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Undue Burdens and Potential Opportunities in Voting Rights and Abortion Law

PAMELA S. KARLAN*

*Reaching for the world, as our lives do,
As all lives do, reaching that we may give
The best of what we are and hold as true:
Always it is by bridges that we live.¹*

One of the problems with the way we have tried to build a more just constitutional law is our failure to see, and then to make the most of, doctrinal connections across constitutional subfields—that is, to build constitutional bridges. This Essay seeks to build one such bridge between two areas of legal doctrine that might seem relatively disconnected from one another: voting rights and reproductive justice.²

Many years ago, I joked about one aspect of that connection: “Redistricting, like reproduction, combines lofty goals, deep passions about identity and instincts for self-preservation, increasing reliance on technology, and often a need to ‘pull [and] haul’ rather indelicately at the very end. And of course, it often involves somebody getting screwed.”³ But the connection between them is actually more profound—and

* Kenneth and Harle Montgomery Professor of Public Interest Law, Stanford Law School, and Co-Director, Stanford Law School Supreme Court Litigation Clinic. I thank Viola Canales and Kate Fetrow for many helpful conversations along the way and the participants at the Indiana University Maurer School of Law and American Constitution Society symposium on the Future of the U.S. Constitution. At the time the symposium was conceived and I started work on this Essay, the future looked rather different than it did after the election of 2016. I take my inspiration from the directive in the *Pirkei Avot* that “[y]ou are not required to complete the work, but neither are you at liberty to abstain from it.” CENTRAL CONFERENCE OF AM. RABBIS, *GATES OF PRAYER: THE NEW UNION PRAYERBOOK* 20 (1975). It may take longer than I initially thought, or hoped, for constitutional law to revisit questions of economic equality more broadly, but this Essay seeks at least to begin that process. In the interest of full disclosure, I note that I participated directly in several cases discussed in this Essay: *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008) (as counsel for the petitioners); *Gonzales v. Carhart*, 550 U.S. 124 (2007) (as counsel for amicus curiae California Medical Association); North Carolina State Conference of NAACP v. *McCrory*, 831 F.3d 204 (4th Cir. 2016) (as counsel for the United States during my time at the Department of Justice), *cert. denied*, 137 S. Ct. 1399 (2017); and *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (en banc) (same), *cert. denied*, 137 S. Ct. 612 (2017).

1. PHILIP LARKIN, *Bridge for the Living*, in *COLLECTED POEMS* 189 (Anthony Thwaite ed., 2003).

2. In an earlier contribution to the *Indiana Law Journal*, I tried to build another such bridge. I used themes developed in the religion clause cases—that “[f]ree people are entitled to free and diverse thoughts, which government ought neither to constrain nor to direct”; that the Constitution should combat the creation of an outsider class; and that judicial review should prevent capture and exploitation of the machinery of government—to suggest how we ought to think about regulating political parties, redistricting, and campaign finance. Pamela S. Karlan, *Taking Politics Religiously: Can Free Exercise and Establishment Clause Cases Illuminate the Law of Democracy?*, 83 *IND. L.J.* 1, 4–5 (2008).

3. Pamela S. Karlan, *The Fire Next Time: Reapportionment After the 2000 Census*, 50

potentially more promising. First, a citizen's right to vote and a woman's right to decide whether to terminate a pregnancy share a distinctive structure: they are rights-creating rights that lie at the intersection of the liberty and equality values expressed by the Fourteenth Amendment. Second, these two rights have been subject to a similar doctrinal evolution over the last half century, as the Supreme Court first ratcheted up and then relaxed the level of judicial scrutiny; both are now subject to an undue burden standard. That doctrinal retrenchment has, rightly, been subject to withering criticism. Finally, in several recent cases, courts have begun to analyze burdens on voting rights and access to abortion in ways that take account of how people actually live and that account for the interaction between the challenged restrictions and socioeconomic disadvantage. This emerging, more muscular understanding of undue burden allows us an opportunity, within the confines of current constitutional doctrine, to talk about how economic inequality and poverty undermine constitutional values of self-determination, liberty, and equality. Perhaps these undue burden cases can become an opening wedge in litigation over the Constitution and what equal opportunity should mean more generally.

I. FOUNDATIONAL AND STEREOSCOPIC RIGHTS

To call the entitlement to do (or to resist doing) something a "right" is to give that entitlement special force.⁴ All constitutional rights, almost by definition, thus express important commitments. That being said, voting rights and abortion rights have a form of what Kenneth Karst has called "analytical primacy."⁵

The Supreme Court long ago declared the right to vote "fundamental" because it is "preservative of all rights."⁶ The ordinary way in which individuals acquire most rights or protect the rights they already have is through the political processes of self-government. Particularly given the fact that the U.S. Constitution confers few affirmative rights directly, virtually all of the important social and economic rights that Americans enjoy today are the product of legislation passed by elected officials. Rights to health care are provided through Medicare and Medicaid and the Emergency Medical Treatment and Labor Act; workers' rights are protected through the National Labor Relations Act, the Occupational Health and Safety Act, and Title VII; the right to a clean environment is protected by the Clean Water Act and the Clean Air Act.⁷ Under existing doctrine, none of these rights are protected fully and

STAN. L. REV. 731, 733 (1998) (quoting *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994)).

4. LEIF WENAR, *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* § 5.1 (Edward N. Zalta ed., 2015), <https://plato.stanford.edu/archives/fall2015/entries/rights> [<https://perma.cc/M28X-MHP2>].

5. Kenneth L. Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 27 (1977) (applying this concept to the right to vote) [hereinafter Karst, *Equal Citizenship*]. Karst later offered a parallel assessment of reproductive autonomy. See Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 659–64 (1980).

6. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

7. See, e.g., *Katzenbach v. Morgan*, 384 U.S. 641, 652 (1966) (upholding a federal statute that enabled Puerto Rican voters to cast ballots without having to be literate in English "as a measure to secure for the Puerto Rican community residing in New York nondiscriminatory

directly by the Constitution, and none of these statutes were constitutionally compelled.⁸ These rights are protected because citizens elected public officials who voted to enact laws conferring particular entitlements.

