AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 12: The Contemporary Era – Individual Rights/Personal Freedom and Public Morality/Abortion

**June Medical Services, L.L.C. v. Russo, 140 S.Ct. 2103** (2020) (abortion).

*June Medical Services operated an abortion clinic in Shreveport, Louisiana. In June 2014, the Louisiana state legislation passed a law that required the doctors at abortion clinics to have admitting privileges and a local hospital or have an arrangement with another doctor who had those privileges. This law was almost identical to a Texas law that was declared unconstitutional in* Whole Woman’s Health v. Hellerstedt *(2016). Claiming that the Louisiana law violated the right an abortion protected by the due process clause of the Fourteenth Amendment , June Medical Services filed a lawsuit against the Secretary of the Louisiana Department of Health and Hospitals, who in 2020 was Stephen Russo. A lower federal court agreed that the law was unconstitutional, but that decision was reversed by the Court of Appeals for the Fifth Circuit. June Medical Services appealed to the Supreme Court of the United States.*

 *The Supreme Court by a 5-4 vote declared the Louisiana abortion restriction unconstitutional. Justice Stephen Breyer’s plurality opinion asserted that the Louisiana law failed the undue burden test as applied in* Whole Women’s Health*. Chief Justice John Roberts’s asserted that the Louisiana law failed the undue burden test announced in* Planned Parenthood of Southeastern Pennsylvania v. Casey *(1993). What does the Chief Justice belief is the difference between the tests? What do the dissenting opinions believe is the correct test and why do they believe the Louisiana law may pass those tests? What is the correct test? Does the Louisiana abortion restrict pass that test? If the justices were to follow precedent in the next abortion case, what test would they follow? In* June Medical Services*, the four liberal justices agreed on one opinion, while each of the five conservatives wrote separately. Is this the difference between being in the majority and being a dissenter? Is this the difference between the liberals and the conservatives on the Roberts Court.*

Justice [BREYER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=I68d43d82b9cf11eaacfacd2d37fb36e9&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I68d43d82b9cf11eaacfacd2d37fb36e9) announced the judgment of the Court and delivered an opinion, in which Justice [GINSBURG](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=I68d43d82b9cf11eaacfacd2d37fb36e9&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I68d43d82b9cf11eaacfacd2d37fb36e9), Justice [SOTOMAYOR](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=I68d43d82b9cf11eaacfacd2d37fb36e9&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I68d43d82b9cf11eaacfacd2d37fb36e9), and Justice [KAGAN](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0301239401&originatingDoc=I68d43d82b9cf11eaacfacd2d37fb36e9&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I68d43d82b9cf11eaacfacd2d37fb36e9) join.

In [*Whole Woman's Health* v. *Hellerstedt* (2016)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2039250555&pubNum=0000780&originatingDoc=I68d43d82b9cf11eaacfacd2d37fb36e9&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)), we held that “ ‘[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right’ ” and are therefore “constitutionally invalid.”  We explained that this standard requires courts independently to review the legislative findings upon which an abortion-related statute rests and to weigh the law's “asserted benefits against the burdens” it imposes on abortion access.

. . . .

In this case, we consider the constitutionality of a Louisiana statute, Act 620, that is almost word-for-word identical to Texas’ admitting-privileges law. As in [*Whole Woman's Health,*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2039250555&pubNum=0000506&originatingDoc=I68d43d82b9cf11eaacfacd2d37fb36e9&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))the District Court found that the statute offers no significant health benefit. It found that conditions on admitting privileges common to hospitals throughout the State have made and will continue to make it impossible for abortion providers to obtain conforming privileges for reasons that have nothing to do with the State's asserted interests in promoting women's health and safety. And it found that this inability places a substantial obstacle in the path of women seeking an abortion. As in [*Whole Woman's Health*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2039250555&pubNum=0000506&originatingDoc=I68d43d82b9cf11eaacfacd2d37fb36e9&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)), the substantial obstacle the Act imposes, and the absence of any health-related benefit, led the District Court to conclude that the law imposes an undue burden and is therefore unconstitutional.

. . . .

Because the issues before us in this case primarily focus upon the factual findings (and fact-related determinations) of the District Court, we set forth only the essential findings here, giving greater detail in the analysis that follows.

