

November 2015

Not in My Hospital: The Future of State Statutes Requiring Abortion Providers to Maintain Admitting Privileges at Local Hospitals

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NOT IN MY HOSPITAL: THE FUTURE OF STATE STATUTES REQUIRING ABORTION PROVIDERS TO MAINTAIN ADMITTING PRIVILEGES AT LOCAL HOSPITALS

*Daniel J. Glass**

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I. INTRODUCTION

Abortion in the United States has long been a subject of great controversy. In 1821, the Connecticut General Assembly became the first state to pass a law restricting abortion.¹ Since then, many state legislatures have passed laws regulating, restricting, or even seeking to eliminate abortion procedures within the state.² Opponents commonly refer to these statutes as Targeted Regulation of Abortion Providers (TRAP) laws.³ Frequently, these laws come in the form of medical regulations and place a disproportionate burden on abortion clinics as opposed to other clinics that perform outpatient procedures.⁴ Since 2010, there has

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1. Linda Greenhouse, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 YALE L.J. 2028, 2034 (2011) (“At the Founding and until 1821, when Connecticut passed a law criminalizing abortion, abortion was legal throughout the United States if performed before quickening.”).

2. For example, some states have mandated that women seeking abortions be provided with information regarding possible risks before going through with the procedure. *See, e.g.*, KAN. STAT. ANN. § 65-5709 (West, Westlaw through 2015 Reg. Sess.); TEX. HEALTH & SAFETY CODE ANN. § 171.012 (West, Westlaw through 2015 Reg. Sess.). Several states require a waiting period after mandatory counseling, which in some states may be as long as three days. *See, e.g.*, MONT. CODE ANN. § 50-20-106 (West, Westlaw through July 1, 2015 Sess.); UTAH CODE ANN. § 76-7-305 (West, Westlaw through 2015 Gen. Sess.). Several other states impose requirements on abortion clinics including specified procedure room size and corridor width. 410 IND. ADMIN. CODE 26-17-2 (West, Westlaw through Aug. 5, 2015); 28 PA. CODE § 29.33 (2015).

3. Gillian E. Metzger, *Abortion, Equality, and Administrative Regulation*, 56 EMORY L.J. 865, 871 (2007).

4. *Id.* at 875. “In addition to such targeted regulation of abortion, evidence exists of generally applicable health regulations, in particular licensing requirements, being applied against abortion clinics in a discriminatory fashion.” *Id.* (discussing *Planned Parenthood of Greater Iowa, Inc. v. Atchison*, 126 F.3d 1042 (6th Cir. 1997)). In *Planned Parenthood of Greater Iowa, Inc. v. Atchison*, the Sixth Circuit held that Iowa enforced its certificate of need statute disproportionately against abortion clinics in order to prevent women from obtaining abortion services. 126 F.3d 1042, 1048-49 (6th Cir. 1997). Iowa had demonstrated a history of allowing similar medical offices to continue

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been a great increase in the number of new abortion restrictions passed by state legislatures.⁵ There were more abortion restrictions enacted by state legislatures between 2011 and 2013 than there were in the entire previous decade.⁶ By 2014, the rate at which these laws were passed appeared to be slowing down.⁷ However, this does not necessarily mean a victory for the pro-choice movement. Rather, it may mean that pro-life lawmakers have succeeded in accomplishing their goals through restrictions passed in previous years.⁸

This Note will discuss a particular class of TRAP laws: those that require an abortion provider to have admitting privileges with a local hospital. Abortion providers frequently experience difficulty in affiliating with local hospitals. As a result, the clinics they operate are forced to close for failing to comply with state regulations.⁹ Abortion clinics and providers have challenged these provisions in state and federal courts, seeking to enjoin their enforcement and, ultimately, to obtain an order invalidating the regulations.¹⁰ In six states, admitting privilege laws have been temporarily enjoined pending a final decision in the courts, and one state's statute has been permanently enjoined.¹¹

operating without obtaining a certificate of need. *Id.*

5. Lane Florsheim, *Here's Proof That the Anti-Abortion Movement is Winning*, THE NEW REPUBLIC (July 30, 2014) (internal quotations omitted), <http://www.newrepublic.com/article/118897/pro-life-movement-winning-abortion-battle-arizona-mississippi> ("We've seen 226 abortion restrictions enacted over the past four years.").

6. *More State Abortion Restrictions Were Enacted in 2011-2013 Than in the Entire Previous Decade*, GUTTMACHER INSTITUTE (Jan. 2, 2014), <https://guttmacher.org/media/inthenews/2014/01/02/index.html>.

7. *Id.*

8. *Id.*

9. Olga Khazan, *The Difficulty of Getting an Abortion in Texas*, THE ATLANTIC (Jan. 14, 2014, 8:00 AM), <http://www.theatlantic.com/health/archive/2014/01/the-difficulty-of-getting-an-abortion-in-texas/283045/>. See also Associated Press, *Wisconsin Abortion Providers Challenge Law on Admitting Privileges*, THE GUARDIAN (May 27, 2014), <http://www.theguardian.com/world/2014/may/27/wisconsin-abortion-providers-challenge-law-trial>.

10. See, e.g., *Planned Parenthood of Greater Tex. Surgical Servs. v. Abbott*, 951 F. Supp. 2d 891 (W.D. Tex. 2013); *Planned Parenthood of Wis., Inc. v. Van Hollen*, 963 F. Supp. 2d 858 (W.D. Wis. 2013); *Jackson Women's Health Org. v. Currier*, No. 3:12cv436-DPJ-FKB, 2012 U.S. Dist. LEXIS 90393 (S.D. Miss. July 1, 2012).

11. *State Policies in Brief: Targeted Regulation of Abortion Providers*, GUTTMACHER INSTITUTE (August 1, 2014), available at http://www.guttmacher.org/statecenter/spibs/spib_TRAP.pdf. Alabama (injunction granted in *Planned Parenthood Se., Inc. v. Strange*, 33 F. Supp. 3d 1330 (M.D. Ala. 2014)); Kansas (temporary restraining order granted pending outcome of litigation in *Hodes & Nause v. Moser*. Order Granting Temporary Restraining Order Pending Hearing on Application for Temporary Injunction at 3, *Hodes & Nause v. Moser*, No. 2011-CV-001298, available at [http://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/\[12\]20Order%20Granting%20TRO%20Pending%20Hearing%20on%20App%20for%20TI%20SIGNED%2011-10-](http://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/[12]20Order%20Granting%20TRO%20Pending%20Hearing%20on%20App%20for%20TI%20SIGNED%2011-10-)

The federal circuits have disagreed with one another regarding the constitutionality of admitting privilege restrictions, creating an emerging split and an opportunity for the issue to reach the Supreme Court.¹² In *Planned Parenthood of Wisconsin, Inc. v. Van Hollen*, the Seventh Circuit upheld an injunction against enforcing a state statute containing an admitting privileges requirement.¹³ In *Planned Parenthood of Greater Texas Surgical Health Services. v. Abbott*, the Fifth Circuit reversed an injunction against enforcing an admitting privileges requirement.¹⁴ In *Jackson Women's Health Org. v. Currier*, however, a different panel of Fifth Circuit judges upheld an injunction against enforcing an admitting privileges requirement that would close the sole abortion clinic in the state.¹⁵ A conflict between the federal circuits is a primary criterion for the Supreme Court to grant certiorari.¹⁶

This Note concludes that enforcement of an admitting privileges requirement would close many abortion clinics, effectively eliminating a woman's access to abortion services in particular localities and, thus, intrude impermissibly on a woman's right to privacy. This Note further concludes that imposing a statutory requirement that abortion providers obtain privileges at a local hospital is effectively a violation of both pro-

11.pdf); Louisiana (temporary restraining order blocked enforcement in *June Med. Servs., LLC v. Caldwell*, No. 3:14-cv-00525-JWD-RLB, 2014 WL 4296679 (M.D. La. Aug. 31, 2014)); Mississippi (injunction upheld in *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 459 (5th Cir. 2014)); Oklahoma (enjoined by the Supreme Court of Oklahoma in *Burns v. Cline*, 339 P.3d 887 (Okla. 2014)); Texas (in *Whole Woman's Health v. Cole*, 135 S. Ct. 2923 (2015), the Supreme Court stayed the mandate issued by the Fifth Circuit in *Whole Woman's Health v. Cole*, 790 F.3d 563 (5th Cir. 2015) pending the timely filing and disposition of a petition for writ of certiorari); and Wisconsin (permanent injunction granted in *Planned Parenthood of Wis., Inc. v. Van Hollen*, 94 F. Supp. 949 (W.D. Wis. 2015).

12. See *Jackson Women's Health Org. v. Currier*, 760 F.3d 448 (5th Cir. 2014) (upheld district court's grant of preliminary injunction on the grounds that the statute would close the sole remaining abortion clinic in the state, placing a substantial burden on Mississippi women's ability to obtain abortions—a constitutional right that cannot be delegated to an adjacent state); *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583 (5th Cir. 2014), *reh'g, en banc, denied*, No. 13-51008, 2014 U.S. App. LEXIS 19280 (5th Cir. 2014) (reversing an injunction against enforcing an admitting privileges requirement finding no undue burden on a woman's ability to obtain abortions); *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786 (7th Cir. 2013) (upheld district court's grant of injunction on opining that the state's refusal to give a reasonable time for abortion providers to comply was an undue burden on the ability of women to obtain abortions).

13. *Van Hollen*, 738 F.3d at 799.

14. *Abbott*, 748 F.3d at 587 [hereinafter *Abbott II*]. The Fifth Circuit previously reviewed this case in a separate appeal. *Planned Parenthood of Greater Rex Surgical Health Servs. v. Abbott*, 734 F.3d 406 (5th Cir. 2013) [hereinafter *Abbott I*].

15. *Jackson Women's Health Org.*, 760 F.3d at 459.

16. Ryan Stephenson, Note, *Federal Circuit Case Selection at the Supreme Court: An Empirical Analysis*, 102 GEO. L.J. 272 (2013).

cedural and substantive due process rights of the physician by impermissibly depriving a physician of the property interest in his medical license. Moreover, such statutes delegate state powers to regulate the medical profession to private institutions in an impermissible manner; a violation of the non-delegation clause.

Part II of this Note explains the concept of an admitting privileges requirement and its significance to the regulation of abortion providers by state governments. In Part III, the Note explains the standard established by the Supreme Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*¹⁷ for determining when states may legitimately impose restrictions on the right to abortion and concludes that federal courts of appeal have inconsistently applied the standard established in *Casey*. Part IV concludes that, without further clarification by the Supreme Court, the courts of appeal should conclude that these admitting privileges requirements violate *Casey*'s undue burden standard. Part IV also explains that such requirements deprive abortion providers of a property interest in the scope of their medical practice without due process of law. The Note ultimately concludes that this issue is ripe for review and that the Supreme Court should resolve the issue in the near future.

II. BACKGROUND

The Supreme Court has repeatedly recognized that a woman's right to an abortion is a fundamental privacy right guaranteed by the due process clause of the Constitution.¹⁸

In 1973, the Supreme Court decided *Roe v. Wade*, which, depending on one's perspective is either the most famous or the most infamous of all the abortion rights cases.¹⁹ *Roe v. Wade* presented a constitutional challenge to a Texas statute, which criminalized abortions in that state unless they were procured for the purposes of saving the mother's life.²⁰ The Supreme Court held that the Texas statute violated a woman's right to privacy guaranteed by the due process clause of the Fourteenth Amendment.²¹ Importantly, the Court also recognized that the states

17. *Casey*'s undue burden test was adopted by a plurality of the court in the joint opinion by Justices O'Connor, Kennedy, and Souter. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 878 (1992) (plurality opinion).