Even rights that lie at the core of our constitutional culture are often given real force only once elected officials intervene. *Brown v. Board of Education*⁹ is surely the most celebrated case in modern constitutional law. And yet, the Supreme Court's decision achieved virtually no desegregation on its own.¹⁰ Only after Congress enacted Title VI of the Civil Rights Act of 1964 and the Department of Health, Education, and Welfare threatened to cut off federal funds to recalcitrant districts did school systems begin to comply with the constitutional command.¹¹

Ironically, the same is true of the right to vote itself. The most robust protections of that right have come from legislation and not from courts acting on their own to enforce constitutional commands. For example, although the Fifteenth Amendment forbids denying or abridging the right to vote on account of race,¹² virtually all black citizens in the South were disenfranchised for decades. Litigation was slow and only minimally successful until Congress passed the Voting Rights Act of 1965.¹³ Federal examiners authorized by a provision in that Act added more black citizens in the South to the voting rolls in two years than had been registered in the entire preceding century.¹⁴ Litigation under sections 2 and 5 of the Act transformed the composition of school boards, city councils, and legislatures throughout the nation, ultimately transforming policies as well.¹⁵

And even rights that courts do locate expressly in the Constitution are, in reality, shaped by elections at one or two steps' remove. The judges themselves, after all, are

treatment by government—both in the imposition of voting qualifications and the provision or administration of governmental services, such as public schools, public housing and law enforcement”).

8. As opposed to, for example, the constitutional command that Congress provide for a census every ten years, U.S. CONST. art. I, § 2, cl. 3, or that each house keep, and publish, a “Journal of its Proceedings,” *id.* art. I, § 5, cl. 3.

9. 347 U.S. 483 (1954).

10. Roughly a decade after *Brown*, only 2.3% of black children in the South attended a school with any white students. Case Comment, *The Courts, HEW, and Southern School Desegregation*, 77 *YALE L.J.* 321, 322 (1967).

11. See Pamela S. Karlan, *The Supreme Court, 2011 Term—Foreword: Democracy and Disdain*, 126 *HARV. L. REV.* 1, 24–25 (2012).

12. U.S. CONST. amend. XV, § 1 (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.”). Section 2 of the amendment gives Congress “power to enforce this article by appropriate legislation.” *Id.* amend XV, § 2. As the text indicates, effective enfranchisement of African Americans has depended on congressional enforcement of section 1’s prohibition.

13. Pub. L. No. 89-110, 79 Stat. 437.

14. CHANDLER DAVIDSON, *CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE* 21 (Bernard Grofman & Chandler Davidson eds., 1992).

15. For two wide-ranging discussions, see QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965-1990, at 379–382 (Chandler Davidson & Bernard Grofman eds., 1994); LAUGHLIN McDONALD, *AMERICAN INDIANS AND THE FIGHT FOR EQUAL VOTING RIGHTS* 30–33 (2010).

either elected (in the overwhelming majority of states) or (at the federal level) nominated and appointed by people who are. As recent work by Reva Siegel and David Cole has shown, judicial constitutional interpretations are the products of complex political and social forces that often originate in popular movements and political activity.¹⁶ For anyone who was under the illusion that constitutional interpretation is sealed off from voting, the election of 2016, which placed Neil Gorsuch on the Supreme Court rather than Merrick Garland, offers a sobering lesson. The kind of constitutional doctrine we will have in the future will be shaped by the kinds of Presidents who nominate judges, and the kinds of Senators who confirm them. Who votes, and how, will determine who interprets the Constitution.¹⁷

The ability to control one's reproductive capacity is also a rights-protecting right. "The decision whether or not to beget or bear a child is at the very heart" of a "cluster of constitutionally protected choices" that are themselves treated as fundamental.¹⁸ A person who lacks the right to make that decision will be circumscribed in how she exercises all the other rights tied to reproduction and family formation. And even beyond the way in which reproductive autonomy is preservative of that constellation of fundamental constitutional rights, it is preservative of a "basic control over [one's] life."¹⁹ Modern America offers its residents a panoply of choices, but "a woman must have control over her own maternity in order to control her future: education, work, marriage, the support of other children, or any life plan she might have."²⁰

Voting rights and abortion rights share another distinctive characteristic: they are "stereoscopic," lying at the intersection of the liberty and equality interests protected by adjacent clauses in the Fourteenth Amendment.²¹

16. See DAVID COLE, *ENGINES OF LIBERTY: THE POWER OF CITIZEN ACTIVISTS TO MAKE CONSTITUTIONAL LAW* (2016) (explaining how recent marriage equality and gun rights decisions are the product of social movements and political activism influencing how courts interpret the Equal Protection Clause and the Second Amendment); Reva B. Siegel, *Dead or Alive: Originalism As Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 201 (2008) (exploring the role of popular constitutionalism in the Supreme Court's Second Amendment decision). See generally LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004) (exploring how ultimate control over constitutional interpretation in the long run is a product of politics).

17. Cf. FINLEY PETER DUNNE, MR. DOOLEY'S OPINIONS 26 (1901), <http://tinyurl.com/FPDunne-MrDooley> [<https://perma.cc/TM9C-DMMR>] (providing the original source for the statement that the Supreme Court follows the election returns). Given its various interventions, "[t]oday, the Court produces the election system almost as much as the election system produces the Court." Pamela S. Karlan, *Cousins' Kin: Justice Stevens and Voting Rights*, 27 RUTGERS L.J. 521, 522 (1996).

18. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685 (1977) (pointing to the right to marry, the right to procreate, rights involving family relationships, and the right to control over child rearing).

19. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 928 (1992) (Blackmun, J., concurring in part, concurring in judgment in part, and dissenting in part).

20. Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLAL. REV. 99, 125 (2007).

21. I first developed the concept of "stereoscopic" rights in Pamela S. Karlan, *Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment*, 33 MCGEORGE L. REV. 473 (2002). The Supreme Court invoked a similar idea in *Bolling v. Sharpe*, 347 U.S. 497

Rights are conventionally framed as a species of individual liberty to be protected by the Due Process Clause.²² Voting rights and access to abortion, however, are not simply about individual autonomy untethered from social realities. These liberty interests are bound up in considerations of equality as well.

Voting has both individual and aggregative dimensions. With respect to the former, the right to vote is a fundamental public expression of equal citizenship and dignity.²³ That dignitary interest matters without regard to the outcome of any particular election.²⁴ But the right to vote also gains much of its importance from the way in which it determines winners and losers, and ultimately public policy, by adding votes together. This aspect of voting is necessarily about *groups* of citizens who share common political preferences, which may themselves be the product of other characteristics the citizens share.²⁵ And when some groups have more opportunity than other groups to affect election outcomes, this becomes a question of equality, not just liberty. Cases involving claims of racial vote dilution, unconstitutional political gerrymandering, malapportionment, or excessive reliance on race in the redistricting process are cases about voting rights that inherently sound in one form of equality or another.²⁶ The upshot, as put succinctly by Dean Chemerinsky, is that “the Supreme Court repeatedly has declared that the right to vote is a

(1954), to explain why the federal government could not segregate schools in the District of Columbia. That day, the Court had held in *Brown v. Board of Education*, 347 U.S. 483 (1954), that racial segregation violated the Equal Protection Clause of the Fourteenth Amendment. That amendment binds only the states. The Fifth Amendment, by contrast, binds the federal government but does not contain an equal protection clause. The Court explained that because the concepts of equal protection and due process “both stem[] from our American ideal of fairness,” the Fifth Amendment prohibits “discrimination” that is “unjustifiable.” *Bolling*, 347 U.S. at 499.

