IT'S A TRAP: THE CONSTITUTIONAL DANGERS OF ADMITTING PRIVILEGES FOR BOTH WOMEN AND ABORTION PROVIDERS

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I. INTRODUCTION

There can be little doubt that in the forty years since the Supreme Court handed down its seminal decision in *Roe v. Wade*,[1] abortion has continued to fascinate and challenge the American psyche. Given the diverse composition of the modern electorate, with its seemingly endless mix of political, ethical, and religious flavors, it is not hard to see why abortion, and the collateral issues that

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[1] 410 U.S. 113 (1973).

arise from it, continue to be so polarizing in nature.[2] Although the decision in *Roe* firmly grounded a woman's right to terminate her pregnancy in the Due Process Clause of the Fourteenth Amendment,[3] the Court recognized that right is not absolute, and has remained firm in that conviction in subsequent decisions.[4] It is this portion of the Court's holding, which reserves to the states the ability to pass abortion regulations in the interest of potential life, as well in the interest of the health and safety of the mother,[5] that has given rise to seemingly endless legislation in the post-*Roe* abortion landscape.

In 1992, some twenty years after the dust from *Roe* had settled, the Court handed down another landmark decision in *Planned Parenthood v. Casey*,[6] a decision which altered the basic framework through which abortion regulations are analyzed.[7] Prior to *Casey*, courts evaluated the validity of abortion legislation in light of the trimester framework articulated in *Roe*.[8] The joint opinion in *Casey* abandoned this approach and imposed an "undue burden" standard upon all subsequent abortion legislation.[9] Henceforth, a law would be deemed to impose an undue burden—and thus be unconstitutional—if "it ha[d] the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[10] Years later, in *Gonzales v. Carhart*, the Court further clarified: "Where [the state] has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others . . . ."[11] Although *Casey* firmly stated that the new standard did "not disturb the central holding in *Roe*,"[12] neither *Casey* nor its progeny have articulated firm methods through which the undue burden standard can be reliably administered.

This Article does not suggest that courts have consistently employed flawed means of analyzing the presence of undue burden. To the contrary, many courts have engaged in inquiries true to the letter and spirit of *Casey*—that is, to allow women to exercise autonomous control over their bodies, decision making ability, and ultimately, in the unique context of abortion, the survival of another

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[2] *See* Peter Berger, *Abortion on the Agenda After GOP Victories*, THE AMERICAN INTEREST (Dec. 1, 2014), http://www.the-american-interest.com/2014/12/01/abortion-on-the-agenda-after-gop-victories/.

[3] *Roe*, 410 U.S. at 164.

[4] *Id.* at 154. *See also* Planned Parenthood v. Casey, 505 U.S. 833, 877–78 (confirming the state's power to proscribe abortions after fetal viability, as well as articulating state rights to regulate abortion pre-viability).

[5] *See Roe*, 410 U.S. at 154.

[6] 505 U.S. 833 (1992).

[7] *Casey*, 505 U.S. 833.

[8] *Roe*, at 162–64.

[9] *Casey*, at 833.

[10] *Id.* at 877.

[11] Gonzales v. Carhart, 550 U.S. 124, 158 (2007).

[12] *Casey*, 505 U.S. at 879.

potential human life.[13] The wide array of approaches analyzing undue burden, however, suggests that courts do not have a sound methodology for employing a consistently effective approach. The lack of a sound methodology has become especially noticeable in the context of "admitting privileges laws," which have quickly become a source of controversy on a state and national level.[14]

Admitting privilege laws require physicians who provide abortion services to gain the right to admit patients they treat to local[15] hospitals in order to be legally able to perform abortions.[16] Four states currently have admitting privilege laws on the books, and an additional seven states have passed such laws but have been temporarily enjoined from enforcing them pending final court decisions.[17] Nine states require abortion providers to have either admitting privileges or some alternative arrangement that mirrors them.[18] Furthermore, the circuit courts appear to be in little agreement regarding the enforceability of admitting privilege laws, as illustrated by the Fifth Circuit, which issued two decisions—mere months apart—that split on the issue.[19] At the end of 2013, the Seventh Circuit upheld the grant of a preliminary injunction of an admitting privilege provision in Wisconsin, before ultimately striking down the statute as unconstitutional in early 2014.[20] Thereafter, a district court in Louisiana ruled in May 2015 that the same law satisfied rational basis review, yet could still not be enforced statewide on the grounds that the law may have been passed with an improper purpose.[21] In total contrast to the Louisiana court, a district court in Oklahoma refused to grant any sort of injunction regarding an admitting

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[13] *See infra* Part III–IV.

[14] Tierney Sneed, *Battle Over Abortion May Return to the Supreme Court*, U.S. NEWS & WORLD REPORT (Oct. 14, 2014, 12:01 AM), http://www.usnews.com/news/articles/2014/10/14/battle-over-abortion-may-return-to-the-supreme-court.

[15] Although the definition of "local" varies from state to state, several provisions have defined a local hospital as being within thirty miles of a clinic. Planned Parenthood of Wisconsin, Inc. v. Van Hollen, No. 13-cv-465-wmc, 2013 WL 3989238 at *46 (W.D. Wis. Aug. 2, 2013).

[16] *See* Jackson Women's Health Org. v. Currier, 760 F.3d 448 (5th Cir. 2014); Planned Parenthood of Greater Texas Surgical Health Services v. Abbott, 748 F.3d 583 (5th Cir. 2014).

[17] *State Policies in Brief: Targeted Regulation of Abortion Providers*, GUTTMACHER INST. (July 1, 2015), www.guttmacher.org/statecenter/spibs/spib_TRAP.pdf.

[18] *Id.*

[19] *Compare Abbott*, 748 F.3d 583 (upholding admitting privilege provision) *with Jackson*, 760 F.3d 448 (affirming preliminary injunction of state admitting privilege law).

[20] Planned Parenthood of Wisconsin, Inc. v. Van Hollen, 738 F.3d 786 (7th Cir. 2013); Planned Parenthood of Wisconsin, Inc. v. Van Hollen, No. 13-cv-465-wmc, 2015 WL 1285829 (7th Cir. Mar. 20, 2015).

[21] June Medical Serv., LLC v. Caldwell, No. 3:14–cv–00525–JWD–RLB, 2014 WL 4296679 (M.D. La. Aug. 31, 2014); June Medical Services, LLC v. Kliebert, No. 14-525-JWD-RLB, 2015 WL 2239877 (M.D. La. May 12, 2015).

privilege law enacted in late 2014.[22] To complicate the matter, these courts have either employed completely different approaches to framing admitting privileges in the context of the undue burden standard, or have employed the same approach and reached different results.[23]

This Article will begin by exploring the nature of admitting privilege laws, as well as the long and arduous process required by physicians seeking to obtain them. Part II briefly will examine the modern abortion outpatient procedure through statistics and comparatively to other outpatient procedures. Part III will discuss the undue burden standard as articulated in *Casey* and examine the difficulty courts have had applying it. Part IV will discuss the undue burden standard in the admitting privilege context by examining two cases: the Fifth Circuit's approach in *Planned Parenthood of Greater Texas Surgical Health Services v. Abbott,* and the Seventh Circuit's approach in *Planned Parenthood of Wisconsin v. Van Hollen.*[24] Although both cases will be discussed at some length, analysis will center on the Fifth Circuit's holding in *Abbott*, which ruled that the state of Texas properly exercised its powers in passing an admitting privilege law.[25] Not only was the Fifth Circuit's approach contrary to the law as articulated in *Casey*, but the opinion also contained the court's brief analysis of the Seventh Circuit's decision in *Van Hollen*, the analysis of which was flawed in its own right.[26] Finally, in Part V, this Article proposes a solution for applying *Casey's* undue burden standard to admitting privilege laws, one predicated on the substantial, unique obstacles that obtaining such privileges pose to physicians. By focusing analysis on the almost insurmountable hurdles physicians face in obtaining admitting privileges—as evidenced in almost every recent admitting privilege case on record—it logically follows that those difficulties result in an impermissible undue burden on women seeking an abortion. Examining the permissibility of admitting privileges through this lens emphasizes the important causal relationship between physicians and the women they serve, and helps expose the counter-intuitive logic state legislatures use in attempting to pass these laws.