18. See *Roe v. Wade*, 410 U.S. 113 (1973); *Casey*, 505 U.S. 833; *Gonzalez v. Carhart*, 550 U.S. 124 (2007).

19. *Roe*, 410 U.S. 113.

20. *Id.* at 117-18.

21. *Id.* at 164.

have a compelling interest in protecting fetal life after viability.²²

In *Planned Parenthood v. Casey*, the Supreme Court reaffirmed its key holdings in *Roe v. Wade*.²³ *Planned Parenthood* had challenged the constitutionality of five provisions of the Pennsylvania Abortion Control Act of 1982.²⁴ The Supreme Court held some provisions to be valid and others invalid after applying an undue burden standard to assess the constitutionality of laws that impact a woman's access to an abortion procedure.²⁵ The Court recognized that "all abortion regulations interfere to some degree with a woman's ability to decide whether to terminate her pregnancy."²⁶ It concluded that, in regulating abortion, the state must not place a substantial obstacle in the way of a woman seeking an abortion of a nonviable fetus.²⁷ Writing jointly in a plurality opinion, Justices O'Connor, Kennedy, and Souter applied a type of intermediate scrutiny, recognizing that states have an important interest in protecting potential life and in the regulation of medical procedures, but also that a state cannot pass unnecessary regulations that have the purpose or effect of an undue burden.²⁸ The undue burden test uses a two-part analysis by which courts are to determine: "(1) whether the statute has a purpose of placing a substantial obstacle in the path of a woman seeking an abortion, and (2) even if the purpose of the regulation is a valid state interest, whether the law has such an effect."²⁹ Although the undue burden standard was set out by only three of the justices in *Casey*, it has since become the authoritative standard used by the Supreme Court in reviewing statutes regulating abortion.³⁰

Part II.A provides background regarding the varying levels of scrutiny that the Supreme Court applies in assessing the constitutionality of

22. *Id.*

23. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992) (plurality opinion).

24. *Id.* at 844.

25. *See id.* at 874. The Pennsylvania statute contained the following provisions: an informed consent requirement; a 24-hour waiting period requirement; parental consent provisions for minors; reporting and recordkeeping requirements; and a spousal notice requirement. *Id.* at 902 (appendix to opinion of Justices O'Connor, Kennedy, and Souter containing 18 PA. CONS. STAT. § 3203 *et seq.* (1990)). The Court upheld all provisions of the Pennsylvania statute except for the requirement that a woman notify her spouse before obtaining an abortion. *Id.* at 893.

26. *Id.* at 875.

27. *Id.* at 877.

28. *Id.* at 878.

29. *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 769 F.3d 330, 337 (5th Cir. 2014).

30. *See e.g.*, *Gonzales v. Carhart*, 550 U.S. 124 (2007); *Stenberg v. Carhart*, 530 U.S. 914 (2000); *Barnes v. Mississippi*, 992 F.2d 1335 (1993); *see also* Gillian E. Metzger, *Unburdening the Undue Burden Standard: Orienting Casey in Constitutional Jurisprudence*, 94 COLUM. L. REV. 2025 (1994).

statutes, and Part II.B explores the level of scrutiny that the Supreme Court has applied to legislation restricting the right to abortion. Part II.C then delves into the meaning and purpose of the admitting privilege statutes that are the focus of this Note.

A. Judicial Levels of Scrutiny for Assessing the Constitutionality of Statutes

Principally at issue in this emerging circuit split is the level of judicial scrutiny that should be applied by the courts in determining the constitutionality of legislation that restricts the right to abortion.³¹ To determine the appropriate level of scrutiny, it is important to understand how the differing levels of judicial scrutiny of legislation developed and how those levels of review differ. This will require a brief historical overview of landmark cases, beginning with *McCulloch v. Maryland*³² and the so-called means-end test, which became the basis for rational scrutiny that applies to any law that “neither proceeds along suspect lines nor infringes fundamental constitutional rights.”³³ At the opposite end of the judicial scrutiny spectrum is strict scrutiny, a much more exacting scrutiny that originated in Justice Stone’s discussion in footnote four of *United States v. Carolene Products Co.*³⁴ Finally, the Supreme Court has also invoked an intermediate scrutiny, an elevated level of scrutiny that falls somewhere in between rational basis review and strict scrutiny, and has applied it to laws that discriminate on the basis of alienage, gender, and mental disability, to name a few.³⁵ The federal courts are now working to clarify which level of scrutiny should apply to statutes that restrict the right to abortion.

In *McCulloch v. Maryland*, the Supreme Court analyzed Congress’ power under the necessary and proper clause of the United States Constitution.³⁶ Article I, Section 8, Clause 18 of the Constitution provides that Congress shall have all powers “necessary and proper for carrying into Execution . . . the Powers vested by this Constitution in the Gov-

31. See *Planned Parenthood of Greater Tex. Surgical Servs. v. Abbott*, 951 F. Supp. 2d 891 (W.D. Tex. 2013); *Planned Parenthood of Wis., Inc. v. Van Hollen*, 963 F. Supp. 2d 858 (W.D. Wis. 2013); *Jackson Women’s Health Org. v. Currier*, No. 3:12cv436-DPJ-FKB, 2012 U.S. Dist. LEXIS 90393 (S.D. Miss. July 1, 2012).

32. *McCulloch v. Maryland*, 17 U.S. 316 (1819).

33. *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993).

34. *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

35. Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, 66 GEO. WASH. L. REV. 298, 300, 316-19 (1998).

36. *McCulloch*, 17 U.S. at 418.

ernment of the United States.”³⁷ In one of his most famous opinions, Chief Justice Marshall reasoned that in reviewing congressional action, the courts should ascertain whether the means adapted by Congress “tended directly to the execution of the constitutional powers of the government.”³⁸ Any means that reasonably relate to the execution of constitutional powers are in and of themselves constitutional.³⁹ *McCulloch* established the rational basis level of scrutiny in American constitutional jurisprudence, which is a low standard requiring only that Congress’s effectuating legislation bear a rational relationship to a permissible constitutional end.⁴⁰

In 1938, in footnote four of his opinion in *United States v. Carolene Products Co.*, Justice Stone introduced the notion that certain pieces of legislation may be subject to more exacting judicial scrutiny than that imposed under the rational basis test.⁴¹ Justice Stone was among those justices who felt that a strong presumption of constitutionality should prevent the Court from intervening in anti-majoritarian issues.⁴² Critics of ‘heightened scrutiny’ see this as the Court imposing its own economic and social values on the legislature and invading what is the proper concern of the democratic process.⁴³ The more exacting judicial scrutiny standard of review that Justice Stone referred to is now commonly referred to as strict scrutiny review.⁴⁴ Under strict scrutiny review, the law is presumed unconstitutional unless it is narrowly tailored to achieve a compelling state interest and is likely to achieve that interest.⁴⁵ It is applied in limited categories of cases, including those that involve a law that infringes on a fundamental right such as the right to marital privacy.⁴⁶

Intermediate scrutiny is a stricter standard than rational basis re-

37. U.S. CONST. art. I, § 8. cl. 18.

38. *McCulloch*, 17 U.S. at 419.

39. *Id.*

40. *United States v. Wang Kun Lue*, 134 F.3d 79, 84 (2d Cir. 1997) (“[T]he ‘plainly adapted’ standard requires that the effectuating legislation bear a rational relationship to a permissible constitutional end.”).

41. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

42. J.M. Balkin, *Symposium: Law and Social Theory: The Footnote*, 83 NW. U. L. REV. 275, 297 (1989).

43. *Id.*

44. *Id.* at 305 (“Stone’s revolutionary approach had hardened into an equal protection doctrine featuring two tiers of scrutiny, where government action either received no review at all or a virtually irrebuttable presumption of unconstitutionality.”).

45. See, e.g., *Reno v. Flores*, 507 U.S. 292, 301-02 (1993).

46. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1975).

view, yet it falls below the most stringent standard of strict scrutiny.⁴⁷ The classic formulation of the intermediate scrutiny standard is that the law being assessed must be substantially related to the achievement of an important governmental objective.⁴⁸ Since it was established in *Craig v. Boren*, intermediate scrutiny has been criticized as giving rise to inconsistent holdings and judicial activism.⁴⁹ Others have defended intermediate scrutiny as a useful method of resolving analogical crises.⁵⁰ Analogical crises occur when it would be difficult or impossible for a court to decide a set of cases using either strict scrutiny or rational basis standards of review.⁵¹ Intermediate scrutiny is an important tool used by courts to establish limited holdings based on the facts of the particular case presented to a court.⁵²

Intermediate scrutiny has been described as a form of judicial minimalism that helps courts work through difficult and controversial issues.⁵³ Judicial minimalism allows courts to “decide no more than they have to decide . . . doing and saying as little as necessary to justify an outcome.”⁵⁴ As a form of judicial minimalism, intermediate scrutiny can help protect the democratic process and ensure that democratically accountable bodies decide highly complex issues rather than appointed judges.⁵⁵ Exercising judicial minimalism tends to result in less social upheaval over court decisions and promotes gradual, deliberative change.⁵⁶ By using intermediate scrutiny, courts decide cases more narrowly and with fewer rippling effects.⁵⁷ Deciding cases narrowly and in a fact-specific manner, as permitted by intermediate scrutiny, also permits the Court more easily to alter prior decisions without violating the principle of *stare decisis* when societal norms and values can no longer tolerate those holdings.⁵⁸

47. Wexler, *supra* note 35, at 300.

48. *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 769 F.3d 330, 336 n.3 (5th Cir. 2014) (citing *Wengler v. Druggist Mutual Ins. Co.*, 446 U.S. 142, 150 (1980)).

49. Wexler, *supra* note 35, at 301 (citing *Craig v. Boren*, 429 U.S. 190 (1976)) (Chief Justice Rehnquist criticized the plurality’s application of an intermediate scrutiny standard.).

50. *Id.* at 319 (citing Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 61-65 (1992)).

51. Wexler, *supra* note 35, at 319.

52. *Id.* at 323.

53. *Id.* at 302.

54. Cass R. Sunstein, *The Supreme Court 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 6 (1996).

55. *Id.* at 38.

56. Wexler, *supra* note 35, at 304.

57. *Id.*

58. *Id.* at 310.

There are, however, certain negative implications of using intermediate scrutiny as a form of judicial minimalism.⁵⁹ First, by leaving questions open and unanswered, lower courts bear greater decision costs.⁶⁰ When a court's limited holding leaves a law uncertain, lower courts are less able to expeditiously dispense with cases in which litigants seek to ascertain the meaning, scope, and boundaries of the law to clarify its uncertainty.⁶¹ Second, judicial minimalism "may threaten the ideal of the rule of law in certain circumstances by allowing lower courts to treat similarly situated parties differently."⁶²

In some cases, it may be more appropriate for the court to find the middle way between rational basis and strict scrutiny review but in a manner that is also distinct from intermediate scrutiny.⁶³ As discussed below, the undue burden standard, which governs when assessing the constitutionality of regulating abortion, may provide another form of intermediate scrutiny.

