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Link to publisher version (DOI)
https://doi.org/10.15779/Z38125Q84J

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Urbanormativity, Spatial Privilege, and Judicial Blind Spots in Abortion Law

Lisa R. Pruitt & Marta R. Vanegas†

ABSTRACT

State laws regulating abortion have proliferated dramatically in recent years. Twenty-two states adopted seventy different restrictions in 2013 alone. Between 2011 and 2013, state legislatures passed 205 abortion restrictions, exceeding the 189 enacted during the entire prior decade. The constitutionality of several such restrictions—parts of Texas H.B. 2—was recently litigated in the U.S. Court of Appeals for the Fifth Circuit in Planned Parenthood of Texas v. Abbott. The Abbott court upheld a requirement that doctors performing abortions have admitting privileges at a hospital within thirty miles of the abortion clinic, and it also upheld a limitation on the use of medication-induced abortions. The constitutionality of a third restriction in H.B. 2, which required abortion providers to meet the requirements of ambulatory surgical centers (ASC), was struck down by a federal district court in Texas in August 2014, in Whole Women’s Health v. Lakey. The Fifth Circuit reversed that holding a few weeks later, permitting the ASC requirement to enter into effect. That decision was trumped a few days later, however, by a decision of the U.S. Supreme Court that stayed enforcement of the Texas law until the Fifth Circuit considers the merits of the case, presumably in early 2015. Meanwhile, other federal courts have recently considered the constitutionality of Mississippi, Alabama, and Wisconsin laws which, like H.B. 2, require abortion providers to have hospital-admitting privileges within thirty miles of a clinic. Most of those courts have enjoined the

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laws because they are presumptively unconstitutional, though the rationales for striking the laws vary. In part because of their differing outcomes and rationales, these cases raise issues likely to be taken up by the U.S. Supreme Court.

Rarely acknowledged in this litigation or commentary about it—at least until the Lakey case—is the fact that these regulations have the greatest impact on women who live farthest from the major metropolitan areas where abortion providers tend to be located. Indeed, these laws appear to exact the greatest toll on women who are both rural and poor. We argue that, contrary to the Fifth Circuit’s decisions in Abbott and Lakey, these laws place undue burdens on the abortion rights of a significant number of women and that they should be declared unconstitutional.

In addition to these normative claims, we draw on three complementary critical frames—legal geography, the concept of privilege, and rural studies’ concept of urbanormativity—to articulate new ways of thinking about the recent spate of so-called incremental abortion regulations and federal courts’ adjudication of the constitutionality of these laws. First, legal geography provides a frame for theorizing the relationship between the abortion regulations and spatiality, revealing how law is variegated and variable and how material space dictates different outcomes from place to place. Second, we deploy the concept of privilege in arguing that many federal judges are spatially privileged but blind to that privilege. In our increasingly metro-centric nation, where rural populations are dwindling and marginalized both literally and symbolically, most federal appellate judges appear to have little experience with, or understanding of, typical socio-spatial features of rurality: transportation challenges, a dearth of services, lack of anonymity, and—frequently—extreme socioeconomic disadvantage. Yet those same spatially privileged judges are applying the undue burden standard to laws that require women to travel hundreds of miles, sometimes on multiple occasions, to access abortion services. Those judges are also typically upholding laws that burden women’s access to medication-induced abortions, which have the potential to ameliorate spatiality’s burden on rural women.

Such spatial privilege and judges’ obliviousness to it are most evident among U.S. Courts of Appeal judges and U.S. Supreme Court justices who construe the “undue burden” standard, while these tend to be less prominent among federal district judges applying the same standard. The judicial blind spot associated with metropolitan spatial privilege was evident most recently in Abbott and Lakey, in which the Fifth Circuit minimized the burden of traveling more than 150 miles each way to reach an abortion provider. Such privilege was also on display more than two decades ago in the U.S. Supreme Court’s decision in Casey v. Planned Parenthood and in many U.S. Courts of Appeals decisions in Casey’s wake. The spatial privilege phenomenon is closely linked to the third frame: critical rural studies’ concept of urbanormativity. By treating urban life as a benchmark for what is normal and, as in Abbott and Lakey, dismissing as constitutionally insignificant the seventeen percent of Texas women who live
more than 150 miles from an abortion provider (some as far as 250 miles away), federal appellate judges increasingly articulate an urbanormative jurisprudence. Such decisions have dramatic real-life consequences for rural and other women who live far from the few major metropolitan areas where clinics are able to remain open. But these decisions also marginalize rural people symbolically, and we provide illustrations of judicial urbanormativity in other constitutional contexts—from voting rights to the establishment clause—to further highlight the problem. We close with some suggestions for how reproductive rights advocates could better represent to courts the lived realities of rural women seeking abortion services.

INTRODUCTION

State laws regulating abortion have proliferated dramatically in recent years, with twenty-two states adopting seventy different restrictions in 2013 alone. As of mid-2014, thirteen states had adopted twenty-one new restrictions.  

1. See, e.g., Erik Eckholm, Access to Abortion Falling as States Pass Restrictions, N.Y. TIMES (Jan. 3, 2014), http://www.nytimes.com/2014/01/04/us/women-losing-access-to-abortion-as-opponents-gain-ground-in-state-legislatures.html. Eckholm states: Anti-abortion legislation in the states exploded after the major conservative gains in the 2010 state elections, resulting in more than 200 measures in 30 states over the last three years. . . . Twenty-four states have barred abortion coverage by the new health exchanges and nine of them forbid private insurance plans, as well, from covering most abortions. A dozen states have barred most abortions at 20 weeks of pregnancy, based on a theory of fetal pain that has been rejected by major medical groups.

Id. See also Julie Rovner, 22 States Curb Access to Abortion in 2013, SHOTS: HEALTH NEWS
Between 2011 and 2013, 205 abortion restrictions were enacted, exceeding the 189 that became effective during the entire prior decade. What is infrequently acknowledged in academic literature and only slightly more often noted in recent media coverage is that these regulations—like many others that states have enacted since the U.S. Supreme Court’s 1992 decision in Planned Parenthood of Southeastern Pennsylvania v. Casey—have a dramatic impact on women who live farthest from major metropolitan areas. We refer to these women generally as rural women. Because recent regulations have the net effect of closing


5. As more abortion clinics are closed, women living in small- and medium-sized cities are also disadvantaged by these laws, even though these woman do no live in places that are rural by any official definition. Our use of the term “rural” to refer to women living in places removed from major metropolitan areas thus does not track any U.S. government definition. The U.S. Census Bureau defines “rural” as “all population, housing, and territory not included in an urban area”; urban areas include areas of more than 50,000 people and clusters of 2,500 to 50,000 people. U.S. Census Bureau, 2010 Census Urban and Rural Classification and Urban Area Criteria, CENSUS.GOV, http://www.census.gov/geo/reference/ua/urban-rural-2010.html (last accessed Jan. 4, 2014). The Office of Management and Budget moved away from the urban/rural dichotomy and now uses an entirely different terminology, consisting of Core Based Statistical Area (CBSA) (i.e., a county or counties associated with at least one core of at least 10,000 population), Metropolitan Statistical Area (i.e., a CBSA associated with at least one urbanized area that has a population of at least 50,000), Micropolitan Statistical Area (i.e., a Core Based Statistical Area associated with at least one urban cluster that has a population between 10,000 and 50,000), and Outside CBSAs (i.e., counties that do not qualify for
clinics, the laws increase both the time and money required to get to a clinic that is able to comply with the regulation and thus to keep its doors open.

Women who are both rural and poor suffer the greatest impact from these laws because those women are without the economic resources that would permit them to traverse the very substantial distances—sometimes hundreds of miles—to reach an abortion provider. As one of us has elaborated in great detail in a 2007 article, *Toward a Feminist Theory of the Rural*, such travel is no small feat for many rural women. At the same time, in our increasingly metro-centric nation, spatially privileged judges frequently fail to grasp the very real socio-spatial obstacles that constrain these women’s agency. In ruling that the need to travel hundreds of miles to procure an abortion (whether surgical or medicinally-induced) is not an undue burden, these judges articulate an abortion jurisprudence that is implicitly urbanormative. That is, these decisions treat urban life as the “benchmark for what is considered normal about place.”

6. A rural woman is more likely to be poor than one living in a metropolitan area. See infra notes 65-71 and accompanying text.


9. See Elizabeth Seale & Gregory M. Fulkeron, *Critical Concepts for Studying Communities and Their Built Environments*, in STUDIES IN URBANORMATIVITY: RURAL COMMUNITY IN URBAN SOCIETY 31, 32 (Gregory M. Fulkeron & Alexander R. Thomas eds., 2013). Thomas et al. define urbanormativity as “an assumption that the conditions of urbanism found in metropolitan areas are normative; a corollary is that a departure from an urban lifestyle is deviant.” A.R. THOMAS ET AL., CRITICAL RURAL THEORY: STRUCTURE*SPACE*CULTURE 151 (2010). Seale and Fulkeron paraphrase this: “This is another case where the dominant group enjoys visibility and social perceptions of normalcy while less powerful groups are either ignored or understood through a stigmatized or prejudiced lens.” Seale & Fulkeron, supra, at 32. Scale and Fulkeron also note that an “urbanormative lens would presuppose easy access to most of life’s basic needs and wants.”
Abortions have never been easy to access in the United States: they are expensive, and the number of abortion providers in the United States has dwindled in recent decades. Further, abortion restrictions have enormously different consequences not only from person to person, but also from place to place. The prior generation of abortion restrictions tended to impose waiting periods that required women to make multiple trips to abortion providers. Toward a Feminist Theory of the Rural outlined in great detail spatially contingent variations in the impact of waiting periods. These laws represent serious obstacles for women—many of them rural—who must travel farther than before the regulation took effect, in each of those multiple trips.

The new wave of abortion regulations is particularly detrimental to rural women in two other ways that also implicate material spatiality. First, targeted regulations of abortion providers (“TRAP” provisions), including those that require abortion providers to have admitting privileges at a nearby hospital and those that require abortion clinics to qualify as ambulatory surgical centers (ASC), have the direct effect of closing abortion clinics. The clinics most likely

Id. at 33. Yet, “[f]or rural communities, a premium must be paid in order to gain access to these taken-for-granted facets of life.” Id.