II. ABORTION STATISTICS AND THE ADMITTING PRIVILEGE PROCESS

In response to *Casey's* unwillingness to overturn the central holding of *Roe,* states began to enact abortion legislation aimed squarely at abortion clinics and

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[22] Oklahoma Coalition for Reprod. Justice v. Cline, No. 113355, 2014 WL 5585490 (Ok. Nov. 4, 2014). Although the opinion for the district court's denial of an injunction is unavailable, the above citation references the Supreme Court of Oklahoma's subsequent decision to enjoin the law in question. *Cline* has been remanded for trial on the constitutionality of the admitting privilege provision that took effect on November 1, 2014.

[23] *See supra* notes 19–22.

[24] *Abbott*, 748 F.3d 583; *Van Hollen*, 738 F.3d 786.

[25] *Abbott,* 748 F.3d. 583.

[26] *See id.* at 596.

their physicians.[27] Although not targeted at women per se, these laws, commonly referred to as "targeted regulations of abortion providers," or "TRAP laws," have the effect of restricting access to abortions under the purported objective of furthering important state interests in protecting the health and safety of its female citizens.[28] Many of these laws require abortion clinics to go above and beyond what is reasonably necessary to provide for patient safety. For example, twenty-six states require abortion facilities to meet health and safety standards intended for ambulatory surgical centers.[29] Of those twenty-four states, twelve states specify the size of the procedure rooms, and twelve also specify the width of the corridors within the building.[30] These regulations seemingly do little for patient care, yet may be difficult for providers of abortion services to meet.[31] Admitting privilege laws fit squarely within the TRAP characterization, as they restrict a woman's right to access an abortion indirectly via the state's claimed interest in protecting the health and safety of the mother. These provisions seem especially suspect given the wealth of evidence indicating abortions are highly safe procedures and because obtaining admitting privileges is an extremely difficult, if not almost impossible endeavor for abortion providers.[32]

A. *Outpatient Abortion Procedures are Overwhelmingly Safe*

As a general trend, the abortion rate in the United States has steadily declined since 1980.[33] According to a study conducted from 2012–2013, the U.S. abortion rate was 16.9 abortions per every 1,000 women aged fifteen to forty-four, the lowest mark since *Roe* legalized abortion in 1973.[34] This study marked a thirteen percent decrease from 2008.[35] Despite the decline in the number of women seeking to have an abortion, outpatient clinics, traditionally the preferred establishments in terms of providing abortion services, remained busy.[36] Although abortion clinics account for only nineteen percent of all abortion providers, these clinics accounted for an astounding sixty-three percent of all abortions performed in 2011, with many of these clinics performing

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[27] Rachel B. Gold and Elizabeth Nash, *TRAP Laws Gain Political Traction While Abortion Clinics—And the Women They Serve—Pay the Price*, 16 GUTTMCHER POL'Y REV. 7, 8 (2013).

[28] *Id.* at 7.

[29] *Id.* at 8–9.

[30] *Id.*

[31] *See id.* at 7.

[32] *See infra* Part II.A–B.

[33] Rachel K. Jones and Kathryn Kooista, *Abortion Incidence and Access to Services in the United States, 2008*, 43 PERSPECTIVES ON SEXUAL AND REPRODUCTIVE HEALTH 41, 43 (2011).

[34] Rachel K. Jones and Jenna Jerman, *Abortion Incidence and Service Availability in the United States, 2011*, 46 PERSPECTIVES ON SEXUAL AND REPRODUCTIVE HEALTH 3, 3 (2014).

[35] *Id.*

[36] *Id.* at 4.

upwards of 1,000 abortions during the calendar year.[37] By comparison, hospitals provided roughly a third of all abortions in the same time period, two-thirds of which performed fewer than thirty abortions, representing roughly four percent of total abortions that year.[38] The primary reason why these statistics are so skewed in the direction of specialized outpatient abortion clinics is that procedures at these clinics are among some of the safest surgical procedures administered in the United States. Data collected in early 2013 shows that less than 0.3 percent of abortion patients in this country experience any type of complication resulting in hospitalization after receiving an abortion at a specialized outpatient abortion clinic.[39] The risk of dying from an abortion performed in the first trimester is estimated to be one in four million.[40] By contrast, the risk of death from childbirth is roughly fourteen times greater than that from an abortion.[41] Numerous other studies have recognized the safety of abortions as outpatient procedures, both at the national and international levels.[42]

B. *Admitting Privileges: A Long and Arduous Process*

Despite the apparent safety under which outpatient clinics operate, and in addition to the *Clinical Policy Guidelines* published by the National Abortion Federation,[43] many states have chosen to exercise their power to pass abortion legislation with the purported intent to provide for the continued safety and health of women choosing to have an abortion.[44] Many of these laws attempt to

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[37] *Id.*

[38] *Id.*

[39] Gold & Nash, *supra* note 27 at 7.

[40] Nine out of ten abortions performed in the United States occur during the first trimester. *See Id.*

[41] Elizabeth G. Raymond and David A. Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 OBSTETRICS AND GYNECOLOGY, 215, 216 (Feb. 2012).

[42] *See* TA Weitz et al., *Safety of Aspiration Abortion Performed by Nurse Practitioners, Certified Nurse Midwives, and Physician Assistants Under a California Legal Waiver*, 103 AM. J. PUB. 454, 454-61 (Mar. 2013) (study showing that nurses, certified nurse midwives, and physicians assistants could perform outpatient aspiration abortions with extremely low complication rates). *See also* WORLD HEALTH ORGANIZATION, *Safe Abortion: Technical and Policy Guidance for Health Systems*, 65 (2012), http://www.who.int/reproductivehealth/publications/unsafe_abortion/9789241548434/en/ (asserting that abortion procedures in outpatient clinics are safe, while minimizing cost and maximizing convenience and timeliness of care, and that regulation of abortion providers "should be based on evidence of best practices and be aimed at ensuring safety, good quality, and accessibility").

[43] The guidelines contain numerous and detailed safety and procedural requirements to be followed throughout the entirety of the surgical process, including measures designed to effectively deal with complications involving bleeding and perforations, among other issues. *See 2014 Clinical Policy Guidelines*, NATIONAL ABORTION FEDERATION (2014), *available at* http://prochoice.org/wp-content/uploads/2014NAFCPGs.pdf.

[44] *See supra* notes 27–30.

regulate abortion through targeted regulation of abortion providers, and often contain provisions—such as corridor width—that can be difficult for abortion clinics to comply with.[45] Admitting privilege laws, although comparatively new, also can be characterized as "TRAP laws." Although the wording and requirements of these admitting privilege provisions can vary slightly, the following language, found in Wisconsin Statute Section 253.095(2)—which has since been held unconstitutional by the Seventh Circuit—is typical:

> (2) Admitting privileges required. No physician may perform an abortion, as defined in s. 253.10(2)(a), unless he or she has admitting privileges in a hospital within 30 miles of the location where the abortion is to be performed.[46]

The language of the Wisconsin statute is unambiguous in nature and poses no problems of interpretation, but the process an individual physician must undertake to secure an admitting privilege is comprised of many significant hurdles, virtually impossible to overcome in a timely manner, if at all.[47] In the context of abortion, these hurdles can have major repercussions, both for the clinic and the women they serve.

Speaking on abortion in front of a local gathering a few years ago, a Mississippi State Representative stated, "anybody here in the medical field knows how hard it is to get admitting privileges to a hospital."[48] This quote serves to underscore the difficulty physicians at abortion clinics face in attempting to gain access to local hospitals. A long application process, quota requirements, and hospitals' varying religious and moral affiliations all serve to impede progress despite diligent efforts from physicians.[49] First, the review process itself is a rigorous one, requiring two to three months simply for information gathering and review.[50] In Texas, the entire process "undisputedly" can take anywhere from ninety to one hundred seventy days.[51] Physicians are evaluated by a committee that reviews all paperwork submitted by the physician, including firsthand verification of all credentials, where the physician attended medical school, and where the physician got his or her residencies, various board mem-

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[45] Gold & Nash, *supra* note 27 at 11.

[46] WISC. STAT. § 253.095(2) (preempted). Although the Seventh Circuit has held this admitting privilege statute to be unconstitutional, the provision is still useful for linguistic purposes.

[47] *See infra* text accompanying notes 48–63.

[48] Gold & Nash, *supra* note 27 at 10.

[49] *See infra* text accompanying notes 50–63.