B. Judicial Levels of Scrutiny for Assessing the Constitutionality of State Statutes Regulating Abortion

In *Roe v. Wade*, the Court established that abortion restriction statutes should be evaluated by a strict scrutiny level of review.⁶⁴ The Court held that a woman has a fundamental right to an abortion.⁶⁵ Legislation may limit fundamental rights only if there is a compelling state interest.⁶⁶ Additionally, any legislation limiting fundamental rights "must be narrowly drawn to express only the legitimate state interests at stake."⁶⁷ However, there are early signs of the Court's shift away from strict scrutiny in the concurring and dissenting opinions of *Roe*. In his concurring opinion, Justice Stewart questioned whether the state's interest justified the abridgment of a woman's personal *liberty*.⁶⁸ He referred to this re-

59. *Id.* at 305.

60. *Id.*

61. See generally Sunstein, *supra* note 54, at 16-19.

62. Wexler, *supra* note 35, at 305.

63. See Norman v. Reed, 502 U.S. 112 (1992) and Anderson v. Celebrezze, 460 U.S. 780 (1983), for two cases that applied a standard of review that did not fall within the standards strict scrutiny, rational basis, or intermediate scrutiny.

64. *Roe v. Wade*, 410 U.S. 113, 155 (1973).

65. *Id.* at 152-53.

66. *Id.* at 155 (citing *Kramer v. Union Free Sch. District*, 395 U.S. 621, 627 (1969); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969); and *Sherbert v. Verner*, 374 U.S. 398, 406 (1963)).

67. *Id.* at 155-56 (citing *Griswold v. Connecticut*, 381 U.S. 479, 485 (1975); *Aptheker v. Secretary of State*, 378 U.S. 500, 508 (1964); and *Cantwell v. Connecticut*, 310 U.S. 296, 307-08 (1940)).

68. *Id.* at 169 (Stewart, J., concurring).

view as a “particularly careful scrutiny” required by the Fourteenth Amendment.⁶⁹ Justice Stewart would not apply a higher form of scrutiny, as did the majority. In his dissenting opinion, Justice Rehnquist also wrote that a woman’s ability to procure an abortion is not a right, but is instead a liberty that a woman may be deprived of only with due process of law.⁷⁰ Justice Rehnquist applied the traditional test in his dissent in *Roe* and determined that the law was constitutional because it bore a rational relation to a valid state objective.⁷¹

In *City of Akron v. Akron Center for Reproductive Health*, the Supreme Court reaffirmed its previous holdings in *Roe*, and, again, the justices differed over the appropriate level and type of scrutiny for abortion rights.⁷² The majority reaffirmed *Roe* and applied a strict scrutiny level of review to the challenged abortion regulations.⁷³ Writing for the majority, Justice Powell noted that the dissenting Justices would have used rational basis or, if deemed appropriate, heightened scrutiny to uphold any abortion-inhibiting regulation based on the state’s interest in preserving potential life—an analysis that Justice Powell found to be “wholly incompatible with the existence of a fundamental right recognized in *Roe v. Wade*.”⁷⁴

In her dissenting opinion in *City of Akron*, Justice O’Connor first proposed the undue burden standard that would later become the mid-level standard by which abortion regulations are measured.⁷⁵ In Justice O’Connor’s view, not every abortion regulation “must be measured against the State’s compelling interest and examined with strict scrutiny.”⁷⁶ Justice O’Connor instead pushed for a different test by which the Court would determine if an abortion regulation infringed the woman’s right substantially or heavily burdened the right before applying a heightened scrutiny.⁷⁷ The undue burden requirement would serve as a threshold test that must be conducted before the Court imposes on the state the burden of proving that its legislative actions were in furtherance of a compelling interest of the state.⁷⁸ In the majority opinion in *City of*

69. *Id.* (citing *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (opinion dissenting from dismissal of appeal)).

70. *Id.* at 172-73 (Rehnquist, J., dissenting).

71. *Id.* at 173.

72. *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 420 (1983).

73. *Id.*

74. *Id.* at 420 n.1.

75. *Id.* at 463 (O’Connor, J., dissenting).

76. *Id.* at 461.

77. *Id.*

78. *Id.* at 463.

Akron, Justice Powell noted that the dissent would likely uphold almost any abortion regulation under a rational basis test.⁷⁹ In Justice Powell's view, applying Justice O'Connor's undue burden standard would "uphold virtually any abortion-inhibiting regulation because of the State's interest in preserving potential human life."⁸⁰

Ultimately, in the 1992 opinion, *Planned Parenthood v. Casey*, Justice O'Connor, writing jointly with Justices Kennedy and Souter, put the undue burden standard in force. In *Casey*, Justice O'Connor joined the plurality to conclude that an abortion regulation will be deemed invalid if "in a large fraction of the cases in which [it] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion."⁸¹

In the *Casey* Court's dissenting opinions, there is evidence of the controversy surrounding the undue burden test.⁸² In Justice Blackmun's dissenting opinion, he defended the Court's position in the *Roe* decision that strict scrutiny should supply the level of scrutiny for statutes regulating abortion.⁸³ Justice Blackmun wrote that "today, no less than yesterday, the Constitution and decisions of this Court require that a State's abortion restrictions be subjected to the strictest judicial scrutiny."⁸⁴ He believed that precedent required the Court to apply a strict scrutiny standard to all non-*de minimis* abortion regulations.⁸⁵ Strict scrutiny, Justice Blackmun concluded, provides the strongest protection and ensures that a woman's right to make her own reproductive choices will be free from state coercion.⁸⁶ Justice Blackmun went on to opine that because the Court had invalidated almost identical provisions in the past, the doctrine of *stare decisis* required the Court to strike down the provisions of the challenged Pennsylvania statute.⁸⁷

In his dissent in *Casey*, Chief Justice Rehnquist also challenged the plurality's adoption of an undue burden standard.⁸⁸ Justice Rehnquist criticized the standard as an "unjustified constitutional compromise."⁸⁹

79. *Id.* at 420 n.1 (majority opinion).

80. *Id.* (Powell used the words "heightened scrutiny" in referring to O'Connor's undue burden standard).

81. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 895 (1992) (plurality opinion).

82. *Id.* The plurality opinion was written by Justices O'Connor, Kennedy, and Souter. *Id.* at 843. Justices Stevens, Blackmun, C.J. Rehnquist, and Scalia all authored opinions which concurred in part with the joint opinion, and dissented in part with the joint opinion. *Id.* at 912-1002.

83. *Id.* (Blackmun, J., dissenting).

84. *Id.* at 926.

85. *Id.*

86. *Id.* at 930.

87. *Id.* at 934.

88. *Id.* at 945 (Rehnquist, J., dissenting).

89. *Id.*

Furthermore, he expressed concerns that the Court had become increasingly more divided on how to deal with challenges to abortion regulations.⁹⁰ Justice Rehnquist noted a state of confusion amongst the lower courts as to the proper application of standards of judicial review that the Court should address. In his view, however, not only was the undue burden analysis adopted by the plurality wrong, the *Roe* Court's use of strict scrutiny was also erroneous.⁹¹ According to Justice Rehnquist, American history simply cannot sustain the conclusion that the right to an abortion is fundamental under the Fourteenth Amendment.⁹² He would, thus, have subjected legislation imposing restrictions on the right to abortion only to the lowest level of scrutiny, that is, rational basis scrutiny.⁹³

C. The Meaning and Purpose of Admitting Privileges

To fully assess the constitutionality of state regulations requiring that abortion providers have admitting provisions at local hospitals, it is important to understand what admitting privileges are and how admitting privileges requirements impose restrictions on abortion providers. Admitting privileges—also called staff privileges—allow a physician to admit and treat patients at a particular hospital.⁹⁴ State and federal regulatory bodies that license hospitals require that each hospital appropriately grants privileges to every physician before allowing the physician to admit patients or provide services in that hospital.⁹⁵ The Joint Commission on Accreditation of Healthcare Organizations (JCAHO), a non-profit organization that accredits and certifies hospitals, has recommended certain minimal screening procedures; but hospitals are permitted to set their own standards for granting privileges.⁹⁶ When granting admit-

90. *Id.* at 950.

91. *Id.* at 953.

92. *Id.* at 952-53.

93. Chief Justice Rehnquist stated that “a woman’s interest in having an abortion is a form of liberty protected by the Due Process Clause, but States may regulate abortion procedures in ways rationally related to a legitimate state interest.” *Id.* at 966.

94. Craig W. Dallan, *Understanding Judicial Review of Hospitals’ Physician Credentialing and Peer Review Decisions*, 73 TEMP. L. REV. 597, 605 (2000). “[S]taff privileges serve to delimit a doctor’s authority to practice in the hospital based upon the doctor’s overall competence in his particular field(s) of practice.” *Id.* (quoting *Englestad v. Virginia Mun. Hosp.*, 718 F.2d 262, 267 (8th Cir. 1983)).

95. *Id.* at 646.

96. Robert A. Wise, *OPPE and FPPE: Tools to Help Make Privileging Decisions*, JC PHYSICIAN BLOG (Aug. 21, 2013), http://www.jointcommission.org/jc_physician_blog/oppe_fppe_tools_privileging_decisions/. JCAHO recommends that hospitals implement two processes it has created for making privileging decisions: Ongoing Professional Practice Evaluation (OPPE) and Focused Professional Practice Evaluation (FPPE).

ting privileges, health care providers typically consider factors such as a physician's competency, training, experience, malpractice history, and criminal history.⁹⁷ The hospital has an important interest in ensuring quality of care and patient safety, so physicians are carefully vetted before admitting privileges may be granted.⁹⁸

In 1973, Congress passed the Church Amendments, which, under certain circumstances, protect physicians from discrimination on the basis of their performance or non-performance of abortions.⁹⁹ The Church Amendments, and other similar provisions, are sometimes referred to as conscience clauses because they protect religious beliefs and moral convictions as they pertain to components of the Public Health Service Act.¹⁰⁰ On the issue of hospitals granting abortion providers admitting privileges, the Church amendments provide that a hospital receiving federal money under the Public Health Service Act may not:

[D]iscriminate in the extension of staff or other privileges to any physician or other health care personnel, because he performed or assisted in the performance of a lawful sterilization procedure or abortion . . . or because of his religious beliefs or moral convictions respecting sterilization procedures or abortions.¹⁰¹

Although federal law protects physicians seeking admitting privileges from being discriminated against on the basis of their performance of an abortion, obtaining admitting privileges can be difficult for abortion providers for a variety of other reasons. For example, some hospitals require that physicians admit a certain minimum number of patients per year.¹⁰² A requirement of 10 or 12 admissions per year is a relatively

97. See, e.g., MERCY HEALTH, MERCY HOSPITAL MEDICAL STAFF CREDENTIALING MANUAL 16 (2014), available at <http://e-mercy.com/images/pdfs/resources/credentialingmanualapprovedjanuary242008.pdf>; McLAREN HEALTH CARE, MEDICAL STAFF CREDENTIALING MANUAL 13 (2012), available at <http://www.mclaren.org/uploads/public/documents/macomb/documents/medical%20staff%20services/ms%20Credentials%20Manual.pdf>.

98. See MERCY HEALTH, *supra* note 97, at 17. "Each department must have a system for the development of delineation criteria, the adjustment of criteria to meet developing community needs and the state of medical knowledge, and the monitoring of delineated privilege." *Id.* "At a minimum, this system must make quality of patient care its main design objective." *Id.*

99. SECRETARIAT OF PRO-LIFE ACTIVITIES, THE U.S. CONFERENCE OF CATHOLIC BISHOPS, CURRENT FEDERAL LAWS PROTECTING CONSCIENCE RIGHTS (Sep. 2014), available at <http://www.usccb.org/issues-and-action/religious-liberty/conscience-protection/upload/Federal-Conscience-Laws.pdf>.