With respect to the Act's asserted benefits, the District Court found that:

• “[A]bortion in Louisiana has been extremely safe, with particularly low rates of serious complications.” The “testimony of clinic staff and physicians demonstrated” that it “rarely ... is necessary to transfer patients to a hospital: far less than once a year, or less than one per several thousand patients.” And “[w]hether or not a patient's treating physician has admitting privileges is not relevant to the patient's care.”

• There was accordingly “‘no significant health-related problem that the new law helped to cure.’ The record does not contain any evidence that complications from abortion were being treated improperly, nor any evidence that any negative outcomes could have been avoided if the abortion provider had admitting privileges at a local hospital

• There was also “no credible evidence in the record that Act 620 would further the State's interest in women's health beyond that which is already insured under existing Louisiana law.”

Turning to Act 620's impact on women's access to abortion, the District Court found that:

• Approximately 10,000 women obtain abortions in Louisiana each year.  At the outset of this litigation, those women were served by six doctors at five abortion clinics.  By the time the court rendered its decision, two of those clinics had closed, and one of the doctors (Doe 4) had retired, leaving only Does 1, 2, 3, 5, and 6.

• “[N]otwithstanding the good faith efforts of Does 1, 2, 4, 5 and 6 to comply with the Act by getting active admitting privileges at a hospital within 30 miles of where they perform abortions, they have had very limited success for reasons related to Act 620 and not related to their competence.”

. . . .

• These requirements establish that admitting privileges serve no “ ‘relevant credentialing function’ ” because physicians may be denied privileges “for reasons unrelated to competency.”

. . . .

• Doe 3 testified credibly “that, as a result of his fears, and the demands of his private OB/GYN practice, if he is the last physician performing abortion in either the entire state or in the northern part of the state, he will not continue to perform abortions.”

• Enforcing the admitting-privileges requirement would therefore “result in a drastic reduction in the number and geographic distribution of abortion providers, reducing the number of clinics to one, or at most two, and leaving only one, or at most two, physicians providing abortions in the entire state,” Does 3 and 5, who would only be allowed to practice in Shreveport and New Orleans. Depending on whether Doe 3 stopped practicing, or whether his retirement was treated as legally relevant, the impact would be a 55%–70% reduction in capacity.

• “The result of these burdens on women and providers, taken together and in context, is that many women seeking a safe, legal abortion in Louisiana will be unable to obtain one. Those who can will face substantial obstacles in exercising their constitutional right to choose abortion due to the dramatic reduction in abortion services.”

• In sum, “Act 620 does not advance Louisiana's legitimate interest in protecting the health of women seeking abortions. Instead, Act 620 would increase the risk of harm to women's health by dramatically reducing the availability of safe abortion in Louisiana.”

The District Court added that

“there is no legally significant distinction between this case and [[*Whole Woman's Health*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2039250555&originatingDoc=I68d43d82b9cf11eaacfacd2d37fb36e9&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))]: Act 620 was modeled after the Texas admitting privileges requirement, and it functions in the same manner, imposing significant obstacles to abortion access with no countervailing benefits.”

. . . .

We start from the premise that a district court's findings of fact, “whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses’ credibility.” . . . Where “the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.”  Our dissenting colleagues suggest that a different, less-deferential standard should apply here because the District Court enjoined the admitting-privileges requirement before it was enforced. We are aware of no authority suggesting that appellate scrutiny of factual determinations varies with the timing of a plaintiff's lawsuit or a trial court's decision. And, in any event, the record belies the dissents’ claims that the District Court's findings in this case were “conjectural” or premature. . . . Under that familiar standard, we find that the testimony and other evidence contained in the extensive record developed over the 6-day trial support the District Court's ultimate conclusion that, “[e]ven if Act 620 could be said to further women's health to some marginal degree, the burdens it imposes far outweigh any such benefit, and thus the Act imposes an unconstitutional undue burden

. . . .