11. See Pruitt, Toward, supra note 7, at 467-77. The article also explains how parental notification laws can have a different impact on minors in rural communities, where the judge from whom they must seek “judicial bypass” to avoid getting parental consent may be someone they know in their community. This rural difference is a function of the lack of anonymity associated with sparsely populated places. Id. at 478-82. For further discussion of judicial bypass regulations, see Rachel Reboucé, Parental Involvement Laws and the New Governance, 34 HARV. J.L. & GENDER 175, 183 (2011) (stating that judicial bypass statutes require that the bypass process is “confidential, expeditious and efficient” for minors, and providing examples of how statutes ensure confidentiality, such as “sealing records, using pseudonyms for petitioners or limiting those who may participate in the hearing”). See also Maya Manian, Functional Parenting and Dysfunctional Abortion Policy: Reforming Parental Involvement Legislation, 50 FAM. CT. REV. 241, 243-44 (2012) (stating that the judicial bypass alternative in parental consent legislation, though intended to be a workable compromise that would in theory ensure adult guidance to pregnant teenagers while still guaranteeing that minors could exercise their rights, does not generally improve adolescent decision-making or otherwise improve health outcomes for pregnant teenagers).


13. As an astounding example, closure of the last abortion clinic in Mississippi was at stake until the Fifth Circuit ruled in July 2014 that its closure due to an admitting-privileges requirement would be unconstitutional. Jackson Women’s Health Org. v. Currier, 760 F.3d 448 (5th Cir. 2014). See also Debbie Elliott, Mississippi’s Lone Abortion Clinic Fights to Remain Open, NPR.ORG (Apr. 28, 2014),
to close—as is evident from recent events in Texas—are those in the smallest population centers, which also serve many women in surrounding nonmetropolitan counties. In short, these laws effectively situate many women—especially those living outside major metropolitan areas, including rural women—farther than ever from the nearest abortion provider.

Generally speaking, the deleterious impact of a restriction on a woman’s constitutional right to choose an abortion increases in proportion to the woman’s distance from an abortion provider that is able to continue operating in the face of the restriction. Further, a woman’s lack of access to reliable transportation, combined with any number of other factors, may dramatically intensify the challenge created by her physical distance from a clinic. These factors include low-income status, an inflexible work schedule, and lack of access to child care for a woman who already has children. All of these factors are highly
associated with rural livelihoods.\textsuperscript{20} Even though the TRAP measures will have no impact on the travel required of a woman who lives near an abortion provider that is able to comply with the regulation’s requirements, clinic closures are nevertheless likely to increase the demands on the remaining clinics, thus restricting abortion access across the board, even for metropolitan women.\textsuperscript{21}

Regulations that impose additional requirements on the use of medication-induced abortions also have recently become popular among state legislatures.\textsuperscript{22} The option of a medication abortion\textsuperscript{23} is highly beneficial to rural women because dispensing medication remotely saves the expense and time needed to travel to an abortion provider.\textsuperscript{24} Limitations on medication abortions and on the

amounts to six or seven thousand dollars a year, which can make up a quarter of the average income for many single mothers).

\textsuperscript{20}See infra notes 62-69, 134 and accompanying text (detailing the rural socioeconomic and employment milieu). Note, for example, that eighty-one percent of high-poverty counties are nonmetropolitan. \textit{Kusmin}, supra note 8, at 4 (stating that from 2007 to 2011, 703 counties in the United States were “high-poverty,” of which 571 were nonmetropolitan).

\textsuperscript{21}As the appellees in \textit{Abbott} argued to the 5th Circuit Court of Appeals:

The record shows that as a result of the admitting-privileges requirement, more than 20,000 women annually would no longer be able to access abortion due to the shortfall in capacity among remaining providers. Given that over 60,000 women will seek abortion each year in Texas, this amounts to approximately one in three women unable to effectuate their constitutionally protected choice to terminate a pregnancy. This number is solely related to capacity; it does not include those women who cannot overcome other obstacles created by the requirement, such as women forced to travel significant distances to access services because a closer provider lacks privileges.

Brief of Plaintiffs-Appellees at 6, Planned Parenthood of Greater Tex., Surgical Health Servs. v. Abbott (\textit{Abbott I}), 734 F.3d 406 (5th Cir. 2013) (citation omitted); see also Sandhya Somashekhar, \textit{Ruling Forces 13 Texas Clinics to Close Abruptly}, \textsc{Wash. Post}, Oct. 4, 2014, at A03 (discussing the impact on the McAllen clinic, where women showed up for abortions the day after the Fifth Circuit decision in \textit{Lakey} and were turned away); Laura Tillman & Erik Eckholm, \textit{Texas Women Forced to Reassess After New Ruling on Abortions}, \textsc{N.Y. Times}, Oct. 4, 2014 at A10 (discussing the impact of the Fifth Circuit’s ruling in \textit{Lakey} on abortion availability in the Rio Grande Valley, with patients being diverted to San Antonio); Schladen, supra note 14 (quoting Nancy Northup, President and CEO of the Center for Reproductive Rights in reporting that, if legislative attacks continue, “fewer than 10 clinics will be available to provide abortion care to Texas’s 13 million women”). This issue was hotly contested in \textit{Lakey}. \textit{See infra Part III.C} (examining \textit{Lakey}’s impact on clinic closures).


\textsuperscript{23}We use the term “medication abortion” instead of “medical abortion,” the latter being the commonly used, albeit confusing and erroneous, term. \textit{See generally T.A. Weitz et al., “Medical” and “Surgical” Abortion}, \textsc{69 Contraception} 77 (2004).

\textsuperscript{24}For example, research shows that fewer abortions were obtained in clinics after telemedicine was introduced in Iowa, and the proportion of medication abortions that were obtained in clinics increased from 46% to 54%. Dan Grossman et al., \textit{Changes in Service Delivery Patterns After Introduction of Telemedicine Provision of Medical Abortion in Iowa}, \textsc{103 Am. J. Pub. Health} 73, 73 (2013). Furthermore, women living farther than fifty miles from nearest clinic offering surgical abortion were more likely to obtain a medication abortion...
remote dispensation of abortion-inducing medicines are thus also disproportionately burdensome on rural women, especially those who are poor.

A third type of regulation requires abortion providers to meet the requirements of ambulatory surgery centers (ASCs). H.B. 2 includes such a provision. On September 1, 2014, a few days before the effective date of that provision, a federal district judge enjoined the law’s enforcement based on the conclusion that it was presumptively unconstitutional. The Fifth Circuit has since reversed that decision, staying the district court’s injunction and permitting the law to go into effect. The U.S. Supreme Court then vacated the stay order of the Fifth Circuit with reference to the district court’s order enjoining the admitting privileges requirement as applied to the McAllen and El Paso clinics. The Court also vacated the Fifth Circuit’s stay order regarding the federal district court’s order enjoining the ambulatory surgical center requirement. Like the requirement that a provider have hospital-admitting privileges, implementation

after telemedicine introduction. Id.

25. Andrea Grimes describes the effects of ASC requirements on abortion providers:

It is this last prong of the law, which goes into effect September 1, that is expected to shutter all but six currently existing abortion providers in the state, all of which are located in urban areas east of the Interstate 35 corridor that cuts Texas roughly in half. After the new Planned Parenthood facility opens in Dallas, that city will have two providers. Houston will also have two providers, and Austin and Fort Worth will each have one provider. Another new Planned Parenthood facility is scheduled to open this fall in San Antonio. Two years ago, before HB 2 passed, Texas had 44 abortion providers serving its 27 million residents. After September 1, if a pending federal court challenge does not delay the implementation of the law, six of Texas’ eight legal abortion facilities will be Planned Parenthood locations.


The plaintiffs, which include providers from El Paso, Central Texas, Dallas, and the Rio Grande Valley, are asking for a court order that would prevent abortion providers from having to renovate—or build anew—facilities to mirror hospital-style ambulatory surgical centers (ASC), construction that can often cost millions of dollars. Though the conservative sponsors of HB 2 claimed that its intent was to improve patient safety, when the law was passed last summer, Texas Lt. Gov. David Dewhurst, a Republican, tweeted that it was intended to shutter as many legal abortion providers as possible.

Id.


of the ASC provision would force many abortion providers to cease operation. 29 If ultimately upheld, the law’s impact on rural women is therefore likely to be similar to that of other parts of Texas H.B. 2: it will close more clinics, require more women to drive greater distances to reach a provider, and exacerbate the shortage of providers. 30

In cases adjudicating the constitutionality of state laws restricting abortion, we see a trend of district courts striking down such laws as unconstitutional, only to be reversed by U.S. Courts of Appeals. 31 We argue that decisions holding that such regulations do not constitute an undue burden on the right to an abortion reveal a metro-centricity on the part of the judges, which results in an urbanormative jurisprudence. These decisions thus expose a sort of spatial privilege enjoyed by these judges, a privilege of which they appear unaware. The phenomenon is summarized well by Judge Clyde Hamilton in his dissent from the Fourth Circuit’s 2000 decision in Greenville Women’s Clinic v. Bryant:

While traveling seventy miles on secondary roads may be inconsequential to my brethren in the majority who live in the urban sprawl of Baltimore, as the district court below and I conclude, such is not to be so casually addressed and treated with cavil when considering the plight and effect on a woman residing in rural Beaufort County, South Carolina. 32

Here Judge Hamilton called out his urban colleagues for their ignorance of rural spatiality and the very real obstacle that distance represents for rural women. In short, Judge Hamilton revealed his colleagues’ spatial privilege and, in so doing, the urbanormativity of their ruling.

* * *

In the following sections, we discuss the recent wave of state abortion restrictions through three complementary critical lenses. First, we discuss them through the frame of legal geography in order to reveal the variegated and variable nature of reproductive rights law in the United States. Second, we explain how rural women are spatially disadvantaged in ways that judges often

30. See supra notes 25-26 (discussing the effects of H.B. 2 on abortion clinics).
31. While Abbott is an example of this dynamic, it was the trend among the cases before and after Casey. See infra notes 126, 128, 132, and 199 and accompanying text (discussing, e.g., Hodgson v. Minnesota, 853 F.2d 1452 (8th Cir. 1988), aff’d, 497 U.S. 417 (1990); A Woman’s Choice-East Side Women’s Clinic v. Newman, 305 F.3d 684 (7th Cir. 2002)).
do not see because those judges are oblivious to their own spatial privilege in our increasingly urbanized nation.\textsuperscript{33}

This brings us to the third theoretical frame: critical rural studies. This nascent field asserts that, as the United States (and indeed the world) has become more urbanized, experiences and culture associated with metropolitan life have become the unstated norm.\textsuperscript{34} In articulating the concept of urbanormativity, critical rural scholars analogize to heteronormativity, which reveals how heterosexuality is constructed as “the benchmark for sexual normalcy.”\textsuperscript{35} In the same way that “straight” is the dominant sexuality group, urban is the dominant geographical group, leaving the rural remnant a marginalized other whose lives appear anomalous.\textsuperscript{36} Indeed, in the cases we review in detail below, \textit{Abbott} and \textit{Lakey}, the Fifth Circuit treated many of these women as constitutionally irrelevant.\textsuperscript{37}

Among other things, critical rural scholarship theorizes the impact of rural socio-spatiality on the experiences of those in rural places. One strand of this work focuses on the significance of the built environment, “including an expectation for spatial density and ease of access. The built environments in rural areas are inconsistent with these expectations because they are, by definition, spatially scattered.”\textsuperscript{38} Medical services and transportation infrastructure are just two components of metropolitan built environments that urban and suburban dwellers may take for granted.

