“We agree with the District Court that the surgical-center requirement, like the admitting-privileges requirement, provides few, if any, health benefits for women, poses a substantial obstacle to women seeking abortions, and constitutes an ‘undue burden’ on their constitutional right to do so.”—Justice BREYER

“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.”—Justice THOMAS

“We should decline to hold that these statistics justify the facial invalidation of the H.B. 2 requirements.”—Justice ALITO

Whole Woman’s Health v. Hellerstedt

579 U.S. ___, 136 S.Ct. 2292, 195 L.Ed.2d 665 (2016)

■JUSTICE **BREYER** delivered the opinion of the Court.

In Planned Parenthood of Southeastern Pa. v. Casey (1992), a plurality of the Court concluded that there “exists” an “undue burden” on a woman’s right to decide to have an abortion, and consequently a provision of law is constitutionally invalid, if the “*purpose or effect*” of the provision “*is to place a substantial obstacle* in the path of a woman seeking an abortion before the fetus attains viability.” (Emphasis added.) The plurality added that “[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.”

We must here decide whether two provisions of Texas’ House Bill 2 violate the Federal Constitution as interpreted in *Casey*. The first provision, which we shall call the “*admitting-privileges requirement,*” says that “[a] physician performing or inducing an abortion . . . must, on the date the abortion is performed or induced, have active admitting privileges at a hospital that . . . is located not further than 30 miles from the location at which the abortion is performed or induced.” . . . The second provision, which we shall call the “*surgical-center requirement,*” says that “the minimum standards for an abortion facility must be equivalent to the minimum standards adopted under [the Texas Health and Safety Code section] for ambulatory surgical centers.” [ASCs]

We conclude that neither of these provisions confers medical benefits sufficient to justify the burdens upon access that each imposes. Each places a substantial obstacle in the path of women seeking a previability abortion, each constitutes an undue burden on abortion access, *Casey* (plurality opinion), and each violates the Federal Constitution. Amdt. 14, § 1.

I

In July 2013, the Texas Legislature enacted House Bill 2 (H.B. 2 or Act). . . . [P]etitioners, a group of abortion providers, filed the present lawsuit in Federal District Court. They sought an injunction preventing enforcement of the admitting-privileges provision as applied to physicians at two abortion facilities. . . . They also sought an injunction prohibiting enforcement of the surgical-center provision anywhere in Texas. . . . On August 29, 2014, the court enjoined the enforcement of the two provisions. . .

. On June 9, 2015, the Court of Appeals reversed the District Court on the merits.

II . . . .

III

Undue Burden—Legal Standard

We begin with the standard, as described in *Casey.* We recognize that 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." Roe v. Wade (1973). But . . . "a statute which, while furthering [a] valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends." *Casey* (plurality opinion). Moreover, "[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right."

The Court of Appeals wrote that a state law is "constitutional if: (1) it does not have the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus; and (2) it is reasonably related to (or designed to further) a legitimate state interest." [It held] that "the district court erred by substituting its own judgment for that of the legislature" when it conducted its "undue burden inquiry," in part because "medical uncertainty underlying a statute is for resolution by legislatures, not the courts." *Id.* (citing Gonzales v. Carhart (2007)).

The Court of Appeals' articulation of the relevant standard is incorrect. The first part . . . may be read to imply that a district court should not consider the existence or nonexistence of medical benefits when considering whether a regulation of abortion constitutes an undue burden. The rule announced in *Casey,* however, requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer. And the second part of the test is wrong to equate the judicial review applicable to the regulation of a constitutionally protected personal liberty with the less strict review applicable where, for example, economic legislation is at issue. See, *e.g.,* Williamson v. Lee Optical of Okla., Inc. (1955). . . .

The statement that legislatures, and not courts, must resolve questions of medical uncertainty is also inconsistent with this Court's case law. Instead, the Court, when determining the constitutionality of laws regulating abortion procedures, has placed considerable weight upon evidence and argument presented in judicial proceedings. . . .