In [*Whole Woman's Health*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2039250555&pubNum=0000506&originatingDoc=I68d43d82b9cf11eaacfacd2d37fb36e9&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)), we said that, by presenting “direct testimony” from doctors who had been unable to secure privileges, and “plausible inferences to be drawn from the timing of the clinic closures” around the law's effective date, the plaintiffs had “satisfied their burden” to establish that the Texas admitting-privileges requirement caused the closure of those clinics. . . . The District Court supervised Does 1, 2, 5, and 6 for over a year and a half as they tried, and largely failed, to obtain conforming privileges from 13 relevant hospitals. The court heard direct evidence that some of the doctors’ applications were denied for reasons that had nothing to do with their ability to perform abortions safely. . . . The evidence shows, among other things, that the fact that hospital admissions for abortion are vanishingly rare means that, unless they also maintain active OB/GYN practices, abortion providers in Louisiana are unlikely to have any recent in-hospital experience. Yet such experience can well be a precondition to obtaining privileges. . . . The evidence also shows that many providers, even if they could initially obtain admitting privileges, would be unable to keep them. That is because, unless they have a practice that requires regular in-hospital care, they will lose the privileges for failing to use them. . . . The evidence also shows that opposition to abortion played a significant role in some hospitals’ decisions to deny admitting privileges. . . . Still other hospitals have requirements that abortion providers cannot satisfy because of the hostility they face in Louisiana. Many Louisiana hospitals require applicants to identify a doctor (called a “covering physician”) willing to serve as a backup should the applicant admit a patient and then for some reason become unavailable. The District Court found “that opposition to abortion can present a major, if not insurmountable hurdle, for an applicant getting the required covering physician.”

. . . .

. . . .

We turn finally to the law's asserted benefits. The District Court found that there was “ ‘no significant health-related problem that the new law helped to cure.’ . . . First, the District Court found that the admitting-privileges requirement serves no “relevant credentialing function.”. As we have seen, hospitals can, and do, deny admitting privileges for reasons unrelated to a doctor's ability safely to perform abortions. . . . Moreover, while “competency is a factor” in credentialing decisions,  hospitals primarily focus upon a doctor's ability to perform the inpatient, hospital-based procedures for which the doctor seeks privileges—not outpatient abortions. . . .

Second, the District Court found that the admitting-privileges requirement “does not conform to prevailing medical standards and will not improve the safety of abortion in Louisiana.” . . . .

[T]he State says that the record does not show that Act 620 will burden *every*woman in Louisiana who seeks an abortion. True, but beside the point. As we stated in [*Casey*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1992116314&pubNum=0000780&originatingDoc=I68d43d82b9cf11eaacfacd2d37fb36e9&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)), a State's abortion-related law is unconstitutional on its face if “it will operate as a substantial obstacle to a woman's choice to undergo an abortion” in “a large fraction of the cases in which [it] is relevant.” . . . .

. . . .

This case is similar to, nearly identical with, [*Whole Woman's Health.*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2039250555&pubNum=0000506&originatingDoc=I68d43d82b9cf11eaacfacd2d37fb36e9&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) And the law must consequently reach a similar conclusion. Act 620 is unconstitutional. . . .

CHIEF JUSTICE [ROBERTS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0258116001&originatingDoc=I68d43d82b9cf11eaacfacd2d37fb36e9&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I68d43d82b9cf11eaacfacd2d37fb36e9), concurring in the judgment.

. . . .

I joined the dissent in [*Whole Woman's Health*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2039250555&pubNum=0000506&originatingDoc=I68d43d82b9cf11eaacfacd2d37fb36e9&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))and continue to believe that the case was wrongly decided. The question today however is not whether [*Whole Woman's Health*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2039250555&pubNum=0000506&originatingDoc=I68d43d82b9cf11eaacfacd2d37fb36e9&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) was right or wrong, but whether to adhere to it in deciding the present case.

. . . .

The legal doctrine of *stare decisis*requires us, absent special circumstances, to treat like cases alike. The Louisiana law imposes a burden on access to abortion just as severe as that imposed by the Texas law, for the same reasons. Therefore Louisiana's law cannot stand under our precedents.

*Stare decisis* (“to stand by things decided”) is the legal term for fidelity to precedent. It has long been “an established rule to abide by former precedents, where the same points come again in litigation; as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion.” . . .Adherence to precedent is necessary to “avoid an arbitrary discretion in the courts.” The constraint of precedent distinguishes the judicial “method and philosophy from those of the political and legislative process.” The doctrine also brings pragmatic benefits. Respect for precedent “promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” . . .