This article brings together the critical frames of legal geography, privilege, and urbanormativity to illustrate and highlight the fact that women’s access to abortion is an acutely spatial phenomenon, even though appellate judges have tended to discount the role of spatiality in relation to the undue

\textsuperscript{33} \textit{Kusmin}, \textit{supra} note 8, at 3 (reporting reduction in number of nonmetropolitan counties from 2052 to 1976 in the last decade); Kenneth M. Johnson et al., \textit{Age and Lifecycle Patterns Driving U.S. Migration Shifts}, 62 Carsey Inst. 1, 2 (Spring 2013), available at http://www.carseyinstitute.unh.edu/sites/carseyinstitute.unh.edu/files/publications/IB-Johnson-Migration-US-Counties-web_0.pdf (stating that, for agriculture-dependent rural counties, the losses sustained due to age-specific out-migration of emerging and young adults represents a loss of human resources and diminishes the potential for future growth, and that modest gains from in-migration of older adults were insufficient to offset the loss of young adults).

\textsuperscript{34} \textit{See Thomas et al.}, \textit{supra} note 9, at 151 (describing urbanormativity as “an assumption that the conditions of urbanism found in metropolitan areas are normative; a corollary is that a departure from an urban lifestyle is deviant”).

\textsuperscript{35} \textit{Seale & Fulkerson}, \textit{supra} note 9, at 32 (citing Sue Jackson & Tamsyn Gilbertson, ‘\textit{Hot Lesbians}’: Young People’s Talk About Representations of Lesbianism, 12 \textit{Sexualities} 199-224 (2009)).


\textsuperscript{37} \textit{See infra} notes 280-305, 354-363 and accompanying text.

\textsuperscript{38} \textit{Seale & Fulkerson}, \textit{supra} note 9, at 33.
burden standard. For many rural women, so-called incremental abortion restrictions are anything but incremental or minor in the impact they have on reproductive rights. These restrictions coalesce to aggravate the limitation on agency that material, physical space already presents to a woman living in a rural area. Each additional regulation—and each additional clinic closure begotten by a regulation—may be the proverbial straw to break the camel’s back, putting abortion entirely beyond any given woman’s reach.

In Part I, we elaborate on these three strands of critical thought to illuminate the burdens rural women face in relation to abortion access. These critical theories may help explain the apparent blind spots of federal judges when it comes to comprehending the realities of rural women’s lives and therefore the magnitude of rural women’s socio-spatial burdens. In Part II, we discuss the “undue burden” standard for evaluating a measure that affects a woman’s right to obtain an abortion and examine in more detail the continuing assault on women’s abortion rights by “incremental” and targeted legislation, with a focus on the state of regulations recently passed.

In Part III, we use the recent decisions regarding a Texas measure to illustrate the cumulative effect of these regulations: a significant diminution of abortion access, especially for rural women. Both a TRAP provision and a restriction on administration of medication-induced abortion were at issue in Planned Parenthood of Greater Texas Surgical Health Services v. Abbott. The requirement that abortion providers comply with ambulatory surgical center (ASC) regulations was at stake in Whole Women’s Health v. Lakey. The decisions of the U.S. Court of Appeals for the Fifth Circuit in these cases reveal the prevailing judicial understandings of rurality and its denizens—which are actually gross misunderstandings. That is, judges display a profound lack of appreciation for the burdens created by rural spatiality and how those burdens are aggravated by abortion regulations that cause clinic closures. Thus the Fifth Circuit erred in finding that the law did not unduly burden the reproductive rights of a significant number of women. Although the new Texas regulations

40. Judge Lee Yeakel of the federal district court for the Western District of Texas recognized this precise point in his opinion staying enforcement of H.B. 2’s ASC requirement. Lakey, 2014 WL 4346480, at *13; see also infra Part III.C.
41. Abbott, 951 F. Supp. 2d 891 (W.D. Tex. 2013); Abbott I, 734 F.3d 406 (5th Cir. 2013). In separate litigation, the district court found the cumulative effect of these regulations an unconstitutional burden on the abortion right. Lakey, 2014 WL 4346480; see also infra Part III.C.
42. See infra Part III.C.
43. See Pruitt, Toward, supra note 7, at 441 (“Judicial assumptions of individual responsibility—for both the consequences of having sex and of living in an inconvenient place—also loom large in the abortion context.”); see also Beth Burkstrand-Reid, The Invisible Woman: Availability and Culpability in Reproductive Health Jurisprudence, 81 COLO. L. REV. 97 (2010).
effectively close all abortion clinics in a large part of the state (the lower and middle Rio Grande Valley and West Texas), the Fifth Circuit played down the significance of the regulations increasing travel for thousands of women. In concluding that the law does not constitute an undue burden, the court—like the Texas legislature—further burdened an already disadvantaged group of women. Because of the likelihood that the U.S. Supreme Court will ultimately decide the constitutionality of the regulations at stake in Abbott and Lakey, either in those cases or in another case challenging similar regulations, it is critically important to make clear the ways in which these laws create undue burdens for numerous women, especially those living in rural places.

I. USING NEW CRITICAL TOOLS TO REVEAL JUDICIAL BLIND SPOTS

A. Legal Geography: The Where of Law

A core tenet of critical geography is that space matters, and legal geographers deploy that lens to analyze spatial variations in law’s role and operation. While historical analysis relies on the vector of time, geographic analysis deploys the complementary vector of space. “Space” is an abstract


45. It is worth noting that state legislatures, especially in states with significant rural populations, are less likely to be oblivious to spatial realities. Indeed, it seems likely that the Texas legislature intended for H.B. 2 to have the effect of closing abortion clinics and that it anticipated the negative impact on rural populations in particular. See infra note 247 and accompanying text (discussing the “purpose” prong of Casey). On the other side, Louisiana representative Herbert Dixon opposed a new Louisiana law imposing hospital-admitting privileges requirements similar to those in Texas H.B. 2, on the basis that such requirements pose particular barriers to rural communities: “The problem I have with the bill is access, especially in the rural areas I represent. There will be none.” Jeremy Alford & Erik Eckholm, With New Bill, Abortion Limits Spread in South, N.Y. TIMES, May 21, 2014, http://www.nytimes.com/2014/05/22/us/politics/new-bill-spreads-abortion-limits-in-south.html?_r=0.

46. Some rural sociologists have also deployed spatial concepts. See, e.g., THE SOCIOLOGY OF SPATIAL INEQUALITY (Linda M. Lobao et al. eds., 2007); Ann R. Tickamyer, Space Matters! Spatial Inequality in Future Sociology, 29 CONTEMP. SOC. 805, 811 (2000); Linda Lobao, Continuity and Change in Place Stratification: Spatial Inequality and Middle-Range Territorial Units, 69 RURAL SOC. 1, 21-25 (2004).

47. See NICHOLAS K. BLOMLEY, LAW, SPACE, AND THE GEOGRAPHIES OF POWER 14-24 (1994) (citing R.W. Gordon, Critical Legal Histories, 36 STAN. L. REV. 57 (1984) as an example of legal scholars’ reliance on time and history, even as they neglect space); see also Pruitt, Gender, Geography, supra note 5, at 339.

48. Legal geographers thus focus on the role of spatiality in shaping lives, including the constriction of human agency. See generally THE EXPANDING SPACES OF LAW: A TIMELY LEGAL GEOGRAPHY (Irus Braverman et al. eds., 2014); Pruitt, Gender, Geography, supra note 5.
concept that refers both to physical or material space and to the impact that particular spatial configurations have on many aspects of life, from social relationships to economic opportunity. Space is relevant even if it is relatively “empty” in terms of population and the built environment, as in rural places. The rural, like the urban, is socially constructed in that it is “borne and interpreted by social agents.” Society is “constituted in and by space” because space both contains and actively shapes social processes, including human agency. Just as critical geographers see “social phenomena [as] necessarily spatial phenomena,” legal geographers see legal phenomena as necessarily spatial. As a recent legal geography text explains:

Legal geography is a stream of scholarship that makes the interconnections between law and spatiality, and especially their reciprocal construction, into core objects of inquiry. . . . Legal geographers note that nearly every aspect of law is located, takes place, is in motion, or has some spatial frame of reference. In other words, law is always “worlded” in some way. Likewise, social spaces, lived places, and landscapes are inscribed with legal significance. Distinctively legal forms of meaning are projected onto every segment of the physical world. These meanings are open to interpretation and may become caught up in a range of legal practices. Such fragments of a socially segmented world—the where of law—are not simply the inert sites of law but are inextricably implicated in how law happens.

