *The Theory of Critical Legal Studies*, 6 OXFORD J. LEGAL STUD. 1, 1 (1986).

scholarship within contemporary political science.<sup>8</sup>

In Part II, we transition to *Whole Woman's Health*. The judicial skeptics would have us believe that this story (the story of the buildup to *Whole Woman's Health*) is likely one of law being penetrated by inherently political actors (Supreme Court Justices) and inherently political actions (political reasonings and rulings).<sup>9</sup> In short, it was a simple ideological divide that led to the result in *Whole Woman's Health*, instead of a case study in Robertsian apolitical, technical, and logical umpiring.<sup>10</sup> Before we can adjudicate this skeptical claim, we need to unpack the controversial features of Texas's recent abortion law, as well as the main judicial developments of the case.

After reviewing "the facts" behind *Whole Woman's Health* and evaluating the majority opinion, we turn in Part III to Justice Thomas's dissenting opinion. In the dissent, we unearth a unique view of radical indeterminacy within constitutional law (ironically, we find that this view mirrors insights from critical legal scholarship).<sup>11</sup> We then use Justice Thomas's view to test for radical indeterminacy: Where does Justice Thomas see it and where is it in the majority's opinion in *Whole Woman's Health*?<sup>12</sup>

In Part IV, we explore the terrain of skepticism that lies beyond even Justice Thomas's dissent, analyzing the battles over language and science in *Whole Woman's Health*. This Part showcases the extreme reaches of indeterminacy and partisan disagreement on the Court.

In the concluding Part V, we review the main takeaways of the article and gesture to the different paths that the constitutional law surrounding reproductive health can take following *Whole Woman's Health*. This labyrinth entails a full range of normative and descriptive concerns.

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8. Isaac Unah & Ange-Marie Hancock, *U.S. Supreme Court Decision Making, Case Salience, and the Attitudinal Model*, 28 L. & POL'Y 295, 296 (2006).

9. Caroline Simon, *The Supreme Court Could Soon Decide on a Major Abortion Case for the First Time in Over 20 Years*, BUS. INSIDER (June 23, 2016, 9:57 AM), <http://www.businessinsider.com/supreme-court-decision-on-whole-womans-health-v-hellersted-2016-6>.

10. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (statement of John G. Roberts, Jr., Nominee to be Chief Justice of the United States) ("I have no agenda, but I do have a commitment. If I am confirmed, I will confront every case with an open mind. I will fully and fairly analyze the legal arguments that are presented. I will be open to the considered views of my colleagues on the bench, and I will decide every case based on the record, according to the rule of law, without fear or favor, to the best of my ability, and I will remember that it's my job to call balls and strikes, and not to pitch or bat.").

11. See *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2321 (2016) (Thomas, J., dissenting).

12. See *id.*

## I. A BRIEF HISTORY OF JUDICIAL SKEPTICISM IN AMERICA

A. *Legal Realists*

Although there have been skeptics of judicial behavior since time immemorial, we focus our attention on central figures in American legal and political thought who have developed influential criticisms of the courts' decision-making procedures and ideological investments. A good place to start is with the legal realists. As a hodgepodge of legal scholars working in the first few decades of the twentieth-century, the legal realists represented one of the first great scholarly assaults on the dominant brands of legal theory, practice, and pedagogy in the United States.<sup>13</sup> Although the realists are particularly difficult to classify—due to the diverse thinking, commitments, and methodologies found within the movement—there is a set of general characteristics that have come to be associated with the legal realists.

First and foremost, the legal realists were intellectual dissidents, rebelling against the staid conventions and problematic practices of a twentieth-century American legal system that was still stuck in the Gilded Age.<sup>14</sup> In some regard, American legal education and judicial practice still held to a brand of classical legal thought that understood law as a neutral, nonpolitical, and scientific body of knowledge, sharply delimited and distinct from moral or political knowledge.<sup>15</sup> This classical legal view placed intense focus on the role of the judge, who was charged with patrolling the boundaries of legal knowledge and understanding.<sup>16</sup> As a principled adjudicator, the well trained judge ostensibly provided clear and logical decisions, based on determinate standards and deductible legal rules.<sup>17</sup> Legal realists took issue with this regnant characterization of the law and of judicial behavior.<sup>18</sup>

In *The Path of the Law*, future Supreme Court Justice Oliver Wendell Holmes, Jr., offers an early version of the legal realist understanding of the American judiciary.<sup>19</sup> In the controversial and

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13. See Brian Leiter, *American Legal Realism*, in 18 *THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY* 50 (Martin P. Golding & William A. Edmundson eds., 2005).

14. *Id.*

15. See, e.g., Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850–1940*, in 3 *RESEARCH IN LAW & SOCIOLOGY* 3, 4 (Stephen Spitzer ed., JAI Press Inc. 1980).

16. *Id.* at 5.

17. Thomas C. Grey, *Langdell's Orthodoxy*, 45 *U. PITT. L. REV.* 1, 44 (1983).

18. *Id.* at 45.

19. See generally Oliver Wendell Holmes, *The Path of the Law*, 110 *HARV. L. REV.* 991

sometimes cryptic article, Holmes tells the reader that the best way to understand the law is through the lens of the “bad man,” who is engaged in a game of prediction with the legal system, estimating the possible legal outcomes before him without consideration or care for the moral axioms or rigid rules that supposedly sparkle through the letters of the law.<sup>20</sup> Holmes’s jurisprudence-shattering thesis is that our law, at its core, concerns “prediction of the incidence of the public force through the instrumentality of the courts.”<sup>21</sup> Law is a forecast of what the judges are going to do.

Holmes’s reconceptualization of the relationship between the law and the legal subject had a profound influence on later generations of legal realists.<sup>22</sup> The future Supreme Court Justice declared that our law is not like mathematics or pure logic, with “general axioms of conduct” that naturally develop, but is about policy and social advantage.<sup>23</sup> Holmes is clearly coming to terms with the fact that all legal decisions are, at a fundamental level, political decisions. Even the most impartial and logical of judges is guilty of entrenching propositions about law, society, morality, and politics into his professional work, even when these particular propositions are not logically required or “self-evident” within the law.<sup>24</sup>

It is because of the indeterminacy, uncertainty, and malleability of the law that Holmes assures American judges that they have a duty not of tirelessly working to excavate the sole, correct decision, but a “duty of weighing considerations of social advantage.”<sup>25</sup> Lawyers, in return, exercise their duty to clients not by presenting a case of logical necessity—linking fact patterns, legal precedents, and embedded moralisms into a neatly sequenced syllogism of law—but instead by playing to their strategic advantages within each discrete legal space and predicting judicial behavior well.<sup>26</sup> From Holmes’s perspective, humans’ relationship to the law is less about legal subjects’ knowledge of, and obedience to, a fairly static legal field, and more about potential and actual bad men exercising utilitarian calculations and probabilistic

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(1997) (providing an early version of the legal realist understanding of the American judiciary).

20. *Id.* at 993.

21. *Id.* at 991.

22. See Vitalius Tumonis, *Legal Realism and Judicial Decision-Making*, 19 JURIS. 1361, 1367 (2012).

23. Holmes, *supra* note 19, at 998.

24. *Id.*

25. *Id.* at 999.

26. See *id.* at 992.

reasoning in a field wrought with uncertainty, arbitrated by enigmatic and not-so-impartial robed barons.<sup>27</sup>

Successive generations of legal realists furthered Holmes's skepticism, and their collective unwillingness to conceive of America's judges as constrained and rule-guided agents had important implications both for legal theory and praxis. Worried about the "transcendental nonsense" that regularly passed as thorough, dispositive, and nonpolitical legal reasoning, realists such as Felix Cohen hoped that legal professionals would set aside "the vivid fictions and metaphors of traditional jurisprudence" and instead focus on "the social forces which mold the law and the social ideals by which the law is to be judged."<sup>28</sup> It is important to note how noncatastrophic the realists' assertion about the judiciary was. The realists claimed that simply because a judge had ruled did not, ipso facto, make the ruling "legally decent, legally right" or "legally inevitable," but it also did not, ipso facto, make our legal system chaotic, destined toward failure, or worthy of repeated jeremiads.<sup>29</sup>

Prominent realist Karl Llewellyn argues that realists promoted a "conception of law in flux, of moving law, and of judicial creation of law."<sup>30</sup> Law and legal professionals were tasked with keeping pace with a society that was also on the move, "typically faster than the law."<sup>31</sup> Many realists hoped that by shedding light on the camouflaged sources that actually shape judicial behavior and the law, judges would learn to exercise these sources more effectively and with greater accountability.<sup>32</sup> Many realists also hoped that judges' embrace of the movement's skeptical view of law and judicial behavior would pave the way for a formal entry of social science and philosophy into judicial decision-making, for the "realistic judge" would "frankly assess the conflicting human values that are opposed in every controversy, appraise the social importance of the precedents to which each claim appeals, open the courtroom to all evidence that will bring light to this delicate practical task of social adjustment."<sup>33</sup>

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27. See generally *id.* (discussing a perspective on humans' relationship to the law).

28. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 812 (1935).