*Stare decisis*is not an “inexorable command.”  But for precedent to mean anything, the doctrine must give way only to a rationale that goes beyond whether the case was decided correctly. The Court accordingly considers additional factors before overruling a precedent, such as its administrability, its fit with subsequent factual and legal developments, and the reliance interests that the precedent has engendered.

*Stare decisis*principles also determine how we handle a decision that itself departed from the cases that came before it. In those instances, “[r]emaining true to an ‘intrinsically sounder’ doctrine established in prior cases better serves the values of *stare decisis* than would following” the recent departure. . . .

. . . .

Under [*Casey*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1992116314&pubNum=0000780&originatingDoc=I68d43d82b9cf11eaacfacd2d37fb36e9&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)), the State may not impose an undue burden on the woman's ability to obtain an abortion. “A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”  Laws that do not pose a substantial obstacle to abortion access are permissible, so long as they are “reasonably related” to a legitimate state interest.

. . . .

Nothing about [*Casey*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1992116314&pubNum=0000780&originatingDoc=I68d43d82b9cf11eaacfacd2d37fb36e9&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) suggested that a weighing of costs and benefits of an abortion regulation was a job for the courts. On the contrary, we have explained that the “traditional rule” that “state and federal legislatures [have] wide discretion to pass legislation in areas where there is medical and scientific uncertainty” is “consistent with [*Casey*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1992116314&pubNum=0000780&originatingDoc=I68d43d82b9cf11eaacfacd2d37fb36e9&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)).” [*Casey*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1992116314&pubNum=0000780&originatingDoc=I68d43d82b9cf11eaacfacd2d37fb36e9&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) instead focuses on the existence of a substantial obstacle, the sort of inquiry familiar to judges across a variety of contexts. . . . . The upshot of [*Casey*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1992116314&pubNum=0000780&originatingDoc=I68d43d82b9cf11eaacfacd2d37fb36e9&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) is clear: The several restrictions that did not impose a substantial obstacle were constitutional, while the restriction that did impose a substantial obstacle was unconstitutional.

. . . .

[*Whole Woman's Health*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2039250555&pubNum=0000506&originatingDoc=I68d43d82b9cf11eaacfacd2d37fb36e9&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) held that Texas's admitting privileges requirement placed “a substantial obstacle in the path of women seeking a previability abortion,” independent of its discussion of benefits. Because Louisiana's admitting privileges requirement would restrict women's access to abortion to the same degree as Texas's law, it also cannot stand under our precedent. To begin, the two laws are nearly identical. . . . . Crucially, the District Court findings indicate that Louisiana's law would restrict access to abortion in just the same way as Texas's law, to the same degree or worse. . . .

. . . .

*Stare decisis* instructs us to treat like cases alike. The result in this case is controlled by our decision four years ago invalidating a nearly identical Texas law. The Louisiana law burdens women seeking previability abortions to the same extent as the Texas law, according to factual findings that are not clearly erroneous. For that reason, I concur in the judgment of the Court that the Louisiana law is unconstitutional.

Justice [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I68d43d82b9cf11eaacfacd2d37fb36e9&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I68d43d82b9cf11eaacfacd2d37fb36e9), dissenting.

Today a majority of the Court perpetuates its ill-founded abortion jurisprudence by enjoining a perfectly legitimate state law and doing so without jurisdiction. . . . .Our abortion precedents are grievously wrong and should be overruled. . . . The Constitution does not constrain the States’ ability to regulate or even prohibit abortion. This Court created the right to abortion based on an amorphous, unwritten right to privacy, which it grounded in the “legal fiction” of substantive due process, . . .

. . . .

. . . . The Court's current “formulation of the *stare decisis* standard does not comport with our judicial duty under Article III,” which requires us to faithfully interpret the Constitution.  Rather, when our prior decisions clearly conflict with the text of the Constitution, we are required to “privilege [the] text over our own precedents.” Because [*Roe*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1973126316&pubNum=0000780&originatingDoc=I68d43d82b9cf11eaacfacd2d37fb36e9&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) and its progeny are premised on a “demonstrably erroneous interpretation of the Constitution,” we should not apply them here. Even under THE CHIEF JUSTICE's approach to *stare decisis*, continued adherence to these precedents cannot be justified. *Stare decisis* is “not an inexorable command and this Court has recently overruled a number of poorly reasoned precedents that have proved themselves to be unworkable. . . .