One of us has elsewhere drawn on the tools of critical and legal geography to theorize about the legal significance of rural socio-spatiality with regard to law’s operation, particularly analyzing the intersection of gender and rurality, including how rural socio-spatiality constrains agency. Toward a Feminist Theory of the Rural illustrated how geography or spatiality, like various immutable and quasi-immutable aspects of identity, can be accommodated

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49. Pruitt, Gender, Geography, supra note 5, at 340.
52. Id.
53. Id.
54. Introduction to THE EXPANDING SPACES OF LAW: A TIMELY LEGAL GEOGRAPHY, supra note 48, at 1, 1.
56. See Pruitt, Gender, Geography, supra note 5; Pruitt, Toward, supra note 7; Lisa R. Pruitt, Place Matters: Domestic Violence and Rural Difference, 23 WISC. J. GENDER L. & JUST. 347 (2008) [hereinafter Pruitt, Place Matters].
within anti-essentialist feminism.\textsuperscript{57}

Rural residents face many challenges to their economic self-sufficiency and overall well-being, including inadequate and substandard housing, a dearth of public transportation, and a shortage of child care centers.\textsuperscript{58} Because rural places are spread over large areas,\textsuperscript{59} they tend to be characterized by a relative lack of infrastructure and thus greater distances to traverse in order to reach services.\textsuperscript{60} Distance from population centers is associated with a host of challenges: lack of economic diversification, population loss, lack of human capital, and low-wage jobs.\textsuperscript{61} Indeed, the depth and persistence of poverty are highly troubling aspects of the lives of many rural residents. Poverty rates in nonmetropolitan America have long been higher and more enduring than in metropolitan areas.\textsuperscript{62} In 2012, the average poverty rate in nonmetropolitan counties was 17.7\%, compared to 14.5\% in metropolitan counties.\textsuperscript{63} Further, the difference between metro and nonmetro poverty rates varied by region, with the most dramatic difference in the South, where the nonmetro poverty rate was
nearly 7% higher than that for metropolitan counties.\textsuperscript{64} Ninety percent of our nation’s persistently poor counties—those with poverty rates of 20% or higher over the last three decades—are nonmetropolitan.\textsuperscript{65} Indeed, persistent poverty is linked to the degree of rurality: nearly 28% of people living in “completely rural” counties—those not adjacent to a metropolitan county—live in persistent poverty counties, and poverty rates tend to be highest in these completely rural counties.\textsuperscript{66} Physical distance from jobs,\textsuperscript{67} opportunities,\textsuperscript{68} services,\textsuperscript{69} and other people\textsuperscript{70} can profoundly influence both everyday decision-making and life course, including at the critical junctures where rural women encounter the law,\textsuperscript{71} as in cases involving domestic violence or termination of parental rights.\textsuperscript{72}

\begin{itemize}
  \item[\textsuperscript{65}] Daniel T. Lichter & Kenneth M. Johnson, \textit{The Changing Spatial Concentration of America’s Rural Poor Population,} 72 RURAL SOC. 331, 338 (2007). The USDA’s Economic Research Service “defines counties as being persistently poor if 20 percent or more of their populations were living in poverty continuously for the last 30 years.” \textit{Id.} at 338. That agency observes that under “the 2004 classification,” 340 of the 386 persistently poor counties in the United States are nonmetropolitan. These 386 counties comprise 12% of all counties and are home to 4% of the U.S. population. \textit{Id.} Further, a number of these persistent poverty counties are in the Rio Grande Valley, an area that has borne the brunt of H.B. 2’s consequences.
  \item[\textsuperscript{66}] \textit{Dean Jolliffe,} U.S. DEP’T OF AGRIC., RURAL POVERTY AT A GLANCE (2004), available at http://www.ers.usda.gov/media/875427/rdrr100full_002.pdf (noting that persistent poverty is linked to degree of rurality, as almost 28% of people living in “completely rural” counties—i.e., those not adjacent to a metropolitan county—live in persistent poverty counties, and the poverty rate is highest, at 16.8%, in these completely rural counties).
  \item[\textsuperscript{67}] See Pruitt, \textit{Missing the Mark,} supra note 58 (discussing the limited job markets associated with rural places).
  \item[\textsuperscript{68}] See Pruitt, \textit{Latina/os,} supra note 61, at 141; Johnson et al., \textit{supra} note 33, at 2.
  \item[\textsuperscript{69}] See Seale & Fulkerson, \textit{supra} note 9, at 33 (discussing the significance of the built environment to urban-centric views of access to services); Pruitt, \textit{Rural Lawscape,} \textit{supra} note 55, at 195-20 (discussing the significance of the built environment to law enforcement efforts and legal notions of privacy and vulnerability); \textit{infra} notes 155-168 and accompanying text (discussing distance and travel in relation to the right to vote, including voter identification laws).
  \item[\textsuperscript{70}] Ongoing population loss exacerbates this problem. See HAMILTON ET AL., \textit{supra} note 61, at 26-27; Johnson, \textit{supra} note 61, at 19-25; Johnson et al., \textit{supra} note 33, at 2.
  \item[\textsuperscript{71}] Pruitt, \textit{Gender, Geography,} \textit{supra} note 5, at 359-61. Physical distances are typically more burdensome for rural women than for rural men simply because women generally have fewer resources, and they are already vulnerable to a variety of economic and physical harms. See Daniel T. Lichter & Diane K. McLaughlin, \textit{Changing Economic Opportunities, Family Structures, and Poverty in Rural Areas,} 60 RURAL SOC. 688, 706 (1995) (noting that spatial differences in poverty rates were most strongly correlated with women’s employment and family headship status); Anastasia R. Snyder & Diane K. McLaughlin, \textit{Female-Headed Families and Poverty in America,} 69 RURAL SOC. 127, 146 (2004) (finding that female-headed families, particularly those living in nonmetropolitan areas, are significantly more likely to live in poverty).
spatiality also significantly influences a woman’s ability to exercise her right to terminate a pregnancy.

Only 13% of U.S. counties have an abortion provider; among nonmetropolitan counties, that figure drops to just 3%. Because most abortion providers are located in major metropolitan areas, material or physical space is highly relevant to a rural woman seeking an abortion. A rural woman may find it impossible to get an abortion if she must travel many hours to reach an abortion provider, especially if she has few transportation options, little money, or is otherwise constrained. The farther away the abortion provider,
the greater the likelihood she will be deterred. If a mandatory waiting period or regulations related to medication abortions require that she travel twice or even three times to an abortion provider, she may be literally unable to procure an abortion. In short, her agency has been constrained by spatiality, yes, but also and further by legislation that closes abortion clinics for no legitimate reason.

When judges cannot or will not see rural women’s lived realities, when they turn a blind eye to the spatial and economic consequences of TRAP regulations for this group, they add insult to injury, further marginalizing this vulnerable population.

Finally, it must be noted that American Indian women are especially
marginalized in this context. American Indian women are a subset of rural women who face particularly great barriers to accessing reproductive health services. Their struggles in this regard are aggravated by frequently greater need for abortion because of very high rates of sexual assault—nearly three times that of other women.82 Most American Indian women receive health care services only through Indian Health Services (IHS),83 a federal agency which, under the 1976 Hyde Amendment, is prohibited from providing abortion services except under such circumstances as incest, rape, and danger to maternal health.84 Because IHS serves as the principal health care provider for members of federally recognized American Indian tribes, the Hyde Amendment has a disproportionate effect on Native American women’s ability to procure an abortion. This prohibition combines with the low socioeconomic status of Native American women to create a de facto prohibition of abortion for indigenous women.

B. Spatial Privilege in a Metro-Centric Nation

Critical scholars have for several decades deployed the concept and rhetoric of “privilege” to describe the difficult-to-detect and often-unacknowledged social benefits that some people enjoy but others do not.85

82. See Rebecca A. Hart, No Exceptions Made: Sexual Assault Against Native American Women and the Denial of Reproductive Healthcare Services, 25 WIS. J.L. GENDER & SOC’Y 209, 211 (2010). “First, a Native American woman is sexually assaulted; second, she is unable to seek redress through the criminal justice system; and, third, she is unable to access the reproductive healthcare services she is entitled to in the aftermath of her sexual assault.” Id. at 216.

83. See Charon Asetoyer, Introduction to NATIVE AM. WOMEN’S HEALTH EDUC. RES. CTR., INDIGENOUS WOMEN’S DIALOGUE: ROUNDTABLE REPORT ON THE ACCESSIBILITY OF PLAN B AS AN OVER THE COUNTER (OTC) WITHIN INDIAN HEALTH SERVICE 4 (2012) [hereinafter NAWHERC] (“For land based (reservation) Native American women the only pharmacist on most reservations is within the local Indian Health Service. Other options would be to travel to the nearest city to a mainstream pharmacy to access Plan B, which could be as far away as one hundred miles.”).

84. Policies such as the Hyde Amendment are carried out in an inconsistent manner with respect to federally funded programs such as Medicaid because some states supplement the prohibited federal funds with their own funds to provide free or low-cost abortion services even for Medicaid patients. Because women of color are more likely to rely on federally funded programs, they are “more likely to be directly affected by abortion funding restrictions.” JESSICA ARONS & MADINA AGÉNOR, CTR. FOR AM. PROGRESS, SEPARATE AND UNEQUAL: THE HYDE AMENDMENT AND WOMEN OF COLOR 4, 7 (2010), available at http://cdn.americanprogress.org/wp-content/uploads/issues/2010/12/pdf/hyde_amendment.pdf. There is also evidence to suggest that American Indian women do not know about emergency contraceptives (ECs) such as Plan B; the Native American Women’s Health Education Resource Center points out that the low overall requests for ECs compared to the high incidence of rape in American Indian communities suggests that women are unaware of ECs. It could also mean that IHS providers are not informing their patients of this option, even though it is their responsibility to do so. See NAWHERC, supra note 83, at 11.

85. See, e.g., BOB PEASE, UNDOING PRIVILEGE: UNEARNED ADVANTAGE IN A DIVIDED WORLD (2010); JOSEPH A. SOARES, THE POWER OF PRIVILEGE: YALE AND AMERICA’S ELITE
Stephanie Wildman defines privilege as “the systemic conferral of benefit and advantage . . . [based on] affiliation, conscious or not and chosen or not, to the dominant side of a power system.” Best known, surely, is the concept of white privilege, the notion that white people—by virtue of their skin color and associated social, cultural, and typically economic capital—experience untold benefits of which they are often unaware and which they rarely acknowledge. Peggy McIntosh famously conceptualized white privilege as “an invisible weightless knapsack of special provisions, assurances, tools, maps, guides, codebooks, passports, visas, clothes, compass, emergency gear, and blank checks.” The privilege that facilitates their mobility and comfort in ordinary life is particularly difficult for whites to see. Martha Mahoney observes, “Opening a bank account appears routine, as does air travel without police stops, or shopping without facing questions about one’s identification.”