22. *Washington v. Glucksberg*, 521 U.S. 702, 719–20 (1997) (further explaining that the Due Process Clause “also provides heightened protection against government interference with certain fundamental rights and liberty interests”).

23. For discussions of this point, see Joseph Fishkin, *Equal Citizenship and the Individual Right to Vote*, 86 *IND. L.J.* 1289, 1334–36 (2011); Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 *TEX. L. REV.* 1705, 1710–11 (1993); Karst, *Equal Citizenship*, *supra* note 5, at 28–30.

24. *See, e.g., Bell v. Southwell*, 376 F.2d 659, 664 (5th Cir. 1967) (ordering a new election because voting booths had been racially segregated, even though the segregation did not necessarily affect the outcome of the election, because “gross, unsophisticated, significant, and obvious racial discriminations” tainted the election).

25. *Davis v. Bandemer*, 478 U.S. 109, 167 (1986) (Powell, J., concurring in part and dissenting in part) (pointing out that “groups of voters elect representatives, individual voters do not”). I develop a tripartite taxonomy of the interests involved in voting—participation, aggregation, and governance—in Karlan, *supra* note 23, at 1709–20.

26. That doctrinal categorization was in part strategic. *See* Rebecca L. Brown, *Liberty, The New Equality*, 77 *N.Y.U. L. REV.* 1491, 1508–09 (2002) (suggesting that in *Harper v. State Board of Elections*, 383 U.S. 663 (1966)—the case in which the Supreme Court began to ratchet up the level of scrutiny—the Court “self-consciously aligned itself on the opposite side of [the] now-reviled [*Lochner v. New York*, 198 U.S. 45 (1905), which had relied on substantive due process and] squarely on the more righteous [Equal Protection Clause-based] trajectory” that had led to “*Brown v. Board of Education* and beyond”).

fundamental right protected under equal protection.”²⁷

But as the list of potential equality claims shows, voting rights doctrine has been driven by more than the notion of abstract equality that lies at the heart of one person, one vote. It is impossible to understand virtually any aspect of constitutional voting rights doctrine without taking account of the struggle for racial equality. Much of the law has focused directly on questions of racial justice, precisely because racial minorities have so often borne the brunt of restrictions on the right to vote or of electoral arrangements that operate “designedly or otherwise” to “cancel out the voting strength” of particular “elements of the voting population.”²⁸ And even doctrines that are not on their face directed at racial equality often originated in concerns about it.²⁹ It is impossible to explain the trajectory of U.S. voting rights law without taking race into account.³⁰

The entwinement of liberty and group equality is equally at the core of abortion rights. Here, too, in its foundational decision in *Roe v. Wade*,³¹ the Supreme Court invoked the liberty of each individual protected by the Due Process Clause as the source of constitutional protection for a woman’s right to make the decision whether to terminate a pregnancy. But from the very outset, supporters of abortion rights also pressed the claim that abortion was critical to women’s equality as well.³² Women can attain full equality in the public sphere only if they can control their fertility, and access to abortion remains a critical element of that control. Thus, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,³³ the joint opinion of Justices O’Connor, Kennedy, and Souter pointed to the fact that “[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated

27. ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 893–94 (4th ed. 2011).

28. *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965).

29. See Pamela S. Karlan, *The Alabama Foundations of the Law of Democracy*, 67 ALA. L. REV. 415, 416–21 (2015) (discussing this connection between racial equality and the Supreme Court’s imposition of one person, one vote). That connection may actually be quite a bit deeper. The first federal requirement for equipopulous districting appeared in the first apportionment bill after the Civil War. See An Act for the Apportionment of Representatives to Congress Among the Several States According to the Ninth Census, ch. 11, § 2, 17 Stat. 28 (1872). A central focus of that Act, and the debate leading up to it, was how to ensure political equality for newly freed slaves in the South. See George David Zuckerman, *A Consideration of the History and Present Status of Section 2 of the Fourteenth Amendment*, 30 FORDHAM L. REV. 93, 107–116 (1961) (discussing the legislative history of the Act).

30. For a striking recent example, consider *Cooper v. Harris*, 137 S. Ct. 1455 (2017), which involved a challenge to North Carolina’s congressional district map. Every member of the Court agreed that racial and political considerations were closely tied to one another; they disagreed only over whether racial concerns predominated over political ones, or vice versa. Compare *id.* at 1473–74 (opinion of the Court), with *id.* at 1503–04 (Alito, J., concurring in the judgment in part and dissenting in part).

31. 410 U.S. 113 (1973).

32. For three celebrated examples, see Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375 (1985); Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 659–64 (1980); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984).

33. 505 U.S. 833 (1992).

by their ability to control their reproductive lives”³⁴ and that “[a]n entire generation has come of age free to assume *Roe*’s concept of liberty in defining the capacity of women to act in society” as a reason to reaffirm *Roe*’s central holding.³⁵ Justice Ginsburg has even more directly linked abortion rights to a “woman’s autonomy to determine her life’s course, and thus to enjoy equal citizenship stature.”³⁶

The fundamental role of both voting and control over one’s fertility in enabling full and equal participation in civic life led the Supreme Court, during the early 1970s, to demand heightened scrutiny of laws that restricted these two rights. With respect to voting, the Court declared that “if a challenged statute grants the right to vote to some citizens and denies the franchise to others, ‘the Court must determine whether the exclusions are necessary to promote a compelling state interest.’”³⁷ That is the language of strict scrutiny. With respect to abortion, the Court actually quoted its earlier voting rights decision that laws limiting “fundamental rights” could “be justified only by a ‘compelling state interest,’”³⁸ and required that restrictions on access to abortion “must be narrowly drawn to express only the legitimate state interests at stake.”³⁹ In both areas, then, the normal presumption of constitutionality was abandoned in favor of deep judicial skepticism.

II. THE EMERGENCE OF THE UNDUE BURDEN STANDARD

The Rehnquist and Roberts Courts retreated dramatically from the strict scrutiny regimes in both voting rights and abortion rights cases. In their place, the Court announced standards that asked whether the challenged law imposes an undue burden on the underlying right. Those tests abandoned the presumption that restrictions on the right to vote, or on a woman’s ability to terminate her pregnancy, deserved searching judicial review. They replaced them with a fluid inquiry in which the Justices often substituted intuition for rigorous analysis of the purpose and effect of the challenged regulations.⁴⁰

The retreat in voting rights began in *Burdick v. Takushi*,⁴¹ where the Supreme Court upheld Hawaii’s refusal to permit write-in voting—an unusual provision, and far removed from the sort of restriction on the franchise that had prompted the Court’s adoption of heightened scrutiny. The Court rejected the idea that “a law that imposes any burden upon the right to vote must be subject to strict scrutiny.”⁴² That requirement, the Court declared, would too stringently “tie the hands” of the states, because every election law “will invariably impose some burden upon individual

34. *Id.* at 856 (opinion of O’Connor, Kennedy, and Souter, JJ.).