Justice [ALITO](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=I68d43d82b9cf11eaacfacd2d37fb36e9&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I68d43d82b9cf11eaacfacd2d37fb36e9), with whom Justice [GORSUCH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=I68d43d82b9cf11eaacfacd2d37fb36e9&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I68d43d82b9cf11eaacfacd2d37fb36e9) joins, with whom Justice [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I68d43d82b9cf11eaacfacd2d37fb36e9&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I68d43d82b9cf11eaacfacd2d37fb36e9) joins [in part], and with whom Justice [KAVANAUGH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0364335801&originatingDoc=I68d43d82b9cf11eaacfacd2d37fb36e9&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I68d43d82b9cf11eaacfacd2d37fb36e9) joins [in part], dissenting.

. . . .

Under our precedent, the critical question in this case is whether the challenged Louisiana law places a “substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”  If a law like that at issue here does not have that effect, it is constitutional. . . . . [U]nless an abortion law has an adverse effect *on women*, there is no reason why the law should face greater constitutional scrutiny than any other measure that burdens a regulated entity in the name of health or safety. Many state and local laws that are justified as safety measures rest on debatable empirical grounds. But when a party saddled with such restrictions challenges them as a violation of due process, our cases call for the restrictions to be sustained if “it might be thought that the particular legislative measure was a rational way” to serve a valid interest. . . .

. . . .

[C]ontrary to the view taken by the plurality and (seemingly) by THE CHIEF JUSTICE, there is ample evidence in the record showing that admitting privileges help to protect the health of women by ensuring that physicians who perform abortions meet a higher standard of competence than is shown by the mere possession of a license to practice. In deciding whether to grant admitting privileges, hospitals typically undertake a rigorous investigative process to ensure that a doctor is responsible and competent and has the training and experience needed to perform the procedures for which the privileges are sought. . . . Hospitals look beyond the mere possession of a license, and they do that for very obvious reasons. If nothing else, their review process serves the hospitals’ interests by diminishing the risk of awards for malpractice committed by doctors practicing on their premises. . . .

. . . .

Louisiana adopted Act 620 in the aftermath of the Kermit Gosnell grand jury report, which expounded on the failures of regulatory oversight that allowed Gosnell's practices to continue for an extended period. The grand jury concluded that closer supervision would have uncovered Gosnell's egregious health and safety violations. Gosnell had a medical license, but it is doubtful that any hospital would have given him admitting privileges.

*. . . .*

. . . . The decision in [*Whole Woman's Health*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2039250555&pubNum=0000506&originatingDoc=I68d43d82b9cf11eaacfacd2d37fb36e9&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) was not based on the face of the Texas statute, but on an empirical question, namely, the effect of the statute on access to abortion in that State.  The Court's answer to that question depended on numerous factors that may differ from State to State, including the demand for abortions, the number and location of abortion clinics and physicians, the geography of the State, the distribution of the population, and the ability of physicians to obtain admitting privileges.  There is no reason to think that a law requiring admitting privileges will necessarily have the same effect in every state. As a result, just because the Texas admitting privileges requirement was found by this Court, based on evidence in the record of that case, to have substantially reduced access to abortion in that State, it does not follow that Act 620 would have comparable effects in Louisiana. . . .

. . . .

When the District Court made its assessment of the doctors’ “good faith,” enforcement of Act 620 had been preliminarily enjoined, and the doctors surely knew that enforcement would be permanently barred if the lawsuit was successful. Thus, the doctors had everything to lose and nothing to gain by obtaining privileges. . . . Thus, in light of the situation at the time when the doctors made their attempts to get privileges, they had an incentive to do as little as they thought the District Court would demand, not as much as they would if they stood to benefit from success. . . . In light of the doctors’ incentives, more should have been required. The court should have asked whether the doctors’ efforts to acquire privileges were equal to the efforts they would have made if they knew that their ability to continue to perform abortions was at stake. The District Court did not do that, and because its finding on abortion access rests on the wrong legal standard, it cannot stand. . . .