29. Karl N. Llewellyn, Response, *Some Realism About Realism: Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1239 (1931).

30. *Id.* at 1236.

31. *Id.*

32. See Kennedy, *supra* note 15, at 8.

33. Cohen, *supra* note 28, at 842. See generally LAURA KALMAN, *LEGAL REALISM AT YALE 1927-1960* (1986) (providing an analysis of the legal realism evolution at Harvard, Yale, and Columbia); JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM & EMPIRICAL SOCIAL SCIENCE* (1995) (reviewing empirical legal research at Yale and Johns Hopkins, and

### B. Critical Legal Studies

Several decades after the end of the legal realist assault on classical legal thought, the critical legal studies (CLS) movement proclaimed itself the rightful heir to the realist tradition.<sup>34</sup> More strident and institutionally ambitious than their realist forebears, the “Crits” injected their own brand of radical skepticism into the American legal academy.<sup>35</sup>

Unlike the legal realists, who saw in scientific evidence and social awareness a responsible path forward for American judges, the Crits did not believe that judges could wiggle out of adjudicative controversies so easily.<sup>36</sup> A central commitment of CLS was the “programmatically statement that law is politics, all the way down.”<sup>37</sup> Although American judges may characterize themselves as neutral, impartial, and apolitical arbiters carefully maintaining the balance of our liberal legal order, the truth is that these judges are either unaware of, or unwilling to admit, the absence of *any* neutral foundations for their decisions.<sup>38</sup> The CLS movement brought attention to the political struggle involved in every stage of lawmaking and remaking, especially as it relates to judicial behavior.

For the Crits, a fundamental reason why judicial behavior cannot be understood without reference to politics has to do with the nature of law.<sup>39</sup> Expanding the realists’ claims of vagueness and uncertainty within American law, leading critical legal scholars expounded a thesis of radical indeterminacy.<sup>40</sup> In *The Player and the Cards: Nihilism and Legal*

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more broadly reviewing such research since World War II).

34. See, e.g., ROBERTO M. UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT: ANOTHER TIME, A GREATER TASK 3* (Verso 2015).

35. See, e.g., Jerry Frug, *McCarthyism and Critical Legal Studies*, 22 HARV. C.R.-C.L. L. REV. 665, 677 (1987) (reviewing ELLEN W. SCHRECKER, *NO IVORY TOWER: MCCARTHYISM AND THE UNIVERSITIES* (1986)). Like the legal realist movement that preceded it, the critical legal studies movement presents difficulties in classification. See *id.* Demarcating members from non-members, for instance, is especially troublesome, even for Crits themselves. See *id.* Similarly, it would be wildly irresponsible—and probably impossible—to delineate a singular CLS perspective on law or judicial behavior. Our aim is a modest one. Similar to our treatment of the legal realists, we will outline several characteristic views of critical legal scholars, which provide insight into the key intellectual contributions of the CLS movement and help to better understand aspects of *Whole Woman’s Health*.

36. In fact, as one Crit put it, “[T]he rise of Critical Legal Studies is associated with the observable decline of faith in the objectivity and neutrality of contemporary social science.” David M. Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575, 585 n.26 (1984).

37. Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515, 1526 (1991).

38. Trubek, *supra* note 36, at 578.

39. *Id.* at 591.

40. *Id.* at 578.

*Theory*, Joseph William Singer cogently walks through the thesis.<sup>41</sup> According to Singer, “A legal theory or set of legal rules is completely determinate if it is comprehensive, consistent, directive and self-revising. Any doctrine or set of rules that fails to satisfy any one of these requirements is indeterminate because it does not fully constrain our choices,”<sup>42</sup> adding elsewhere,

A legal theory or a legal rule is determinate if it tells us what to do. A completely determinate theory or rule will leave us no choice; a relatively determinate theory or rule will constrain our choices, more or less narrowly, within boundaries. The claim that a legal doctrine is indeterminate means that the doctrine allows choice rather than constraining or compelling it.<sup>43</sup>

Many within the CLS movement charged the American legal system with being radically indeterminate, demonstrating in their research and publications how various areas of law rested on unstable and fundamentally contradictory lines.<sup>44</sup> These scholars wielded history and detailed doctrinal analysis “to illuminate the swirl of competing ideologies and values that jostled for ascendancy within the domain of law” and “to demonstrate the contingent, indeterminate, and continuously contested character of law.”<sup>45</sup> A body of doctrine almost never offers a judge a single tradition, gifted with clear and determinate rules and principles. Instead, legal doctrine is layered with multiple traditions and competing features.

In addition to the problem of internal contradiction and indeterminacy, the judges themselves represent a second tier of indeterminacy to the law. According to one critical legal scholar,

[J]udges have no magical way of reading statutes or legal opinions so as to prevent their own views on such social questions from influencing what they think the law is. Given the uncertainty involved in interpreting any text, a reader’s interpretation contributes to shaping the meaning of the texts he or she purports merely to be describing. These interpretations define what the law is.<sup>46</sup>

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41. Joseph W. Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 10 (1984).

42. *Id.* at 14.

43. *Id.* at 11.

44. Hendrik Hartog, *Introduction to Symposium on “Critical Legal Histories,”* 37 L. & SOC. INQUIRY 147, 150 (2012) (reviewing Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984)).

45. *Id.*

46. Jerry Frug, *Henry James, Lee Marvin and the Law*, N.Y. TIMES (Feb. 16, 1986), <http://www.nytimes.com/1986/02/16/books/henry-james-lee-marvin-and-the-law.html>.



Duncan Kennedy, a leading critical legal scholar, argues that the only shred of determinacy that can ever be unearthed in the process of adjudication comes not as a “property of the materials” before the judge, but from the determinate and agenda-seeking judge attempting to engage with and interpret the morass of dialectical material before him.<sup>47</sup>

The radical indeterminacy thesis patented by the CLS movement is a consequential concept in American legal theory and in the history of judicial skepticism. Even set against legal perspectives that acknowledge and condone a moderate amount of political activity from the judiciary, the CLS position is remarkably extreme.<sup>48</sup> Far from even the Dworkinian or Ackermanian liberal perspective that purports to be benignly political, by holding up the “importance of rights, . . . the role of courts as guardians of fundamental values, and . . . law’s potential as a vehicle of incremental social progress,” the Crits’ radical indeterminacy thesis emphasizes the complete “political plasticity” of law.<sup>49</sup> American judges are not tangentially and benevolently involved in the political realm.<sup>50</sup> Uniform and congruous rights and values are not embedded in legal materials, ripe for the sagacious jurist to recognize and apply prudently. Our judges are primarily political actors, but, unlike the Rousseauian lawgiver, they are not ever blessed with first-rate public spiritedness and political omniscience.<sup>51</sup> Constantly and completely engaged in political discourse and decision-making, these fallible and partisan officials navigate through a complex network of valid and competing rules, rights, and

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47. Tor Krever et al., *Law on the Left: A Conversation with Duncan Kennedy*, 10 UNBOUND 1, 27 (2015); see also Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518, 518 (1986).

48. Although a remarkably extreme thesis, it would be irresponsible to ignore the limits that the Crits placed on the radical indeterminacy thesis. For instance, Karl Klare notes, CLS scholars always accepted that legal outcomes are often highly predictable in a statistical or sociological sense. No one in CLS argued that legal outcomes are random or that they exhibit no patterns or regularities, and no one argued that legal authorities or texts can be given any meaning a legal interpreter wishes to impose on them. The indeterminacy thesis was the much more modest claim that legal outcomes are often logically under-determined by existing rules, authorities, and decision-procedures.

Karl Klare, *Teaching Local 1330: Reflections on Critical Legal Pedagogy*, 7 UNBOUND 81, 92 n.17 (2011).

49. RICHARD W. BAUMAN, *IDEOLOGY AND COMMUNITY IN THE FIRST WAVE OF CRITICAL LEGAL STUDIES* 3 (2002); see also BRUCE A. ACKERMAN, *RECONSTRUCTING AMERICAN LAW* 23 (1984); RONALD DWORIN, *A MATTER OF PRINCIPLE* 11 (1985); RONALD DWORIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 2 (1996); RONALD DWORIN, *LAW’S EMPIRE* 356 (1986); ALLAN C. HUTCHINSON, *WAITING FOR CORAF: A CRITIQUE OF LAW AND RIGHTS* 7–8 (1995).