35. *Id.* at 860.

36. *Gonzales v. Carhart*, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting).

37. *Dunn v. Blumstein*, 405 U.S. 330, 337 (1972) (emphasis omitted) (quoting *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 627 (1969)).

38. *Roe v. Wade*, 410 U.S. 113, 155 (1973) (quoting *Kramer*, 395 U.S. at 627).

39. *Id.*

40. For a general discussion of undue burden standards across a wide array of constitutional issues, see Alan Brownstein, *How Rights Are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine*, 45 *HASTINGS L.J.* 867 (1994).

41. 504 U.S. 428 (1992).

42. *Id.* at 432.

voters.”⁴³ So the Court borrowed the more “flexible” standard it had earlier applied to laws restricting candidates’ access to the ballot.⁴⁴ Under that standard, a reviewing court

must weigh “the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate” against “the precise interests put forward by the State as justifications for the burden imposed by its rule,” taking into consideration “the extent to which those interests make it necessary to burden the plaintiff’s rights.”⁴⁵

Only if the burdens are “severe” must the restriction be “narrowly drawn to advance a state interest of compelling importance.”⁴⁶ Otherwise, a state’s “important regulatory interests are generally sufficient to justify” the restrictions.⁴⁷

Burdick was announced during what was, in retrospect, one of the high-water marks of voting rights in the United States.⁴⁸ Many of the traditional restrictions on the right to vote—poll taxes, literacy tests, various restrictive registration practices—had either been struck down by the Supreme Court or abolished by federal law.⁴⁹ And the preclearance requirement of section 5 of the Voting Rights Act kept many jurisdictions that had had a history of restrictions on the right to vote from enacting new ones. Moreover, the restriction in *Burdick* did not bar individuals from voting altogether; nor, as an empirical matter, did it seem to systematically prevent identifiable groups of voters from electing candidates of their choice.

Shortly after the turn of the century, however, the United States began to experience a wave of voting restrictions that *did* pose those threats of disenfranchisement and group disempowerment: the “new vote denial.”⁵⁰ In the first of these cases to reach the Supreme Court, *Crawford v. Marion County Election Board*,⁵¹ the Court applied the *Burdick* framework, rather than strict scrutiny. The case concerned Indiana’s voter ID law, which required voters to present currently valid, government-issued photo identification in order to cast a ballot that would be counted. Justice Stevens’s opinion announcing the judgment of the Court insisted that ““evenhanded

43. *Id.* at 433.

44. *Id.* at 434 (citing *Anderson v. Celebrezze*, 460 U.S. 780, 788–89 (1983)).

45. *Id.* (quoting *Anderson*, 460 U.S. at 789).

46. *Id.* (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)).

47. *Id.* (quoting *Anderson*, 460 U.S. at 788).

48. See generally ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 295–98 (rev. ed. 2009) (showing that the right to vote has expanded and contracted across American history).

49. For example, the Twenty-Fourth Amendment abolished poll taxes for federal elections, and the Supreme Court then struck them down for all other elections. See *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666 (1966). Congress permanently prohibited all literacy tests nationwide in 1970. 52 U.S.C.A. § 10501 (2015). For examples of cases striking down restrictive residency requirements, see, for example, *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Carrington v. Rash*, 380 U.S. 89 (1965).

50. The phrase was introduced by Professor Dan Tokaji. Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C.L. REV. 689, 692 (2006).

51. 553 U.S. 181 (2008).

restrictions that protect the integrity and reliability of the electoral process itself” are not invidious.”⁵² For most voters, even most voters currently lacking acceptable forms of ID, he thought the burdens imposed by the statute were relatively minor. And because the case was before the Court on a facial, pre-enforcement challenge, there was nothing in the record “to quantify . . . the magnitude of the burden” on the “narrow class of voters” who might experience a “special burden” under the statute due to “economic or other personal limitations.”⁵³

On the other side of the ledger, Justice Stevens credited several interests the State had advanced. For present purposes, the two most salient were preventing voter fraud and promoting voter confidence. The Justice’s discussion of fraud prevention veered perilously close to the most toothless form of rationality review. He acknowledged that the “only kind of voter fraud” that a photo ID requirement could prevent is in-person voter impersonation at the polls.⁵⁴ And he conceded that there was “no evidence of any such fraud actually occurring in Indiana at any time in its history.”⁵⁵ But he pointed to “infamous examples” of such fraud in nineteenth-century New York,⁵⁶ some “scattered instances of in-person voter fraud” in other states more recently,⁵⁷ and one example of absentee-ballot fraud in an Indiana municipal election to conclude that “not only is the risk of voter fraud real but that it could affect the outcome of a close election.”⁵⁸ Given these anecdotes, he implied that a state might somehow rationally adopt voter identification requirements to protect the integrity of its elections against the possibility that some form of in-person impersonation fraud might emerge in the future.

One step further removed was the State’s interest in “protecting public confidence” in that integrity.⁵⁹ Justice Stevens saw “independent significance” in this interest “because it encourages citizen participation in the democratic process.”⁶⁰ A few Terms later, the Court went even further, in vacating preliminary relief against an Arizona voter ID law:

Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised. “[T]he right of suffrage can be denied by a debasement or dilution of the weight

52. *Id.* at 189–90 (quoting *Anderson*, 460 U.S. at 788 n.9). Justice Stevens wrote for himself, the Chief Justice, and Justice Kennedy. Since Justice Scalia’s opinion for himself, Justice Thomas, and Justice Alito would have upheld the challenged statute after looking at the impact of the law on “voters generally,” *id.* at 206 (Scalia, J., concurring in the judgment) (emphasis in original), rather than by considering its impact on the voters most affected, it is fair to treat Justice Stevens’s opinion, to the extent it upheld the law, as controlling.

53. *Id.* at 199–200 (opinion of Stevens, J.).

54. *Id.* at 194.

55. *Id.*

56. *Id.* at 195 n.11.

57. *Id.* at 195 n.12.

58. *Id.* at 196.

59. *Id.* at 197.

60. *Id.*

of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."⁶¹

In other words, states are entitled to protect the rights of voters who would otherwise "feel" disenfranchised by *actually* disenfranchising some number of their citizens.