Unlike in *Gonzales,* the relevant statute here does not set forth any legislative findings. Rather, one is left to infer that the legislature sought to further a constitutionally acceptable objective (namely, protecting women's health). For a district court to give significant weight to evidence in the judicial record in these circumstances is consistent with this Court's case law. As we shall describe, the District Court did so here. It did not simply substitute its own judgment for that of the legislature. . . . It considered the evidence in the record—including expert evidence, presented in stipulations, depositions, and testimony. It then weighed the asserted benefits against the burdens. We hold that, in so doing, the District Court applied the correct legal standard.

IV

Undue Burden—Admitting–Privileges Requirement

. . . The evidence upon which the court based this conclusion included, among other things:

• A collection of at least five peer-reviewed studies on abortion complications in the first trimester, showing that the highest rate of major complications—including those complications requiring hospital admission—was less than one-quarter of 1%.

• Figures in three peer-reviewed studies showing that the highest complication rate found for the much rarer second trimester abortion was less than one-half of 1%. . . .

• Expert testimony to the effect that complications rarely require hospital admission, much less immediate transfer to a hospital from an outpatient clinic.

• Expert testimony stating that "it is extremely unlikely that a patient will experience a serious complication at the clinic that requires emergent hospitalization" and "in the rare case in which [one does], the quality of care that the patient receives is not affected by whether the abortion provider has admitting privileges at the hospital."

• Expert testimony stating that in respect to surgical abortion patients who do suffer complications requiring hospitalization, most of these complications occur in the days after the abortion, not on the spot.

• Expert testimony stating that a delay before the onset of complications is also expected for medical abortions, as "abortifacient drugs take time to exert their effects, and thus the abortion itself almost always occurs after the patient has left the abortion facility."

• Some experts added that, if a patient needs a hospital in the day or week following her abortion, she will likely seek medical attention at the hospital nearest her home.

We have found nothing in Texas' record evidence that shows that . . . the new law advanced Texas' legitimate interest in protecting women's health.

We add that, when directly asked at oral argument whether Texas knew of a single instance in which the new requirement would have helped even one woman obtain better treatment, Texas admitted that there was no evidence in the record of such a case. This answer is consistent with the findings of the other Federal District Courts that have considered the health benefits of other States' similar admitting-privileges laws.

At the same time, the record evidence indicates that the admitting-privileges requirement places a "substantial obstacle in the path of a woman's choice." *Casey* (plurality opinion). The District Court found, as of the time the admitting-privileges requirement began to be enforced, the number of facilities providing abortions dropped in half, from about 40 to about 20. Eight abortion clinics closed in the months leading up to the requirement's effective date. Eleven more closed on the day the admitting-privileges requirement took effect. . . .

In our view, the record contains sufficient evidence that the admitting-privileges requirement led

to the closure of half of Texas' clinics, or thereabouts. Those closures meant fewer doctors, longer waiting times, and increased crowding. Record evidence also supports the finding that after the admitting-privileges provision went into effect, the "number of women of reproductive age living in a county . . . more than 150 miles from a provider increased from approximately 86,000 to 400,000 . . . and the number of women living in a county more than 200 miles from a provider from approximately 10,000 to 290,000." We recognize that increased driving distances do not always constitute an "undue burden." See *Casey* (joint opinion of O'Connor, Kennedy, and Souter, JJ.). But here, those increases are but one additional burden, which, when taken together with others that the closings brought about, and when viewed in light of the virtual absence of any health benefit, lead us to conclude that the record adequately supports the District Court's "undue burden" conclusion. . . .

V

Undue Burden—Surgical–Center Requirement

. . . There is considerable evidence in the record supporting the District Court's findings indicating that the statutory provision requiring all abortion facilities to meet all surgical-center standards does not benefit patients and is not necessary. . . .