50. See sources cited *supra* note 49.

51. See sources cited *supra* note 49.

resources when deciding what the law is.<sup>52</sup>

### C. Legal Attitudinalists

Within contemporary political science, a group of scholars have spent the past few decades extending the legal realist critique through the use of quantitative analyses of judicial behavior.<sup>53</sup> These legal attitudinalists have shown great interest in demonstrating the determinative role of ideology in Supreme Court decision-making, by evaluating large swaths of Supreme Court Justices, terms, and cases.<sup>54</sup> In *The Supreme Court and the Attitudinal Model Revisited*, Jeffrey Segal and Harold Spaeth explain that a model centered around judges' ideological "attitudes" is well suited for study of Supreme Court behavior, especially due to the lack of substantive obstacles to Supreme Court decision-making.<sup>55</sup>

Justices are remarkably unaccountable actors, blessed with life tenure and rarely facing discipline from the other branches of the national government.<sup>56</sup> Justice Samuel Chase remains the only member of the high court to have been impeached, back in 1804, but even Chase survived impeachment proceedings and remained on the Court.<sup>57</sup> The American public also does not impose significant curbs and checks on the Court.<sup>58</sup> Over the past twenty-five years, the American people have voiced a decent amount of confidence in the Supreme Court, far outpacing the people's faith in Congress and usually consistent with faith in the presidency.<sup>59</sup> Moreover, the likelihood of the Court's constitutional opinions being formally overruled is staggeringly low, and not just because the rate of constitutional amendment is infrequent in the United States (even by international standards).<sup>60</sup>

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52. For more on CLS and judicial skepticism, see also MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 64 (1987); and DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION* 81 (1997).

53. Lawrence B. Solum, *The Positive Foundations of Formalism: False Necessity and American Legal Realism*, 127 HARV. L. REV. 2464, 2465 (2014) (book review).

54. See Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557, 557 (1989) (exposing the influence of ideology on civil liberties cases before the Supreme Court over a thirty-five year period).

55. See JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 94 (2002).

56. *Id.* at 19, 94.

57. *Id.* at 94.

58. *Id.* at 19.

59. Justin McCarthy, *Confidence in U.S. Branches of Government Remains Low*, GALLUP (June 15, 2015), <http://www.gallup.com/poll/183605/confidence-branches-government-remains-low.aspx>.

60. See ZACHARY ELKINS ET AL., *THE ENDURANCE OF THE NATIONAL CONSTITUTIONS* 163

Attitudinalists assert that the reservoir of institutional and personal freedom granted to the Court liberates Justices, enabling them to act out their ideologies when deciding cases and pursue their true political preferences.<sup>61</sup> In the words of the two most preeminent attitudinalists, “Simply put, Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he is extremely liberal.”<sup>62</sup> The importance of traditional judicial norms and adjudicative conventions, such as precedent, are exaggerated. Justices’ policy preferences are what matter.<sup>63</sup> Although the Justices may depict themselves as rule-guided and personally detached while umpiring, “[s]elf-deception, social desirability effects, and flat-out lying” help to explain why Justices are not forthcoming with the true nature of their behavior.<sup>64</sup>

This is best highlighted by the contrast between judicial self-presentation and judicial behavior on controversial constitutional issues, such as abortion. “Judicial nominees who can state under oath before the entire nation that they had never thought about *Roe v. Wade*” present themselves as professional, politically unsullied, and well disciplined in the technical science of decision-making.<sup>65</sup> Attitudinalists rejoin that this is all necessary window dressing, a clever yet redundant judicial posture that seeks to glamorize atypical tools, traits, and dispositions. For example, in *The Influence of Stare Decisis on the Votes of United States Supreme Court Justices*, Segal and Spaeth investigate whether precedents set in landmark cases since the time of the Warren Court have bound the

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(2009).

61. SEGAL & SPAETH, *supra* note 55, at 92.

62. JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 65 (1993).

63. The attitudinal model holds that judges decide cases based on their ideological attitude toward various policy outcomes. In any given case, [J]ustices will act so as to advance their preferred policies, regardless of such legal factors as precedent, text, or legislative intent. Judges exercise relatively unconstrained discretion so as to achieve favored results. The unique features of the judicial setting are largely irrelevant to judicial decision making; [J]ustices behave like any other political actor—only more so, since [J]ustices do not have electoral incentives to compromise their ideological preferences. Given judicial independence, the [J]ustices have the freedom “to base their decisions solely upon personal policy preferences,” and the attitudinalist assumption is that they do.

Keith E. Whittington, *Once More Unto the Breach: PostBehavioralist Approaches to Judicial Politics*, 25 L. & SOC. INQUIRY 601, 606 (2000) (book review) (quoting DAVID W. ROHDE & HAROLD J. SPAETH, *SUPREME COURT DECISION MAKING* 72 (1976)).

64. Jeffrey A. Segal & Harold J. Spaeth, *The Attitudinal Model: The Authors Respond*, L. & CTS. NEWSL., Spring 1994, at 10, 12.

65. *Id.*

Justices to a particular jurisprudential course.<sup>66</sup> The attitudinalists' skepticism is reinforced when their research finds that "90.8% of the votes conform to the [J]ustices' revealed preferences. That is, only 9.2% of the time did a [J]ustice switch to the position established in the landmark precedent."<sup>67</sup> It is not surprising that attitudinalists have used such lopsided quantitative findings to argue that "the attitudinal model is a complete and adequate model of the Supreme Court's decisions on the merits."<sup>68</sup>

Although the attitudinalists have been criticized from every direction within American political science—for being too reductionist in their labels of liberalism and conservatism, for deemphasizing certain cases, for neglecting the actual constraints that exist on individual Justices and on the Supreme Court itself—the attitudinalists' critiques of judicial behavior are notable for the staying power they have achieved within judicial politics scholarship.<sup>69</sup> The core attitudinal belief that "judicial decisions simply reflect the political preferences of a majority of the [J]ustices on the Court at any given time" resonates within the academy, and appears to align with the general public opinion of Supreme Court behavior.<sup>70</sup> By isolating a single variable from the legal realist attack on classical legal thought—ideology—and rigorously measuring its causal relationship to judicial outcomes, the attitudinalists have sought to supply clear, quantitative evidence to the forms of judicial skepticism that have persisted in legal theoretical circles for generations.

## II. ROUND AND ROUND THE BRAMBLE BUSH: THE PATH TO *WHOLE WOMAN'S HEALTH*

As inherently interesting as the arguments and attacks leveled by these different generations of judicial skeptics may be, we wonder about their descriptive strengths vis-à-vis *Whole Woman's Health*. Put simply, is this judicial story one of law being penetrated by inherently political actions? To answer this question, we must first investigate the background of the case, as well as the Supreme Court's majority opinion. In the opening of his dissent in *Whole Woman's Health*, Justice Thomas writes that "the very existence of this suit is a jurisprudential oddity."<sup>71</sup>

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66. See Jeffrey A. Segal & Harold J. Spaeth, *The Influence of Stare Decisis on the Votes of United States Supreme Court Justices*, 40 AM. J. POL. SCI. 971, 971 (1996).

67. *Id.* at 983.

68. Segal & Spaeth, *supra* note 64, at 11.

69. For a representative account of the academic debates over legal attitudinalism, see Segal & Spaeth, *supra* note 66, at 973.

70. Whittington, *supra* note 63, at 606.

71. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2321 (2016) (Thomas, J.,

The history of how the case made it before the Supreme Court reveals this to be true.

*A. Legislation and Litigation*

In 2013, the state of Texas enacted House Bill 2, a bill that contained two provisions that came to be challenged in the Court.<sup>72</sup> First, the bill required physicians performing abortions to have active admitting privileges at a hospital within thirty miles of the abortion facility.<sup>73</sup> Second, the law required abortion facilities to meet the same minimum standards set for ambulatory surgical centers under Texas law.<sup>74</sup> Shortly after the law was passed, but before it took effect, the plaintiffs filed suit in federal district court seeking to have provisions of the law declared unconstitutional.<sup>75</sup> These parties succeeded in district court, but the U.S. Court of Appeals for the Fifth Circuit overturned much (though not all) of their victory.<sup>76</sup> Instead of appealing the adverse ruling of the Fifth Circuit, the plaintiffs filed suit in district court again one week later.<sup>77</sup> Because a facial challenge was precluded by the final judgment of the Fifth Circuit in the previous case, the plaintiffs leveled an as-applied challenge on behalf of two specific clinics in the new suit.<sup>78</sup>

The district court once again found for the plaintiffs, and—contrary to the purportedly neutral office of district judge—ignored the prior ruling from the Fifth Circuit.<sup>79</sup> The district court found the admitting privileges requirement facially unconstitutional, even though the plaintiffs had only charged that the requirement was unconstitutional as applied to two specific clinics.<sup>80</sup> In essence, the district judge revived an issue that even the plaintiffs' attorneys believed had been put to rest.

The case was once again appealed to the Fifth Circuit, where the appellate court took the district judge to task for acting outside the scope of his authority.<sup>81</sup> The Fifth Circuit held that *res judicata* barred the same

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dissenting).

72. *See id.* at 2300–01.

73. Act effective Oct. 29, 2013, ch. 1, § 2, 2013 Tex. Gen. Laws 5013, 5013–14.

74. *Id.* § 4, 2013 Tex. Gen. Laws at 5017.

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

76. *See Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583, 605 (5th Cir. 2014).

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

78. *Id.* at 678 (citations omitted).