There is simply no way to reconcile the Court's extraordinary deference in *Crawford* and *Purcell* with its earlier skepticism about voting restrictions, particularly in light of Justice Stevens's recognition that "partisan considerations may have played a significant role" in the Republican-dominated legislature's decision to impose the new ID requirement.⁶² Even after acknowledging that such motivations standing alone would be as "invidious" as the inadequate justifications for "the poll tax at issue in *Harper [v. State Board of Elections]*,"⁶³ the Justice did not ask the normal next question in constitutional law: would the challenged ID requirement have been adopted in the absence of that impermissible motive? Both in its approach to what counts as a burden that should prompt judicial skepticism and in its explanation of how to determine whether that burden is "undue"—that is, cannot be justified by the State's asserted interests—*Crawford* threatened abandonment of meaningful judicial scrutiny.

The Supreme Court's retreat on abortion rights followed a similar trajectory. Even before the Court formally changed the standard in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,⁶⁴ the Court had stopped "rigidly insisting upon 'compelling interests' and 'narrow tailoring,'" instead "essentially pass[ing] upon the 'reasonableness' of individual regulations from case to case."⁶⁵ In *Casey*, expressly drawing on the same election-law decisions that were that Term beginning to reshape its voting rights jurisprudence, the controlling joint opinion of Justices O'Connor, Kennedy, and Souter emphasized that "not every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right" because states are entitled to "substantial flexibility."⁶⁶ Accordingly, the Justices abandoned conventional strict scrutiny for a different test:

61. *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam) (quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)) (alteration in original).

62. *Crawford*, 553 U.S. at 203.

63. *Id.* at 203. See also *Carrington v. Rash*, 380 U.S. 89, 94 (1965) (holding that "[f]encing out" from the franchise a sector of the population because of the way they may vote is constitutionally impermissible"). For a discussion of the partisan motivations behind many contemporary voting restrictions, see RICHARD L. HASEN, *THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN* (2012) (discussing the increased partisanship in election administration); Samuel Issacharoff, *Ballot Bedlam*, 64 DUKE L.J. 1363, 1370 (2015) ("[T]he single predictor necessary to determine whether a state will impose voter-access restrictions is whether Republicans control the ballot-access process."); Pamela S. Karlan, *Turnout, Tenuousness, and Getting Results in Section 2 Vote Denial Claims*, 77 OHIO ST. L.J. 763, 786–89 (2016).

64. 505 U.S. 833 (1992).

65. David D. Meyer, *Gonzales v. Carhart and the Hazards of Muddled Scrutiny*, 17 J.L. & POL'Y 57, 62 (2008).

66. *Casey*, 505 U.S. at 873 (opinion of O'Connor, Kennedy, and Souter, JJ.).

The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it. Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.⁶⁷

The new undue burden test depended on a form of balancing. A state was entitled to regulate abortions up to the point at which its regulation “has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”⁶⁸ As with the *Anderson-Burdick* standard for restrictions on voting, the real action would come in deciding what counted as a “substantial obstacle” (in the voting cases, a “severe” burden).

In some ways, the Court's decision in *Gonzales v. Carhart*⁶⁹ upholding a federal statute outlawing the use of certain abortion procedures is disturbingly similar to its decision in *Crawford*.

First, in rejecting the idea of a facial, pre-enforcement challenge, the Court failed to focus on the group of people actually burdened by the statute. One of the bases for the challenge to the federal abortion statute was that it contained no exception for cases in which the forbidden procedure was necessary to preserve the health of the woman. Prior Supreme Court decisions had required such exceptions.⁷⁰ (Another way of expressing this point is to say that a statute without a health exception placed an undue burden on a woman whose health was at stake.) But the *Carhart* Court held that the plaintiffs had not “demonstrated that the Act would be unconstitutional in a large fraction of relevant cases.”⁷¹ The Court seemed to be saying that in cases where the prohibited procedure was not necessary to preserve the health of the woman, the absence of a health exception would place no health-related burden on the woman. But even talking about a “fraction of relevant cases” misses the point: the need for a health exception is relevant only when a woman's health is at risk. The fact that most women needing abortions would not be affected by the lack of a health exception was true but irrelevant,⁷² in the same way that the fact that most voters will not be affected by an ID requirement says nothing about whether the voters who lack ID are severely burdened. And stating that “[t]he Act is open to a proper as-applied challenge in a discrete case”⁷³ was cold comfort. As with the similar proviso in *Crawford*,

67. *Id.* at 874.

68. *Id.* at 877. The joint opinion's explanation that a law that, “while furthering the interest in potential life or some other 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,” *id.*, uses terms like “valid state interest” and “legitimate ends” that seem far closer to rationality review than to strict scrutiny—which would demand the existence of a compelling interest as the prerequisite for upholding a challenged statute. See Emma Freeman, Note, *Giving Casey Its Bite Back: The Role of Rational Basis Review in Undue Burden Analysis*, 48 HARV. C.R.-C.L. L. REV. 279, 292 (2013).

69. 550 U.S. 124 (2007).

70. See, e.g., *Ayotte v. Planned Parenthood of N. Eng.*, 546 U.S. 320, 328 (2006).

71. *Carhart*, 550 U.S. at 167–68.

72. See *id.* at 188–89 (Ginsburg, J., dissenting) (making this point).

73. *Id.* at 168 (Thomas, J., concurring) (making this point).

this suggestion left open the question whether each individual burdened would have to litigate the question in light of the individual's particular circumstances—itsself a significant burden.⁷⁴

Second, as it had done in *Crawford* and *Purcell*, the Court moved far away from heightened scrutiny and into the most deferential form of rationality review. Acknowledging that it had “no reliable data,” the Court offered up its conclusion that “some women come to regret their choice to abort the infant life they once created and sustained.”⁷⁵ There was in fact no more empirical support for that conclusion than there had been for the proposition that in-person voter impersonation is an actual problem or that any voter decided not to vote because a jurisdiction lacked a voter ID law. It was adjudication by anecdote.⁷⁶

And as with its assertion that imposing restrictions on the right to vote was actually vote protective (because it increased public confidence and thus voter turnout),⁷⁷ the *Carhart* Court then sought to couch its approval of restrictions on women's access to abortion as a woman-protective decision: “The State has an interest in ensuring so grave a choice is well informed.”⁷⁸ Left unexplained is how an outright prohibition on the procedure—rather than, say, truthful information about what the procedure entails—can “inform” a choice that the statute forbids the woman and her physician from making.⁷⁹

74. Cf. Christopher S. Elmendorf, *Undue Burdens on Voter Participation: New Pressures for a Structural Theory of the Right To Vote?*, 35 HASTINGS CONST. L.Q. 643, 661–62 (2008) (discussing what it would mean to have as-applied undue burden challenges to restrictions on the right to vote).