[50] *See Van Hollen*, 2013 WL 3989238 at *17–18. These steps may vary from state to state but are generally similar. *See* Marti Mikkelson, *Hospital Admitting Privileges a Tedious Process*, WUVM MILWAUKEE PUBLIC RADIO (Aug. 7, 2013), http://wuwm.com/post/hospital-admitting-privileges-tedious-process.

[51] Planned Parenthood of Greater Texas Surgical Health Services v. Abbott, 951 F. Supp. 2d 891, 900 (W.D. Tex. Oct. 28, 2013).

berships, and specialties.[52] After the credentialing process is complete, the committee must establish what the physician would be "privileged" to do at the hospital in light of the individual's medical background.[53] In some states such as Wisconsin, a second committee must again perform the credentialing and privileging process, after which the hospital's governing board must do the same.[54] Even after these initial review processes, some hospitals require the approved physician to go through a probationary period in which their work can be observed and reviewed before gaining full membership in a hospital's staff.[55]

Additionally, some hospitals condition admitting privileges on physicians being able to admit a certain number of patients per year.[56] This practice may include more than just "some hospitals;" it is prevalent enough to be described as "common."[57] For example, in Michigan, Detroit Medical Center requires physicians to admit at least ten patients per year.[58] Given the extremely low rate of complications arising from abortion procedures, it is highly unlikely, if not impossible, for physicians to meet such quota requirements.[59] Furthermore, the practice of abortion may contradict a hospital's code of ethics or violate religious or moral principles upon which the hospital was founded. As a result, many facilities simply refuse to grant admitting privileges to physicians at abortion clinics.[60] According to the Center of Reproductive Rights, in 2012, five Mississippi hospitals refused to consider the merits of doctors who applied for admitting privileges at their facilities, citing their policies regarding abortion and their "concern about the effect on relationships in the community" should they grant those physicians the privileges they sought.[61]

Obtaining admitting privileges is an almost insurmountable hurdle, and the failure to secure them can mean the closure of one or more clinics.[62] To provide

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[52] Mikkelson, *supra* note 50.

[53] *See* Veronica Zaragovia, *What it Takes for Texas Abortion Doctors to Get Admitting Privileges*, KUT.org (Feb. 19, 2014), http://kut.org/post/what-it-takes-texas-abortion-doctors-get-admitting-privileges.

[54] Mikkelson, *supra* note 50.

[55] *Id. See also Van Hollen*, 2013 WL 3989238 at *4.

[56] Gold & Nash, *supra* note 27 at 10.

[57] *Van Hollen,* 2013 WL 3989238 at *4.

[58] Gold & Nash, *supra* note 27 at 10.

[59] *See supra* text accompanying notes 33–42.

[60] Gold & Nash, *supra* note 27 at 9–11.

[61] Katrina Trinko, *Will Mississippi's Last Abortion Clinic Close?*, NATIONAL REVIEW ONLINE (Dec. 18, 2012), http://www.nationalreview.com/article/335814/will-mississippis-last-abortion-clinic-close-katrina-trinko.

[62] Mary Emily O'Hara, *Texas and Other States are Using Red Tape to Close Abortion Clinics*, VICE NEWS (Oct. 7, 2014) (stating that "when the Texas law went into affect [after *Abbott*] about half of the abortion clinics closed due to the admitting privileges requirements alone").

one final illustration, physician Larry Burns performs forty-four percent of all abortions in the state of Oklahoma.[63] Since the passage of an admitting privilege provision in Oklahoma in early November 2014, Burns has made "diligent efforts" to obtain admitting privileges at sixteen area hospitals, and despite a "high quality of care" and "impeccable health record," he has flatly been rejected at all sixteen hospitals for varying reasons, including at least two on the basis of quota requirements.[64]

III. *CASEY'S* UNDUE BURDEN STANDARD AND SUBSEQUENT APPLICATION

Roughly twenty years after *Roe v. Wade*, the Supreme Court stated in *Planned Parenthood v. Casey* that "liberty finds no refuge in a jurisprudence of doubt."[65] Those words did not ring hollow, as the joint opinion in *Casey* reaffirmed the constitutionality of a woman's right to terminate her pregnancy, and ushered in a new standard through which all subsequent abortion legislation would be judged—through the lens of "undue burden."[66] Part III.A of this Article describes the basic framework of the undue burden test as articulated in *Casey*, a test which dictates an inquiry into both the "effect" and "purpose" of the regulation in question.[67] Parts III.B–C focus on the difficulty lower courts have had in consistently applying both the effect and purpose prongs, respectively.

A. Planned Parenthood v. Casey*: The Basics of Undue Burden*

Prior to *Casey*, the Supreme Court had adopted a trimester approach in order to balance a woman's right to terminate her pregnancy with competing state interests in protecting new life and preserving the health and safety of the mother.[68] Strict scrutiny was applied to any law enacted by the state pre-viability, requiring state legislatures to narrowly tailor provisions in order to justify their compelling interests and prevent unnecessary infringement of a woman's

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[63] Tim Talley, *Reproductive Rights Group Asks Court to Block Law*, WASH. TIMES (Oct. 31, 2014), http://www.washingtontimes.com/news/2014/oct/31/reproductive-rights-group-asks-court-to-block-law/.

[64] *Judge Hears Oral Arguments Over Okla. Admitting Privileges*, NATIONAL PARTNERSHIP FOR WOMEN AND FAMILIES (Oct. 20, 2014), http://go.nationalpartnership.org/site/News2?page=NewsArticle&id=45870.

[65] *Casey*, 505 U.S. at 844.

[66] *Id.* at 877.

[67] *Id.*

[68] *Roe*, 410 U.S. at 163–66. As articulated in *Roe*, no state interest was found to be strong enough to warrant interference with a woman's choice during the first trimester of pregnancy. Once a pregnancy entered the second trimester, however, states could pass regulations aimed at protecting the health of the mother, but nothing further. Finally, the Court determined that in the third trimester, the point at which a fetus is viable, the state had a compelling interest in protecting life and could thus enact legislation restricting abortion entirely, except in cases where the life or health of the mother were in danger.

fundamental right to abortion.[69] Post viability, the state was held to have a "compelling interest" in protecting life and could enact legislation more freely.[70] *Casey* discarded *Roe's* trimester framework in favor of a new, "undue burden" standard—a standard which inquired as to whether or not "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."[71] As a result, states could now enact abortion legislation irrespective of trimester so long as the regulation in question did not have an impermissible purpose *or* effect.[72] Significantly, whether a regulation impacts a majority of women is not a dispositive factor in determining the existence of an undue burden, as the Court made clear that "the analysis does not end with the one percent of women upon whom the statute operates; it begins there."[73]

Although *Casey* did not expressly articulate a bright-line rule for how to analyze a regulation's purpose or effect, its application of the newly-minted undue burden standard proved instructive—at least as it pertained to the effects prong. In analyzing Pennsylvania's husband notification provision, the Court placed significant weight on factual findings made by the district court that focused on the potential repercussions faced by victims of domestic violence as a consequence of informing their husbands that they were pregnant and planning to have an abortion.[74] In doing this, *Casey* endorsed a specific, fact-intensive inquiry that examined the effects of the provision on the women it was most likely to impact.[75] Although the Court's analysis in *Casey* was beneficial from an effects standpoint, the purpose prong of the undue burden standard was given short shrift. The language in *Casey* indicates that a state may not enact an abortion regulation "designed to strike at the right itself," but it offers little in the way of further guidance.[76] As a result, many lower courts have openly deemphasized the purpose prong due to *Casey's* relative silence.[77] Other commentators have noted a further reason for its sparse use, namely, appellate

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[69] *Id.* at 155.

[70] *Id.*

[71] *Casey*, 505 U.S. at 877. *Casey* labeled the trimester approach as "rigid," finding that subsequent inconsistencies in its later interpretation prevented states from permissibly exercising their powers. *Id.* at 872.

[72] *Id.* at 877.

[73] *Id.* at 894.

[74] *Id.* at 882–91.

[75] *Id.* at 894–95; *see also* Gillian E. Metzger, *Unburdening the Undue Burden Standard: Orienting Casey in Constitutional Jurisprudence*, 94 COLUM. L. REV. 2025, 2030 (1994).

[76] *Casey*, 505 U.S. at 874.