79. *See id.*

80. *Id.*

81. *See Whole Woman's Health v. Cole*, 790 F.3d 563, 580–81 (5th Cir. 2015) (first citing *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 458 (5th Cir. 2014); then citing

parties from litigating the same issue concerning the same cause of action where a final and valid judgment had already been obtained, but that the parties were free to bring an as-applied challenge.<sup>82</sup> However, since the district court revived the issue of the law's constitutionality—even beyond what the plaintiffs had charged—the Fifth Circuit devoted some of their opinion to explaining why they believed the Texas law to be facially constitutional.<sup>83</sup>

This time, the plaintiffs appealed the adverse ruling of the Fifth Circuit to the Supreme Court.<sup>84</sup> But now that the issue of facial invalidation was on the table, they argued in their brief to the Court that only facial invalidation could vindicate the rights they sought to protect.<sup>85</sup> This set the stage for the Justices to consider whether the statute was facially invalid, even though the present litigation began as an as-applied challenge.

### *B. Justice Breyer's Opinion: The Nuts and Bolts*

In an opinion that is largely deferential to the factual findings and legal conclusions of the district judge, Justice Breyer's opinion reaches two main conclusions, one concerning res judicata and the other on the merits of the statute.<sup>86</sup> On the question of res judicata, Justice Breyer holds that *Whole Woman's Health v. Hellerstedt* was properly before the Court and that the case's claims were not precluded.<sup>87</sup> On this point, Justice Breyer is in agreement with the Fifth Circuit, which held that as-applied challenges are not barred by former facial challenges.<sup>88</sup> Justice Breyer goes on at some length to explain that the existence of new facts—or changing facts—may provide grounds for another valid challenge.<sup>89</sup>

However, on the question of res judicata as it concerns the admitting privileges requirement, Justice Breyer parts ways with the Fifth Circuit on the question of facial relief.<sup>90</sup> The Fifth Circuit concluded that its prior ruling had settled the matter and that the plaintiffs in the second suit had

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Whole Woman's Health v. Lakey, 769 F.3d 285, 293 (5th Cir. 2014); and then citing *United States v. Teel*, 691 F.3d 578, 582–83 (5th Cir. 2012)).

82. *Id.* at 583.

83. *See id.* at 583–90 (citations omitted).

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

85. Brief for Petitioner at 24–25, *Hellerstedt*, 136 S. Ct. 2292 (No. 15-274).

86. *See Hellerstedt*, 136 S. Ct. at 2304, 2318.

87. *Id.* at 2306.

88. *Id.*; *Cole*, 790 F.3d at 592.

89. *Hellerstedt*, 136 S. Ct. at 2306–07.

90. *Id.* at 2308.

not asked for facial relief.<sup>91</sup> Thus, the plaintiffs were not to be given more relief than requested.<sup>92</sup> Justice Breyer counters this by citing the Federal Rules of Civil Procedure, which dictate that a “final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.”<sup>93</sup> Breyer’s closing line—putting the issue to rest—is a reminder of the Supreme Court’s immense power: “Nothing prevents this Court from awarding facial relief as the appropriate remedy for petitioners’ as-applied claims.”<sup>94</sup>

On the second claim, concerning the surgical center requirement, Justice Breyer also holds that *res judicata* is no bar in this case.<sup>95</sup> On this question, the Fifth Circuit held that the claim was barred because, even though the plaintiffs did not raise the challenge in their first lawsuit, they should have done so.<sup>96</sup> Justice Breyer rejoins by holding that challenges to “two different statutory provisions that serve two different functions” may be challenged in separate suits.<sup>97</sup> This, Justice Breyer claims, “makes sense” to avoid a “kitchen-sink approach to any litigation challenging the validity of statutes.”<sup>98</sup>

Justice Breyer’s consideration of the merits of the statute is divided into two parts.<sup>99</sup> First, he considers the undue burden standard and analyzes both the admitting privileges requirement and the surgical center requirement.<sup>100</sup> Second, in what may be considered a “mop-up” section, Justice Breyer considers arguments raised regarding the statute’s severability clause (both generally and in regard to the surgical center requirement) and various other arguments raised by the state of Texas in attempting to defend House Bill 2.<sup>101</sup>

The majority’s treatment of the undue burden standard contains

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91. *Cole*, 790 F.3d at 581 (citing *United States v. Teel*, 691 F.3d 578, 582–83 (5th Cir. 2012)).

92. *Id.* at 580 (citing *Whole Woman’s Health v. Lakey*, 46 F. Supp. 3d 673, 677 (W.D. Tex. 2014)).

93. *Hellerstedt*, 136 S. Ct. at 2297 (quoting FED. R. CIV. P. 54(c)).

94. *Id.* at 2307.

95. *Id.* at 2309.

96. *Cole*, 790 F.3d at 581 (citing *In re Southmark Corp.*, 163 F.3d 925, 934 (5th Cir. 1999)).

97. *Hellerstedt*, 136 S. Ct. at 2308.

98. *Id.*

99. *See id.* at 2300 (first quoting TEX. HEALTH & SAFETY CODE ANN. § 171.0031(a) (West Supp. 2015); and then quoting TEX. HEALTH & SAFETY CODE ANN. § 245.010(a) (West 2010)).

100. *Id.* at 2303 (quoting *Whole Woman’s Health v. Lakey*, 46 F. Supp. 3d 673, 687 (W.D. Tex. 2014)).

101. *Id.* at 2318–19 (citing Brief for Respondents at 45, 48, 53, *Hellerstedt*, 136 S. Ct. 2292 (No. 15-274)).

several novelties in relation to previous cases on the matter, as we argue in later Sections. For instance, the Fifth Circuit believed the legal matter to involve an underlying “medical uncertainty,” and, therefore, demonstrated great deference to the state legislature.<sup>102</sup> The Fifth Circuit thus took the district court to task for substituting its own judgment for the democratic decisions of the Texas legislature.<sup>103</sup> Justice Breyer counters this reasoning by holding that *Casey* requires courts to not only consider any burdens a law may impose, but to also weigh those burdens against any benefits.<sup>104</sup>

Indeed, Justice Breyer explicitly holds—in seeming contravention of earlier precedent—that “[t]he statement that legislatures, and not courts, must resolve questions of medical uncertainty is also inconsistent with this Court’s case law.”<sup>105</sup> To defend this holding, Justice Breyer points to the mass of evidence acquired in the *Casey* litigation, and in the Court’s holding in *Gonzalez* that “the Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake.”<sup>106</sup>

Justice Breyer then turns his balancing burden-benefit analysis specifically to the admitting privileges requirement.<sup>107</sup> Relying on the district court for his facts, he first finds that the House Bill 2 regulation offered no benefit and that it additionally placed a substantial obstacle in the path of a woman’s choice (although these two purportedly separate considerations seem blurred together).<sup>108</sup> Justice Breyer and the majority of the Court holds that the admitting privileges provision offered no health benefits because it addressed a problem that was statistically a very rare occurrence.<sup>109</sup> The Court frames the provision as insuring against any serious health complications that may arise from an abortion procedure that requires emergency medical treatment.<sup>110</sup> On this question, the district court collected testimony and other evidence indicating that serious complications in the first and second trimester

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102. *Whole Woman’s Health v. Cole*, 790 F.3d 563, 587 (5th Cir. 2015) (quoting *Gonzalez v. Carhart*, 550 U.S. 124, 163 (2007)).

103. *Id.*

104. *Hellerstedt*, 136 S. Ct. at 2309 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 887, 895–98 (1992)).

105. *Id.* at 2310.

106. *Id.* (quoting *Gonzalez*, 550 U.S. at 165).

107. *Id.*

108. *Id.* at 2310–11.

109. *Hellerstedt*, 136 S. Ct. at 2311.

110. *Id.*



were less than .25% and .50% respectively.<sup>111</sup> Considering this, Breyer writes, “We have found nothing in Texas’ record evidence that shows that, compared to prior law (which required a ‘working arrangement’ with a doctor with admitting privileges), the new law advances Texas’ legitimate interest in protecting women’s health.”<sup>112</sup>

Only after considering the law’s purported benefits, does Justice Breyer go on to hold that the admitting privileges requirement placed “a substantial obstacle [or burden] in the path of a woman’s choice.”<sup>113</sup> In support of this, Breyer accepts the finding of the district court, which concluded enforcement of the law led to the closure of half of the state’s abortion clinics (eight clinics closed in the months leading up to the law’s enforcement date and eleven closed on the day in which enforcement began).<sup>114</sup>

Justice Breyer then turns to evidence outside the record (which he at one point chides the dissent for doing)<sup>115</sup> to help explain why the admitting privileges requirement led to so many clinic closures.<sup>116</sup> As one amicus brief explained, doctors with admitting privileges often had contractual obligations that prohibited them from moonlighting as abortionist.<sup>117</sup> Returning to the record, Justice Breyer notes that several physicians at the abortion clinics were unable to obtain admitting privileges at nearby hospitals for various reasons “not based on clinical competence.”<sup>118</sup>

Justice Breyer concludes from this, “[T]he record contains sufficient evidence that the admitting privileges requirement led to the closure of half of Texas’ clinics, or thereabouts.”<sup>119</sup> These closures constituted an undue burden because they increased the number of women of reproductive age who were more than 150 miles from a clinic to 400,000 (from 86,000) and the number of women who were more than 200 miles

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111. *Id.* (discussing the record).

112. *Id.*

113. *Id.* at 2312 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992)).