McIntosh acknowledges variations in the experience of whiteness, but goes on to list forty-six ways in which white privilege benefits whites, largely or implicitly, regardless of class and gender position. Interestingly, McIntosh

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86. See supra note 85, at 29.
89. Id. at 292; see also Mahoney, supra note 87. Mahoney explains that from the position of people of color, white privilege is neither transparent nor invisible, and its reproduction through many conscious and unconscious acts is not at all mysterious. Id. at 1665 n.23. More recently, critical race scholars have begun to question the notion of “white invisibility.” As Ruth Frankenberg explains, the current “conditions and practice of whiteness” render “the notion that whiteness might be invisible . . . bizarre in the extreme.” Ruth Frankenberg, The Mirage of an Unmarked Whiteness, in The Making and Unmaking of Whiteness 72, 76 (Rasmussen et al. eds., 2001). See also John Hartigan, Jr., Establishing the Fact of Whiteness, 99 AM. ANTHROPOLOGIST 495, 498 (1997); Douglas Hartmann et al., An Empirical Assessment of Whiteness Theory: Hidden from How Many?, 56 SOC. PROBLEMS 403 (2009). White privilege arguably became more visible to many more whites in the wake of the August 2014 shooting of an unarmed black teenager, Michael Brown, by a Ferguson, Missouri police officer. See Melissa Block & Michel Martin, The Talk: How Parents of All Backgrounds Tell Kids About the Police, NPR.ORG (Sept. 5, 2014), http://www.npr.org/2014/09/05/346137530/the-talk-how-parents-of-all-backgrounds-tell-kids-about-the-police.
90. Mahoney, supra note 87, at 1665-66.
91. Among other items, McIntosh lists these:
   * I can avoid spending time with people whom I was trained to mistrust and who have learned to mistrust my kind or me.
mentions the role of place—"geographical location"—in her list of other axes of privilege (which, conversely, are also axes of disadvantage), writing that she chose these forty-six items because, “in [her] case,” she saw them as “attach[ing] somewhat more to skin color privilege than to class, religion, ethnic status, or geographical location, though of course all these other factors are intricately intertwined.” 92 McIntosh thus recognizes the relevance of geography to the privilege framework she articulates, even as she downplays its significance regarding her own life and the manifestations of privilege that she enumerates in relation to herself.

Let us be very clear that we see limits in the analogy of spatial privilege to white privilege, not least because, as McIntosh has argued, racial power is a zero-sum game.93 For every bit of power associated with whiteness or which a white person enjoys, the power of racial minorities is diminished.94 The zero-

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* If I should need to move, I can be pretty sure of renting or purchasing housing in an area which I can afford and in which I would want to live.
* I can be pretty sure that my neighbors in such a location will be neutral or pleasant to me.
* I can go shopping alone most of the time, pretty well assured that I will not be followed or harassed.
* I can turn on the television or open to the front page of the paper and see people of my race widely represented.
* I can speak in public to a powerful male group without putting my race on trial.
* I can do well in a challenging situation without being called a credit to my race.
* I am never asked to speak for all the people of my racial group.

McIntosh, supra note 88, at 293.

92. Id.

93. The distinction between mutable and immutable characteristics is another limitation. But see IAN HANEY-LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996) (documenting how law has constructed race); Jill M. Fraley, Invisible Histories and the Failure of the Protected Classes, 29 HARV. J. ON RACIAL & ETHNIC JUST. 95, 115-16 (2013) (arguing that race and ethnicity, because they are socially constructed, have proved difficult to define, which has undermined the protected classes concept of equal protection law) (citing john a. powell, The “Racing” of American Society: Race Functioning as a Verb Before Signifying as a Noun, 15 LAW & INEQ. 99, 106 (1997))..

94. McIntosh, supra note 88 at 292. Michael Omi explains:

Political issues are frequently racially coded and framed in a manner that uncritically assumes a zero-sum game of race relations. In this zero-sum game, group members are seen as ‘naturally’ segregated and fundamentally antagonistic toward each other. One group’s gain is perceived to be another group’s loss. Herein lies the possibilities for open conflict.

sum game is not necessarily implicated by spatial privilege, although rural and urban places do compete for resources.\(^{95}\) Take transportation dollars as an example particularly relevant to socio-spatial milieu that is rural America—and to laws like H.B. 2 in Texas. The U.S. government spends a fixed amount on transportation, and less than 10% of it goes to rural areas,\(^{96}\) although over 95% of the nation’s land area is considered rural.\(^{97}\) Further, the scramble for stimulus dollars over the past several years often pitted rural interests against those of metropolitan areas.\(^{98}\) The federal government’s recent designation of “Promise Zones”\(^{99}\)—both rural and urban—is another illustration of how competition for federal dollars pits places against one another.\(^{100}\) Promise Zones are federally designated areas that will receive preference in competing for certain federal monies, the goal being to concentrate fiscal support in a few particular places in order to assess the benefits of doing so.\(^{101}\)

Class privilege has been the subject of less attention in the United States, no doubt a side effect of our nation’s general embrace of the “American dream” ideal and the pervasive denial of class stratification that seems to accompany it.\(^{102}\) But one can find occasional mentions of class privilege, such as liberal

\(^{95}\) See, e.g., Lisa R. Pruitt, *The Forgotten Fifth: Rural Youth and Substance Abuse*, 20 STAN. L. 
& POL’Y REV. 359, 398-99 (2009) (observing that rural areas are much more reliant on state and federal funding for substance abuse prevention and treatment programs, but that funding for such federal programs favors urban populations).


\(^{97}\) See [A Transportation Bill for Rural America](http://www.dailyyonder.com/transportation-bill-rural-america/2011/04/20/3288) (advocating for federal transportation policy to ensure that rural communities have the same level of choice as urban communities in pursuing multiple transportation goals and options); KRISTIN E. SMITH & ANN R. TICKAMYER, *ECONOMIC RESTRUCTURING AND FAMILY WELL-BEING IN RURAL AMERICA*, 340-41 (2011) (“Rural areas tend to be a lesser priority for politicians. Even if an administration or policy is favorable to government assistance, including recent stimulus efforts, the benefits are disproportionately neglectful of rural areas.”).

\(^{98}\) See also [Pruitt, Class Culture Wars](http://www.jstor.org/stable/25719787) supra note 8, at 785 (discussing the race for federal stimulus dollars in relation to the rural-urban continuum).

\(^{99}\) See [Promise Zones](http://www.hudexchange.info/promise-zones/) (last visited Jan. 15, 2015) (explaining that communities may compete in a process to become “Promise Zones,” which would then provide preferential treatment for certain federal programs).

\(^{100}\) Further, the rhetoric of these discussions can be quite harsh, revealing disdain for rural livelihoods. See Pruitt, *Class Culture Wars*, supra note 8, at 786 (quoting Michael Katz, former FCC commissioner, speaking in opposition to federal investment in rural broadband: “Other people don’t like to say bad things about rural areas . . . [s]o I will . . . The notion that we should be helping people who live in rural areas avoid the costs that they impose on society . . . is misguided . . . from an efficiency point of view and an equity one.”); see also Jennifer Bradley & Bruce Katz, *Village Idiocy: Enough with Small-Town Triumphalism*, NEW REPUBLIC (Oct. 8, 2008), http://www.newrepublic.com/article/urban-policy/village-idiocy.

\(^{101}\) *Promise Zones*, supra note 99.

\(^{102}\) Reflecting this denial, Paul Fussell has called social class America’s “dirty little secret.”
commentator Thomas Frank’s statement of his epiphany in that regard.

The theories of the universe that I developed so painstakingly . . . were but fantasies that arose directly from my peculiar perch in life. Here was I, a Mission Hills [Kansas] lad, growing up in one of the perfect regional arcadies of American capitalism . . . and what I had managed to do was invent a romantic justification for precisely the system of social arrangements that had made Mission Hills possible.103

Frank quotes William Allen White, who recognized himself as “a cocksure lad who never suspected that his political ideas were derived more from his fortunate social position than from reason and learning. . . . Being what I was, a child of the governing classes, I was blinded by my birthright.”104

Indeed, in a 2010 opinion, Chief Judge Alex Kozinski of the U.S. Court of Appeals for the Ninth Circuit remarked on the blind spot created by the socioeconomic privilege enjoyed by those on the federal bench:

There’s been much talk about diversity on the bench, but there’s one kind of diversity that doesn’t exist: No truly poor people are appointed as federal judges, or as state judges for that matter. Judges, regardless of race, ethnicity or sex, are selected from the class of people who don’t live in trailers or urban ghettos. The everyday problems of people who live in poverty are not close to our hearts and minds because that’s not how we and our friends live.105

Just as Kozinski observed federal judges’ general inability to empathize with poor people, we maintain that most are also unable to empathize with rural people. In the same way that federal judges do not typically come from trailers or urban ghettos, it appears that few grew up in rural places. Further, many

Paul Fusse, Thank God for the Atom Bomb and Other Essays 14 (1988). See also Jennifer L. Hochschild, Facing Up to the American Dream: Race, Class and the Soul of the Nation 4 (1995) (discussing the American dream that promises that everyone, “regardless of ascription or background, may reasonably seek success through actions and traits under their own control”). But see Gregory Acs, Pew Charitable Trusts, Downward Mobility from the Middle Class: Waking Up from the American Dream (2011), available at http://www.urban.org/UploadedPDF/1001603-Downward-Mobility-from-the-Middle-Class.pdf (defining the middle-class group as those falling between the thirtieth and seventieth percentiles of the family-size-adjusted income distribution and finding that 28% of children raised in middle-class families are downwardly mobile as adults); Ruy Teixeira & Joel Rogers, America’s Forgotten Majority: Why the White Working Class Still Matters 4 (2000) (asserting that white working-class men and women constitute 55% of the voting population and continue to be the swing voters in the United States).