[77] *See* Karlin v. Foust, 975 F. Supp. 1177, 1208 (W.D. Wis. 1997) ("The absence of any detailed discussion of the purpose prong of the undue burden test in Casey signals the considerable difficulty of mounting a credible challenge to an abortion law on the premise that the law harbors an impermissible purpose, even if the law's provisions are medically unnecessary").

courts relying on lower court fact-finding regarding legislative purpose in the absence of clear error on the state's part.[78] The Fifth Circuit's decision in *Abbott*, discussed below, is a prime example of such appellate court reliance. The absence of a clear methodology for determining undue burden has resulted in extreme judicial discretion, leading to wildly inconsistent results regarding various types of abortion regulations, including admitting privileges.[79]

B. *Inconsistencies in Measuring Effect*

After *Casey*, many courts have begun carefully examining the factual record in individual abortion cases,[80] although the inconsistences within *Casey* likely have prevented lower courts from universally applying this type of empirical review. *Casey* undertook a fact-intensive inquiry in rendering Pennsylvania's husband notification provision unconstitutional, but it failed to do the same when evaluating the other provisions at issue in the case, namely parental and informed consent, as well as the twenty-four hour waiting period requirement.[81] The lack of uniformity in *Casey* has paved the way for subsequent inconsistencies and excessive judicial discretion.

One approach to measuring the effect of an abortion regulation takes it cue from *Casey's* analysis of two Supreme Court voting rights cases, *Anderson v. Celebreeze* and *Norman v. Reed*.[82] Despite striking down the state's attempted ballot access limitations in both cases, the Court acknowledged that not all such limitations amounted to an infringement on the right to vote. To arrive at its holding, the Court applied a flexible balancing test—one apart from any established tier of scrutiny—where the state was given space to regulate for a valid purpose so long as that regulation did not infringe upon an individual's voting

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[78] Linda Wharton, *Preserving the Core of Roe: Reflections on Planned Parenthood v. Casey*, 18 YALE J.L. & FEMINISM 317, 377–79.

[79] *See* Metzger, *supra* note 75, at 2037.

[80] *See Van Hollen*, 738 F.3d 786, Planned Parenthood Southeast, Inc. v. Strange, No. 2:13cv405–MHT, 2014 WL 3809403 (M.D. Ala. Aug. 4, 2014).

[81] *See generally Casey*, 505 U.S. 833. *See also* Metzger, *supra* note 75 n.58 (pointing out that the *Casey* court had evidence of harmful effects pertaining to the parental consent requirement); Martha A. Field, *Abortion Law Today*, 14 J. LEGAL MED. 3, 14 (1993). Further, a cornerstone of the *Casey* decision was that "the proper focus of the constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." *Casey*, 505 U.S. at 894. Although the vast majority of woman likely would not have been inconvenienced by waiting an additional twenty-four hours, the extra day would undoubtedly have imposed burdens on women who lived in rural areas and faced lengthy travel, or on poorer women who simply could not afford the extra day's expense or additional time off work.

[82] Discussion of these cases can be found in *Casey*, 505 U.S. at 873–74. *See also* Planned Parenthood of Greater Texas Surgical Health Services v. Abbott, 769 F.3d 330, 335–37 (5th Cir. 2014) (petition for rehearing denied) (Dennis, J., dissenting).

rights.[83] *Casey* acknowledged that "the abortion right is similar [to voting rights],"[84] and therefore some courts have derived a "proportionality principle": if a regulation has the effect of imposing a particularly severe obstacle upon a woman's right to an abortion, then the government's justification must be correspondingly strong.[85] Two recent admitting privilege cases have applied this "proportionality" approach: the Seventh Circuit in *Planned Parenthood of Wisconsin, Inc. v. Van Hollen*, and a district court in Alabama in *Planned Parenthood Southeast, Inc. v. Strange*. In upholding a preliminary injunction blocking implementation of a Wisconsin admitting privilege law, the court in *Van Hollen* acknowledged that "the feebler the medical grounds, the likelier the burden, even if slight, to be 'undue' in the sense of disproportionate or gratuitous."[86] In denying summary judgment for the state, the court in *Strange* asserted, "as the severity of obstacle increases, so increases the requirement that the government establish that the regulation furthers its interests in real and important ways."[87] The proportionality approach to undue burden embraces *Casey*'s willingness to look to other areas of the law for guidance in measuring the effect of a particular regulation and represents a level of scrutiny above rational basis but below strict scrutiny, one that still offers strong protection for a woman's abortion right, especially in the admitting privilege context.[88]

Not all courts have been so willing to implement such an analysis, however. In the admitting privilege context, this unwillingness is most evident in *Abbott*, although courts evaluating other abortion regulations have differed as well.[89] Notably, these other courts seemingly reject *Casey's* suggestion that effect should be measured through diligent and case sensitive fact-finding, choosing instead to substitute their own inferences and speculations in the absence of clear error by the lower court. In *Greenville Women's Clinic v. Bryant*, a South Carolina law required abortion clinics that performed more than an "occasional" first-trimester abortion to obtain a license in order to operate.[90] In finding the law unconstitutional, the district court concluded, after months of reviewing case-specific evidence, that "the medical evidence exposing the constitutional infirmities [was] overwhelming . . . every part of the regulation, and nearly every section, contain[ed] requirements which [we]re unnecessary to the provision of quality healthcare to women seeking abortions . . . ."[91] Additionally, the

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[83] *See Casey,* 505 U.S. at 874.

[84] *Id.*

[85] *Abbott*, 769 F.3d at 337 (Dennis, J., dissenting).

[86] *Van Hollen,* 738 F.3d at 798.

[87] Planned Parenthood Southeast, Inc. v. Strange, 9 F. Supp. 3d 1272, 1287 (M.D. Ala. 2014).

[88] *See Abbott*, 769 F.3d at 335–340 (Dennis, J., dissenting).

[89] *See infra* text accompanying notes 89–94.

[90] Greenville Women's Clinic v. Bryant, 222 F.3d 157 (4th Cir. 2000). *See also* Wharton, *supra* note 78, at 368–70.

[91] Greenville Women's Clinic v. Bryant, 66 F. Supp. 2d 691, 732 (D. S. C. 1999).

district court detailed numerous consequences of the law that would have the effect of imposing an undue burden on women in South Carolina: the increase in the cost of abortion services, substantial delays for women seeking those services, and even cessation of abortion services in areas altogether.[92] Despite the district court's findings, the Fourth Circuit reversed on the grounds that South Carolina's attempt to regulate abortion facilities and their physicians through the medical licensure provision and other requirements did not have the effect of placing an undue burden on women.[93] The Fourth Circuit's analysis is at odds with what *Casey* dictates: the Fourth Circuit failed to find any clear error with any of the lower court's factual findings, and instead chose to spin the lower court's findings to suit its purposes.[94] Most notably, the Fourth Circuit suggested that traveling an additional seventy miles in the event of a clinic closing down hardly constituted an undue burden. As the dissent pointed out, however, although seventy miles "may be inconsequential to my brethren in the majority who live in the urban sprawl of Baltimore," seventy miles to poor women in rural South Carolina may pose a substantial obstacle.[95] The majority clearly failed to adhere to *Casey's* instruction that effect must be measured on those women whom the law would have the greatest effect. Additionally, no balancing test as seen in *Van Hollen* and *Strange* was applied in *Bryant*. The Fourth Circuit's exercise of discretion in *Bryant* was not in line with the language and spirit of *Casey*, but is highly illustrative of the inconsistences taken by many courts in the post-*Casey* era.[96]

C. *Inconsistencies in Determining Purpose*

As a general matter, *Casey* is more or less silent on the purpose prong's application outside of the assertion that purpose can be discerned "where a

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[92] *Id.* at 735–36 (additionally contending that "by causing delays in the woman's financial ability to obtain an abortion, the regulation will cause the woman to undergo abortion later in the pregnancy, or forego the procedure altogether, both of which result in a higher cost and higher medical risk for the woman").

[93] *Bryant,* 222 F.3d at 157. The Fourth Circuit also incorrectly held that in facially challenging an abortion law, proof of the regulation's actual impact on women must be shown. Inconsistent with *Casey*, this approach is inherently flawed, as all facial challenges to abortion restrictions must be mounted on the predictive impact the law will have in the absence of concrete data. *See* Wharton, *supra* note 78, at 370–71. If the reverse were true, all challenges, including those seeking injunctive relief in admitting privilege cases, would fail.