The record makes clear that the surgical-center requirement provides no benefit when complications arise in the context of an abortion produced through medication. That is because, in such a case, complications would almost always arise only after the patient has left the facility. The record also contains evidence indicating that abortions taking place in an abortion facility are safe—indeed, safer than numerous procedures that take place outside hospitals and to which Texas does not apply its surgical-center requirements. The total number of deaths in Texas from abortions was five in the period from 2001 to 2012, or about one every two years (that is to say, one out of about 120,000 to 144,000 abortions). Nationwide, childbirth is 14 times more likely than abortion to result in death, but Texas law allows a midwife to oversee childbirth in the patient's own home. . . . Medical treatment after an incomplete miscarriage often involves a procedure identical to that involved in a nonmedical abortion, but it often takes place outside a hospital or surgical center. And Texas partly or wholly grandfathers (or waives in whole or in part the surgical-center requirement for) about two-thirds of the facilities to which the surgical-center standards apply. But it neither grandfathers nor provides waivers for any of the facilities that perform abortions. . . . These facts indicate that the surgical-center provision imposes "a requirement that simply is not based on differences" between abortion and other surgical procedures "that are reasonably related to" preserving women's health, the asserted "purpos[e] of the Act in which it is found." Doe v. Bolton (1973).

Moreover, many surgical-center requirements are inappropriate as applied to surgical abortions….

At the same time, the record provides adequate evidentiary support for the District Court's conclusion that the surgical-center requirement places a substantial obstacle in the path of women seeking an abortion. The parties stipulated that the requirement would further reduce the number of abortion facilities available to seven or eight facilities, located in Houston, Austin, San Antonio, and Dallas/Fort Worth. . . . In the District Court's view, the proposition that these "seven or eight providers could meet the demand of the entire State stretches credulity." We take this statement as a finding that these few facilities could not "meet" that "demand." . . .

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

More fundamentally, in the face of no threat to women's health, Texas seeks to force women to travel long distances to get abortions in crammed-to-capacity superfacilities. Patients seeking these services are less likely to get the kind of individualized attention, serious conversation, and emotional support that doctors at less taxed facilities may have offered. Healthcare facilities and medical professionals are not fungible commodities. Surgical centers attempting to accommodate sudden, vastly increased demand, may find that quality of care declines. Another commonsense inference that the District Court made is that these effects would be harmful to, not supportive of, women's health.

Finally, the District Court found that the costs that a currently licensed abortion facility would have to incur to meet the surgical-center requirements were considerable, ranging from $1 million . . . to $3 million per facility. . . . This evidence supports the conclusion that more surgical centers will not soon fill the gap when licensed facilities are forced to close.

We agree with the District Court that the surgical-center requirement, like the admitting-privileges requirement, provides few, if any, health benefits for women, poses a substantial obstacle to women seeking abortions, and constitutes an "undue burden" on their constitutional right to do so.

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VI . . .

* * *

For these reasons the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

■JUSTICE **GINSBURG**, concurring.

[H.B. 2] inevitably will reduce the number of clinics and doctors allowed to provide abortion services. Texas argues that H.B. 2's restrictions are constitutional because they protect the health of women who experience complications from abortions. In truth, "complications from an abortion are both rare and rarely dangerous." Planned Parenthood of Wis., Inc. v. Schimel (C.A.7 2015). See Brief for American College of Obstetricians and Gynecologists et al. as *Amici Curiae* 6–10 (collecting studies and concluding "[a]bortion is one of the safest medical procedures performed in the United States"). Many medical procedures, including childbirth, are far more dangerous to patients, yet are not subject to ambulatory-surgical-center or hospital admitting-privileges requirements. Given those realities, it is beyond rational belief that H.B. 2 could genuinely protect the health of women, and certain that the law "would simply make it more difficult for them to obtain abortions." *Planned Parenthood of Wis.* When a State severely limits access to safe and legal procedures, women in desperate circumstances may resort to unlicensed rogue practitioners, *faute de mieux,* at great risk to their health and safety. . . . [L]aws like H.B. 2 that "do little or nothing for health, but rather strew impediments to abortion," *Planned Parenthood of Wis.,* cannot survive judicial inspection.