Not only did the District Court apply the wrong test, but the evidence in the record fails to show that the doctors made anything more than perfunctory efforts to obtain privileges.

*. . . .*

The Court should remand this case for a new trial under the correct legal standards. The District Court should apply [*Casey*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1992116314&originatingDoc=I68d43d82b9cf11eaacfacd2d37fb36e9&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))’s “substantial obstacle” test, not the [*Whole Woman's Health*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2039250555&pubNum=0000506&originatingDoc=I68d43d82b9cf11eaacfacd2d37fb36e9&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) balancing test. And it should require those challenging Act 620 to demonstrate that the doctors who lack admitting privileges attempted to obtain them with the same zeal they would have exhibited if the Act were in effect and they stood to lose by failing in those efforts.

. . . .

Justice [GORSUCH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=I68d43d82b9cf11eaacfacd2d37fb36e9&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I68d43d82b9cf11eaacfacd2d37fb36e9), dissenting.

. . . .

When confronting a constitutional challenge to a law, this Court ordinarily reviews the legislature's factual findings under a “deferential” if not “[u]ncritical” standard.  When facing such a challenge, too, this Court usually accepts that “the public interest has been declared in terms well-nigh conclusive” by the legislature's adoption of the law—so we may review the law only for its constitutionality, not its wisdom.  Today, however, the plurality declares that the law before us holds no benefits for the public and bears too many social costs. All while sharing virtually nothing about the facts that led the legislature to conclude otherwise. The law might as well have fallen from the sky.

Of course, that's hardly the case. In Act 620, Louisiana's legislature found that requiring abortion providers to hold admitting privileges at a hospital within 30 miles of the clinic where they perform abortions would serve the public interest by protecting women's health and safety. Those in today's majority never bother to say so, but it turns out that Act 620's admitting privileges requirement for abortion providers tracks longstanding state laws governing physicians who perform relatively low-risk procedures like [colonoscopies](https://1.next.westlaw.com/Link/Document/FullText?entityType=mproc&entityId=Ic3f35258475411db9765f9243f53508a&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)), Lasik eye surgeries, and steroid injections at ambulatory surgical centers. In fact, the Louisiana legislature passed Act 620 only after extensive hearings at which experts detailed how the Act would promote safer abortion treatment—by providing “a more thorough evaluation mechanism of physician competency,” promoting “continuity of care” following abortion, enhancing inter-physician communication, and preventing patient abandonment.

Testifying physicians explained, for example, that abortions carry inherent risks including uterine perforation, hemorrhage, [cervical laceration](https://1.next.westlaw.com/Link/Document/FullText?entityType=injury&entityId=Ic6c75a13475411db9765f9243f53508a&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)), infection, retained fetal body parts, and missed [ectopic pregnancy](https://1.next.westlaw.com/Link/Document/FullText?entityType=disease&entityId=Ibacf635b475411db9765f9243f53508a&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)). Unsurprisingly, those risks are minimized when the physician providing the abortion is competent. Yet, unlike hospitals which undertake rigorous credentialing processes, Louisiana's abortion clinics historically have done little to ensure provider competence. Clinics have failed to perform background checks or to inquire into the training of doctors they brought on board. Clinics have even hired physicians whose specialties were unrelated to abortion—including a radiologist and an ophthalmologist. Requiring hospital admitting privileges, witnesses testified, would help ensure that clinics hire competent professionals and provide a mechanism for ongoing peer review of physician proficiency. Loss of admitting privileges, as well, might signal a problem meriting further investigation by state officials. At least one Louisiana abortion provider's loss of admitting privileges following a patient's death alerted the state licensing board to questions about his competence, and ultimately resulted in restrictions on his practice.

The legislature also heard testimony that Louisiana's clinics and the physicians who work in them have racked up dozens of citations for safety and ethical violations in recent years. Violations have included failing to use sterile equipment, maintaining unsanitary conditions, failing to monitor patients’ vital signs, permitting improper administration of medications by unauthorized persons, and neglecting to obtain informed consent from patients. Some clinics have failed to maintain supplies of emergency medications and medical equipment for treating surgical complications. One clinic used single-use hoses and tubes on multiple patients, and the solution needed to sterilize instruments was changed so infrequently that it often had pieces of tissue floating in it. Hospital credentialing processes, witnesses suggested, could help prevent such violations. In the course of the credentialing process, physicians’ prior safety lapses, including criminal violations and medical malpractice suits, would be revealed and investigated, and incompetent doctors might be weeded out.