100. *Id.*

101. Public Health Service Act, 42 U.S.C.S. § 300a-7(c)(1)(B) (LEXIS through PL 114-49).

102. Veronica Zaragovia, *What It Takes for Texas Abortion Doctors to Get Admitting Privileges*, KUT.ORG (Feb. 19, 2014, 8:50 AM), <http://kut.org/post/what-it-takes-texas-abortion-doctors-get-admitting-privileges>.

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high threshold for an abortion provider to meet.¹⁰³ Abortions are typically performed outside of the hospital setting in outpatient clinics, and it is rare for complications to arise that would require admitting the patient to a hospital.¹⁰⁴ One study showed that only 0.05% of abortion procedures resulted in a complication that would require the patient to be admitted to a hospital.¹⁰⁵ Statistically, abortions are safer than some outpatient procedures performed by physicians who are not required by the state to have admitting privileges at a local hospital.¹⁰⁶ Hospitals also typically require physicians to establish local residency.¹⁰⁷ This requirement may be particularly onerous if a physician chooses not to live near the clinic in which she works due to fears of harassment.¹⁰⁸ In the past, abortion clinics and providers have been the target of violent protests and even instances of domestic terrorism.¹⁰⁹ Some physicians are unable to meet a local residence requirement because they live in another state, and one Alabama physician could not meet the requirement because he lived in another country.¹¹⁰

103. *Id.*

104. *Id.*

105. Tracy A. 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. HEALTH 454, 459 (2013) (Out of 11,487 abortion procedures being evaluated, California researchers found that only 6 procedures required hospital-based care.). *See also* Geneva Pittman, *Medical Abortions Are Safe: Study*, REUTERS HEALTH (Dec. 20, 2012, 5:28 PM), <http://www.reuters.com/article/2012/12/20/us-medical-abortions-are-safe-study-idUSBRE8BJ1CW20121220> (Of 233,805 abortions during the study, 135 women were admitted to a hospital with no fatalities.).

106. Julie Rovner, *FAQ: The Next Abortion Battle: the Courts and Hospital Admitting-Privilege Laws*, KAISER HEALTH NEWS (Aug. 8, 2014), <http://kaiserhealthnews.org/news/abortion-admitting-privileges-fight/>.

107. Brian Lyman, *Alabama Abortion Law Unconstitutional, Judge Rules*, USA TODAY (Aug. 4, 2014, 12:31 PM) <http://www.usatoday.com/story/news/nation/2014/08/04/alabama-abortion/13574467/> (discussing requirements physicians must meet before a hospital grants admitting privileges).

108. *Id.*

109. *See* Amanda Terkel & Laura Bassett, *Planned Parenthood Bombed in Wisconsin*, HUFFINGTON POST (Apr. 9, 2014), http://www.huffingtonpost.com/2012/04/02/planned-parenthood-bomb-wisconsin_n_1396665.html (A Wisconsin Planned Parenthood was minimally damaged in 2014 after an individual placed a homemade explosive device outside a window sill.); Matt Smith, *Doctor Who Performed Abortions Shot to Death*, CNN (June 2, 2009), <http://www.cnn.com/2009/CRIME/05/31/kansas.doctor.killed/index.html?iref=mps> (Dr. George Tiller was shot and killed while serving as an usher at his church nearly 16 years after surviving a shooting outside his Wichita clinic.); *Violence Statistics and History*, NAT'L ABORTION FED'N, <http://prochoice.org/education-and-advocacy/violence/violence-statistics-and-history/> (last visited Feb. 7, 2015) (The National Abortion Federation has tracked and compiled statistics on violence against abortion providers since 1977.).

110. Jay Reeves, *Judge: Ala. Abortion Clinic Law Unconstitutional*, ASSOCIATED PRESS (Aug. 4, 2014, 3:55 PM), <http://bigstory.ap.org/article/judge-ala-abortion-clinic-law-unconstitutional> (dis-

As of July 2015, eleven states have enacted laws requiring that an abortion provider must have admitting privileges with a local hospital at the time the physician performs an abortion procedure.¹¹¹ From state to state, there is relatively little variation in the language of these statutes.¹¹² Most of these states impose a more specific requirement that the abortion provider obtain admitting privileges at a hospital located within thirty miles of where the abortion is to be performed.¹¹³ The statutes and administrative code provisions contain language typified by Texas' statute:

An abortion may not be performed by any person other than a physician who is using applicable medical standards and who is licensed to practice in this state. All physicians performing abortion procedures must have admitting privileges at a hospital located within thirty miles [42.28 kilometers] of the abortion facility and staff privileges to replace hospital on-staff physicians at that hospital. These privileges must include the abortion procedures the physician will be performing at abortion facilities.¹¹⁴

Four of the eleven states—Missouri, North Dakota, Tennessee, and Utah—have admitting privileges requirements currently enforced.¹¹⁵ In six of the remaining states—Alabama, Kansas, Louisiana, Mississippi, Oklahoma, and Texas—admitting privileges statutes are temporarily enjoined pending the outcome of litigation, and Wisconsin's admitting privileges statute was permanently enjoined.¹¹⁶ In some cases, the stat-

cussing Alabama physicians who could not meet residency requirements imposed by local hospitals because they lived out of the state or out of the country).

111. *State Policies in Brief: Targeted Regulation of Abortion Providers*, *supra* note 11. Six state statutes are temporarily enjoined pending a final decision in the courts, and one is permanently enjoined. In addition, there are nine states that have passed statutes requiring either admitting privileges or an alternative agreement between an abortion provider and a local hospital. *Id.*

112. See MISS. CODE ANN. § 41-75-1 (West, Westlaw through 2015 Reg. Sess.); TENN. CODE ANN. § 39-15-202 (West, Westlaw through 2015 First. Reg. Sess.); UTAH ADMIN. CODE. § R432-600 (West, Westlaw through Jul. 1, 2015).

113. See ALA. CODE § 26-23E-4 (West, Westlaw through Act 2015-499 of the 2015 Reg. Sess.); KAN. STAT. ANN. § 65-4a04 (West, Westlaw through 2015 Reg. Sess.); LA. STAT. ANN. § 40:1299.35.2 (West, Westlaw through 2014 Reg. Sess.); MO. ANN. STAT. § 188.027 (West, Westlaw through 2015 Reg. Sess.); N.D. CENT. CODE ANN. § 14-02.1-04 (West, Westlaw through 2013); OKLA. STAT. tit. 63, § 1-748 (West, Westlaw through First Reg. Sess. of the 55th Leg.); TEX. HEALTH & SAFETY CODE ANN. § 171.0031 (West, Westlaw through 2015 Reg. Sess.); WIS. STAT. ANN. § 253.095 (West, Westlaw through 2015 Act).

114. N.D. CENT. CODE § 14-02.1-04.

115. *State Policies in Brief: Targeted Regulation of Abortion Providers*, *supra* note 11. See MO. ANN. STAT. § 188.027; N.D. CENT. CODE § 14-02.1-04; TENN. CODE ANN. § 39-15-202; and UTAH ADMIN. CODE. § R432-600.

116. *State Policies in Brief: Targeted Regulation of Abortion Providers*, *supra* note 11. See

utes require compliance only days after the governor signs them into law.¹¹⁷ This adds an almost insurmountable hurdle for physicians to obtain admitting privileges at most hospitals as the process takes at a minimum two or three months to complete.¹¹⁸

III. INCONSISTENCY IN FEDERAL TREATMENT OF ADMITTING PRIVILEGES REQUIREMENTS

A. The Federal Courts of Appeal Have Held Inconsistently in Response to Challenges to State Statutes Imposing Admitting Privileges Requirements

In Part III.A.1 this Note discusses the cases in which federal courts have held that admitting privilege statutes impose an undue burden on a woman's right to an abortion. Part III.A.2 discusses those cases in which the Fifth Circuit has upheld admitting privileges statutes as constitutional absent unique circumstances. Part B of this Note explains that the Fifth Circuit has analyzed admitting privileges statutes in a manner inconsistent with the purpose of the Casey plurality's undue burden standard. In Part III.C this Note explains that admitting privileges statutes cannot survive a properly applied undue burden analysis.

1. Federal Courts Holding Admitting Privileges Statutes Unconstitutional

In *Planned Parenthood of Wisconsin, Inc. v. Van Hollen*, Planned Parenthood challenged the constitutionality of Section 1 of 2013 Wisconsin Act 37 (the Act).¹¹⁹ The Act prohibited a physician from performing an abortion without first obtaining admitting privileges at a hospital located within 30 miles of the place where an abortion would be performed.¹²⁰ If a physician performed an abortion in violation of the Act,

ALA. CODE § 26-23E-4; KAN. STAT. ANN. § 65-4a04; LA. STAT. ANN. § 40:1299.35.2; MISS. CODE ANN. § 41-75-1 (West, Westlaw through 2015 Reg. Sess.); OKLA. STAT. tit. 63, § 1-748; TEX. HEALTH & SAFETY CODE ANN. § 171.0031; WIS. STAT. ANN. § 253.095.

117. *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 788 (7th Cir. 2013) (explaining that the Wisconsin statute was signed on a Friday and required compliance by the following Monday, and therefore did not provide adequate time for the physician to comply with the statute).

118. *Id.* at 788.

119. *Planned Parenthood of Wis., Inc. v. Van Hollen*, No. 13-cv-465-wmc, 2013 U.S. Dist. LEXIS 110097, at *4 (W.D. Wis. Aug. 2, 2014), *aff'd*, 738 F.3d 786 (7th Cir. 2013), *cert. denied*, No. 13-1127, 2014 U.S. LEXIS 4404 (June 23, 2014).

120. *Id.* at *11 (citing WIS. STAT. § 253.095 (2014)).

the Medical Examining Board could investigate and discipline the physician, sometimes to the extent of revoking the physician's license to practice medicine in the State.¹²¹ Planned Parenthood argued that the Act violated the Due Process Clause of the Fourteenth Amendment.¹²² The District Court granted Planned Parenthood's motion for preliminary injunction, rendering the Act unenforceable pending a decision on the merits.¹²³ The District Court determined that the plaintiffs would almost certainly be irreparably harmed because of undue burden and health risks associated with additional travel to procure an abortion, as well as the possibility that women would be forced to consider an unregulated, illegal abortion as an option.¹²⁴ The District Court also found that the defendants failed to demonstrate "any reasonable relationship between maternal health and imposing this restriction."¹²⁵ On appeal, the Seventh Circuit court affirmed the District Court's ruling.¹²⁶

In reviewing the District Court's ruling, Seventh Circuit Judge Richard Posner applied *Casey's* undue burden standard to balance the State's justification for implementing the law against the burdens imposed on women seeking an abortion in that State.¹²⁷ Judge Posner explained that "the feebler the medical grounds, the likelier the burden, even if slight, to be 'undue' in the sense of disproportionate or gratuitous."¹²⁸ The State relied on medical grounds as the primary justification for the Act.¹²⁹ The State argued that if a woman were to require hospitalization due to complications from an abortion procedure, she would get better continuity of care if the doctor who performed the abortion procedure had admitting privileges at a local hospital.¹³⁰ Judge Posner stated that the evidence presented thus far in the case was feeble relative to the burden imposed on women seeking an abortion.¹³¹ Posner reasoned that the burden to women seeking an abortion was great because abortion

121. *Id.*

122. *Id.* at *4.