■JUSTICE **THOMAS**, dissenting. . . .

This case . . . underscores the Court's increasingly common practice of invoking a given level of scrutiny—here, the abortion-specific undue burden standard—while applying a different standard of review entirely. Whatever scrutiny the majority applies to Texas' law, it bears little resemblance to the undue-burden test the Court articulated in *Casey*. . . .

I. . . .

II

. . . First, today's decision 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. . . .

III

The majority's furtive reconfiguration of the standard of scrutiny applicable to abortion restrictions also points to a deeper problem. The undue-burden standard is just one variant of the Court's tiers-of-scrutiny approach to constitutional adjudication. And the label the Court affixes to its level of scrutiny in assessing whether the government can restrict a given right—be it "rational basis," intermediate, strict, or something else—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.

Though the tiers of scrutiny have become a ubiquitous feature of constitutional law, they are of recent vintage. Only in the 1960's did the Court begin in earnest to speak of "strict scrutiny" versus reviewing legislation for mere rationality, and to develop the contours of these tests. See Fallon, Strict Judicial Scrutiny, 54 UCLA L. Rev. 1267, 1274, 1284–1285 (2007). In short order, the Court adopted strict scrutiny as the standard for reviewing everything from race-based classifications under the Equal Protection Clause to restrictions on constitutionally protected speech. *Roe* then applied strict scrutiny to a purportedly "fundamental" substantive due process right for the first time; see Fallon, *supra,* at 1283; accord, *Casey* (plurality opinion) (noting that post-*Roe* cases interpreted *Roe* to demand "strict scrutiny"). Then the tiers of scrutiny proliferated into ever more gradations. See, *e.g.,* Craig v. Boren (1976) (intermediate scrutiny for sex-based classifications); Lawrence v. Texas (2003) (O'Connor, J., concurring in judgment) ("a more searching form of rational basis review" applies to laws reflecting "a desire to harm a politically unpopular group"); Buckley v. Valeo (1976) (*per curiam*) (applying " 'closest scrutiny' " to campaign-finance contribution limits). *Casey*'s undue-burden test added yet another right-specific test on the spectrum between rational-basis and strict-scrutiny review.

The illegitimacy of using "made-up tests" to "displace longstanding national traditions as the primary determinant of what the Constitution means" has long been apparent. United States v. Virginia

(1996) (Scalia, J., dissenting). The Constitution does not prescribe tiers of scrutiny. The three basic tiers—"rational basis," intermediate, and strict scrutiny—"are no more scientific than their names suggest, and a further element of randomness is added by the fact that it is largely up to us which test will be applied in each case"; see also *Craig* (Rehnquist, J., dissenting).

[I]f our recent cases illustrate anything, it is how easily the Court tinkers with levels of scrutiny to achieve its desired result. . . . The Court should abandon the pretense that anything other than policy preferences underlies its balancing of constitutional rights and interests in any given case.

IV

It is tempting to identify the Court's invention of a constitutional right to abortion in *Roe* as the tipping point that transformed . . . the tiers of scrutiny into an unworkable morass of special exceptions and arbitrary applications. But those roots run deeper, to the very notion that some constitutional rights demand preferential treatment. During the *Lochner* era, the Court considered the right to contract and other economic liberties to be fundamental requirements of due process of law. See Lochner v. New York (1905). The Court in 1937 repudiated *Lochner*'s foundations. See West Coast Hotel Co. v. Parrish (1937). But the Court then created a new taxonomy of preferred rights.

In 1938, seven Justices heard a constitutional challenge to a federal ban on shipping adulterated milk in interstate commerce. Without economic substantive due process, the ban clearly invaded no constitutional right. See United States v. Carolene Products Co. (1938). Within Justice Stone's opinion for the Court, however, was a footnote that just three other Justices joined—the famous *Carolene Products* Footnote 4.