75. *Carhart*, 550 U.S. at 159. Note that the Court never explains whether there is a necessary “connection between regret and a wish to have been precluded from making a choice in the first place.” Pamela S. Karlan, *The Law of Small Numbers: Gonzales v. Carhart, Parents Involved in Community Schools, and Some Themes from the First Full Term of the Roberts Court*, 86 N.C. L. REV. 1369, 1395 (2008).

76. The sole source cited by the Court was a brief filed on behalf of 180 women. *See id.* at 159 (citing Brief for Sandra Cano et al. as *Amici Curiae* in No. 05-380, pp. 22–24). There had been roughly forty-five million legal abortions during the time period covered by the brief. *See* Karlan, *supra* note 75, at 1394. To the extent there is evidence of regret levels, “[a]bortion has a comparable or lower rate of decisional regret than do many other procedures: the regret rate for abortions hovers around 5%, whereas, for instance, 20% of people regret their tattoos, 6% regret sterilizations, 20% regret prostate surgery, and a whopping 42.5% regret some aspect of their treatment for breast cancer.” Kate L. Fetrow, *Taking Abortion Rights Seriously: Towards a Holistic Undue Burden Jurisprudence*, 70 STAN. L. REV. 319, 340–41 (2018).

77. An empirically unsupported proposition itself. *See* Stephen Ansolabehere & Nathaniel Persily, *Vote Fraud in the Eye of the Beholder: The Role of Public Opinion in the Challenge to Voter Identification Requirements*, 121 HARV. L. REV. 1737, 1754–60 (2008).

78. *Carhart*, 550 U.S. at 159.

79. For persuasive analysis and criticism of the woman-protective rationales for restrictions on access to abortions, see Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991 (2007); Reva Siegel, *Reasoning From the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992); Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815 (2007).

In announcing the undue burden standards, the Justices continued to give lip service to the importance of the rights at stake. But as they applied those standards in cases like *Crawford*, *Purcell*, *Casey*, and *Carhart*, they often seemed to be using an approach conventionally applied to restrictions on nonfundamental liberty interests. Intermediate forms of scrutiny generally look at whether the government's actual purpose is in fact both "important" and "substantially" served by the challenged restriction.⁸⁰ By contrast, the Justices' reliance on intuition and anecdote resembled far more closely standard rationality review in which "[a] statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it;"⁸¹ it is "entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature."⁸² Faced with a conservative political movement bent on rolling back protections for both voting rights and abortion rights, this form of undue burden review provides little protection. It ignores completely the way in which restrictions on voting and on access to abortion actually operate in the lives of real people in favor of a stylized vision of the world.

III. REFRAMING UNDUE BURDENS

Blindness to the actual burdens a challenged law imposes on voters or women who have decided to terminate a pregnancy is not a necessary consequence of adopting an undue burden standard. Several recent decisions show how courts that are sensitive to the realities of the world "out there"⁸³ determine whether a particular law imposes a significant burden of the kind that demands judicial skepticism. And those courts' descriptions of how socioeconomic disadvantage transforms what might be only minor impediments for more affluent individuals into constitutionally suspect burdens offers a vantage point from which to work on the longer-term project of persuading the people and the courts that our constitutional values are threatened by economic inequality.⁸⁴

The two leading judicial discussions of the burdens imposed by the new vote denial appear in cases ultimately resolved under section 2 of the Voting Rights Act, which forbids the use of any voting practice or procedure that "results in a denial or

80. This is how the standard for intermediate scrutiny is articulated in cases involving sex discrimination. *See* *United States v. Virginia*, 581 U.S. 515, 535–36 (1996) (holding that in such cases "a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded"); *id.* at 533 (explaining that the government "must show at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives" (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (internal quotations omitted) (alteration in original))).

81. *McGowan v. Maryland*, 366 U.S. 420, 426 (1961).

82. *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993) (citing *U.S. R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980)).

83. I borrow the phrase from Justice Blackmun's dissent in *Beal v. Doe*, in which he criticized the majority for upholding Pennsylvania's refusal to fund abortions for poor women as part of its Medicaid program. 432 U.S. 438, 463 (1977) (Blackmun, J., dissenting).

84. *See* GANESH SITARAMAN, *THE CRISIS OF THE MIDDLE-CLASS CONSTITUTION* 18 (2017).

abridgement of the right of any citizen of the United States to vote on account of race or color” or membership in a language-minority group.⁸⁵

In *North Carolina State Conference of the NAACP v. McCrory*,⁸⁶ the Fourth Circuit struck down provisions in a North Carolina omnibus statute that imposed a photo ID requirement, cut back on early voting, and eliminated same-day registration during the early voting period, out-of-precinct voting on Election Day, and preregistration for sixteen- and seventeen-year-olds.⁸⁷ In describing the burdens the omnibus act imposed on African American voters, the Fourth Circuit identified ways in which the new regime interacted with socioeconomic disadvantage to restrict the right to vote. For example, the elimination of same-day registration undermined the ability of citizens with “low literacy skills or other difficulty completing a registration form to receive personal assistance from poll workers.”⁸⁸ Pointing to the district court’s findings that African Americans in North Carolina were “disproportionately likely to move, be poor, less educated, have less access to transportation, and experience poor health,”⁸⁹ the Fourth Circuit declared that “[t]hese socioeconomic disparities establish that no mere ‘preference’ led African Americans to disproportionately use early voting, same-day registration, out-of-precinct voting, and preregistration. Nor does preference lead African Americans to disproportionately lack acceptable photo ID.” Instead, “for many African Americans, [the provisions that had been eliminated] are a necessity.”⁹⁰

85. 52 U.S.C.A. §§ 10301(a), 10303(f)(2) (2015). For more general discussions of section 2 and the new vote denial, see Dale E. Ho, *Voting Rights Litigation After Shelby County: Mechanics and Standards in Section 2 Vote Denial Claims*, 17 N.Y.U. J. LEGIS. & PUB. POL’Y 675 (2014); Karlan, , *supra* note 63; Janai S. Nelson, *The Causal Context of Disparate Vote Denial*, 54 B.C. L. REV. 579 (2013); Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 HARV. C.R.-C.L. L. REV. 439 (2015). Because courts generally “will not decide a constitutional question if there is some other ground upon which to dispose of the case,” once the courts concluded that the challenged provisions violated section 2, they did not fully address the constitutional claim. *See Escambia County v. McMillan*, 466 U.S. 48, 51 (1984) (per curiam) (applying this principle, often referred to as the *Ashwander* rule, *see Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring), to a voting rights case involving both Voting Rights Act and Fourteenth Amendment claims). In both of the cases discussed in the text, some plaintiffs also alleged that the challenged statutes impermissibly infringed the fundamental right to vote protected by the Fourteenth Amendment.

86. 831 F.3d 204 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1399 (2017).