123. *Id.* at *4-5.

124. *Id.* at *70.

125. *Id.*

126. *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 799 (7th Cir. 2013).

127. *Id.* at 798.

128. *Id.* Circuit Judge Manion issued a concurring opinion calling for a two-part test, which would include a rational basis threshold test followed by an undue burden analysis. *Id.* at 799 (internal citation omitted) ("[L]egislation regulating abortions must pass [sic] muster rational basis review and must not have the practical effect of imposing an undue burden on the ability of women to obtain abortions.") (internal citation omitted).

129. *Id.*

130. *Id.* at 789.

131. *Id.* at 798.

providers could not possibly comply with the Act within a reasonable period of time.¹³² On remand from the Seventh Circuit, Judge William Conley ordered that the Wisconsin statute was unconstitutional under the Fourteenth Amendment and granted Planned Parenthood's motion for permanent injunction.¹³³

Similarly, in August of 2014, Judge Myron Thompson in the Western District of Alabama declared that the State's admitting privileges requirement imposed an undue burden on a woman's right to an abortion.¹³⁴ In *Planned Parenthood Southeast, Inc. v. Strange*, the court used a "[balancing] approach, taking account of both the protected liberty of the woman and the important interests of the state."¹³⁵ The court found that physicians working at five Alabama abortion clinics would be unable to obtain admitting privileges at a local hospital and that finding replacement physicians for these clinics would be a tremendously difficult task.¹³⁶ In determining the severity of the obstacle posed by the closure of abortion clinics, Judge Thompson applied the following five factors in his analysis of the real world circumstances surrounding the admitting privileges regulation:¹³⁷ First, the means by which the regulation operates the right to obtain an abortion; second, the nature and circumstances of the women affected by the regulation; third, the availability of abortion services, both prior to and under the challenged regulation; fourth, the kinds of harms created by the regulation; and fifth, the social, cultural, and political context.¹³⁸

2. The Fifth Circuit Holds that Admitting Privilege Statutes Are Constitutional, Absent Unique Circumstances

In *Planned Parenthood of Greater Texas Surgical Health Services v. Abbott*, Planned Parenthood sued the State of Texas, contending that admitting privileges portion of Texas House Bill 2 (H.B. 2) was unconstitutional.¹³⁹ H.B. 2 required a physician performing an abortion to have

132. *Id.*

133. *Planned Parenthood of Wis., Inc. v. Van Hollen*, 94 F. Supp. 949, 998 (W.D. Wis. 2015), *appeal docketed*, No. 15-1736 (7th Cir. Apr. 6, 2015).

134. *Planned Parenthood Se., Inc. v. Strange*, 33 F. Supp. 3d 1330, 1342 (M.D. Ala. 2014).

135. *Id.* at 1337.

136. *Id.* at 1343.

137. *Id.* at 1342 (citing *Planned Parenthood Se., Inc. v. Strange*, 9 F. Supp. 2d 1272, 1288-90 (M.D. Ala. 2014)).

138. *Id.*

139. *Abbott II*, *supra* note 14, at 587. Planned Parenthood challenged two provisions of the Texas bill, but for the purposes of this article I will only address the challenge to the admitting privileges requirement. The second provision placed restrictions on medication abortions. *Id.*

admitting privileges at a hospital within 30 miles of where the abortion procedure was to be performed.¹⁴⁰ Planned Parenthood challenged this provision on four grounds in the district court.¹⁴¹ First, Planned Parenthood argued that the provision violated patients' substantive due process rights because it placed an undue burden on a woman's access to abortion services.¹⁴² Second, it argued that the provision violated a physician's procedural due process rights because it failed to give physicians sufficient time to comply.¹⁴³ Third, it argued, in enacting the statute, the Texas legislature unlawfully delegated legislative authority to hospitals.¹⁴⁴ Lastly, Planned Parenthood argued that the provision was unconstitutionally vague.¹⁴⁵

The District Court ruled that the provisions of H.B. 2 were unconstitutional after applying a two part test: first analyzing the law under rational basis review and then applying *Casey's* undue burden standard. Finding that the medical evidence did not support a connection between an admitting privileges requirement and the state's interest in protecting the health of women and unborn children, the District Court held that the admitting privileges requirement failed under rational basis review.¹⁴⁶ The court went on to say that even if the state law passed rational basis review, it would still place an undue burden on a woman's access to abortion services because the law provided no time for physicians to comply.¹⁴⁷ The court, thus, granted Planned Parenthood's request for injunctive relief.¹⁴⁸

In *Abbott I*, a motions panel of the Fifth Circuit stayed the injunction granted by the Western District of Texas pending an expedited briefing and oral arguments on the merits.¹⁴⁹ The panel reasoned that the

140. *Abbott II*, *supra* note 14 at 587.

141. *Id.*

142. Complaint at 27, *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 951 F. Supp. 2d 891 (W.D. Tex. 2013) (No.1:14CV00284).

143. Plaintiff's Motion for Preliminary Injunction and Memorandum of Law in Support Thereof, *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 951 F. Supp. 2d 891 (W.D. Tex. 2013) (No.1:13CV00862).

144. Complaint, *supra* note 142, at 28.

145. Complaint and Application for Preliminary and Permanent Injunction at 28, *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 951 F. Supp. 2d 891 (W.D. Tex. 2013) (No.1:13CV00862).

146. *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 951 F. Supp. 2d 891, 900 (W.D. Tex. 2013).

147. *Id.*

148. *Abbott II*, *supra* note 14, at 587.

149. *Abbott I*, *supra* note 14, at 419. The Supreme Court denied application to vacate the stay though Justice Scalia wrote a concurring opinion in which he dissented from the Court's refusal to vacate the stay. *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 134 S. Ct.

State would likely be able to show that the admitting privileges requirement had a rational basis because “there was evidence that such a requirement would assist in preventing abandonment by the physician who performed the abortion.”¹⁵⁰ The *Abbott I* panel went on to say that the State would also likely succeed in showing that the admitting privileges requirement did not place an undue burden on a woman’s access to abortion services.¹⁵¹ The motions panel reasoned that women could travel to another part of Texas in order to obtain an abortion.¹⁵² The panel also suggested that some hospitals do not have minimum annual admissions requirements, so even if an abortion provider admits zero patients in a given year, the physician might still be eligible for admitting privileges.¹⁵³ In granting the stay, the motions panel found that the State would likely succeed on the merits.¹⁵⁴

In *Abbott II*, the Fifth Circuit reviewed the challenged provisions of H.B. 2 on the merits and upheld them as constitutional, granting judgment for the State.¹⁵⁵ The court ruled that the District Court applied “the wrong legal standards under rational basis review and erred in finding that the admitting privileges requirement amounts to an undue burden for a ‘large fraction’ of women” in the state.¹⁵⁶ The panel reasoned that, under rational basis review, courts need only to find that some conceivable rationale exists for the law’s enactment.¹⁵⁷ The panel found that the Texas legislature clearly articulated rational objectives and that those objectives were tied to its desire to protect abortion patients’ health.¹⁵⁸ The *Abbott II* panel went on to say that the law did not place an undue burden on a woman’s ability to obtain abortion services.¹⁵⁹ The merits panel explained that women living in the areas affected by abortion clinic closures would still be able to travel to other counties in order to obtain an abortion.¹⁶⁰ The panel, however, noted that some women would be required to travel more than one hundred miles to obtain abortion services, and that these women would be exempted from the State’s 24-hour wait-

506 (2013) Justice Scalia stated, “I would maintain the [District Court’s injunction] while the lower courts consider this difficult, sensitive, and controversial legal matter.” *Id.* at 509.

150. *Abbott I*, *supra* note 14, at 411.

151. *Id.* at 416.

152. *Id.* at 415.

153. *Id.* at 416.

154. *Id.* at 411.

155. *Abbott II*, *supra* note 14, at 590.

156. *Id.*

157. *Id.* at 594 (citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985)).

158. *Id.*

159. *Id.* at 598.

160. *Id.*

ing period requirement.¹⁶¹ The Fifth Circuit concluded that “an increase of travel of less than one hundred and fifty miles for some women is not an undue burden under *Casey*.”¹⁶² The court further noted that ninety percent of Texas women would be able to obtain an abortion within one hundred miles of their respective residence, and thus, the Texas law did not constitute an undue burden in a large fraction of relevant cases.¹⁶³

The Fifth Circuit denied plaintiffs’ petition for rehearing en banc.¹⁶⁴ Fifth Circuit Judge Dennis wrote a dissenting opinion in which he admonished his colleagues for what he saw as a misapplication of the undue burden standard set out by the Supreme Court in *Casey*.¹⁶⁵ Judge Dennis asserted that the *Abbott II* panel gave “only a modicum of scrutiny,” showing “abject deference” to state authority, and minimizing the important constitutional rights of the individual.¹⁶⁶ Judge Dennis argued that the *Abbott II* panel had an obligation to follow *Casey*’s undue burden test and that the panel decision conflicted with the Supreme Court’s decision.¹⁶⁷ Judge Dennis warned that “if not overruled, the panel’s undue burden test will continue to exert its precedential force in courts’ review of challenges to similar types of recently minted abortion restrictions in Texas, Louisiana, and Mississippi.”¹⁶⁸ Judge Dennis contended that the panel should have weighed and balanced the burdens imposed on Texas women seeking an abortion against the State’s justification for implementing an admitting privileges requirement.¹⁶⁹ If the State’s justification is not robust enough to warrant the obstacles placed in the way of women seeking an abortion, then the burden is undue.¹⁷⁰ Judge Dennis explained that this test was so crucial because it “lies at the very heart of *Casey*”.¹⁷¹ The *Casey* plurality expressly rejected both a strict scrutiny and rational basis review, and the balancing test was central to the undue burden test adopted in the joint opinion authored by Justices O’Connor, Kennedy, and Souter.¹⁷² Judge Dennis would have affirmed the District Court’s conclusion that the Texas law imposed an

161. *Id.*

162. *Id.*

163. *Id.* (quoting *Abbott I*, *supra* note 14).

164. *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 769 F.3d 330, 331 (5th Cir. 2014).

165. *Id.* (“[T]he panel opinion flouts the Supreme Court’s decisions in [*Casey*].”).

166. *Id.* at 332.

167. *Id.* at 333.

168. *Id.* at 332.

169. *Id.* at 335.

170. *Id.*

171. *Id.* at 365.