114. *Hellerstedt*, 136 S. Ct. at 2312 (citing Brief of Amici Curiae Planned Parenthood Fed’n of Am., Planned Parenthood of Greater Tex. Surgical Health Servs., Planned Parenthood Ctr. for Choice, and Planned Parenthood S. Tex. Surgical Ctr. in Support of Petitioners at 13–15, *Hellerstedt*, 136 S. Ct. 2292 (No. 15-274)).

115. *Id.* at 2313.

116. *Id.*

117. Brief of Amici Curiae Soc’y of Hosp. Med. and Soc’y of Ob/Gyn Hospitalists in Support of Petitioners at 9, *Hellerstedt*, 136 S. Ct. 2292 (No. 15-274).

118. *Hellerstedt*, 136 S. Ct. at 2312–13 (quoting Brief of Amici Curiae Med. Staff Prof’ls in Support of Petitioners at 15, *Hellerstedt*, 136 S. Ct. 2292 (No. 15-274)).

119. *Id.* at 2313.

to 290,000 (from 10,000).<sup>120</sup> Justice Breyer admits the Court has in the past held that increased driving distance itself is not an undue burden,<sup>121</sup> but when coupled with the other obstacles House Bill 2 imposed and “when viewed in light of the virtual absence of any health benefit” the law was sufficiently burdensome.<sup>122</sup>

Justice Breyer takes a final paragraph in his consideration of the admitting privileges requirement to rebut the claim that the provision would have protected against the behavior of physicians like Kermit Gosnell, who was an abortionist convicted of first-degree murder and manslaughter.<sup>123</sup> But not even this recent scandal—the type which legislatures are often called to act in response to—could provide a justification for this law.<sup>124</sup> Justice Breyer dismisses the concern, saying, “Gosnell’s behavior was terribly wrong. But there is no reason to believe that an extra layer of regulation would have affected that behavior.”<sup>125</sup>

Justice Breyer then moves on to consider how the surgical center requirement fared under the undue burden analysis.<sup>126</sup> The surgical center requirement covered a host of specific building and safety standards that abortion clinics would have been required to meet.<sup>127</sup> These included staff and building size, the inclusion of a full surgical suite and a patient holding room, and other safety and sanitation standards.<sup>128</sup> In regard to these standards, the district court found that “risks are not appreciably lowered for patients who undergo abortions at ambulatory surgical centers as compared to nonsurgical center facilities”<sup>129</sup> and that five deaths occurred in Texas related to abortion procedures between 2001 and 2012.<sup>130</sup>

Relying on the district court’s findings, Justice Breyer holds, “[T]he surgical-center requirement provides no benefit when complications arise in the context of an abortion produced through medication.”<sup>131</sup> Justice Breyer also compares the abortion procedure to other ostensibly more

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120. *Id.*

121. *Id.* (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 885–87 (1992)).

122. *Id.* (citation omitted).

123. *See Hellerstedt*, 136 S. Ct. at 2313.

124. *See id.* at 2314.

125. *Id.* at 2313.

126. *Id.* at 2314.

127. *Id.*

128. *Hellerstedt*, 136 S. Ct. at 2314.

129. *Whole Woman’s Health v. Lakey*, 46 F. Supp. 3d 673, 684 (W.D. Tex. 2014).

130. *Hellerstedt*, 136 S. Ct. at 2315 (discussing the record).

131. *Id.*

dangerous procedures that are less regulated.<sup>132</sup> All of this leads the majority to conclude—note the phrasing—that “[t]he record evidence thus supports the ultimate legal conclusion that the surgical-center requirement is not necessary.”<sup>133</sup>

After concluding that the Texas law offered no benefits and is not necessary, Justice Breyer further explains the ways in which the law imposed an undue burden.<sup>134</sup> The plaintiffs and the district court stipulated that the law would lead to the closure of all but seven or eight clinics.<sup>135</sup> Justice Breyer accepts these predictions on their face.<sup>136</sup> Assuming the stipulations are true, Breyer finds that the district court correctly relied on testimony that closings would lead to the remaining clinics having to perform thousands of additional abortions annually.<sup>137</sup> From this further stipulation, Justice Breyer finds, “[C]ommon sense suggests that, more often than not, a physical facility that satisfies a certain physical demand will not be able to meet five times that demand without expanding or otherwise incurring significant costs.”<sup>138</sup>

For Justice Breyer, the burden analysis involves looking at the regulatory burden imposed on the providers—not just on the burden imposed directly on the women themselves.<sup>139</sup> This is highlighted again when Justice Breyer rejects evidence in the form of a recent clinic that was built to House Bill 2’s standards and that appears capable of handling increased demand.<sup>140</sup> This example does not sway Justice Breyer, because it costs twenty-six million dollars to construct, which he takes as illustrative of an undue burden.<sup>141</sup> Ultimately then, Justice Breyer’s argument is that the regulation made abortion too expensive to administer.<sup>142</sup> He later references the cost of constructing facilities again, accepting the district court’s conclusion that the requirement would have forced clinics to pay between one and three million dollars to update and meet House Bill 2’s added safety standards.<sup>143</sup> The regulatory burden on

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132. *See id.* (listing a number of procedures that are more dangerous than abortions).

133. *Id.* at 2316.

134. *See id.*

135. *Whole Woman’s Health v. Lakey*, 46 F. Supp. 3d at 680, 682 (W.D. Tex. 2014).

136. *Hellerstedt*, 136 S. Ct. at 2316.

137. *See id.* at 2316–17.

138. *Id.* at 2317.

139. *See id.* at 2318 (discussing the burden on the clinics).

140. *Id.*

141. *Hellerstedt*, 136 S. Ct. at 2317–18.

142. *Id.*

143. *Id.* at 2318 (citing *Whole Woman’s Health v. Lakey*, 46 F. Supp. 3d 673, 682 (W.D. Tex. 2014)).

the abortion provider (which, as is true in any regulated industry, necessarily imposes cost) was ultimately what—Breyer concludes—made the burden undue, as it would have “force[d] women to travel long distances to get abortions in crammed-to-capacity superfacilities.”<sup>144</sup>

### III. AN UNLIKELY VESSEL: JUSTICE THOMAS, THE CONSERVATIVE CRIT?

Of the four different opinions in *Whole Woman’s Health*, Justice Thomas’s dissenting opinion confronts the issue of ideology most directly.<sup>145</sup> In the most immediate sense, Justice Thomas’s opinion concerns the problems that he sees with the majority’s reasoning and decision in *Whole Woman’s Health*.<sup>146</sup> In the broader sense, Thomas sounds off on the ways in which the case at hand is not particularly exceptional, but instead represents the conventional behaviors of the Court, and the ways in which constitutional rights compose and decompose in contemporary jurisprudence.<sup>147</sup> As we come to see, Justice Thomas’s dissent winds up embracing a view of radical indeterminacy within constitutional law that tracks closely with the judicial skeptics discussed in Part I.

#### A. *The Immediate Sense: Casey Chaos*

Borrowing heavily from his recently deceased comrade, Justice Antonin Scalia, Justice Thomas begins his opinion with the claim that the majority “decision exemplifies the Court’s troubling tendency ‘to bend the rules when any effort to limit abortion, or even to speak in opposition to abortion, is at issue.’”<sup>148</sup> What is especially troubling, Thomas repeatedly remarks, is that try as they might, the majority cannot reconcile its reasoning with *Casey*.<sup>149</sup> *Whole Woman’s Health* turns *Casey* on its head and wildly exploits the undue burden standard set down twenty-four years earlier, all the while pretending to pay homage to *Casey*.<sup>150</sup> In his most concise treatment of the majority’s manipulation of *Casey*, Thomas writes:

Even taking *Casey* as the baseline, however, the majority radically rewrites the undue-burden test in three ways. First, today’s decision

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144. *Id.*

145. *See id.* at 2326–27 (Thomas, J., dissenting).

146. *Hellerstedt*, 136 S. Ct. at 2321 (Thomas, J., dissenting).

147. *Id.* at 2321–23 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

148. *Id.* at 2321 (quoting *Stenberg v. Carhart*, 530 U.S. 914, 954 (2000) (Scalia, J., dissenting)).

149. *Id.* (citing *Casey*, 505 U.S. at 871).