87. *See id.* at 242.

88. *Id.* at 217.

89. *Id.* at 233 (quoting *N.C. State Conference of the NAACP v. McCrory*, 182 F. Supp. 3d 320, 432 (M.D.N.C. 2016)).

90. *Id.* The court of appeals also emphasized the interactive nature of the various challenged provisions. Quoting Justice O’Connor’s observation in *Clingman v. Beaver*, 544 U.S. 581 (2005), that a “panoply of regulations, each apparently defensible when considered alone, may nevertheless have the combined effect of severely restricting participation and competition,” *id.* at 607–08 (O’Connor, J., concurring), the court explained that “the photo ID requirement inevitably increases the steps required to vote, and so slows the process.” *McCrory*, 831 F.3d at 231. Because there were fewer days of early voting, more voters would find it necessary to vote on Election Day. “Together, these produce longer lines at the polls on Election Day, and absent out-of-precinct voting, prospective Election Day voters may wait in these

Similarly, in striking down Texas’s draconian voter ID law as violative of section 2, the Fifth Circuit explained why the law’s “burdens” on minority voters were “excessive”⁹¹ by pointing to how the law interacted with socioeconomic conditions. The ID requirement fell more heavily on poor citizens, with more than one in five voters earning less than \$20,000 per year lacking such documentation, nearly ten times the rate at which voters earning between \$100,000 and \$150,000 lacked it. The court of appeals pointed to testimony about how the “[u]nreliable and irregular wage work and other income” of poor citizens burdened their ability to “locate and bring the requisite papers and identity cards, travel to a processing site, wait through the assessment, and get photo identifications.”⁹² And it explained that “most job opportunities do not include paid sick or other paid leave; taking off from work means lost income. Employed low-income Texans not already in possession of such documents will struggle to afford income loss from the unpaid time needed to get photo identification.”⁹³

Moreover, precisely because poor Texans were less likely to own cars, they had less need for driver’s licenses (the primary form of government-issued photo ID). For them to travel to a DMV office to get even the formally no-cost election identification certificate Texas purportedly made available imposed a significant burden: “Of eligible voters without access to a vehicle, a large percentage faced trips of three hours or more to obtain an [election identification certificate].”⁹⁴

Moreover, the court of appeals praised the district judge, Nelva Gonzales Ramos, for going beyond just “statistical disparity” to rest its findings on “concrete evidence” from individual citizens “regarding the excessive burdens” they faced.⁹⁵ Those stories make for powerful, and powerfully disturbing, reading about the obstacles faced by indigent citizens in negotiating everyday life and exercising the rights they

longer lines only to discover that they have gone to the wrong precinct and are unable to travel to their correct precincts. Thus, cumulatively, the panoply of restrictions results in greater disenfranchisement than any of the law’s provisions individually.” *Id.*; see also NAACP State Conference of Pa. v. Cortes, 591 F. Supp. 2d 757, 765 (E.D. Pa. 2008) (stating with respect to long lines on Election Day that “we would be blind to reality if we did not recognize that many individuals have a limited window of opportunity to go to the polls due to their jobs, child care and family responsibilities, or other weighty commitments. Life does not stop on election day. Many must vote early or in the evening if they are to vote at all”). For a parallel argument with respect to abortion rights, see Fetrow, *supra* note 76, at 353-54 (criticizing current undue burden doctrine in the abortion context for evaluating challenged provisions in isolation and failing to take into account the cumulative impact of a state’s entire legal regime on women’s access to abortion).

91. *Veasey v. Abbott*, 830 F.3d 216, 250 (5th Cir. 2016), *cert. denied*, 137 S. Ct. 612 (2017).

92. *Id.* at 251.

93. *Id.*

94. *Id.* For more extensive discussion of the extent to which the legal system ignores the logistical difficulties faced by poor and rural individuals, see generally Lisa R. Pruitt & Marta R. Vanegas, *Urbanormativity, Spatial Privilege, and Judicial Blind Spots in Abortion Law*, 30 BERKELEY J. GENDER L. & JUST. 76 (2015); Michele Statz & Lisa R. Pruitt, *To Recognize the Tyranny of Distance: A Spatial Reading of Whole Woman’s Health v. Hellerstedt* (Aug. 3, 2017) (unpublished manuscript on file with the Indiana Law Journal).

95. *Veasey*, 830 F.3d at 253–54.

formally possess. They put meat on the bones of an undue burden standard. The framework for analyzing section 2 claims requires courts to look at “the extent to which members of the minority group . . . bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process.”⁹⁶ Courts analyzing a constitutional undue burden claim with regard to the right to vote should do the same.⁹⁷

In *Planned Parenthood Southeast v. Strange (Strange II)*,⁹⁸ Judge Myron H. Thompson took a similarly concrete and context-sensitive approach in adjudicating a challenge to Alabama’s requirement that a doctor who performs abortions “have staff privileges at an acute care hospital within the same standard metropolitan statistical area” as the facility where he or she performs them.⁹⁹ In a prior opinion, Judge Thompson had laid out a framework for assessing “how ‘significant’ the obstacle created by [a] statute is.”¹⁰⁰ Among the factors he identified were “the nature and circumstances of the women affected by the regulation,”¹⁰¹ and he pointed to “wealth and education,” and “any personal factors that may serve to amplify the harms imposed by the regulation, such as being in an abusive relationship or lack of legal immigration status” as circumstances a court should consider.¹⁰² Next, he pointed to logistical concerns including the number and geographic distribution of abortion providers and “travel patterns, access to transportation, and availability of information about abortion services.”¹⁰³ Finally, he pointed to the surrounding “social, cultural, and political context” in which women make decisions whether to terminate a pregnancy and physicians make decisions whether to provide abortion services.¹⁰⁴

Taking these various factors into account, Judge Thompson concluded that Alabama’s staff privileges requirement imposed an undue burden. He found that the requirement would drive abortion providers out of Alabama’s three largest cities:

96. S. REP. NO. 97-417, at 28–29 (1982). The Supreme Court incorporated this report into its foundational opinion construing section 2. *See Thornburg v. Gingles*, 478 U.S. 30, 43 n.7 (1986).

97. In discussing the poll tax, Professor Brown asks the question whether the legislators who enacted it would have “require[d] themselves to pay so much for the privilege of voting that it would strain their ability to feed their children.” Brown, *supra* note 26, at 1551. Her focus on what she calls “we/they legislation,” *id.*, is a useful device for considering what kinds of restrictions on liberty courts should uphold. *Cf. Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring) (stating that “[o]ur salvation is the Equal Protection Clause, which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me”). It is hard to imagine a legislative majority that would place significant obstacles to voting in its own path (or even the path of its political supporters).

98. 33 F. Supp. 3d 1330 (M.D. Ala. 2014).