172. *Id.* at 359 (citing *Gonzalez v. Carhart*, 550 U.S. 124, 146 (2007)).

undue burden on women seeking to obtain a pre-viability abortion and, thus, is unconstitutional.¹⁷³

In a strange turn of events, a different panel of the Fifth Circuit subsequently upheld an injunction that declined to enforce an admitting privileges requirement in Mississippi.¹⁷⁴ In *Jackson Women's Health Org. v. Currier*, the sole remaining abortion clinic in the state of Mississippi challenged the validity of an admitting privileges requirement.¹⁷⁵ The Fifth Circuit reasoned that the statute placed an undue burden on women seeking abortion services in Mississippi.¹⁷⁶ Bound by *stare decisis* to follow *Abbott*, the Fifth Circuit first applied a rational basis review and determined that the Alabama law was rationally related to a legitimate state interest.¹⁷⁷ However, the Fifth Circuit subsequently applied an undue burden standard to determine the validity of the law.¹⁷⁸ In the district court, the State argued that even if the only abortion clinic in Mississippi closed, a Mississippi woman could still travel outside the state to procure abortion services.¹⁷⁹ In assessing this argument, the Fifth Circuit found that the fact that women may have access to nearby clinics in adjacent states makes no difference in the analysis.¹⁸⁰

In *Jackson*, the panel determined that access to abortion clinics in adjacent states does not relieve the undue burden placed on women seeking an abortion in the state of Mississippi.¹⁸¹ The court relied on a 1938 Supreme Court decision, *State of Missouri ex. rel. Gaines v. Canada*.¹⁸² In *Gaines*, an African-American was denied admission to the University of Missouri's law school on account of his race.¹⁸³ The University advised Gaines to take advantage of a tuition stipend provided for use at a law school in a neighboring state.¹⁸⁴ Gaines challenged the decision, taking the issue to the Supreme Court.¹⁸⁵ The Supreme Court held that "a state cannot lean on its sovereign neighbors to provide protection of its

173. *Id.* at 366.

174. *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 459 (5th Cir. 2014).

175. Campbell Robertson & Erik Eckholm, *Judges Block Abortion Curb in Mississippi*, N.Y. TIMES (July 29, 2014), http://www.nytimes.com/2014/07/30/us/mississippi-abortion-clinic-federal-court-blocks-closing.html?_r=0.

176. *Jackson Women's Health Org.*, 760 F.3d at 449.

177. *Id.* at 454.

178. *Id.* at 455.

179. *Id.*

180. *Id.*

181. *Id.* at 449.

182. *Id.* at 457.

183. *Id.* at 457.

184. *Id.*

185. *Id.*

citizens' federal constitutional rights."¹⁸⁶ Relying on this language from *Gaines*, the Fifth Circuit holding in *Jackson* stands for the principle that in conducting an undue burden analysis of a state abortion regulation, the court may consider only the effect of the statute within the state itself.

B. The Fifth Circuit Misapplied the Undue Burden Analysis

The Fifth Circuit misapplied *Casey*'s undue burden standard. As Judge Dennis warned in his dissent in *Abbott*, a misapplication of the undue burden standard would result in setting precedent that would conflict with federal constitutional common law established by the Supreme Court in *Casey*.¹⁸⁷ It is particularly troubling that the Fifth Circuit has so deviated from the standard as to completely frustrate the purpose of *Casey*'s balancing test.¹⁸⁸

In upholding the admitting privileges requirement in *Abbott*, the Fifth Circuit applied a low-level rational basis standard of review.¹⁸⁹ However, as discussed above, the *Casey* plurality intended that the undue burden test be applied as a measure of heightened scrutiny, falling in between the polar standards of strict scrutiny and rational basis review.¹⁹⁰ Indeed, the *Casey* plurality intended to strike a balance between the competing interests involved—a woman's liberty interest against the state's legitimate interest of protecting potential human life. The *Casey* plurality did not adopt any of the traditional levels of scrutiny—rational basis, intermediate scrutiny, or strict scrutiny—but instead applied a flexible balancing test in the undue burden standard.¹⁹¹

The *Casey* plurality expressly stated that a state could not regulate abortions in all instances because "the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law." The abortion issue is, thus, particularly suitable for judicial minimalism. This is especially true when considering the development of the standard following the Supreme Court's decision in *Roe v. Wade*. The strict scrutiny

186. *Id.* (citing *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 350 (1938)) ("[Equal protection under the law] is an obligation the burden of which cannot be cast by one State upon another, and no State can be excused from performance by what another State may do or fail to do.").

187. *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 769 F.3d 330, 332(5th Cir. 2014).

188. *Abbott II*, *supra* note 14, at 590.

189. *Id.* at 593-94 ("The district court's opinion took the wrong approach to the rational basis test. Nothing in the Supreme Court's abortion jurisprudence deviates from the essential attributes of the rational basis test, which affirms a vital principle of democratic self-government.").

190. *Supra*, Background.

191. *Abbott*, 769 F.3d at 336.

analysis in *Roe* has been slowly pared back by the Court as the analysis shifted away from the trimester test.¹⁹² With the *Casey* decision, the Supreme Court adopted the undue burden standard, which is an intensely fact-driven approach to reviewing state statutes for constitutionality.¹⁹³

C. Admitting Privileges Legislation Cannot Survive an Undue Burden Analysis

The undue burden standard is a form of heightened scrutiny that requires courts to balance an individual's constitutionally protected liberty interests against the legislative purpose in enacting the abortion regulation.¹⁹⁴ The undue burden test uses a two-part analysis by which courts are to determine: "(1) whether the statute has a purpose of placing a substantial obstacle in the path of a woman seeking an abortion, and (2) even if the purpose of the regulation is a valid state interest, whether the law has such an effect."¹⁹⁵

Under the undue burden analysis, if an abortion regulation is passed with the purpose of placing a substantial obstacle in the path of a woman seeking an abortion, then that legislation is unconstitutional.¹⁹⁶ It can be difficult to ascertain the legislature's intent in passing a statute, or from a different perspective, it would be relatively easy for legislatures to conceal their true intent under the guise of protecting women's health. The Supreme Court has, thus, identified several factors to consider when evaluating legislative purpose, including the language of the statute on its face, the statute's legislative history, and interpretations of the statute by a responsible administrative agency.¹⁹⁷

It is relatively easy for a state to avail itself of the argument that an abortion regulation is designed to promote the health, safety, and welfare of women in the state. It is for this reason that *Casey*'s undue burden

192. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 837 (1992) ("Roe's rigid trimester framework is rejected. To promote the State's interest in potential life throughout pregnancy, the State may take measures to ensure that the woman's choice is informed. Measures designed to advance this interest should not be invalidated if their purpose is to persuade the woman to choose childbirth over abortion. These measures must not be an undue burden on the right.").

193. Jonathan F. Will, *MS Admitting Privilege Law Struck Down by 5th Circuit*, BILL OF HEALTH: EXAMINING THE INTERSECTION OF LAW AND HEALTH CARE, BIOTECH, AND BIOETHICS, A BLOG BY THE PETRIE-FLOM CENTER AND FRIENDS (Jul. 30, 2014), <http://blogs.law.harvard.edu/billofhealth/2014/07/30/ms-admitting-privilege-law-struck-down-by-5th-circuit/>.

194. Planned Parenthood Se., Inc. v. Strange, 33 F. Supp. 3d 1330, 1332 (M.D. Ala. 2014).

195. *Abbott*, 769 F.3d at 337.

196. *Casey*, 505 U.S. at 878.

197. *Edwards v. Aguillard*, 482 U.S. 578, 594 (1987).

analysis is so crucial. The *Casey* standard gives force to a woman's important liberty interest—recognized, since *Roe*, as within a woman's right to privacy and constitutionally protected by the Fourteenth Amendment—by providing that, even if a state may articulate a valid state interest in restricting abortion, the legislation will still be found unconstitutional if it has the effect of placing a substantial obstacle in the path of a woman's right to an abortion.¹⁹⁸

A statute has the effect of placing a substantial obstacle in the path of a woman seeking an abortion if it creates obstacles to abortion services in a large fraction of cases to which the statute applies.¹⁹⁹ The *Casey* plurality did not specify exactly what would qualify as large fraction, and some courts have refused to consider what the Court might have meant by these terms.²⁰⁰ One court phrased its reluctance by refusing “to peer into the dark abyss of speculation in an attempt to determine at what point a fractional group becomes an impermissibly ‘large fraction’”²⁰¹

From another perspective, the *Casey* plurality exercised caution in refraining from setting a precise threshold or bright line as to what might be considered a large fraction. The purported vagueness as to this element of the standard is really an important form of judicial minimalism. By not defining a large fraction, the *Casey* plurality allowed other courts to settle cases based on a fact-intensive inquiry of the individual case presented. Almost every federal circuit to address the issue has allowed the large fraction standard to remain open ended.²⁰² Only the Fifth Circuit has declined to apply the large fraction test in facial challenges to abortion regulation statutes.²⁰³ In *Barnes v. Moore*, the Fifth Circuit ad-

198. *Roe v. Wade*, 410 U.S. 113, 153 (1973) (“[T]his right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment’s Reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”).

199. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 895 (1992).

200. *A Woman’s Choice-E. Side Women’s Clinic v. Newman*, 305 F.3d 684, 699 (7th Cir. 2002).

201. *Id.*

202. *Cincinnati Women’s Servs., Inc. v. Taft*, 468 F.3d 361, 368 (6th Cir. 2006) (citing *Nat’l Abortion Fed’n v. Gonzales*, 437 F.3d 278, 294 (2d Cir. 2006); *Richmond Med. Ctr. for Women v. Hicks*, 409 F.3d 619, 628 (4th Cir. 2005); *Planned Parenthood v. Heed*, 390 F.3d 53, 57 (1st Cir. 2004); *A Woman’s Choice-E. Side Women’s Clinic*, 305 F.3d at 687; *Planned Parenthood of Cent. N.J. v. Farmer*, 220 F.3d 127, 142-43 (3d Cir. 2000); *Planned Parenthood of S. Ariz. v. Lawall*, 180 F.3d 1022, 1027, *amended on denial of reh’g*, 193 F.3d 1042 (9th Cir. 1999); *Jane L. v. Bangerter*, 102 F.3d 1112, 1116 (10th Cir. 1996); and *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1456-57 (8th Cir. 1995)). *But see Barnes v. Moore*, 970 F.2d 12, 14 (5th Cir. 1992).

203. *Cincinnati Women’s Services*, 468 F.3d at 368 (citing *Barnes v. Moore*, 970 F.2d at 14

hered to the standard for reviewing facial challenges to a statute's constitutionality as established by the Supreme Court in *United States v. Salerno*.²⁰⁴ Disregarding the undue burden standard, the Fifth Circuit panel in *Barnes* held that plaintiffs challenging abortion regulation statutes must "establish that no set of circumstances exists under which the [statute] would be valid."²⁰⁵

In *Abbott*, the Fifth Circuit analyzed the constitutional challenge to the admitting privileges requirement imposed by the statute at issue under *Casey*'s large fraction standard, but explicitly declined to indicate that it was abandoning pre-*Casey* standards set forth in the 1987 case, *Salerno*.²⁰⁶ The court "[did] not intimate" that it was not bound by its prior holding in *Barnes* to follow *Salerno*. Instead, the court assumed *arguendo* that the large fraction test applied, and concluded that the state showed a strong likelihood of success on the merits.²⁰⁷ In the district court, the plaintiffs in *Abbott* presented evidence that, if the admitting privileges requirement were enforced, 22,000 women across Texas would be denied access to an abortion provider.²⁰⁸ The district court did not make such a finding, but instead found that 24 counties in the Rio Grande Valley would be without abortion providers.²⁰⁹ The district court also recognized that ninety percent of women seeking an abortion in Texas would have to travel 100 miles in order to obtain an abortion.²¹⁰ The Fifth Circuit held that it was not an undue burden to cause women seeking an abortion to travel 100 miles.²¹¹ In *Abbott*, the court said that "an increase in travel distance of less than 150 miles for some women is not an undue burden on abortion rights."²¹² Additionally, the Fifth Circuit panel acknowledged the plaintiff's argument that women who are not citizens may have visas that prevent them from traveling to seek an abortion. However, the Fifth Circuit summarily dismissed this argument as "unrelated to the hospital-admitting-privileges requirement."²¹³

In finding that it is not an undue burden for a woman having to travel 100 to 150 miles to obtain an abortion, the Fifth Circuit declined

(quoting *United States v. Salerno*, 481 U.S. 739, 745 (1992)).