. . . .

Nor did the legislature neglect to consider the law's potential burdens. As witnesses explained, the admitting privileges requirement in Act 620 for abortion clinic providers would parallel existing requirements for many physicians who work at ambulatory surgical centers. And there is no indication this parallel admitting privileges requirement has led to the closing of any surgical centers or otherwise presented obstacles to quality care in Louisiana. Further, legislators learned that at least one Louisiana abortion provider already had qualifying admitting privileges, suggesting other competent abortion providers would be able to comply with the new regulation as well.

. . . .

. . . . Generally, courts decide the constitutionality of statutes as applied to specific people in specific situations and disfavor facial challenges seeking to forestall a law's application in every circumstance. . . . [W]hen a court focuses on the parties before it, it is able to assess the law's application within a real factual context, rather than left to imagine “every conceivable situation which might possibly arise in the application of complex and comprehensive legislation.”  Importantly, too, as-applied challenges reduce the risk that a court will “short circuit the democratic process” by interfering with legislation any more than necessary to remedy a complaining party's injury.  . . .

Today, it seems any of these standards would demand too much. . . . [I]nstead of asking how the law's unconstitutional applications compare to its legitimate sweep, the plurality winds up asking only whether the law burdens a very large fraction of the people that it burdens. The words might sound familiar, but this circular test is unlike anything we apply to facial challenges anywhere else.

Abandoning our usual caution with facial challenges leads, predictably, to overbroad conclusions. Suppose that for a substantial number of women Louisiana's law imposes no burden at all. These women might live in an area well-served by well-qualified abortion providers who can easily obtain admitting privileges. No one could dispute the law is constitutional as applied to these women and providers. But suppose the law makes it difficult to obtain an abortion on the other side of the State, where qualified providers are fewer and farther between. Under the standard applied today, it seems the entire law would fall statewide, notwithstanding its undeniable constitutionality in many applications.

. . . .

. . . . Today's decision . . . . appears to assume that, if Louisiana's law took effect, not a single hospital would amend its rules to permit abortion providers easier access to admitting privileges; no clinic would choose to relocate closer to a hospital that offers admitting privileges rather than permanently close its doors; the prospect of significant unmet demand would not prompt a single Louisiana doctor with established admitting privileges to begin performing abortions; and unmet demand would not induce even one out-of-state abortion provider to relocate to Louisiana.

All these assumptions are open to question. Hospitals can (and do) change their policies in response to regulations. Clinic operators have opened, closed, and relocated clinics numerous times. There are hundreds of OB/GYNs with active admitting privileges in Louisiana who could lawfully perform abortions tomorrow. Millions of Americans move between States every year to pursue their profession. Yet with conditions ripe for market entry and expansion, today's decision foresees nothing but clinic closures and unmet demand.

. . . .

. . . . From beginning to end, the plurality treats [*Whole Woman's Health*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2039250555&originatingDoc=I68d43d82b9cf11eaacfacd2d37fb36e9&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))’s fact-laden predictions about how a Texas law would impact the availability of abortion in that State in 2016 as if they obviously and necessarily applied to Louisiana in 2020. Most notably, the plurality cites [*Whole Woman's Health*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2039250555&pubNum=0000506&originatingDoc=I68d43d82b9cf11eaacfacd2d37fb36e9&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) for the proposition that admitting privileges requirements offer no benefit when it comes to patient safety or otherwise. But [*Whole Woman's Health*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2039250555&pubNum=0000780&originatingDoc=I68d43d82b9cf11eaacfacd2d37fb36e9&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))found an absence of benefit based only on the particular factual record before it. Nothing in the decision suggested that its conclusions about the costs and benefits of the Texas statute were universal principles of law, medicine, or economics true in all places and at all times. . . .

. . . .