150. *Id.* at 2321, 2323–24 (citing *Casey*, 505 U.S. at 901).

requires courts to “consider the burdens a law imposes on abortion access together with the benefits those laws confer.” Second, today’s opinion tells the courts that, when the law’s justifications are medically uncertain, they need not defer to the legislature, and must instead assess medical justifications for abortion restrictions by scrutinizing the record themselves. Finally, even if a law imposes no “substantial obstacle” to women’s access to abortions, the law now must have more than a “reasonabl[e] relat[ion] to . . . a legitimate state interest.” These precepts are nowhere to be found in *Casey* or its successors, and transform the undue-burden test to something much more akin to strict scrutiny.<sup>151</sup>

According to Thomas, the *Casey* standard—if it can even be said to still stand—has been refashioned into an unstructured, cost-benefit balancing test that arrogates to the Supreme Court the new title of nation’s highest—and least qualified—medical board.<sup>152</sup> Not only does this disempower medical professionals, it also usurps the democratically elected state legislatures, which traditionally have been given deference when there is “medical uncertainty.”<sup>153</sup>

### *B. Ideology and Indeterminacy*

Beyond its surface level disagreements with the majority, Justice Thomas’s dissent also registers as a memorable onslaught against the current Court, its ideologically driven behavior, and the pernicious effects on legal predictability and institutional legitimacy.<sup>154</sup> Charged with an almost apostatical level of disappointment, Thomas is not simply quibbling that the Court’s newly minted standard for evaluating abortion cases “will surely mystify lower courts for years to come.”<sup>155</sup> His words echo the Critics’ realization that however the Court wants to call and rationalize the *new old* precedent, it “is increasingly a meaningless formalism. As the Court applies whatever standard it likes to any given case, nothing but empty words separates our constitutional decisions from judicial fiat.”<sup>156</sup> Different rules, standards, and variants of standards are offered up, depending on what constitutional right is at hand and whether that right sits in the partisan Justices’ pantheon of privileged rights.<sup>157</sup> The Court is not “bound by the rule of law” in any real sense; it finds a

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151. *Hellerstedt*, 136 S. Ct. at 2324 (Thomas, J., dissenting) (quoting *Hellerstedt*, 136 S. Ct. at 2309 (majority opinion)).

152. *Id.* at 2326 (citing *Gonzalez v. Carhart*, 550 U.S. 124, 164 (2007)).

153. *Id.* at 2325.

154. *See id.* at 2321.

155. *Id.* at 2326.

156. *Hellerstedt*, 136 S. Ct. at 2327 (Thomas, J., dissenting).

157. *Id.* at 2321.

friendly or manipulable standard, “tinkers,” and “simply announces that the” legal material before the Court “either does or does not” meet the chosen standard, depending on which lever will “achieve its desired result.”<sup>158</sup>

Surprisingly, Thomas offers a full-throated endorsement of CLS skepticism that, in practice, the doctrine running through cases such as *Casey* and *Gonzales* “cannot decide cases—that its rules, when applied to controversies, do not compel determinate results.”<sup>159</sup> Recall that the Critics’ radical indeterminacy thesis has both an internal and external dimension.<sup>160</sup> Internally, the legal rules both in place and operative when *Whole Woman’s Health* was decided were open-ended, layered over inconsistent past precedent (e.g., compare *Roe* to *Casey*), and not able to capably constrain judicial choices.<sup>161</sup> Externally, the Justices are clearly acting on “policy preferences” when “balancing . . . constitutional rights and interests in any given case.”<sup>162</sup> For anyone to interpret or post hoc rationalize a modicum of discipline, restraint, or well-bred technical indifference into hot-button cases such as *Whole Woman’s Health* would be naive. In truth, is there any reason to believe that the addition of a conservative Justice, appointed by a Republican president and overwhelmingly liked and endorsed by the Republicans in the Senate would have voted with the majority in *Whole Woman’s Health*? Likewise, is there any reason to believe that the addition of a liberal Justice, appointed by a Democratic president and overwhelmingly liked and endorsed by the Democrats in the Senate would have voted with the minority in *Whole Woman’s Health*?

Of course, this all bodes poorly for the legitimacy of the Court and any semblance of a stable, grounded legal system. With ideological actors

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158. *Id.* at 2321, 2326–27.

159. Guyora Binder, *On Critical Legal Studies as Guerrilla Warfare*, 76 *GEO. L.J.* 1, 4 (1987).

160. *Id.* at 5 (“The difficulty this poses for radical scholars is political as well as intellectual.”).

161. See *Hellerstedt*, 136 S. Ct. at 2328–29 (Thomas, J., dissenting); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992) (“[W]e find it imperative to review . . . the principles that define rights of the woman and the legitimate authority of the State . . . .”); *Roe v. Wade*, 410 U.S. 113, 153 (1973) (“[T]he right of personal privacy includes the abortion decision . . . and must be considered against important state interests in regulation.”); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (“There may be narrower scope . . . when legislation appears on its face to be within a specific prohibition of the Constitution.”); *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 392 (1937); *Lochner v. New York*, 198 U.S. 45, 53 (1905) (“The general right to make a contract . . . is part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution.” (citing *Allgeyer v. Louisiana*, 165 U.S. 578, 587 (1897))).

162. *Hellerstedt*, 136 S. Ct. at 2328 (Thomas, J., dissenting).

ruling over a field of contrived judicial rules, unpredictably applied, it is difficult for Thomas to see how constitutional rights will be safeguarded across time, as each new wave of partisan Justices fills the bench, bearing new predilections and rights prioritizations.<sup>163</sup> In the final page of his opinion, Thomas warns, “Unless the Court abides by one set of rules to adjudicate constitutional rights, it will continue reducing constitutional law to policy-driven value judgments until the last shreds of its legitimacy disappear.”<sup>164</sup>

#### IV. “IT DEPENDS UPON WHAT THE MEANING OF THE WORD *IS IS*”

One particularly striking aspect of *Whole Woman’s Health*, and one that Justice Thomas only lightly addresses, pertains to the role of language and science in judicial behavior.<sup>165</sup> In the face of political decision-making in the judiciary, many of the legal realists placed their faith in the sciences.<sup>166</sup> They believed that introducing the sciences into the legal realm held out the possibility of a lingua franca, hitching judicial behavior to a more rigorous and objective set of terms, practices, methodologies, and criteria for action.<sup>167</sup> Several decades later, many Critics vehemently disagreed with their predecessors, arguing that even a more scientific outlook, when introduced into the field of law, is open to politicization and marked disagreement.

The different opinions in *Whole Woman’s Health* bear witness to the almost comical battles over words and meanings. Three issues divide the Court—overwhelmingly along ideological lines—in *Whole Woman’s Health*: the precedent of *Casey*, the meaning of undue burden, and the rightful content of the Fourteenth Amendment.<sup>168</sup> But beyond these cases of rule indeterminacy lie significant linguistic and scientific indeterminacies.<sup>169</sup> Ostensibly technical, fixed, non-ideological terms become mutable and manipulable, all in the name of good law. The following represent just a few of the linguistic and scientific indeterminacies wrestled over in *Whole Woman’s Health*.

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163. *Id.* at 2329.

164. *Id.* at 2330.

165. *Id.* at 2324.

166. Vicki C. Jackson, *Comparative Constitutional Law, Legal Realism, and Empirical Legal Science*, 96 B.U. L. REV. 1359, 1359–60 (2016) (applying empirical research to constitutional law analysis).

167. *Id.* at 1369 (“Legal realism is one of the most important intellectual movements in law . . . also in its optimism about the possibility of developing better foundations for better law through joint work with social sciences.”).

168. *Hellerstedt*, 136 S. Ct. at 2326 (Thomas, J., dissenting).

169. *Id.* at 2325.

*A. Health/Women's Health*

In *Whole Woman's Health*, the very definitions of health, in general, and women's health, in particular, are found to be underdetermined and valuable fodder for the clashing Justices.<sup>170</sup> The majority and concurring opinions understand health in a very particular way, and the dissenting opinions operate on the basis of a separate conception.

To begin with, the only relevant health in the majority and concurring opinions appears to be the health of the pregnant woman.<sup>171</sup> There is no meaningful treatment regarding fetal health in these opinions, a notable aberration in the Court's oeuvre of abortion law.<sup>172</sup> On the issue of women's health, the relevant considerations and defining features pertain to abortion access and availability.<sup>173</sup> From this vantage point, getting a handle on women's health in *Whole Woman's Health* calls for an assessment of the number of clinics and abortionists within Texas, the distance to the nearest clinic, the amount of crowding within the clinic, patient wait time, cost (both to patient and to abortion provider), and the degree of regulation in the abortion market.<sup>174</sup> Top rate women's health entails easy access and availability of abortion, "individualized attention, serious conversation, and emotional support" from abortion providers, and good overall "quality of care."<sup>175</sup> Inferior women's health occurs "[w]hen a State severely limits access to safe and legal procedures" through unnecessary regulations and measures that make it too costly for patients and clinics, and which harm the quality of the medical care experience.<sup>176</sup>

Based on this standard, House Bill 2 did not improve health. In fact, the bill generated unhealthy effects. Quoting the district court, the majority asserts that "'before the act's passage, abortion in Texas was extremely safe with particularly low rates of serious complications and virtually no deaths occurring on account of the procedure.'" Thus, there

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170. *Id.* at 2320 (Ginsburg, J., concurring) ("Many medical procedures . . . are far more dangerous to patients . . ."); *id.* at 2325 (Thomas, J., dissenting) ("[A]ll health evidence contradict[ed] the claim that here is any health basis for the law." (second alteration in original) (quoting *Mazurek v. Armstrong*, 520 U.S. 968, 973 (1997))).

171. *Id.* at 2300 (majority opinion); *Hellerstedt*, 136 S. Ct. at 2320 (Ginsburg, J., concurring).

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

173. *Hellerstedt*, 136 S. Ct. at 2300.

174. *See id.* at 2312.