Though the footnote was pure dicta, the Court seized upon it to justify its special treatment of certain personal liberties like the First Amendment and the right against discrimination on the basis of race—but also rights not enumerated in the Constitution. As the Court identified which rights deserved special protection, it developed the tiers of scrutiny as part of its equal protection (and, later, due process) jurisprudence as a way to demand extra justifications for encroachments on these rights. And, having created a new category of fundamental rights, the Court loosened the reins to recognize even putative rights like abortion, see *Roe,* which hardly implicate "discrete and insular minorities." . . .

Eighty years on, the Court has come full circle. The Court has simultaneously transformed judicially created rights like the right to abortion into preferred constitutional rights, while disfavoring many of the rights actually enumerated in the Constitution. But our Constitution renounces the notion that some constitutional rights are more equal than others. A plaintiff either possesses the constitutional right he is asserting, or not—and if not, the judiciary has no business creating ad hoc exceptions so that others can assert rights that seem especially important to vindicate. A law either infringes a constitutional right, or not; there is no room for the judiciary to invent tolerable degrees of encroachment. 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.

* * *

Today's decision will prompt some to claim victory, just as it will stiffen opponents' will to object.

But the entire Nation has lost something essential. The majority's embrace of a jurisprudence of rights-specific exceptions and balancing tests is "a regrettable concession of defeat—an acknowledgement that we have passed the point where 'law,' properly speaking, has any further application." Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175, 1182 (1989). I respectfully dissent.

■JUSTICE **ALITO**, with whom **THE CHIEF JUSTICE [ROBERTS]** and JUSTICE **THOMAS** join, dissenting. . . .

III

. . . Under our cases, petitioners must show that the admitting privileges and ASC requirements impose an "undue burden" on women seeking abortions. *Carhart*. . . .

Petitioners did not make that showing. Instead of offering direct evidence, they relied on two crude inferences. First, they pointed to the number of abortion clinics that closed after the enactment of H.B. 2, and asked that it be inferred that all these closures resulted from the two challenged provisions. They made little effort to show why particular clinics closed. Second, they pointed to the number of abortions performed annually at ASCs before H.B. 2 took effect and, because this figure is well below the total number of abortions performed each year in the State, they asked that it be inferred that ASC-compliant clinics could not meet the demands of women in the State. Petitioners failed to provide any evidence of the actual capacity of the facilities that would be available to perform abortions in compliance with the new law. . . .

A

. . . While there can be no doubt that H.B. 2 caused some clinics to cease operation, the absence of proof regarding the reasons for particular closures is a problem because some clinics have or may have closed for at least four reasons other than the two H.B. 2 requirements at issue here. These are:

1. *H.B. 2's restriction on medication abortion*. . . .

2. *Withdrawal of Texas family planning funds*. . . .

3. *The nationwide decline in abortion demand*. . . .

4. *Physician retirement (or other localized factors)*. . . .

At least nine Texas clinics may have ceased performing abortions (or reduced capacity) for one or more of the reasons having nothing to do with the provisions challenged here. . . .

B

Even if the District Court had properly filtered out immaterial closures, its analysis would have been incomplete for a second reason. Petitioners offered scant evidence on the capacity of the clinics that are able to comply with the admitting privileges and ASC requirements, or on those clinics' geographic distribution. Reviewing the evidence in the record, it is far from clear that there has been a material impact

on access to abortion. . . .

. . . Faced with increased demand, ASCs could potentially increase the number of abortions performed without prohibitively expensive changes. . . .

. . . The other potential obstacle to abortion access is the distribution of facilities throughout the State. This might occur if the two challenged H.B. 2 requirements, by causing the closure of clinics in some rural areas, led to a situation in which a "large fraction" of women of reproductive age live too far away from any open clinic. Based on the Court's holding in *Casey* it appears that the need to travel up to 150 miles is not an undue burden, and the evidence in this case shows that if the only clinics in the State were those that would have remained open if the judgment of the Fifth Circuit had not been enjoined, roughly 95% of the women of reproductive age in the State would live within 150 miles of an open facility (or lived outside that range before H.B. 2). . . .