. . . .The plurality sides with the district court in concluding that the time and cost some women might have to endure to obtain an abortion outweighs the benefits of Act 620. Perhaps the plurality sees that answer as obvious, given its apparent conclusion that the Act would offer the public no benefits of any kind. But for its test to provide any helpful guidance, it must be capable of resolving cases the plurality can't so easily dismiss. Suppose, for example, a factfinder credited the State's evidence of medical benefit, finding that a small number of women would obtain safer medical care if the law went into effect. But suppose the same factfinder *also* credited a plaintiff's evidence of burden, finding that a large number of women would have to endure longer wait times and farther drives, and that a very small number of women would be unable to obtain an abortion at all. How is a judge supposed to balance, say, a few women's emergency [hysterectomies](https://1.next.westlaw.com/Link/Document/FullText?entityType=mproc&entityId=Ibc5d07f4475411db9765f9243f53508a&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) against many women spending extra hours travelling to a clinic? The plurality's test offers no guidance. Nor can it. The benefits and burdens are incommensurable, and they do not teach such things in law school.

. . . .

. . . . [*Whole Woman's Health*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2039250555&pubNum=0000506&originatingDoc=I68d43d82b9cf11eaacfacd2d37fb36e9&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) nowhere issued the alternative holding on which the concurrence pins its argument. At no point did the Court hold that the burdens imposed by the Texas law alone—divorced from any consideration of the law's benefits—could suffice to establish a substantial obstacle. To the contrary, [*Whole Woman's Health*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2039250555&pubNum=0000506&originatingDoc=I68d43d82b9cf11eaacfacd2d37fb36e9&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) insisted that the substantial obstacle test “*require s*that courts consider the burdens a law imposes on abortion access together with the benefits th[e] la[w] confer[s].”  And whatever else respect for *stare decisis* might suggest, it cannot demand allegiance to a nonexistent ruling inconsistent with the approach actually taken by the Court.

. . . .

But here again, the concurrence rests on at least one mistaken premise. In the context of laws implicating only the State's interest in fetal life previability, the [*Casey*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1992116314&pubNum=0000780&originatingDoc=I68d43d82b9cf11eaacfacd2d37fb36e9&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))plurality did describe its “undue burden” test as asking whether the law in question poses a substantial obstacle to abortion access.  But when a State enacts a law “to further the health or safety of a woman seeking an abortion,” the [*Casey*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1992116314&pubNum=0000780&originatingDoc=I68d43d82b9cf11eaacfacd2d37fb36e9&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) plurality added a key qualification: Only “*[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.”  That qualification is clearly applicable here, yet the concurrence nowhere addresses it, applying instead a new test of its own creation. In the context of medical regulations, too, the concurrence's new test might even prove stricter than strict scrutiny. . . .

Justice [KAVANAUGH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0364335801&originatingDoc=I68d43d82b9cf11eaacfacd2d37fb36e9&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I68d43d82b9cf11eaacfacd2d37fb36e9), dissenting.

. . . . A threshold question in this case concerns the proper standard for evaluating state abortion laws. . . . The State asks us to assess the law by applying the undue burden standard of *Planned Parenthood of Southeastern Pa. v. Casey* (1992) The plaintiffs ask us to apply the cost-benefit standard of *Whole Woman's Health* v. *Hellerstedt* (2016).

Today, five Members of the Court reject the [*Whole Woman's Health*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2039250555&pubNum=0000506&originatingDoc=I68d43d82b9cf11eaacfacd2d37fb36e9&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) cost-benefit standard.  A different five Members of the Court conclude that Louisiana's admitting-privileges law is unconstitutional because it “would restrict women's access to abortion to the same degree as” the Texas law in [*Whole Woman's Health*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2039250555&pubNum=0000506&originatingDoc=I68d43d82b9cf11eaacfacd2d37fb36e9&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)).

I agree with the first of those two conclusions. But I respectfully dissent from the second because, in my view, additional factfinding is necessary to properly evaluate Louisiana's law. . . . [T]the factual record at this stage of plaintiffs’ facial, pre-enforcement challenge does not adequately demonstrate that the three relevant doctors . . . cannot obtain admitting privileges or, therefore, that any of the three Louisiana abortion clinics would close as a result of the admitting-privileges law. . . .