99. *Id.* at 1336 (quoting ALA. CODE § 26-23E-4(c) (2016)).

100. *Planned Parenthood Se., Inc. v. Strange (Strange I)*, 9 F. Supp. 3d 1272, 1288–89 (M.D. Ala. 2014).

101. *Id.* at 1288.

102. *Id.*

103. *Id.* at 1288–89.

104. *Id.* at 1289.

Birmingham, Montgomery, and Mobile.¹⁰⁵ This would require women to travel either out-of-state or to one of the few in-state providers.

Judge Thompson’s explanation of the burden that came from the need to travel began with the fact that an overwhelming percentage of the woman seeking abortions in Alabama were poor.¹⁰⁶ His account of the difficulties—financial, logistical, and psychological—that flowed from their poverty echoed the account laid out by Judge Ramos in the Texas voter ID case. Judge Thompson concluded:

For these women, going to another city to procure an abortion is particularly expensive and difficult. Poor women are less likely to own their own cars and are instead dependent on public transportation, asking friends and relatives for rides, or borrowing cars; they are less likely to have internet access; many already have children, but are unlikely to have regular sources of child care; and they are more likely to work on an hourly basis with an inflexible schedule and without any paid time off or to receive public benefits which require regular attendance at meetings or classes. A woman who does not own her own car may need to buy two inter-city bus tickets (one for the woman procuring the abortion, and one for a companion) in order to travel to another city. Without regular internet access, it is more difficult to locate an abortion clinic in another city or find an affordable hotel room. The additional time to travel for the city requires her to find and pay for child care or to miss one or several days of work. Furthermore, at each juncture, a woman may have to tell relatives, romantic partners, or work supervisors why she is leaving town: to procure an abortion. . . . Finally, . . . many low-income women have never left the cities in which they live. The idea of going to a city where they know no one and have never visited, in order to undergo a procedure that can be frightening in itself, can present a significant psychological hurdle. “[T]his psychological hurdle is as serious a burden as the additional costs represented by travel.”¹⁰⁷

And Judge Thompson directly addressed the view of some courts that “obstacles that arise from the interactions of regulation with women’s financial constraints, as well as other aspects of women’s circumstances, [are] ineligible to be ‘substantial obstacles’ under *Casey*.”¹⁰⁸ He distinguished the burdens caused by government regulation from those caused by the government’s failure to remove preexisting barriers (for example, by refusing to fund abortions for indigent women). A court, he declared, should not “ignore obstacles aggravated by the realities of poverty.”¹⁰⁹

Most recently, in *Whole Woman’s Health v. Hellerstedt*,¹¹⁰ the Supreme Court rejected the idea that the undue burden test is a form of rationality review,¹¹¹ requir-

105. *Planned Parenthood Se., Inc v. Strange (Strange II)*, 33 F. Supp. 3d 1330, 1355 (M.D. Ala. 2014).

106. *Id.* at 1356 (alteration in original).

107. *Id.* at 1357.

108. *Id.*

109. *Id.* at 1358.

110. 136 S. Ct. 2292 (2016).

111. *Id.* at 2309–10 (expressly distinguishing the undue burden standard from the form of

ing instead that “courts consider the burdens a law imposes on abortion access together with the benefits those laws confer”¹¹² and determine for themselves whether the challenged statute “places a ‘substantial obstacle in the path of a woman’s choice.’”¹¹³ The Court’s detailed discussion of the lack of evidence of any health benefits from the challenged provisions conveyed the message that entirely speculative women-protective rationales cannot counterbalance proven burdens.¹¹⁴

What cases like *McCroy*, *Veasey*, and *Strange II* show is that undue burden tests, in the hands of courts that pay attention to the interactive effects of socioeconomic conditions and the challenged restrictions, are not toothless. They can work to vindicate citizens’ rights to vote and women’s access to abortion. Courts can in fact evaluate both the strength of the government’s proffered interests and the extent to which restricting access to the voting booth or to abortion actually serves those interests. And their opinions can educate the public about the significant obstacles poor people face in exercising their rights.

CONCLUSION

The Supreme Court’s decision in *Harper v. State Board of Elections*¹¹⁵ striking down poll taxes offered two reasons for its conclusion that restrictions on the right to vote demand more searching judicial review. The first one, familiar to the law today, is that the right to vote is fundamental.¹¹⁶ But the second one captures a concern with economic justice: “Lines drawn on the basis of wealth or property, like those of race, are traditionally disfavored.”¹¹⁷ Thus, “the requirement of fee paying causes an ‘invidious’ discrimination.”¹¹⁸

conventional rationality review articulated in *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 491 (1955)).

112. *Whole Woman’s Health*, 136 S. Ct. at 2309 (emphasis added).

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

114. The Court pointed to record evidence that the number of women who lived at a substantial distance from an abortion provider skyrocketed as a result of Texas’s law. *Id.* at 2313 (pointing to the district court’s finding that the number living more than 150 miles away increased from 86,000 to 400,000, and the number living more than 200 miles from a provider increased from 10,000 to 290,000). Although distance alone might not constitute an undue burden, the Court explained that “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.” *Id.*

115. 383 U.S. 663 (1966).

116. *Id.* at 667.

117. *Id.* at 668 (citations omitted).

118. *Id.* (citing *Edwards v. California*, 314 U.S. 160, 184-85 (1941) (Jackson, J., concurring); *Griffin v. Illinois*, 351 U.S. 12 (1956); *Douglas v. California*, 372 U.S. 353 (1963); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), for the proposition that lines drawn on the basis of wealth are disfavored). And even though the *Harper* Court did not directly address racial equality, the Justices surely had not forgotten their decision only a year earlier in *Harman v. Forssenius*, 380 U.S. 528 (1965), where the Court had declared that Virginia’s poll tax “was born of a desire to disenfranchise the Negro.” *Id.* at 543.

That traditional disfavor has been unheeded for decades, interred by the Burger Court in *San Antonio Independent School District v. Rodriguez*.¹¹⁹ But it deserves resuscitation, particularly in an era of striking economic inequality. Everyone understands Anatole France’s rightly caustic condemnation of a regime in which citizenship means merely “the majestic quality of the law which prohibits the wealthy as well as the poor from sleeping under the bridges, from being in the streets, and from stealing bread.”¹²⁰ Showing the courts, and the public, how economic disadvantage thwarts such foundational rights as voting and access to abortion may allow for a new form of stereoscopic understanding, which looks at the intersection of liberty interests and economic equality. And perhaps this understanding can radiate outward into more general discussions about the ways that individuals’ ability to participate fully in American society are constrained by their economic situation and about our responsibility as a society to do something about that.

119. 411 U.S. 1 (1973).

120. ANATOLE FRANCE, *THE RED LILY* 87 (1905).