175. *Id.* at 2318.

176. *Id.* at 2321 (Ginsburg, J., concurring).



was no significant health-related problem that the new law helped to cure.”<sup>177</sup> Acting in “virtual absence of any health benefit,” Texas imposed regulations that the Court believed reduced the number of clinics and abortionists within Texas, increased patients’ distance to the nearest clinic, expanded clinic crowding and wait time, and placed other prohibitive costs on both patient and abortion provider.<sup>178</sup>

The dissenting Justices in *Whole Woman’s Health* chastise the majority for not taking the issue of health “seriously,” for the liberal bloc is interested, first and foremost, in protecting abortion, regardless of the ramifications to women’s health or fetal health.<sup>179</sup> The dissenters offer up a wholly separate conception of health in their opinions.<sup>180</sup> Gesturing back to *Roe*, the conservative bloc stresses the state’s interest in safe medical procedures, for the health of the pregnant woman and her unborn child.<sup>181</sup> Of course the pursuit of safety is going to place restrictions and obstacles on patients and medical providers, but the state has an ethical responsibility to think of more than access, availability, and close patient-doctor relationships when making abortion-related decisions.<sup>182</sup> As per House Bill 2, Justice Alito writes,

I do not dispute the fact that H. B. 2 caused the closure of some clinics. Indeed, it seems clear that H. B. 2 was intended to force unsafe facilities to shut down. The law was one of many enacted by States in the wake of the Kermit Gosnell scandal, in which a physician who ran an abortion clinic in Philadelphia was convicted for the first-degree murder of three infants who were born alive and for the manslaughter of a patient.<sup>183</sup>

Based on this standard, it cannot yet be demonstrated that House Bill 2 represented a health concern raised to the level of unconstitutionality. At this point in time, the dissenting Justices are willing to defer to Texas’s interest in achieving “marginal safety” through their new health statute.<sup>184</sup>

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177. *Id.* at 2311 (majority opinion) (quoting *Whole Woman’s Health v. Lakey*, 46 F. Supp. 3d 673, 684 (W.D. Tex. 2014)).

178. *Hellerstedt*, 136 S. Ct. at 2313 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 895 (1992)).

179. *Id.* at 2350 (Alito, J., dissenting).

180. *See id.*

181. *See id.* at 2322 (Thomas, J., dissenting); *Roe v. Wade*, 410 U.S. 113, 150 (1973) (“The State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient.”).

182. *Roe*, 410 U.S. at 150.

183. *Hellerstedt*, 136 S. Ct. at 2343 (Alito, J., dissenting).

184. *Id.* at 2325 (majority opinion) (quoting *Gonzalez v. Carhart*, 550 U.S. 124, 166 (2007)).

*B. Common Sense*

In his majority opinion, Justice Breyer relies on “common sense” and “commonsense inferences” on four separate occasions to demonstrate the naturalness of the outcome in *Whole Woman’s Health*.<sup>185</sup> To Breyer and the majority, common sense dictates that House Bill 2 would have placed undue constraints on the remaining abortion facilities in Texas, that these facilities would not have the capacity to treat patients adequately in the future, and “that these effects would be harmful to, not supportive of, women’s health.”<sup>186</sup> Justice Ginsburg’s concurring opinion reiterates this common sense, claiming that “it is beyond rational belief that H. B. 2 could genuinely protect the health of women.”<sup>187</sup>

Both of the dissenting opinions find Breyer’s sense to be anything but common.<sup>188</sup> Thomas accuses the majority bloc of relying on flimsy references to make up for the dearth of “actual evidence.”<sup>189</sup> Moreover, the new judicial standard enshrined by the majority for future abortion cases is anything but common and intelligible, requiring the states to “guess at how much more compelling their interests must be to pass muster and what ‘commonsense inferences’ of an undue burden this Court will identify next.”<sup>190</sup>

In Justice Alito’s dissenting opinion, which is joined by Chief Justice Roberts and Justice Thomas, the conservative bloc rejects the majority’s business common sense, arguing that it is neither a well-grounded nor necessary assumption that abortion clinics will be overcapacity or unable to supply adequate treatment to patients.<sup>191</sup> The Justices assert that Texas clinics “could potentially increase the number of abortions performed without prohibitively expensive changes. Among other things, they might hire more physicians who perform abortions, utilize their facilities more intensively or efficiently, or shift the mix of services provided.”<sup>192</sup> As such, it is not irrational to believe that Texans’ health would have been protected if House Bill 2 could stand.

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185. *Id.* at 2317.

186. *Id.* at 2318.

187. *Id.* at 2321 (Ginsburg, J., concurring).

188. *Hellerstedt*, 136 S. Ct. at 2346–47 (Alito, J., dissenting).

189. *Id.* at 2323 (Thomas, J., dissenting).

190. *Id.* at 2326.

191. *Id.* at 2346–47 (Alito, J., dissenting).

192. *Id.* at 2347.

*C. Facts, Numbers, and Expertise*

A related, but possibly more foundational indeterminacy in *Whole Woman's Health* concerns the nature of facts, numbers, and expertise. By the time a case reaches the Supreme Court, there have been multiple entities engaged in the process of fact-finding.<sup>193</sup> When a case revolves around a legislative act, the legislature may have its own findings.<sup>194</sup> At the beginning of litigation, the trial judge engages in fact-finding and decides which evidence is most germane and persuasive.<sup>195</sup> From there, the appellate court may, in some cases, disturb the factual findings of the district court.<sup>196</sup> At the very top of the food chain, when a case comes before the Supreme Court, the Justices must select which fact finders—and political institutions—deserve deference.<sup>197</sup> The Court has neither developed nor consistently applied, a formula for determining fact-finding deference.<sup>198</sup> This element of rule indeterminacy is visible in *Whole Woman's Health*, where the Court's infighting over fact-finding responsibilities and institutional deference represents more than procedural bickering, over which equally objective, epistemic sources should have been relied upon when the time came for the Justices to engage with “the facts.”<sup>199</sup>

The majority opinion seems to accuse the legislature of not setting forth any findings at all.<sup>200</sup> However, when considering the bill, the legislature heard testimony from numerous medical professionals on the merits of the challenged provisions.<sup>201</sup> Additionally, at trial, the state produced testimony from several experts.<sup>202</sup> However, the district court casted a shadow on the state's evidence by remarking in a footnote the following:

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193. See Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255 (2012).

194. See William D. Araiza, *Deference to Congressional Fact-Finding in Rights-Enforcing and Rights-Limiting Legislation*, 88 N.Y.U. L. REV. 878, 880 (2013).

195. See, e.g., Nicola Gennaioli & Andrei Shleifer, *Judicial Fact Discretion*, 37 J. LEGAL STUD. 1, 1–2 (2008).

196. See Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1, 6 (2011).

197. See, e.g., Caitlin E. Borgmann, *Rethinking Judicial Deference to Legislative Fact-Finding*, 84 IND. L.J. 1, 6–7 (2009).

198. Araiza, *supra* note 194, at 880 (“The differing levels of deference accorded to fact-finders . . . present a conundrum.”).

199. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2311 (2016); *cf. id.* at 2325 (Thomas, J., dissenting).

200. *Id.* at 2310 (majority opinion) (citing *Gonzalez v. Carhart*, 550 U.S. 124, 149–50 (2007)).

201. Brief for Respondents, *supra* note 101, at 34.

202. *Whole Woman's Health v. Lakey*, 46 F. Supp. 3d 673, 680 (W.D. Tex. 2014).

The credibility and weight the court affords the expert testimony of the State's witnesses Drs. Thompson, Anderson, Kitz, and Uhlenberg is informed by ample evidence that, at a very minimum, Vincent Rue, Ph.D., a non-physician consultant for the State, had considerable editorial and discretionary control over the contents of the experts' reports and declarations. The court finds that, although the experts each testified that they personally held the opinions presented to the court, the level of input exerted by Rue undermines the appearance of objectivity and reliability of the experts' opinions.<sup>203</sup>

The district court conceded that the substantial contradiction between the two sides' evidence "is the nature of expert testimony."<sup>204</sup> Nevertheless, the reliability of each side's expert witnesses remained an issue all the way to the Supreme Court, with each successive opinion attempting to discredit the witnesses relied on by the other.<sup>205</sup> For instance, appellate courts are bound to defer to the trial court's findings unless there is clear error.<sup>206</sup> In this case, although the Fifth Circuit per curiam opinion admitted there was no clear error, it still managed in passing to take a swipe at the expert testimony offered by the plaintiffs—testimony that was relied on heavily by the district court.<sup>207</sup> That appellate ruling considered the testimony of Dr. Grossman (which speculated that clinics could not meet demand after enforcement) "ipse dixit," and noted that there was no other evidence in the record on the question other than his conjecture.<sup>208</sup> The Fifth Circuit also mused that the testimony of two other experts appeared to be hearsay, but admitted that the state had not objected and thus the question was not preserved on appeal.<sup>209</sup>

This volley over experts continued at the Supreme Court, where Justice Breyer effectively settles the matter by holding that "[t]he District Court's decision to credit Dr. Grossman's testimony was sound, particularly given that Texas provided no credible experts to rebut it."<sup>210</sup> Based on Dr. Grossman's testimony, Justice Breyer holds it to be "common sense" that the remaining clinics under House Bill 2 could not

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203. *Id.* at 680 n.3.