[94] Wharton, *supra* note 78, at 370–72.

[95] *Bryant*, 222 F.3d at 176, 202. In a scathing dissent, Judge Hamilton accused the court of "cavalierly" setting aside a "thorough and meticulous decision . . . without identifying a single finding of fact . . . as being clearly erroneous."

[96] Another case dealt with an Ohio law requiring the abortion provider to have a written transfer agreement at a local hospital in the even of complications. Women's Medical Professional Corp. v. Baird, 438 F.3d 595 (6th Cir. 2006). The court took virtually the same approach applied by the Fourth Circuit in *Greenville*.

requirement serves no other purpose than to make abortions more difficult."[97] As a result, a large number of courts have simply dismissed the purpose prong as "impossible to prove" or given the subject matter short shrift.[98]

As a result, few courts have overturned a controversial abortion provision on purpose grounds. One particular case, however, provides an extremely well-reasoned and instructive opinion on how best to analyze legislative purpose in the framework of *Casey*. *Okpalobi v. Foster* involved a challenge to a Louisiana statute, brought by abortion service providers, that made them liable in tort to women who were subject to any medical injury whatsoever as a result of an abortion procedure.[99] In its analysis, the Fifth Circuit acknowledged the inherent difficulty involved in conducting a purpose analysis in the abortion context—due in part to the lack of guidance in *Casey*—but nonetheless asserted that courts are not totally in the dark, as inquires into purpose are mandated in both voting rights and Establishment Clause cases.[100] Although the Supreme Court has acknowledged that courts should typically afford a government's articulation of legislative purpose significant deference, that purpose is not to be accepted should it be apparent that the stated purpose amounts to nothing more than a "mere sham."[101] Perhaps most importantly for present purposes, the Fifth Circuit in *Okpalobi* correctly acknowledged that in both voting rights and Establishment Clause cases, the Supreme Court looked to various types of evidence to discern legislative purpose, including the language of the challenged act itself, the legislative history, the social and historical context of the legislation, or other legislation that dealt with the same subject matter as the challenged action.[102] The Fifth Circuit's assertion stemmed from a close reading of prior Supreme Court precedent[103] and served as a basic premise for the appel-

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[97] *Casey*, 505 U.S. at 901.

[98] *See Karlin*, 975 F. Supp. at 1208.

[99] Okpalobi v. Foster, 190 F.3d 337 (5th Cir. 1999).

[100] *Id.*

[101] *Id. See also* Edwards v. Aguillard, 482 U.S. 578, 586 (1987); Wharton, *supra* note 78, at 383. It is important to note that although the Fifth Circuit in *Okpalobi* based its purpose analysis on a reading of voting rights and Establishment Clause cases, a showing of purpose is required in all cases where the infringement of constitutional rights is at issue. *See* Employment Division v. Smith, 494 U.S. 872 (1990) (upholding Oregon law banning the use of peyote in part because purpose of law did not violate Free Exercise Clause and applied equally to everyone); Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252 (1977) (holding that a zoning ordinance barring multi-family housing did not have the purpose of discriminating against minorities and thus did not violate the Equal Protection Clause).

[102] *Okpalobi*, 190 F.3d at 354.

[103] The Fifth Circuit specifically looked at two cases, Mazurek v. Armstrong, 520 U.S. 968 (1997) and Jane L. v. Bangerter, 102 F.3d 1112 (10th Cir. 1996). Most notably, the *Okpalobi* court found that *Mazurek* "highlights specific types of evidence that are clearly insufficient to establish improper purpose," but allows for a cumulative analysis of other factors not explicitly barred. *See Okpalobi*, 190 F.3d at 355–56.

late court's two pronged conclusion that (1) courts need not have an express admission from the state legislature of an inadmissible purpose, and (2) a totality of the circumstances test, involving factors such as the ones mentioned above, is a relevant means to discern purpose.[104] In essence, the Fifth Circuit found that illicit purpose could be *inferred* through a thorough investigation of a variety of factors including relevant social and historical evidence.[105] Being able to infer purpose in this manner is an important part of giving the purpose prong of *Casey's* undue burden test sufficient bite, and can be especially useful in the admitting privilege context. In the "physician's first approach" that this Article will endorse, the substantial difficulty physicians face in acquiring admitting privileges gives rise to the inference that these laws—which are based on the state's purported interest in furthering the health and safety of the woman—are counter-intuitive by their very nature, and conceal a purpose impermissible under *Casey*.

IV. CONFLICTING APPROACHES: *ABBOTT* AND *VAN HOLLEN*[106]

The following sections focus on two divergent interpretations of admitting privilege laws. Part IV.A. describes the analysis undertaken by the Fifth Circuit in *Planned Parenthood of Greater Texas Surgical Center v. Abbott*. In finding Texas's admitting privilege law constitutional, the Fifth Circuit fundamentally erred by (1) implementing a form of "rational speculation" review inconsistent with the requirements of the undue burden standard, (2) failing to focus its analysis on the majority of women who would actually be affected by the admitting privilege law, and (3) ignoring the relevant factual and contextual circumstances.[107] Although criticism of *Abbott* has not been universal, the deci-

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[104] *Okpalobi*, 190 F.3d at 355. *See also* Wharton, *supra* note 78, at 385.

[105] *See Okpalobi*, 190 F.3d. at 354.

[106] Although mentioned previously, the split in the Fifth Circuit pertaining to admitting privileges will not be discussed here for the following reasons: Contrary to *Abbott*, the Fifth Circuit panel in *Jackson Women's Health Org. v. Currier* upheld a lower court's grant of preliminary injunction barring the enforcement of an admitting privilege provision. Despite the differing outcome, the holding was almost entirely based on the fact that the regulation had the effect of closing the only abortion clinic in the state of Mississippi, thus requiring women to travel out of state to procure an abortion. *Jackson*, 760 F.3d at 455–56. Such a result dictated that an undue burden had been placed on the women of Mississippi, as the court determined burdening another state as a result of implementing the law would be impermissible. *Id.* at 458–59. However, the opinion in *Jackson* otherwise adheres to the flawed analysis in *Abbott*, which is detailed below. Additionally, the *Jackson* court comments that "nothing in this opinion should be read to hold that any law or regulation that has the effect of closing all abortion clinics in a state would inevitably fail the undue burden analysis." *Id.* at 458. Such a remark is perplexing, as any abortion regulation closing all of a state's clinics would seemingly result in women having to travel outside of state lines to have an abortion, the fact which is the very foundation upon which the opinion is grounded.

[107] *Abbott*, 769 F.3d at 335 (Dennis, J., dissenting).

sion has been attacked by other circuits and outside commentators alike.[108]

Part IV.B. describes a different approach taken by the Seventh Circuit in *Planned Parenthood of Wisconsin, Inc. v. Van Hollen.* In *Van Hollen*, the Seventh Circuit undertook a detailed inspection of the record, giving strong deference to the district court's findings, examined the admitting privilege law by balancing the state's purported justification for the law against the burdens the law created, and utilized inference and deductive reasoning from contextual circumstances, as advocated by the Fifth Circuit in *Okpalobi*, to discern the law's purpose.[109]

A. *Planned Parenthood of Greater Texas Surgical Center v. Abbott*[110]

Abbott centered around House Bill 2, passed by the Texas Legislature on July 12, 2013.[111] At issue was a provision that required a physician "performing or inducing an abortion" to have active admitting privileges at a hospital "not further than thirty miles from the location at which the abortion is performed or induced" and which "provides obstetrical or gynecological health care services."[112] The bill went on to provide that violation of the above provisions would result in a misdemeanor punishable by a fine.[113] In the district court, the state argued that admitting privileges allow for continuity of care and decrease the likelihood of medical error, pointing to a generalized and seemingly irrelevant statistic that eighty percent of significant negative outcomes at emergency rooms relate to difficulties with communication and patient handoff.[114] Additionally, the state also contended that the provisions addressed issues of patient abandonment, hospital costs, and physician accountability, while also improv-

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[108] *See* Planned Parenthood of Arizona, Inc. v. Humble, 753 F.3d 905, 914 (9th Cir. 2014) (holding that approach in *Abbott* failed to recognize the unique circumstances of that particular challenge, and that undue burden is predicated on "both the severity of a burden and strength of the state's justification . . . depending on the circumstances"). *See also* Priscilla J. Smith, *If the Purpose Fits: the Two Functions of Casey's Purpose Inquiry*, 71 WASH. & LEE L. REV. 1135, 1155–56 (2014). *But see Jackson*, 760 F.3d 448 (adhering to *Abbott's* approach to analyzing undue burden in the admitting privilege context).