204. *Barnes v. Moore*, 970 F.2d at 14 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1992)).

205. *Id.*

206. *Abbott I*, *supra* note 14, at 414.

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.* at 415.

211. *Id.*

212. *Id.*

213. *Id.* at 416.

to weigh the additional burden imposed by increased travel time and distance against the state's legitimate interest in passing the regulation.²¹⁴ The Fifth Circuit instead summarily decided that "increased distances are categorically insufficient to constitute a substantial burden."²¹⁵ This reasoning would essentially allow the state to pass any abortion regulation so long as the only impact was an increase in distance and travel time for a woman seeking an abortion, thereby neutralizing *Casey*'s undue burden standard.

What the Fifth Circuit has made clear in *Jackson* is that a state may not lean on its sovereign neighbor to provide women access to abortion services when the effect of the abortion regulation is to foreclose a woman's right to an abortion within the state.²¹⁶ This decision, however, is not sufficient to bring the Fifth Circuit into compliance with the *Casey* standard.

IV. IMPOSING ADMITTING PRIVILEGES REQUIREMENTS ON PHYSICIANS WHO PROVIDE ABORTION SERVICES RESULTS IN AN EFFECTIVE DENIAL OF THOSE PHYSICIANS' SUBSTANTIVE AND PROCEDURAL DUE PROCESS RIGHTS

Admitting privileges statutes also present a substantive and procedural due process issue in that these statutes impermissibly limit the scope of a physician's property interest in his medical license.

The due process clause of the Fourteenth Amendment states that no state shall "deprive any person of life, liberty, or *property*, without due process of law."²¹⁷ Due process is an important constitutional guarantee that protects individuals from the arbitrary action of the government.²¹⁸ Due process protection should be understood as being composed of two subparts, procedural due process and substantive due process.²¹⁹ Substantive due process protects individuals against the arbitrary exercise of legislative and executive power.²²⁰ On the other hand, procedural due process prohibits the government from arbitrarily depriving a person of

214. *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 769 F.3d 330, 364 (5th Cir. 2014).

215. *Id.*

216. *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 457 (5th Cir. 2014).

217. U.S. CONST. amend. XIV, § 1 (emphasis added).

218. J. Bruce Bennett, *The Rights of Licensed Professionals to Notice and Hearing in Agency Enforcement Actions*, 7 TEX. TECH. ADMIN. L.J. 205, 206 (2006).

219. *Id.* (citing *Patient Advocates of Tex.*, 136 S.W.3d at 658; *Skelton v. Comm'n for Lawyer Discipline*, 56 S.W.3d 687, 693 (Tex. App. 14th Dist. 2001)).

220. *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 847 (1998) (citing *Griswold v. Connecticut*, 381 U.S. 479 (1975); *Rochin v. California*, 342 U.S. 165 (1952)).

her property.²²¹ The admitting requirements statutes violate both procedural and substantive due process requirements.

Courts use a two-part inquiry to determine if an individual's substantive or procedural due process rights have been violated.²²² First, courts inquire, under a substantive due process analysis, whether the plaintiff has been deprived of a protected interest in life, liberty, or property.²²³ Second, courts consider, under a procedural due process analysis, whether the process used to deprive the plaintiff of his interest was deficient as compared to the constitutionally required process with respect to that deprivation.²²⁴ If the court concludes that there is either a substantive or a procedural due process violation, the statute is constitutionally infirm.

A practical example illustrates the significant restrictions on a physician's license created by the geographic, minimum-patient, and timing issues imposed by admitting privileges statutes. Consider the following scenario: a licensed physician offers abortion services at a clinic in Smalltown, Wisconsin.²²⁵ The closest hospital to his clinic is 40 miles away. In this scenario, the geographic requirements of the statute, which provide that the physician must have admitting privileges at a hospital within 30 miles of her clinic, prohibit the physician from operating her clinic.²²⁶ To continue operating the clinic, the physician would be subject to fines up to \$10,000 each time an abortion is performed or induced or attempted to be performed or induced.²²⁷

Now consider a slightly different scenario: a licensed physician offers abortion services at a clinic in, Smalltown, Wisconsin. The closest hospital to his clinic is 20 miles away, within the 30-mile zone established by the Wisconsin statute.²²⁸ The physician applies for admitting privileges at a local hospital. The local hospital grants staff privileges only to physicians who admit 50 patients or more to the hospital in a given year. In this scenario, the physician admits no more than one or two patients in a given year to the hospital, because, in most instances,

221. *Bd. of Regents v. Roth*, 408 U.S. 564, 589 (1972). In his dissenting opinion, Justice Marshall described procedural due process as "our fundamental guarantee of fairness, our protection against arbitrary, capricious, and unreasonable government action." *Id.*

222. *Planned Parenthood of Wis., Inc. v. Van Hollen*, 23 F. Supp. 3d 956, 964 (W.D. Wis. 2014); *see also* *Matthews v. Eldridge*, 424 U.S. 319 (1976).

223. *Van Hollen*, 23 F. Supp. 3d at 964.

224. *Id.*

225. Wisconsin being one of the states that passed a statute containing an admitting privileges requirement, WIS. STAT. ANN. § 253.095 (West, Westlaw through 2015 Act).

226. *Id.*

227. *Id.*

228. *Id.*

the applicable standard of care does not require admitting a woman, who undergoes a successful abortion procedure, to a hospital. The physician is consequently denied admitting privileges at the local hospital because he does not meet the minimum patient requirement of the statute. As in the last scenario, the physician could not continue to operate his clinic without facing severe penalties. This Note argues, in Part IV.B below, that the minimum-patient requirement violates substantive due process protections under the United States Constitution.

These examples illustrate how admitting privileges requirements can have sweeping effects on accessibility to abortion services within the state, and also how the requirements may limit the effectiveness of a physician's license. Consider that the Texas admitting privileges requirement closed nearly 40 clinics as of October 2014.²²⁹ Without the temporary relief granted by the Supreme Court, the Texas law would have shuttered all but eight abortion clinics in the nation's second most populous state.²³⁰

A. *The Procedural Due Process Inquiry*

If a state statute deprives a person of her property without due process of law, that statute must be held unconstitutional. Property interests are constitutionally protected, under the due process clause, although the Constitution is not the source of property rights. The Supreme Court has said that property interests arise instead from some other independent source of law.²³¹ Property interests, such as the physician's medical license, which is at issue in the admitting requirements statutes, come from "rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."²³²

Constitutionally protected property interests "extend well beyond actual ownership of real estate, chattels, or money"²³³ and include the medical licenses at issue in admitting privileges statutes. The Supreme

229. Eyder Peralta & Chris Hopkins, *Supreme Court Blocks Abortion Rules that Closed Most Clinics*, NPR (Oct. 15, 2014, 12:27 AM), <http://www.npr.org/blogs/thetwo-way/2014/10/15/356265077/supreme-court-blocks-abortion-rules-that-closed-most-texas-clinics>.

230. Bill Mears, *Supreme Court Allows Texas Abortion Clinics to Reopen for Now*, CNN (Oct. 14, 2014, 8:23 PM), <http://www.cnn.com/2014/10/14/politics/supreme-court-texas-abortion-clinics/>. At 26,956,958 persons, Texas has the second largest population in the United States. See *Florida Passes New York to Become the Nation's Third Most Populous State*, Census Bureau Reports, UNITED STATES CENSUS BUREAU (Dec. 23, 2014), <http://www.census.gov/newsroom/press-releases/2014/cb14-232.html>.

231. Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972).

232. *Id.* (for example, state law).

233. *Id.* at 572.

Court has long recognized that professional licenses are property interests within the protection of the Constitution.²³⁴ As early as 1889, the Supreme Court noted that “few professions require more careful preparation by one who seeks to enter it than medicine” and that “reliance must be placed upon the assurance given by [the physician’s] license, issued by an authority competent to judge in that respect, that he possesses the requisite qualifications.”²³⁵ It has been argued that professional licenses are privileges rather than rights or entitlements.²³⁶ However, the Supreme Court has expressly declined to distinguish between rights and privileges when it comes to deciding whether a person can be prevented from practicing under a professional license.²³⁷

The state’s delegation of this power to hospitals is not, however, even the most serious constitutional problem.²³⁸ The most significant procedural due process problems arise when admitting privileges requirements do not provide physicians sufficient time to come into compliance with the newly imposed statutory requirement.

As the Seventh Circuit observed, the timeline that a physician is given to comply with the admitting privileges requirement may be as little as two days.²³⁹ This is in no way a long enough time to comply with the statute. It may take weeks or months to successfully obtain admitting privileges at a local hospital. If a physician does not meet the preliminary requirements for admitting privileges, it might take even more time for the physician to accomplish the changes that need to be made to her practice. This Note concludes that this timing limitation violates constitutionally imposed limits on depriving physicians of their property in their medical license without procedural due process.

The Supreme Court has considered when a process depriving a person of their life, liberty, or property is constitutionally sufficient.²⁴⁰ An analysis of whether the procedure is sufficient, i.e., whether it meets the requirements of procedural due process, requires an analysis of the private and governmental interests that are affected.²⁴¹ In *Mathews v. Eldridge*, the Supreme Court established a three-part test for determining

234. *Goldberg v. Kelly*, 397 U.S. 254, 262 n.8 (1970) (citing Charles A. Reich, *Individual Rights and Social Welfare: the Emerging Legal Issues*, 74 YALE L.J. 1245 (1965)).

235. *Dent v. W. Va.*, 129 U.S. 114, 122-23 (1889).

236. *Schwartz v. Bd. of Bar Exam’rs of N.M.*, 353 U.S. 232, 239 n.5 (1957).

237. *Id.*

238. *See Planned Parenthood of Wis., Inc. v. Van Hollen*, 23 F. Supp. 3d 956, 965 (W.D. Wis. 2014).

239. *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 788 (7th Cir. 2013).

240. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319 (1976).

241. *Id.* at 334 (quoting *Arnett v. Kennedy*, 416 U.S. 134, 167-68 (1974)).

when state and federal procedures meet due process requirements.²⁴² In the abortion context, it is the private hospital that decides the procedures for issuing admitting privileges to physicians, but under operation of the state statute, the result of the procedures affects a physician's property rights.²⁴³ The *Eldridge* test weighs and balances three factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.²⁴⁴

In this case, the physician's property interest in his license to practice medicine is the private interest that will be affected by the official action. A physician has a property interest not only in actually having a license to practice medicine, but also in the scope of that license.²⁴⁵ Considering the erroneous deprivation factor, it may not be easily argued that the deprivation would be erroneous because the property interest has now been conditioned on meeting the requirements of the statute and because the loss is automatic once the statute is violated. However, it can easily be argued that the value of additional or substitute procedural safeguards would substantially ease the injury to a physician's property interest after she is denied admitting privileges. For instance, if the physician were given a lengthier statutory time period to comply, then the burden on the physician would not be nearly as great.²⁴⁶ As the statutes are currently worded, an abortion clinic would have to close almost immediately due to an inability to conduct business without facing prohibitively high penalties.²⁴⁷ Alternatively, the legislature could pass legislation dictating under what circumstances a physician can be denied

242. *Eldridge*, 424 U.S. at 335.