105. U.S. v. Pineda-Moreno, 617 F.3d 1120, 1123 (9th Cir. 2010) (Kozinski, J., dissenting).
judicial opinions suggest that their authors have had little, if any, firsthand exposure to rural people and places. As a consequence, rurality is mere abstraction for many federal judges.106

It is indisputable that the United States has become a far more urban nation over the past several decades.107 As of the 2010 Census, only 19.3% of our nation’s population live in rural areas, as they are defined by the U.S. Census Bureau: population clusters smaller than 2,500 or in open territory.108 According to that same decennial census, only 15% live in nonmetropolitan counties, those with populations of less than 100,000 and with no population cluster larger than 50,000.109 Of the 85% of the U.S. populace who live in metropolitan areas, more than half live in so-called major metropolitan areas, those with one million or more residents.110 Thus, most Americans now “come to know rural America only through stereotypical media portrayals . . . through exposure to rural vacation spots . . . or by traversing the rural countryside from city to city by automobile.”111 As a consequence, “[t]he true nature of rurality—the worldviews of rural people and the conditions of their lives”—is inconsistent with most Americans’ perceptions.112 The lives of most Americans are not bound to the rural in ways that were more common in prior generations.113 Views of the rural
milieu are thus frequently formed at a distance and are not well founded.114

Among those with an increasingly attenuated connection to rural livelihoods—if they have any connection at all—are members of the federal judiciary. The fact that four U.S. Supreme Court Justices hail from New York City alone attracted some media attention when Justice Elena Kagan, a native of Manhattan, was appointed to the Court.115 Of course, Justice Kagan’s appointment came hot on the heels of the appointment of Justice Sonia Sotomayor, who grew up in the Bronx.116 When President Obama briefly considered Judge Sidney R. Thomas of the Ninth Circuit for the U.S. Supreme Court spot that ultimately went to Justice Kagan, rural advocates took note because Thomas had spent most of his life in Montana and was perceived to be in touch with the rural milieu.117 The brief candidacy of Thomas was also interesting in that he was without the elite educational credentials now increasingly associated with the federal bench118 and with metropolitan upbringings.119 These associations with elite education and city living may be

114. See Pruitt, Rural Rhetoric, supra note 5, at 164-65; see also Seale & Fulkerson, supra note 9, at 33.


116. See Barron, supra note 115.


118. Id. (noting that, if nominated and approved, Judge Sidney R. Thomas, a graduate of the University of Montana Law School, would be the only Supreme Court justice without a law degree from Harvard, Yale, or Columbia). See also Benjamin H. Barton, An Empirical Study of Supreme Court Justice Pre-Appointment Experience, 64 FLA. L. REV. 1137, 1168-69 (2012) (finding that the educational credentials of Supreme Court justices have grown increasingly elite and that the current Roberts Court justices accumulated fifty-five total years of elite education, with elite defined as Ivy League or Stanford).

119. See Thomas J. Espenshade & Alexandria Walton Radford, No Longer Separate, Not Yet Equal: RACE AND CLASS IN ELITE COLLEGE ADMISSION AND CAMPUS LIFE 126 (2009) (finding that involvement in 4-H, Future Farmers of America, and ROTC hurt the applications of those seeking admission to elite colleges and universities, as did involvement in other “career-oriented” activities or holding a part-time job). See also Caroline Hoxby & Christopher Averv, The Missing “One-Offs”: The Hidden Supply of High-Achieving, Low-Income Students, BROOKINGS PAPERS ON ECON. ACTIVITY, Spring 2013, at 1 (finding that the vast majority of high-achieving, low-income students who apply to elite colleges are clustered in big-city public high schools that have competitive admissions, in part because these are the only public high schools with which elite colleges typically have ongoing relationships). In light of apparent admissions office bias against rural applicants, it is interesting to note that geographical diversity was once a valued part of our concept of diversity in elite higher education. In Bakke v. Regents of the University of California, Justice Powell endorsed the view of diversity held by several elite universities, including Harvard:

When the Committee on Admissions reviews the large middle group of applicants who are ‘admissible’ and deemed capable of doing good work in their courses, the race of an applicant may tip the balance in his favor just as geographic origin or a life spent on a farm may tip the balance in other candidates’ cases. A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer.
particularly strong with regard to U.S. Courts of Appeals judges given that these judges are appointed by the executive branch, members of which also increasingly boast elite educational credentials.\footnote{120}

We have not conducted an empirical study of the biographies of the federal judges who have ruled in each and every abortion case,\footnote{121} but it would not be surprising if federal district judges were more likely than those at other levels of the federal judiciary to have grown up in rural or nonmetropolitan areas. Federal district judges are, after all, more likely than their Court of Appeals counterparts to have their chambers in small cities and nonmetropolitan locales and, of course, to preside over trials in such places.\footnote{122} This is particularly true in states with substantial rural or nonmetropolitan populations.\footnote{123} Such states include Alabama,\footnote{124} Texas,\footnote{125} Indiana,\footnote{126} Mississippi,\footnote{127} Minnesota,\footnote{128} Pennsylvania,\footnote{129} and

Similarly, a black student can usually bring something that a white person cannot offer.


\footnote{120} One of us has elsewhere tracked the ways in which educational elitism has crept into the executive branch in the past few decades, with striking differences in the educational credentials even between the cabinet secretaries serving in the Clinton and Obama administrations. Pruitt, Class Culture Wars, supra note 8, at 782-84.

\footnote{121} Below, however, we discuss the locales where the three Fifth Circuit judges who ruled in \textit{Abbott} came of age. See infra notes 294-295.

\footnote{122} Texas, for example, has federal courthouses in many small cities. For instance, Alpine’s population is 6,054; Pecos’s population is 8,903; Marshall’s population is 24,501; Del Rio’s population is 35,589; Lufkin’s population is 36,085; San Angelo’s population is 97,492; Texarkana’s population is 37,442; Galveston’s population is 48,733. See \textit{State & County QuickFacts: Texas}, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/48000.html (choose city from dropdown menu) (last visited Nov. 1, 2014).

\footnote{123} Depending on the definition of “rural” or “nonmetropolitan,” a state may be deemed rural, substantially rural, or predominantly rural. For example, Arkansas’s population is 46% rural, using the Census Bureau’s definition of that term (i.e., population clusters below 2,500 or in open territory); the state is 43% nonmetropolitan using the Office of Management and Budget (OMB) definition (“geographical entities including one or more counties containing a core urban area of 50,000 or more people, together with any adjacent counties that have a high degree of social and economic integration with the urban core” (p. 11)). But, if one raises the population cluster threshold by which urban is defined to 50,000 or more, 81% of Arkansas is rural. See \textit{Rural Definitions: Arkansas}, U.S. DEP’T AGRIC. 1, 8 (2007), http://www.ers.usda.gov/datafiles/Rural_Definitions/StateLevel_Maps/AR.pdf. North Dakota’s population is 45% rural using the Census Bureau’s definition, but 55% nonmetropolitan using the OMB definition, and 77% rural if using the definition of “rural” as a place other than those in population clusters of 50,000 or more. See \textit{Rural Definitions: North Dakota}, U.S. DEP’T AGRIC. 8 (2007), http://www.ers.usda.gov/datafiles/Rural_Definitions/StateLevel_Maps/ND.pdf.

\footnote{124} Planned Parenthood Southeast, Inc. v. Strange, 2014 U.S. Dist. Lexis 106159, at *85-86 (M.D. Ala. 2014) (finding that the Alabama admitting-privileges law constituted an undue burden on many Alabama women, but with a particular focus on urban women who previously had abortion more readily available to them, while expressly discounting the added burden the law would pose for rural women, who are more accustomed to the burdens of distance). Planned Parenthood Southeast, Inc. v. Bentley, 951 F. Supp. 2d 1280, 1286-89 (M.D. Ala. 2013) (enjoining enforcement of a law requiring abortion providers to have hospital-admitting privileges because of the likelihood it would be unconstitutional and
discussing at length the likely closure of abortion clinics that would result from the law’s enforcement, creating undue burdens on poor women. Alabama’s population is 43% rural using the Census Bureau’s definition, but 29% metropolitan using the OMB definition, and 76% rural if using the definition of “rural” as a place other than those in population clusters of 50,000 or more. See Rural Definitions: Alabama, U.S. DEP’T AGRIC. 1, 8 (2007), http://www.ers.usda.gov/datafiles/Rural_Definitions/StateLevel_Maps/AL.pdf.

125. See infra notes 241-262 and accompanying text (discussing the federal district judge’s ruling on admitting privilege requirement in Abbott) and Part III.C (discussing federal district judge’s ruling on ASC requirement in Lakey). Texas’s population is 24% rural using the Census Bureau’s definition, but 13% metropolitan using the OMB definition, and 48% rural if using the definition of “rural” as a place other than those in population clusters of 50,000 or more. See Rural Definitions: Texas, U.S. DEP’T AGRIC. 1, 8 (2007), http://www.ers.usda.gov/datafiles/Rural_Definitions/StateLevel_Maps/TX.pdf.

126. A Woman’s Choice-E. Side Women’s Clinic v. Newman, 132 F. Supp. 2d 1150, 1159 (S.D. Ind. 2001) (striking as unconstitutional a law that required a woman to make two visits to an abortion provider and noting that the law would likely increase significantly the number of women traveling out of state to procure abortion). The Seventh Circuit later reversed the decision, finding that the law’s two-visit requirement did not constitute an undue burden. A Woman’s Choice-E. Side Women’s Clinic v. Newman, 305 F.3d 684 (7th Cir. 2002). Judge Diane Wood dissented, noting the burden on rural women and that Indiana, “like all states,” has “significant rural areas and significant numbers of people living far from a reproductive health services facility.” Id. at 711 (Wood, J., dissenting). Indiana’s population is 40% rural using the Census Bureau’s definition, but 22% metropolitan using the OMB definition, and 70% rural if using the definition of “rural” as a place other than those in population clusters of 50,000 or more. See Rural Definitions: Indiana, U.S. DEP’T AGRIC. 1, 8 (2007), http://www.ers.usda.gov/datafiles/Rural_Definitions/StateLevel_Maps/IN.pdf.

127. See Jackson Women’s Health Org. v. Currier, 940 F. Supp. 2d 416, 418 (S.D. Miss. 2013) (granting a preliminary injunction against a state law requiring abortion providers to have hospital-admitting privileges nearby). The Fifth Circuit upheld the injunction in a July 2014 decision, but it did so on a different basis from the Fifth Circuit decision in Abbott. The court in Currier held that, because the Mississippi law would close the state’s only remaining abortion clinic, it would foist onto neighboring states Mississippi’s obligation with respect to the abortion right. Jackson Women’s Health Org. v. Currier, 760 F.3d 448, 457 (5th Cir. 2014). Mississippi’s population is 53% rural using the Census Bureau’s definition, but 58% metropolitan using the OMB definition, and 89% rural using the definition of “rural” as a place other than those in population clusters of 50,000 or more. See Rural Definitions: Mississippi, U.S. DEP’T AGRIC. 1, 8 (2007), http://www.ers.usda.gov/datafiles/Rural_Definitions/StateLevel_Maps/MS.pdf.