[109] *See Van Hollen,* 738 F.3d at 786.

[110] On October 14, 2014 the Supreme Court partially blocked enforcement of House Bill 2, which *Abbott* had deemed constitutionally valid. However, it did not substantially disturb its November 19, 2013 ruling that the Texas admitting privilege provision could be implemented in the absence of a clear violation of accepted legal standards. *See* Planned Parenthood of Greater Texas Surgical Health Services v. Abbott, 134 S. Ct 506 (2013). However, it did remove the admitting privilege requirement for two clinics, one in McAllen and one in El Paso.

[111] *Abbott*, 951 F. Supp. 2d at 896.

[112] *Id.* at 898.

[113] *Id.*

[114] *Id.* at 899.

ing the quality of treatment once the woman arrives at the hospital.[115] After considering the state's claims, the district court flatly rejected them, reviewing purpose in a manner consistent with the analysis in *Okpalobi*, and also in line with the Seventh Circuit's analysis in *Van Hollen*.[116] Specifically, the district court found that the state had failed to show a valid purpose for the admitting privilege provision.[117] The court based its conclusion on an overwhelming lack of evidence on the part of the state, giving rise to the inference that the law did not serve any purported, legitimate interest.[118] The court found no evidence suggesting that admitting privileges would improve communication between physicians and local hospitals, nor that such a problem even existed.[119] In addition, the court found no evidence suggesting that admitting privileges would directly address issues of abandonment and accountability.[120] Moreover, the court rejected the state's argument that abortion imposed a "unique potential for danger."[121] As a result, the district court enjoined enforcement of the admitting privilege provision.[122]

On appeal, the Fifth Circuit stayed the district court's preliminary injunction. This Article argues that the Fifth Circuit's decision fundamentally erred in three critical areas.[123] First, and most notably, the court in *Abbott* failed to properly apply *Casey's* undue burden test as articulated in that opinion as well as in subsequent decisions.[124] As previously discussed, an undue burden assessment involves weighing the state's interests against the extent of the burden imposed by the regulation.[125] Rather than engage in such an analysis, the *Abbott* panel asserted that "a legislative choice is not subject to courtroom fact-finding" and "may be based on rational speculation unsupported by evidence or empirical data."[126] The Fifth Circuit based its reading of undue burden on the Supreme Court's decision in *Gonzales v. Carhart*, which *Abbott* misread as allowing courts to impose, at best, rational basis review of abortion regulations, and at worst, "rational speculation".[127] The court in *Gonzales* stated "where [the state] has a rational basis to act, and it does not impose an undue burden,

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[115] *Id.*

[116] *Id.* at 899–902.

[117] *Id.* at 900.

[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] *Id.* at 909.

[123] *Abbott*, 769 F.3d at 335 (Dennis, J., dissenting).

[124] *See Abbott*, 748 F.3d 583.

[125] *See supra* text accompanying notes 81–87.

[126] *Abbott*, 748 F.3d at 594 (citing F.C.C. v. Beach Commc'n, 508 U.S. 307, 315). In citing *F.C.C.*, the court used case law and reasoning never before applied in the abortion context. *Abbott*, 769 F.3d at 358 n.10 (Dennis, J., dissenting).

[127] *Abbott*, 769 F.3d at 358 n.10 (Dennis, J., dissenting).

the State may . . . bar certain procedures and substitute others, all in furtherance of its legitimate interests . . . ."[128] *Gonzales* used the phrase "rational basis" to explain why Congress acted with a permissible purpose in banning partial birth abortions, not to suggest that rational basis review should be the standard for analyzing undue burden.[129] Instead of evaluating whether or not the state's purported justifications could hold water sufficient to warrant the burden being placed on women, the Fifth Circuit insisted that since the state's proffered reasons for enacting the admitting provisions were *conceivable,* they had a rational basis.[130] Additionally, the Fifth Circuit panel held that the lower court engaged in erroneous and impermissible review and afforded immense deference to legislatures in the abortion context.[131] This "rational speculation" review employed by *Abbott* is out of line with what *Casey* intended and sets a dangerous precedent.

Second, *Casey* was very clear that an analysis of the constitutionality of restrictive abortion legislation "does not end with the one percent of women upon whom the statute operates; it begins there."[132] To the contrary, the *Abbott* panel found that even if the admitting privilege regulations burdened abortion access, the burdens did "not fall on the vast majority of Texas women seeking abortions."[133] This finding is plainly at odds with what *Casey* dictates: a court must consider whether or not the provision in question would present a substantial obstacle for a majority of women *whom are affected by the law*, not a majority of women generally.[134] In *Abbott*, the record indicated that women in many rural areas, but particularly the Rio Grande Valley and the panhandle area, either would be precluded from access to an abortion clinic entirely or would have to travel distances up to four hundred miles in order to access one.[135] Additionally, almost half of all women seeking an abortion in Texas have annual incomes that put them below the poverty line, further exacerbating the burden posed by extended travel, its costs, and other associated risks.[136]

Third, the court failed to take into account the relevant factual and contextual circumstances surrounding the admitting privilege provision. *Casey*'s treatment of Pennsylvania's spousal notification provision, which analyzed the regulation in light of existing social conditions and empirical data, provided a template for

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[128] Gonzales v. Carhart, 550 U.S. 124, 158 (2007).

[129] *Abbott*, 769 F.3d at 358 n.10. "The *Abbott II* panel relies upon this phrase in Gonzales, taken out of context, to apply a highly deferential, rational-basis review."

[130] *Abbott*, 748 F.3d at 594.

[131] *Id.*

[132] Planned Parenthood v. Casey, 505 U.S. 833, 893–94 (1992).

[133] *Abbott*, 748 F.3d at 600.

[134] *Casey* 505 U.S. at 893–94.

[135] *See* Planned Parenthood of Greater Texas Surgical Health Servs. v. Abbott, 951 F. Supp. 2d 891, 900 (5th Cir. 2014); Planned Parenthood of Greater Texas Surgical Health Servs. v. Abbott, 769 F.3d 330, 347 (5th Cir. 2014) (Dennis, J., dissenting).

[136] *Abbott*, 769 F.3d at 347 (Dennis, J., dissenting).

subsequent inquiries through its careful fact-intensive examination.[137] Despite this template, the Fifth Circuit completely overlooked the empirical data that existed in the record.[138] This data evidenced the substantial difficulties physicians face in securing admitting privileges, as well as the burdens those difficulties impose on women seeking an abortion.[139] The Fifth Circuit's complete ignorance of significant travel times imposed by the admitting privilege provision is perhaps most illustrative.[140] *Abbott* contended that *Casey* "counsels against" striking down a statute because women may have to travel long distances to obtain an abortion.[141] In reality, the *Abbott* court simply applied one of *Casey's* particular holdings to the instant case, much like attempting to fit a square peg in a round hole. *Casey* cautioned on numerous occasions that its particular holdings were contingent on the record before it, and that at some point, pursuant to a proper application of the undue burden analysis, various factors could become substantial obstacles.[142] This interpretation of *Casey* led the *Abbott* panel to implement a bright-line rule where no such rule existed in prior case law, much to the detriment of poor, rural woman. The aforementioned flaws in the Fifth Circuit's analysis set a dangerous precedent, one that may serve to influence lower courts and other Fifth Circuit panels.[143]

B. *Planned Parenthood of Wisconsin, Inc. v. Van Hollen*

Unlike the Fifth Circuit in *Abbott*, the Seventh Circuit saw fit to apply a different approach in *Planned Parenthood of Wisconsin, Inc. v. Van Hollen*,

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[137] *Casey*, 505 U.S. at 893–94; *See also Abbott*, 769 F.3d at 362 (Dennis, J., dissenting).

[138] *Abbott*, 951 F. Supp. 2d at 900–01; *Abbott*, 769 F.3d at 347 (Dennis, J., dissenting).

[139] *Abbott*, 951 F. Supp. 2d at 900–01; *Abbott*, 769 F.3d at 347 (Dennis, J., dissenting).