204. *Id.* at 680.

205. *See* Whole Woman's Health v. Cole, 790 F.3d 563, 593 nn.42–43 (5th Cir. 2015); *Hellerstedt*, 136 S. Ct. at 2316 (citing *Lahey*, 46 F. Supp. 3d at 678 n.1, 681 n.4).

206. *Cole*, 790 F.3d at 580.

207. *See id.* at 589–90, 590 n.34 (citing *Whole Woman's Health v. Lahey*, 769 F.3d 285, 300 (5th Cir. 2014)).

208. *Id.* at 590 (quoting *Lahey*, 769 F.3d at 300).

209. *Id.* at 593 n.39.

210. *Hellerstedt*, 136 S. Ct. at 2317 (citing *Lahey*, 46 F. Supp. 3d at 680 n.3).

meet capacity after House Bill 2 was implemented.<sup>211</sup> Justice Alito devotes nearly four pages to refuting this stipulation, including an entire page long footnote dedicated to discrediting Dr. Grossman.<sup>212</sup>

The opinions in *Whole Woman's Health* also are notable for how saturated they are with numbers and numerical controversy.<sup>213</sup> Even a casual skim of the opinions will reveal the oversized emphasis that the Justices place on calculating the percentage of medical complications, the running tally of abortion facilities, the number of doctors, the total of abortions, the amount of money at stake in the aftermath of House Bill 2, the counting of miles, the quantity of potentially affected women, the fraction of potentially affected women, et cetera.<sup>214</sup> These numbers are not static from decision to decision, although they are quite predictable from a purely ideological vantage point.

The liberal Justices in the majority link large numbers and statistical significance to House Bill 2 burdens (e.g., big numerical losses in abortion facilities, doctors, and abortions; increased cost and distance; large fractions of negatively affected women) with low numbers and statistical insignificance to House Bill 2 benefits (e.g., low percentage of medical complications, low numerical ceiling for medical improvement).<sup>215</sup> The dissenting conservative Justices reach staggeringly different conclusions from the numbers.<sup>216</sup> For instance, the percentage of affected women was lower and the relevant abortion facilities, doctors, and abortion numbers either were uncertain or cannot be linked to House Bill 2.<sup>217</sup>

Although Justice Breyer guarantees us that “[t]he record evidence thus supports the ultimate legal conclusion” in the case, it is not clear that the oh-so-simple record of objective facts demands a specific outcome.<sup>218</sup> To take one example, Breyer assumes that the one to three million dollars needed to bring each clinic up to code under the surgical center requirement was evidence of an undue burden.<sup>219</sup> But regulations by their

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211. *Id.*

212. *See id.* at 2346 n.21 (Alito, J., dissenting).

213. *See id.* at 2312 (majority opinion).

214. The Court found a “substantial obstacle in the path of a woman’s choice” where the “number of [abortion] facilities providing abortions dropped . . . from about 40 to about 20” and a great “number of women of reproductive age” lived over 200 miles from a provider. *Id.* at 2312–13 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992)) (citing *Lakey*, 46 F. Supp. 3d at 681).

215. *Hellerstedt*, 136 S. Ct. at 2312–13, 2316–18.

216. *See id.* at 2349 n.33 (Alito, J., dissenting).

217. *Id.*

218. *Id.* at 2316 (majority opinion).

219. *Id.* at 2318 (citing *Lakey*, 46 F. Supp. 3d at 682).

nature impose costs.<sup>220</sup> At what point is a regulatory cost a constitutional burden instead of just another barrier to entry in the market?

Instead of the assurance promised by Breyer, the Court's back and forth over facts, numbers, and expertise raises several troubling questions: Did the Court's majority side with the district court's fact-finding efforts because these represented the only facts that concurred with the Court's eventual conclusion? Did the Court's dissenting Justices press the topic of legislative deference and district court skepticism for equally ideological reasons? What exactly do the facts, expert testimonies, and numerical calculations prove in *Whole Woman's Health*? Whose facts are qualitatively and quantitatively superior? In light of these concerns, it is not altogether certain how we can extract the mathematical and scientific materials from the ideological materials in *Whole Woman's Health*.

#### V. ON DOOM AND GLOOM? CRITICAL COMMENTS AND CONCLUSIONS

Although there still are legal observers who rely on classical legal insights, seeing law as a neutral, nonpolitical, and scientific body of knowledge, sharply delimited and distinct from moral or political knowledge, we would strongly caution against viewing abortion law in that manner, especially following *Whole Woman's Health*. But where does that leave us? If the skeptics—whether they be the legal realists or the Justice Thomases—are correct about judicial behavior and the ideological process of rights composition and decomposition, it is not obvious what the main takeaway ought to be.

Should the story behind *Whole Woman's Health* worry Americans? Surely, many will not care—much in the same way that they did not care about Justice Ginsburg making caustic remarks about a presidential nominee or the National Rifle Association exerting great pressure on the country's judicial nomination process.<sup>221</sup> Many Americans also will appreciate the majority ruling, regardless of the manner in which it was

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220. See Peter Roff, *The Real Cost of Regulation*, U.S. NEWS & REP. (May 16, 2015, 8:00 AM), <http://www.usnews.com/opinion/blogs/peter-roff/2015/05/16/the-real-cost-of-regulation-is-keeping-america-down> (“Regulatory compliance costs borne by businesses will find their way into the prices that consumers pay, affect the wages workers earn, and lead to lower levels of growth and prosperity.”).

221. See Joan Biskupic, *Justice Ruth Bader Ginsburg Calls Trump a ‘Faker,’ He Says She Should Resign*, CNN, <http://www.cnn.com/2016/07/12/politics/justice-ruth-bader-ginsburg-donald-trump-faker/> (last updated July 13, 2016, 7:45 AM); Linda Greenhouse, *How the G.O.P. Outsourced the Judicial Nomination Process*, N.Y. TIMES (July 21, 2016), <http://www.nytimes.com/2016/07/21/opinion/how-the-gop-outsourced-the-judicial-nomination-process.html>.

forged.<sup>222</sup> Nevertheless, we think that there are those who will recoil from the depth and breadth of ideological power in *Whole Woman's Health*. There is something deeply disturbing and disorienting afoot if the rules, decision-makers, and decision-making processes surrounding abortion law are as indeterminate as the Crits and Justice Thomas lead us to believe.<sup>223</sup> How much long-term security ought a pro-choicer, thrilled at the outcome in *Whole Woman's Health*, have if the whitewashed, publicized legal reasoning used to explain and justify the Court's decision actually "cannot resolve legal questions in an 'objective' manner; nor . . . explain how the legal system works or how judges decide cases"?"<sup>224</sup>

For the optimistic institutionalist following the legal attitudinalist line, changing this legal equation means altering what judges do. To restrain Justices and keep them within some reasonable distance of societal expectations, more substantive checks need to be imposed on the Court. These checks must change the Justices' willingness and ability to act ideologically without consequence. In order to achieve this great institutional reformation, further research needs to be conducted into the types of legal norms that might ensure that ideological majorities do not dictate judicial standards and outcomes. Additionally, new modes of accountability and enforcement should be considered, so that the Court remains responsible to the law, the public, and to fellow branches of government.

For Oliver Wendell Holmes, Jr., and the Crit, the proliferation of accountability mechanisms and institutional constraints may not have changed the ideological dynamic at play in *Whole Woman's Health*, nor would they necessarily eliminate the core sources of indeterminacy within future adjudicative processes. So long as a human is selecting rules and standards riddled with conflicting histories and competing ideational features, and then applying those rules and standards to a unique fact pattern, ideology is going to factor into final judgments.

The ideal, then, is either rebirth—complete *Götterdämmerung*, followed by wholesale socio-legal transformation—or the milder prescription of our judiciary acknowledging and patrolling its ideological production. On the lighter path, consciousness of one's own totalizing ideological construction is an important step forward, especially in light

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222. See Emma Gray, *40 Tweets Explain Exactly Why SCOTUS's Ruling On Abortion Matters*, HUFFINGTON POST (Jun. 27, 2016, 12:13 PM), [http://www.huffingtonpost.com/entry/hell-yeah-the-burden-is-undue\\_us\\_57712fa7e4b0f168323a0df8](http://www.huffingtonpost.com/entry/hell-yeah-the-burden-is-undue_us_57712fa7e4b0f168323a0df8).

223. See *Hellerstedt*, 136 S. Ct. at 2321 (Thomas, J., dissenting) (quoting Stenberg v. Carhart, 530 U.S. 914, 954 (2000) (Scalia, J., dissenting)); Trubek, *supra* note 36, at 578.

224. Singer, *supra* note 41, at 6.

of the growing skepticism surrounding the Court's resolution of contentious constitutional issues. Who knows—maybe along the way, this attempt to acknowledge the prevailing radical indeterminacies will begin to lay the groundwork for increased determinacy in future abortion law.