243. See Katherine A. Van Tassel, *Blacklisted: the Constitutionality of the Federal System for Publishing Reports of "Bad" Doctors in the National Practitioner Data Bank*, 33 CARDOZO L. REV. 2031 (2012) (describing due process issues in the hospital peer-review process). In the hospital peer-review process, private hospitals issue reports to the National Practitioner Data Bank operated by the Department of Health and Human Services, an administrative agency of the federal government. *Id.*

244. *Eldridge*, 424 U.S. at 335.

245. Van Tassel, *supra* note 243, at 2057.

246. As the Seventh Circuit stated, "[T]here would be no quarrel with a one-year deadline for obtaining admitting privileges as distinct from a one-weekend deadline." *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 789 (7th Cir. 2013).

247. See, e.g., WIS. STAT. ANN. § 253.095 (West, Westlaw through 2015 Act).

admitting privileges.²⁴⁸ But even so, the government's interest in health and safety is probably not furthered because so few patients actually need to be admitted to hospitals in connection with an abortion procedure.²⁴⁹

B. The Admitting Privilege Statutes Also Violate Substantive Due process Requirements

Alternatively, the physicians who are forced by admitting privileges requirements to close their clinics have also been denied their substantive due process. A state cannot exclude a person from practicing medicine "in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment."²⁵⁰ A state, thus, may not condition a professional's right to practice on a requirement that is not rationally connected to the person's fitness or capacity to comply with the obligations and responsibilities of the profession.²⁵¹ Admitting privileges requirements allow private hospitals to arbitrarily deny privileges based on reasons that do not relate to a legitimate state interest. For example, if the hospital requires that the physician admit a certain number of patients each year to the hospital in order to obtain admitting privileges, this does not rationally relate to the state's interest in promoting the health and safety of women in the state or to ensuring that the physician is fit to practice medicine.²⁵²

It is perfectly rational for these hospitals to consider admitting numbers when making their decision to grant admitting privileges in order, for example, to ensure that the hospital will not be overcrowded.²⁵³ Staffing health care institutions is an important part of managing the hospital as a business, most importantly its liability to claims,²⁵⁴ but imposing minimum yearly admission requirements does not serve that purpose:

A health care institution, whether hospital, nursing home, or clinic is liable for negligence in maintaining its facilities; providing and main-

248. Although this would likely result in constitutional challenges brought on behalf of hospitals.

249. See *Van Hollen*, 738 F.3d at 790.

250. *Schwartz v. Bd. of Bar Exam'rs of N.M.*, 353 U.S. 232, 238-39 (1957).

251. *Planned Parenthood of Wis., Inc. v. Van Hollen*, 23 F. Supp. 3d 956, 965 (W.D. Wis. 2014).

252. See *id.*

253. See *id.*

254. Barbara Cray, *Due Process Considerations in Hospital Staff Privileges Cases*, 7 HASTINGS CONST. L.Q. 217, 218 (1979).

taining medical equipment; hiring, supervising and retaining nurses and other staff; and failing to have in place procedures to protect its patients.²⁵⁵

A hospital can be held liable for negligent hiring, staff shortages, and the negligence of physicians practicing there and, therefore, has an important interest in determining admitting privileges requirements.²⁵⁶ These determinations are rational business decisions.²⁵⁷

However, in the context of the instant abortion statutes, the hospital's business decisions have a direct impact not only on a woman's ability to obtain an abortion, but also on the scope of the physician's license, which is an important property interest.²⁵⁸ Furthermore, the minimum admission requirements serve no counterbalancing medical or safety purpose. States do not have the power to prohibit a physician from performing abortions merely because they have taken an anti-abortion stance and wish to prevent abortions from taking place in that state.²⁵⁹ Furthermore, a state may not delegate the power to place a substantial obstacle in the path of a woman seeking an abortion in the state because the state itself does not have that power.²⁶⁰

When a hospital grants and denies admitting privileges based on its own business interests—however reasonable and necessary they may be for that hospital's successful operation—it does not necessarily further any legitimate interest of the state.²⁶¹ Requiring that the physician meet certain requirements set by the hospital before obtaining admitting privileges does not necessarily support any legitimate interests of the state in passing an admitting privileges requirement. With respect to the instant admitting privileges statutes for abortion providers, for example, there does not seem to be any connection between the health of the women undergoing an abortion and a physician's ability to admit a specific number of patients to a hospital in a given year.

In *Planned Parenthood of Wisconsin, Inc. v. Van Hollen*, the Seventh Circuit recognized the lurking issue of equal protection in granting

255. BARRY R. FURROW, THOMAS L. GREANEY, SANDRA H. JOHNSON, TIMOTHY STOLZFUS JOST, & ROBERT L. SCHWARTZ, *HEALTH LAW: CASES, MATERIALS, AND PROBLEMS* 438 (7th ed. 2013).

256. *Id.*

257. *See id.* at 962.

258. *Id.*

259. *Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 556 (9th Cir. 2004).

260. *Id.* (citing *Hallmark Clinic v. N.C. Dep't of Human Res.*, 380 F. Supp. 1153, 1158-59 (E.D.N.C. 1974)).

261. *Planned Parenthood of Wis., Inc. v. Van Hollen*, 23 F. Supp. 3d 956, 964 (W.D. Wis. 2014).

admitting privileges based on the number of patients a physician is able to admit to a hospital in a given year.²⁶² In 2012, the state of Wisconsin's report on abortions indicated that only 1 out of every 608 abortions resulted in complications that involved hospitalization.²⁶³ Based on this statistic, it is easy to see how difficult it might be for an abortion provider to obtain admitting privileges at a hospital that requires a certain number of admissions per year. If a hospital required even *two* patients be admitted per year, it would mean that the abortion provider would either have to admit patients who did not require hospitalization, wasting valuable resources and burdening the health care system, or the physician would have to perform more than 3 abortions per calendar day in order to meet the requirement by probability. The end result is inevitably a physician being deprived of his property interests.

C. The Admitting Privileges Statutes Push the Boundaries of What is Appropriate Under the Non-Delegation Clause

When states impose admitting privileges requirements, they condition the scope of the physician's license on the physician's ability to obtain admitting privileges at a local hospital.²⁶⁴ In the cases discussed above, the plaintiffs challenging the admitting privileges requirements contend that the state legislatures have granted hospitals unfettered discretion in determining whether to grant admitting privileges to abortion providers.²⁶⁵ The plaintiffs alleged that the state impermissibly granted private parties—the hospitals—authority to deprive another person, the physicians at issue, of their right to life, liberty, or property without due process of law in violation of the non-delegation doctrine.²⁶⁶ The non-

262. *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 790 (7th Cir. 2013) (“[F]or states seem indifferent to complications from non-hospital procedures other than surgical abortions (especially other gynecological procedures), even when they are more likely to produce complications.”).

263. *Id.*

264. *Hallmark Clinic v. North Carolina Dep’t of Human Res.*, 380 F. Supp. 1153, 1189 (E.D.N.C. 1974). In this case, the physician's license was conditioned on a physician's ability to obtain a patient transfer agreement with a local hospital.

265. *See Planned Parenthood of Greater Tex. Surgical Servs. v. Abbott*, 951 F. Supp. 2d 891 (W.D. Tex. 2013); *Planned Parenthood of Wis., Inc. v. Van Hollen*, 963 F. Supp. 2d 858 (W.D. Wis. 2013); *Jackson Women’s Health Org. v. Currier*, No. 3:12cv436-DPJ-FKB, 2012 U.S. Dist. LEXIS 90393 (S.D. Miss. July 1, 2012).

266. *See, e.g., Van Hollen*, 23 F. Supp. 3d at 962. *But see Women’s Health Ctr. v. Webster*, 871 F.2d 1377 (8th Cir. 1989) (“The requirement that physicians performing abortions obtain surgical privileges, which involves the independent action of a public or private hospital, poses no more significant threat to plaintiff's due process right than the requirement that those performing abortions be licensed physicians, which involves the independent action of a medical licensing board.”).

delegation argument prohibits states from “authorizing private citizens to deprive other private persons of life, liberty, or property without due process of law.”²⁶⁷ Courts have distinguished cases where the power to grant and deny admitting privileges is assigned to a state agency.²⁶⁸ The concern here is that hospital administrators will use or craft privileging requirements to effectively foreclose an abortion providers’ ability to obtain privileges. On the non-delegation ground alone, the Court should conclude that the admitting privileges statutes are unconstitutional.

V. CONCLUSION

Abortion regulations that include admitting privileges requirements for physicians must be declared unconstitutional on two grounds. First, the statutes fail to satisfy the *Casey* plurality’s undue burden standard. Applying the effects test from *Casey*, the Supreme Court should resolve the emerging split in federal court decisions and conclude that the effect of an admitting privileges requirement places a substantial obstacle in the path of a woman lawfully seeking an abortion. Imposing an admitting privileges requirement will result in the shuttering of abortion clinics. When clinics close, abortion services may be made unavailable to a substantial fraction of women seeking abortion services. The Supreme Court should, thus, confirm that a state may not avail itself of an argument that women seeking abortion services may simply travel elsewhere, to another part of the state or to another state.²⁶⁹ If a state intends to advance its interest in protecting potential life by requiring abortion providers to obtain admitting privileges at a local hospital, it might avoid imposing an undue burden by adapting such statutes to allow physicians a reasonable time to do so.²⁷⁰

The inconsistent application by the federal courts of appeals of *Casey*’s undue burden standard as applied to admitting privileges requirements in abortion regulations suggests that the Supreme Court should take up the issue in the near future. The Supreme Court must clarify the level of review to be applied to statutes and regulations that restrict abor-

267. *Van Hollen*, 23 F. Supp. 3d at 962 (quoting *Beary Landscaping, Inc. v. Costigan*, 667 F. Supp. 3d 956, 950 (7th Cir. 2012)).

268. *See, e.g., id.* (“[S]ince the State of Wisconsin has delegated the licensing of physicians to the Wisconsin Medical Examining Board, a *state* entity, and as such in requiring a physician to be licensed to perform abortions, there is no delegation of *any* function to a private entity.”).

269. *See Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938); *see also* *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786 (7th Cir. 2013); and *Planned Parenthood Se., Inc. v. Strange*, 33 F. Supp. 3d 1330 (M.D. Ala. 2014).

270. *Van Hollen*, 738 F.3d at 795-96.

tions. The undue burden standard has been misapplied by the Fifth Circuit as a rational basis test, contravening the intended meaning of Justices O'Connor, Kennedy, and Souter. Considering the history of the undue burden standard in Supreme Court case law, it is clear that the standard was intended to serve as a type of middle-level scrutiny, between the rational basis and strict scrutiny levels of review.

Second, the statutory admitting privileges requirements imposed on physicians violate physicians' Fourteenth Amendment rights to substantive and procedural due process. The admitting privileges statutes at issue, moreover, impermissibly delegate to hospitals the state's power to regulate abortion services. While a hospital receiving federal funding may not discriminate against a physician in granting admitting privileges on the basis of the physician's participation in an abortion, the hospital may deny privileges and, thus, unconstitutionally interfere with the physician's property interest in her medical license, by setting requirements that an abortion provider is unable to meet. Furthermore, a hospital may not choose to deny privileges simply by stating that the denial will protect and promote patient welfare and safety. Finally, the admitting privileges statutes violate physicians' procedural due process rights if physicians are not granted a reasonable time to secure admitting privileges at a local hospital, which may be impracticable.

These issues are ripe for review, and the Supreme Court should offer clarity in order to preserve the important interests of women and physicians alike.