We should decline to hold that these statistics justify the facial invalidation of the H.B. 2 requirements. . . .

EDITORS' NOTES

(1) How does Justice Breyer's formulation of the "undue burden" standard here compare with that of the joint opinion in Planned Parenthood v. Casey (1992; reprinted above, ____)? In "considering the burdens a law imposes on abortion access together with the benefits those laws confer," does he articulate more structure to the inquiry than *Casey* did?

(2) Is Justice Thomas right in dissent that Breyer's formulation "bears little resemblance" to that in *Casey* and that it "transform[s] the undue-burden test to something much more akin to strict scrutiny"? What, more fundamentally, is Thomas's objection to the undue burden test here? He seems to be objecting to an undue burden standard as such as inconsistent with "the rule of law as a law of rules" (in closing, he invokes Justice Scalia's famous law review article with that title). But, in the opinion of the Court in National Institute of Family and Life Advocates v. Becerra (2018; reprinted above, ___), Thomas himself applies an "undue burden" standard and concludes that California imposed an undue burden on the speech of crisis pregnancy centers. Can Thomas's two positions on undue burden tests be reconciled?

(3) Thomas objects that "the Constitution does not prescribe tiers of scrutiny" and invokes then-Justice Rehnquist's dissent in Craig v. Boren (1975; reprinted above, ____) objecting to the Court's development of tiers of scrutiny in interpreting the Equal Protection Clause. Recall the question we put regarding Rehnquist's dissent in the editors' notes to *Craig*: Does the Constitution prescribe its own doctrine with respect to any clause? If not, does that entail that we must throw out all doctrine as illegitimate? Or does it simply entail that in implementing the Constitution, the Court has to develop doctrinal frameworks and tests? If the Constitution does not prescribe tiers of scrutiny, what is the basis for Thomas's own insistence that the Court must apply strict scrutiny to affirmative action programs (see, e.g., Grutter v. Bollinger (2003; Thomas, J., dissenting) and Fisher v. University of Texas 2016; reprinted above, ____) (Scalia, J., dissenting) and to content-based regulations of expression (see, e.g., *Becerra*) and to free exercise of religion (Trinity Lutheran Church of Columbia, Inc. v. Comer (2017;

reprinted below, ____). Given his support for tiers of scrutiny in those cases, it cannot be that he is actually objecting to tiers of scrutiny as such. Can his positions be reconciled?

(4) Similarly, Thomas objects to the Court's use of *Carolene Products* Footnote 4 "to justify its special treatment of certain personal liberties like the First Amendment and the right against discrimination on the basis of race"—"more exacting judicial scrutiny"—yet Thomas himself is at pains to insist on the Court's application of strict scrutiny to the First Amendment's protection of freedom of speech and free exercise of religion and to the Equal Protection Clause's prohibition of discrimination on the basis of race, some of the very rights for which *Carolene Products* justifies more exacting judicial scrutiny. What justification does Thomas offer for strict scrutiny concerning these rights? Here, Thomas also asserts that "our Constitution renounces the notion that some constitutional rights are more equal than others," yet he himself has insisted that the Constitution gives greater protection to the aforementioned rights than to others. Is Thomas really objecting to tiers of scrutiny as such and to the idea that the Constitution gives greater protection to some rights than to others? Or is he instead objecting to the Court's giving stringent protection to the constitutional right of a woman to decide whether to terminate a pregnancy—a right which he believes should not be recognized and protected at all?

(5) What is Justice Alito's point about the closing of the abortion clinics? Is his position that the law going into effect had nothing to do with the closure of over half of the clinics in the state immediately after its passage? If so, is this position defensible? Or is he instead making the lawyerly point that the petitioner has not presented evidence that every one of those clinics closed because of the law rather than because of the other conceivable reasons he lists? What would it take to persuade Alito that the law imposed an "undue burden"?