[140] *Abbott*, 748 F.3d at 598.

[141] *Id.*

[142] *See Casey*, 505 U.S. at 887–901 ("while at some point increased cost [of an abortion] could become a substantial obstacle, there is no such showing on the record before us); *see also Abbott*, 769 F.3d at 364 (Dennis, J., dissenting).

[143] Although the methodology applied in *Abbott* proves highly questionable given *Casey's* language and subsequent interpretation by many courts, it still represents, for now, a prime example of permissible judicial discretion in applying the undue burden standard to abortion regulations. This much is evident given the Supreme Court's willingness to only block enforcement of the admitting privilege provision as applied to two Texas abortion clinics in McAllen and El Paso. Adam Liptak, *Supreme Court Allows Texas Abortion Clinics to Stay Open*, N.Y. TIMES (Oct. 14, 2014), http://www.nytimes.com/2014/10/15/us/supreme-court-allows-texas-abortion-clinics-to-stay-open.html?_r=0. Indeed, two subsequent Fifth Circuit decisions, Jackson Women's Health Org. v. Currier, 760 F.3d 448 (5th Cir. 2014) (reluctantly holding that admitting privilege requirement imposed an undue burden since it had the effect of closing Mississippi's only abortion clinic) and Whole Women's Health v. Lakey, 769 F.3d 285 (5th Cir. 2014) (staying a lower court injunction pending appeal and holding that the State demonstrated a likelihood of success in showing that a law requiring abortion clinics to adhere to ambulatory surgical center requirements was constitutional on its face) have applied the methodology used by the court in *Abbott*.

one more in line with what *Casey* requires.[144] In 2013, the Seventh Circuit affirmed the issuance of a preliminary injunction blocking a Wisconsin statute that mandated that physicians obtain admitting privileges at a hospital within thirty miles of the abortion clinic was warranted.[145] Two notable grounds distinguish *Van Hollen* from *Abbott*: First, the decision in *Van Hollen* was based on a pre-trial record, whereas *Abbott* was decided after a trial on the merits.[146] Second, the admitting privilege provision in *Van Hollen* was signed on a Friday and set to become effective the next Monday, making its implementation virtually immediate.[147] In contrast, the Texas law at issue in *Abbott* instituted a grace period of roughly one hundred days for doctors to obtain such privileges.[148] The Fifth Circuit pointed out these differences between its opinion in *Van Hollen* in its opinion as further justification for its holding, but these differences likely had no practical significance. Specifically, a trial on the merits would not likely have produced a result contrary to the Seventh Circuit's opinion upholding the injunction.[149] The state in *Van Hollen* devoted much of its brief not to the merits of the case, but instead to arguing that the plaintiffs lacked standing to bring the lawsuit because their rights had not been violated.[150] When asked what evidence it anticipated producing at trial, the state mentioned no medical or statistical evidence.[151] The state simply asserted that it "was looking for women in Wisconsin who had experienced complications from an abortion" to testify.[152] The state's strategy flew in the face of overwhelming empirical evidence produced by the plaintiffs as to the unconstitutionality of the statute, prompting the court to note that while a trial on the merits may "cast the facts . . . in a different light," it seemed unlikely that the state would be able to prevail.[153] Second, although the immediate implementation of the Wisconsin admitting privilege provision was undoubtedly a vital fact in upholding the preliminary injunction in *Van Hollen*, *Abbott* treats this fact as dispositive.[154] Given the record in *Abbott* and the subsequent closure of abortion clinics throughout the state of Texas, it seems apparent that the introduction of a grace period for physicians to obtain admitting privileges is ineffective at lessoning that already substantial burden. Thus, the immediate imple-

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[144] *See* Parenthood of Wisconsin, Inc. v. Van Hollen, 738 F.3d 786 (7th Cir. 2013).

[145] *See* WISC. STAT. § 253.095(2) (preempted); *Van Hollen*, 738 F.3d 786.

[146] *See Abbott*, 748 F.3d at 596.

[147] *Id.*

[148] *Id.*

[149] *See Van Hollen*, 738 F.3d at 799.

[150] *Id.* at 793.

[151] *Id.* at 790.

[152] *Id.*

[153] *Id.* at 799; *See also* Planned Parenthood of Wisconsin, Inc. v. Van Hollen, No. 13-CV-465-WMC, 2013 WL 3989238 at *5–6.

[154] *See Abbott*, 748 F.3d at 596.

mentation of the statute in *Van Hollen* is of substantially less consequence.[155]

The lower court in *Van Hollen*, like *Abbott*, analyzed a detailed factual record that indicated the implementation of the admitting privilege laws had *both* the purpose and effect of placing an undue burden on women seeking abortions.[156] Although the Seventh Circuit agreed on both accounts, its analysis of the purpose behind the regulation was most notable. After conceding that "[d]iscovering the intent behind a statute is difficult at best because of the collective character of the legislature," the court attempted to discern the legislative purpose in the present case even though "the purpose of the statute is not at issue in this appeal."[157] In doing so, the Seventh Circuit gave strong deference to the district court findings on the matter and utilized inference and deductive reasoning from contextual circumstances as advocated by the court in *Okpalobi*,[158] an approach of substantial importance in the admitting privilege context.[159] Several inferences informed the Seventh Circuit's determination of illicit purpose, including the complete lack of admitting privilege requirements for other outpatient procedures with a greater risk to patients, and the utter lack of evidence for differential treatment.[160] Also taken into consideration was the incredible haste in which the legislature attempted to have the law become official, as well as the provision which granted the father or grandfather of the aborted child the ability to seek damages, including for emotional distress, should the abortion be performed by a doctor who did not have an admitting privilege.[161] Although admitting privilege laws are often followed by provisions entitling or subjecting a designated group to private civil action, the state in *Van Hollen* conceded that its "*only* interest pertinent to this case is the health of women who obtain abortions."[162] As such, that right to private action would only make sense if the mother were injured during the procedure in light of the state's purported purpose.[163] Yet proof of such an injury to the woman is not required for either the father or grandfather to recover; rather, a showing of a violation of the admitting privilege regulation, along with the requisite emotional harm, is sufficient.[164] These circumstances certainly give rise to a strong inference that the state's purported reason for the admitting privilege law is pretextual, and as *Van Hollen* demonstrates, a proper analysis of purpose can

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[155] After House Bill 2 went into effect, the litigation director of the Center for Reproductive Rights was quoted as saying that "about half [the state's] abortion clinics closed due to the admitting privilege requirements alone." O'Hara, *supra* note 62.

[156] *See Van Hollen*, 2013 WL 3989238 at *16–19.

[157] *Van Hollen*, 738 F.3d at 791.

[158] *See* Okpalobi v. Foster, 190 F.3d 337, 354–56 (5th Cir. 2001).

[159] *Compare Van Hollen*, 738 F.3d 786, *with Abbott*, 748 F.3d 583.

[160] *Van Hollen*, 738 F.3d at 790–91.

[161] *Id.* at 791.

[162] *Id.* at 795 (emphasis added).

[163] *Id.* at 791.

[164] *Id.*

go a long way in the admitting privilege context.[165]

In addition to its contextual analysis of purpose, the Seventh Circuit also applied a flexible balancing test to determine whether or not the effect of the admitting privilege law imposed an undue burden.[166] Relying directly on *Casey* for support, the court stated that when a state seeks to justify a statute on medical grounds, "the feebler the medical grounds, the likelier the burden, even if slight, to be 'undue.'"[167] The court noted that the state's own report listed only eleven complications arising from the roughly seven thousand abortions that took place in Wisconsin during 2012, a complication rate of less than one percent.[168] The report did not indicate how many of the eleven complications, if any, resulted in the patient's hospitalization.[169] Had the Seventh Circuit applied the "rational speculation" standard erroneously used by the Fifth Circuit in *Abbott*, the state's report likely would have been meaningless, as the state's proffered goal of protecting the health of the mother is "conceivable," and thus valid.[170] Instead, the *Van Hollen* court examined the factual findings of the lower court, balanced the state's justifications for the implementation of the admitting privilege law with the burdens it would impose, and found those justifications to be insufficient.[171]

V. A Possible Solution: Physician's First

The above cases provide two different interpretations of *Casey's* undue burden standard at the appellate level—one arguably more true to the spirit of *Casey* than the other—but the fact remains that significant judicial discretion exists in interpreting and applying the standard. A fact intensive inquiry, coupled with informed and contextual inferences, should yield outcomes consistent with what *Casey* dictates in evaluating the effect and purpose of a particular piece of abortion legislation. However, the reality is that the judicial discretion afforded courts in the abortion context can lead to outcomes inconsistent with such an analysis. This is readily visible in admitting privilege cases, which often contain strikingly similar factual records yet result in divergent opinions, as illustrated in *Abbott* and *Van Hollen*.[172] Despite the resulting inconsistencies, admitting privilege laws differ factually from other types of abortion legislation in a key respect: In virtually every admitting privilege case on record, a preponderance of the evidence has shown that *obtaining* admitting privileges is not

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[165] For further articulation of purpose in various abortion contexts, *see generally* Smith, *supra* note 108.