128. See Hodgson v. Minnesota, 648 F. Supp. 756, 761, 763-66, 779-80 (D. Minn. 1986) (striking down the forty-eight-hour, two-parent notice requirement as unconstitutional and discussing at length the spatial configuration of abortion providers in Minnesota, as well as data on where the Minnesota women getting abortions lived, the cost of abortion in Minnesota, the stage of gestation when Minnesota women tended to get abortion, and the lack of familiarity with judicial bypass on the part of non-metropolitan judges). The Eighth Circuit reversed the decision in this pre-Casey case. Hodgson v. Minnesota, 853 F.2d 1452 (8th Cir. 1988). Minnesota’s population is 28% rural using the Census Bureau’s definition of rural as all areas outside Census places with 2500 or more people, but 45% rural using the definition of “rural” as a place other than those in population clusters of 50,000 or more. See Rural Definitions: Minnesota, U.S. DEP’T AGRIC. 1, 8 (2007), http://www.ers.usda.gov/datafiles/Rural_Definitions/StateLevel_Maps/MN.pdf.

129. The district court in Casey found the twenty-four-hour waiting period, informed parental consent, and spousal notification requirements unconstitutional. Planned Parenthood of Se. Pa. v. Casey, 744 F. Supp. 1323, 1352, 1379 (E.D. Pa. 1990) (noting that the twenty-four-hour waiting period would “force women to double their travel time or stay overnight at a location near the abortion facility” and that doing so would be “particularly burdensome to those women who have the least financial resources, such as the poor and the young, those
and North Dakota, all states where federal district judges have shown sensitivity to the travel burdens that abortion regulations impose on rural women. U.S. Courts of Appeals considering the same regulations have often overturned the corresponding federal district court’s decision.

women that travel long distances, such as women living in rural areas . . . .). The U.S. Court of Appeals for the Third Circuit reversed, upholding the waiting period and finding only the spousal notification requirement unconstitutional. Planned Parenthood of Se. Pa. v. Casey, 947 F.2d 682 (3d Cir. 1991). Pennsylvania’s population is 48% rural using the Census Bureau’s definition, but 16% metropolitan using the OMB definition, and 80% rural if using the definition of “rural” as a place other than those in population clusters of 50,000 or more. See Rural Definitions: Pennsylvania, U.S. DEP’T AGRIC. 1, 8 (2007), http://www.ers.usda.gov/datafiles/Rural_Definitions/StateLevel_Maps/PA.pdf.

130. See MKB Mgmt. Corp. v. Burdick, 954 F. Supp. 2d 900, 908 (D.N.D. 2013) (enjoining the enforcement of a North Dakota law that would prohibit an abortion upon detection of fetal heartbeat, noting that many women must travel long distances to reach an abortion provider, especially in North Dakota where there is only one abortion provider); Leigh v. Olson, 497 F. Supp. 1340 (D.N.D. 1980) (holding that certain provisions of North Dakota Abortion Control Act were unconstitutional, including a 48-hour waiting period and a parental notification provision). Cf. Fargo Women’s Health Org. v. Sinner, 819 F. Supp. 862, 865 (D.N.D. 1993) (“[T]he court should not be asked in a facial challenge to invalidate a legislative act ‘based upon a worst-case analysis that may never occur.’ Plaintiffs should save their arguments regarding the degree of burden imposed by these statutory restrictions for an as-applied challenge to the Act’s constitutionality . . . . [W]hile the court is not unsympathetic to the burdens a woman may face when seeking to have an abortion in North Dakota, ‘differences between the [North Dakota] and Pennsylvania Acts are not sufficient to render the former unconstitutional on its face.” (citations omitted)), aff’d sub nom. Fargo Women’s Health Org. v. Schafer, 18 F.3d 526, 533 (8th Cir. 1994) (“Although the distance a woman must travel to obtain an abortion may be a factor in obtaining an abortion, it is not a result of the state regulation. We do not believe a telephone call and a single trip, whatever the distance to the medical facility, create an undue burden.” (emphasis added)).

131. Also of note in this regard is the 2007 decision of the Alaska Supreme Court, overturning a law that required parental consent for all females under the age of 17. State v. Planned Parenthood of Alaska, 171 P.3d 577 (Alaska 2007). Cf. Pro-Choice Miss. v. Fordice, 716 So.2d 645 (Miss. 1998) (affirming a state chancery court judgment that upheld the constitutionality of a twenty-four-hour waiting period and a provision requiring minors, with a limited exception, to obtain consent of both parents prior to having an abortion). One of us has written elsewhere of the differing implications of parental notification laws in rural settings, in particular because of the lack of anonymity associated with rurality and the chilling effect this has on young women seeking judicial bypass when the judge may also be a member of their community. Pruitt, Toward, supra note 7, at 478-82. On the issue of distance, the federal district court in Utah in Utah Women’s Clinic, Inc. v. Levitt used Alaska to illustrate its understanding of the undue burden standard as it relates to distance, writing:

A woman in Alaska, for example, could be required to travel 800 miles to get to an abortion clinic merely because she lives in one place and the nearest abortion clinic is on the other side of the state. But that certainly doesn’t constitute anything approaching an undue burden because Roe v. Wade does not require an abortion clinic in close proximity to every woman’s home.

Utah Women’s Clinic, Inc. v. Levitt, 844 F. Supp. 1482, 1491 n.11. (D. Utah 1994), rev’d in part on other grounds, 75 F.3d 564 (10th Cir. 1995).

The concept of spatial privilege is useful for understanding and labeling many judges’ apparent inability (if not willful refusal) to see how rural women’s agency is limited by their spatial circumstances, which are often inextricably linked to their socioeconomic plight. Recall that McIntosh illustrates white privilege and the difficulty that whites have in recognizing it by observing that whites experience many activities as routine transactions (like opening a bank account, air travel without police stops, and shopping without being questioned about one’s identification). By the same token, urban dwellers—including many federal judges—experience as routine easy access to grocery stores and post offices, often within walking distance of their homes. While more sophisticated services, such as medical care and government services (e.g., motor vehicle licensing) may require a longer journey, those living in urban and suburban places can count on the availability of public transportation to make such journeys. It is not surprising that those living in metropolitan areas—especially if they have never experienced rural living—would take for granted a spatial landscape marked by a comprehensive built environment offering many services, along with a transportation infrastructure that facilitates access to them.

Urbanites may also fail to perceive their spatial privilege and resultant

133. See Kathryn Abrams, Subordination and Agency in Sexual Harassment Law, in DIRECTIONS IN SEXUAL HARASSMENT LAW 111 (Catharine A. MacKinnon & Reva B. Siegel eds. 2004) (explaining the usefulness of the concept of agency to feminist legal theorists, and illustrating its utility in the sexual harassment context in particular).

134. Eighty-one percent of high poverty counties (571 of 703) are nonmetropolitan. KUSMIN, supra note 8, at 4. Between 2001 and 2011, the number of high-poverty counties increased by 230; some of these 230 counties were located adjacent to clusters of persistent poverty counties. Id. Further, the persistence of poverty is linked to degree of rurality. Close to twenty-eight percent of those living in “completely rural” counties, i.e., not adjacent to a metropolitan country, live in persistent poverty counties. Further, poverty rates are highest in these completely rural counties. See JOLLIFFE, supra note 66.

135. See McIntosh, supra note 88 and accompanying text. On the difficulty of seeing one’s own privilege, see PEASE, supra note 85; Stephanie Wildman & Adrienne D. Davis, Making Systems of Privilege Visible, in PRIVILEGE REVEALED, supra note 85, at 7.


137. Of course, access to services, including public transportation, varies greatly from one metropolitan area to another, and it will generally be less convenient in suburbs than in the urban core. Further, our assertion is not that metropolitan access to services is easy, merely that it is typically far easier than for a rural resident.
metro-centricity because theirs is the dominant perspective.\textsuperscript{138} Regarding white privilege, Martha Mahoney has observed that the transparency of whiteness—that is, whites’ difficulty “perceiving whiteness” and its power—is due to “its cultural prevalence and because of its cultural dominance.”\textsuperscript{139} “In our own eyes,” Mahoney writes, “‘we’ appear to be ‘people without culture.’ By courtesy, ‘we’ extend this noncultural status to people who (‘we’ think) resemble ‘us.’”\textsuperscript{140} Those who are metro-centric, including judges, presumably accord the same courtesy to rural people—but only to the extent that rural people resemble urbanites. Sadly, evidence abounds that urbanites see rural people as somewhat peculiar; indeed, rural people have become a cultural spectacle—a nearly all-purpose whipping boy—in popular culture.\textsuperscript{141} Rural people—along with the conditions of their lives—are thus “othered.”\textsuperscript{142} Furthermore, to the extent that urbanites understand the realities of rural livelihoods, urban dwellers may blame rural denizens for their circumstances, for choosing to live where they do.\textsuperscript{143}

C. Critical Rural Studies and Law’s Urbanormativity

In the same way that white privilege may lead whites to explain relative white success (e.g., the earnings gap between black and white), “not by invoking inequality and prejudice, but by relying on ‘individualistic’ explanations about thrift, hard work, and other factors,”\textsuperscript{144} spatial privilege may cause judges to assume that if a woman wants an abortion badly enough, she can and will make it happen.\textsuperscript{145} Many judicial decisions thus reveal the court’s “assumptions of

\textsuperscript{138} See supra note 8.

\textsuperscript{139} Mahoney, supra note 87, at 1664.

\textsuperscript{140} Id. (citing Renato Rosaldo, Culture and Truth: The Remaking of Social Analysis 198 (1989)).

\textsuperscript{141} See Thomas et al., supra note 9, at 151 (suggesting that an aspect of urbanormativity is the assumption that any “departure from an urban lifestyle is deviant”); Pruitt, Class Culture Wars, supra note 8 (tracking media denigration of rural Americans in the 2008 presidential election); see generally Fraley, supra note 93, at 95 (documenting cultural denigration of Appalachians in particular). In fact, television shows that depict rural residents—mostly whites and usually in derogatory ways—have proliferated in recent years, with ninety such shows having been introduced since 2005. Karl Jicha, Depictions of 21st Century Rural America in Television Programming: Celebrating Southern Culture or Redneckploitation?, Presentation at the Rural Sociological Society’s Annual Meeting (Aug. 3, 2014) (on file with author).

\textsuperscript{142} See Thomas et al., supra note 9, at 155-69 (asserting that rural life is simplified in popular culture, which depicts it as simple, wild, or an escape from the urban).

\textsuperscript{143} See Annie Lowery, What’s the Matter with Eastern Kentucky?, N.Y. Times Mag. (June 26, 2014), http://www.nytimes.com/2014/06/29/magazine/whats-the-matter-with-eastern-kentucky.html (suggesting that poor people living in economically depressed areas like Eastern Kentucky should leave for greener pastures—places with more economic opportunity—and discussing why they often do not do so); see supra note 100 (including Michael Katz quote).