[166] *See supra* text accompanying notes 81–87.

[167] *Van Hollen*, 738 F.3d at 798.

[168] *Id.* at 790.

[169] *Id.*

[170] *See supra* text accompanying notes 125–130.

[171] *Van Hollen*, 738 F.3d at 799.

[172] *See supra* Parts IV.A–B.

only extraordinarily difficult, but borderline impossible in many instances.[173] As a result, and in an effort to curb the scope of judicial discretion and inconsistent application of the undue burden standard in the admitting privilege context, courts should evaluate the burden these laws impose on the physician, as they will almost always be substantial, thus dictating their general impermissibility.

This is not to suggest a case may never arise where abortion physicians are able to obtain admitting privileges in an efficient and timely manner. To do so would suggest that the mere implementation of an admitting privilege law would, standing alone, be enough to invalidate it. Courts should always engage in the "proportional" balancing test as suggested in *Casey* and implemented in *Van Hollen* and *Strange* to weigh the strength of the state's rationale for the law against the severity of the burdens created by it.[174] In contrast, "rational speculation" review, as undertaken in *Abbott*, should play no role.[175] This Article suggests that the focus of the balancing inquiry should be on the strength of the state's purported justifications weighed against the level of difficulty required for a physician at an abortion clinic to obtain admitting privileges. Such an approach would be beneficial for two reasons. First, it would offer a degree of consistency rarely seen in the abortion context. For example, consider informed consent provisions. In applying the undue burden test to Pennsylvania's informed consent law in *Casey*, the Supreme Court found that provision and the twenty-hour hour waiting period that accompanied it to be constitutional, as the state had a valid interest in protecting life that did not constitute a significant impediment to a woman's choice of abortion.[176] In contrast, in 2010, a district court in Nebraska struck down a law that sought to add dozens of stringent requirements to an informed consent statute that already contained thirty-six separate and "discrete" requirements for informed consent to an abortion.[177] It is clear that the constitutionality of informed consent provisions, as well as many other abortion regulations, can hinge on a variety of unique, case specific factors. In the admitting privilege context, it has been shown that acquiring those privileges virtually *always* imposes substantial obstacles for physicians.[178] Therefore, given the statistical safety of abortion as an outpatient procedure—and the lack of state regulation pertaining to similar, more dangerous procedures—any proper balancing test using the physicians as a common de-

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[173] *See, e.g.*, Planned Parenthood of Greater Texas Surgical Health Servs. v. Abbott, 951 F. Supp. 2d 891 (5th Cir. 2014); *Van Hollen*, 738 F.3d 786; Planned Parenthood Southeast, Inc. v. Strange, 9 F. Supp. 3d 1272 (M.D. Ala. 2014).

[174] *See supra* text accompanying notes 81–87.

[175] Planned Parenthood of Greater Texas Surgical Health Services v. Abbott, 748 F.3d 583, 594 (5th Cir. 2014).

[176] Planned Parenthood v. *Casey*, 505 U.S. 833, 893–94 (1992).

[177] Planned Parenthood of the Heartland v. Heineman, 724 F. Supp. 2d 1025, 1033 (D. Neb. 2010).

[178] *See supra* text accompanying notes 47–63.

nominator would reach the same result: admitting privilege laws are an impermissible exercise of state power.

Second, an approach evaluating the burden placed on physicians adheres to and operates within the framework of *Casey*'s undue burden test, largely because of the significant causal relationship that exists between the difficulties in obtaining admitting privileges and the burdens imposed on women as a result of those difficulties. Courts are no strangers to investigative fact-finding that reaches the conclusion that obstacles placed in the way of physicians can lead to substantial obstacles for woman.[179] This causal relationship is only further enhanced in the admitting privilege context, as the consequences of failing to gain privileges at a hospital can and have resulted in the stiffest penalty of all—the closure of a clinic.[180] The closure of clinics subsequently has the effect of decreased access to abortions, more substantial wait times at clinics that are available, increased travel costs, psychological effects, and perhaps most importantly, health risks to a pregnant mother when these negative effects overlap.[181] In creating these health risks, admitting privilege laws appear clearly counter-intuitive. The purported purpose behind these laws—the improvement of patient care to further the health and safety of the mother—is revealed as a "mere sham," a pretext to curb the practice of abortion as a whole. This analysis renders other, more speculative avenues of eliciting purpose somewhat superfluous, although they may very well still be helpful in bolstering the plaintiff's case. Ultimately, the "physician's first" approach is about limiting judicial discretion in the admitting privilege context to achieve consistent results in line with the law and spirit of *Casey*.

The ruling in *Abbott*, which ignored the substantial burdens placed on physicians illustrates the inherent dangers in ignoring these obstacles.[182] After House Bill 2 took effect, roughly half the state's abortion clinics closed due to the admitting privilege requirement.[183] Immediately, thousands of women were left with significantly decreased access to abortion and forced to deal with the many collateral issues arising from those closures.[184] With an application process that "undisputedly" takes ninety to one hundred seventy days, a grace period could hardly be considered a factor mitigating the burden on physicians.[185] The adverse outcome resulting from the decision in *Abbott* is illustrative of the consistency a "physician's first" analysis could provide. Further, this approach certainly operates within the framework and spirit of *Casey*, a spirit that serves

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[179] *Id.*

[180] *See Van Hollen*, 738 F.3d 786; *Strange*, 2014 WL 3809403 (M.D. Ala. August 4, 2014). *See also* O'Hara, *supra* note 62.

[181] *See Van Hollen*, 738 F.3d at 805–06.

[182] *Abbott*, 748 F.3d at 600.

[183] O'Hara, *supra* note 62.

[184] *Id.*

[185] *Abbott*, 951 F. Supp. 2d at 900.

to secure a woman's Fourteenth Amendment rights from unchecked judicial discretion.

VI. CONCLUSION

The recent surge of admitting privilege legislation in states across the country has thrust the abortion debate squarely back into the national spotlight. These laws require physicians to obtain privileges in order to admit patients to a local hospital in the event a complication arises, an exceptionally rare occurrence by statistical standards. Uniformly, admitting privileges are almost impossible for a physician to obtain, and subsequent litigation surrounding the issue – in cases such as *Abbott* and *Van Hollen*—have illustrated the numerous burdens women must face as a direct consequence of a physician's difficulty in acquiring them. Although states have the right under *Casey* to regulate abortion in ways that do not have the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion, *Casey's* articulation of the undue burden standard, largely vague in both methodology and application, has led to immense judicial discretion regarding the constitutionality of abortion regulations, producing inconsistent results. Admitting privileges are no different, as demonstrated by the contrasting holdings and analysis in *Abbott* and *Van Hollen*. The Fifth Circuit in *Abbott* applied a type of impermissible "rational speculation" review in declaring a Texas admitting privilege law valid, while the Seventh Circuit in *Van Hollen* upheld an injunction blocking a similar law from taking effect after conducting an inquiry that weighed the strength of the state's justifications for it against the burdens imposed by the law. The Seventh Circuit's methodology, supported by *Casey* and exercised by other courts in the abortion context, provides a sound analysis that makes discerning impermissible effect and inferring impermissible purpose a less daunting task. As a result, courts evaluating the constitutionality of an admitting privilege law should implement this balancing test, weighing *first* the burdens placed on the physician in acquiring these privileges against the state's purported justifications for having the physicians obtain them. The degree of difficulty in obtaining admitting privileges is substantial, and given the strong causal relationship between those difficulties and the adverse effects on women, admitting privilege laws have both the impermissible purpose and effect of placing an undue burden on women, thus rendering them unconstitutional.