\textsuperscript{144} Mahoney, supra note 87, at 1668.

\textsuperscript{145} Note that the inquiry in Casey was not whether the obstacles put in a woman’s way are insurmountable, but whether they were substantial. See infra note 183 and accompanying
individual responsibility—for both the consequences of having sex and of living in an inconvenient place.”146 That is, the individualistic explanation is greatly appealing to the spatially privileged judge, for whom the obstacle of distance is minor given his or her access to an automobile, public transportation networks, or amenities and services by foot. For that judge, the lack of transportation—the profound challenge of getting from place to place—is a mere abstraction.147 Blinded by their own spatial (and class and sometimes gender) privilege, some judges have no basis on which to empathize with a poor, rural woman.148 Many appear unable to comprehend the spatial and financial obstacles facing the woman. The socio-spatial context of her life is thus effectively concealed, and thereby rendered irrelevant to the legal issue at hand: whether laws that close abortion clinics create undue burdens. To many federal judges, then, procuring an abortion becomes simply a matter of grit and determination. This framing,

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146. Pruitt, Toward, supra note 7, at 441. See generally Burkstrand-Reid, supra note 43.

147. For a discussion of the role of judicial preconceptions in decision-making, see generally Epstein et al., supra note 136, at 44 (“Judicial decisions . . . involving either factual or legal uncertainty (or both) can be expected to be heavily influenced by the preconceptions that a judge brings to a case.”).

148. For a discussion of the appropriateness of judicial empathy, see Kathryn Abrams, Empathy and Experience in the Sotomayor Hearings, 36 Ohio N.U.L. Rev. 263 (2010). Justice Sonia Sotomayor has been particularly associated with judicial empathy. See generally Carla D. Pratt, Judging Identity, 36 T. Jefferson L. Rev. 1 (2013). Issues of judicial empathy and relatability arose in relation to a few Supreme Court decisions made during the summer of 2014. On the unanimous decision that warrantless searches of cell phones are unconstitutional, Riley v. California, Linda Greenhouse suggested that all of the Justices could relate to the issue because all use cell phones. Indeed, she suggested that the case did not require judicial empathy because “[t]he justices are walking in their own shoes. The ringing cellphone could be theirs.” Linda Greenhouse, The Supreme Court Justices Have Cellphones—Too, N.Y. Times (June 25, 2014), http://www.nytimes.com/2014/06/26/opinion/linda-greenhouse-the-supreme-court-justices-have-cellphones-too.html (suggesting other Fourth Amendment cases in which judicial empathy has been at play, dating back to the Rehnquist Court). The 2014 furor over the decision by six male Justices in Burwell v. Hobby Lobby to limit the availability of contraception similarly drew attention to judicial empathy. See Deborah C. Weiss, Blogging Federal Judge Says It’s Time for SCOTUS to ‘Sfu’, A.B.A. J. (July 8, 2014), http://www.abajournal.com/news/article/blogging_federal_judge_says_it’s_time_for_scotus_to_sfu_will_he_give_up_bl/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email (discussing U.S. District Court Judge Richard Kopf’s criticism of the U.S. Supreme Court for accepting Burwell v. Hobby Lobby Stores, 134 S. Ct. 2751 (2014), and issuing a decision that opens the justices to accusations of partisanship, and suggesting the court should avoid hot-button cases in the following term); Richard Kopf, Remembering Alexander Bickel’s Passive Virtues and the Hobby Lobby Cases, HERCULES & UMPIRE (July 5, 2014), http://herculesandheumpire.com/2014/07/05/remembering-alexander-bickels-passive-virtues-and-the-hobby-lobby-cases (stating that the presence of five male Justices of the Supreme Court—who were each appointed by a Republican President—on Hobby Lobby, creates a result that “looks stupid and smells worse” to the average person); Hilary Stauffer, Hobby Lobby Shows the Need for a More Diverse Supreme Court, HUFFINGTON POST (July 4, 2014), http://www.huffingtonpost.com/hilary-stauffer/hobbylobby-shows-the-need_b_5554583.html (highlighting that the five male Justices who made up the majority in Hobby Lobby all identify as Roman Catholic and are fifty-nine years of age or older and that the Court’s three female Justices were in the minority on the case).
URBANORMATIVITY, SPATIAL PRIVILEGE AND JUDICIAL BLIND SPOTS

however, diminishes the constitutional requirement that a state must not unduly burden a woman’s choice.

The unacknowledged spatial privilege enjoyed by many federal judges—particularly those in the higher echelons of the federal bench—is a creature of our nation’s increasing metro-centricity and a cause of law’s burgeoning urbanormativity. Related to this urbanormativity is the issue of spatial inequality: “the advantages and disadvantages that emerge as a result of position in physical space.”149 When it comes to the built environment and the associated availability of services, rural places are grossly underserved compared to their urban counterparts. Yet urban dwellers often do not grasp this reality. Seale and Fulkerson explain:

Having access to employers, schools, hospitals, retail establishments, as well as other amenities and necessities of life, is highly predicated on location in physical space and planning with regard to the built environment. Metropolitan areas by definition contain a higher density of people as well as goods and services that serve them, including (to varying degrees) viable transportation alternatives that enhance access. In contrast, rural communities are confronted with a range of challenges related to living with large tracts of physical space, including an inability to provide efficient and affordable public transportation, continuing mandates to consolidate or close schools, similar pressures to consolidate medical services, dealing with a limited number of options when it comes to finding work, and operating with a smaller tax base to support local amenities such as parks or other leisure outlets, not to mention maintaining basic infrastructural needs. Taking all this into consideration, one can observe that an urbanormative lens would presuppose easy access to most of life’s basic needs and wants. For rural communities, a premium must be paid in order to gain access to these taken-for-granted facets of life.150

149. Seale & Fulkerson, supra note 9, at 33 (citing THE SOCIOLOGY OF SPATIAL INEQUALITY (Linda Loba et al. eds., 2007)). See also Lisa R. Pruitt & Beth A. Colgan, Justice Deserts: Spatial Inequality and Local Funding of Indigent Defense, 52 Ariz. L. Rev. 219, 312 (2010) (finding that Arizona’s system of funding county government disproportionately strains the coffers of nonmetropolitan counties, particularly with regards to indigent defense); Lisa R. Pruitt, Spatial Inequality as Constitutional Infirmit: Equal Protection, Child Poverty, and Place, 71 Mont. L. Rev. 1, 73-78 (2010) [hereinafter Pruitt, Constitutional Infirmit] (finding that Montana’s lack of centralization in financing county government creates significant disparities between counties rich in resources compared to those which are not, leaving many of Montana’s rural children particularly vulnerable and with few health and human services); Pruitt, The Forgotten Fifth, supra note 95, at 398-99 (observing the urban bias in federal funding for substance abuse prevention and treatment). Seale and Fulkerson also bring identity into the picture, observing: “Inequality scholars have neglected space—rural and urban—as pertinent to stratification or identity construction and the ways these overlap.” Seale & Fulkerson, supra note 9, at 32-33 (citing KNOWING YOUR PLACE (Barbara Ching & Gerald W. Creed eds., 1997).

150. Seale and Fulkerson, supra note 9, at 33. Another way of thinking about urbanormativity is as “urban bias.” See, e.g., Luke A. Boso, Urban Bias, Rural Sexual Minorities, and the
Tacit neglect or misunderstanding of the rural milieu in other legal contexts similarly reveals the urbanonormativity of the U.S. Supreme Court’s jurisprudence. In considering the constitutionality of school bus service fees, voter identification laws, and prayer at town hall meetings, the Court has disregarded the needs of rural residents or simply overlooked how rural livelihoods differ from an implicit urban norm.

In holding that school bus services are not constitutionally required, for example, the Court in 1988 in *Kadrmas v. Dickinson Public Schools* demonstrated a lack of understanding of the burden of distance on rural families with school-aged children.\(^{151}\) The Court held that North Dakota public schools were not required under the U.S. Constitution to provide bus services to their students.\(^{152}\) Although Justice O’Connor noted the law’s disparate effects in relation to wealth,\(^{153}\) she did not recognize the disparate impact the law would have on rural families. On the one hand, the Court recognized a spatial phenomenon: that population density directly affected school district structure, prompting school districts with small populations to ‘reorganize’ into larger districts in order to be more efficient.\(^{154}\) On the other, the Court overlooked the spatial inequality that resulted from requiring families to bear the cost of school bus transportation. The Court’s failure to take seriously rural difference and the disadvantages it created for rural families suggests that the lived realities and fiscal costs associated with rural spatiality are not readily cognizable to the Justices, even when those Justices pay lip service to economic inequality.

The Court has similarly failed to take seriously the obstacle of distance in the voting rights context. In *Crawford v. Marion County*, the Court in 2008 upheld an Indiana law that required voters to present government-issued photo identification in order to cast a ballot.\(^{155}\) Obtaining the documentation requires “a trip to the BMV [Bureau of Motor Vehicles], gathering the required documents, and posing for a photograph.”\(^{156}\) The Court held that this process is merely an “inconvenience” and does not impose a “substantial burden” that would render

\(^{151}\) *Id.* at 458.

\(^{152}\) *Id.* at 453-54.


\(^{154}\) *Id.* at 198.
the law unconstitutional. The Court opined that any potential burden is mitigated by the fact that anyone without photo identification may still cast a provisional ballot: she must simply travel to the circuit court clerk’s office within ten days of the election to execute the required affidavit in lieu of providing an ID. While this latter provision technically allows voters to circumvent the identification requirement, either getting an ID or filing a post-election affidavit requires travel. Yet while the Crawford majority acknowledged that the Indiana law would create a heavier burden on elderly persons born out of state, the homeless, and those who objected to being photographed on religious grounds, it never mentioned rural residents nor the law’s heavier burden on them.

Justice Souter’s dissent in Crawford took the burden of distance more seriously, citing travel costs as a “nontrivial burden” that the law imposed on Indiana voters.

Although making voters travel farther than what is convenient for most and possible for some does not amount to a ‘severe’ burden under Burdick, that is no reason to ignore the burden altogether. It translates into an obvious economic cost . . . that an Indiana voter must bear to obtain an ID.

While Souter did not expressly mention rural communities, he recognized both economic and spatial obstacles to obtaining voter identification. Souter documented the number of active voting precincts in relation to the number of available BMV locations in many of Indiana’s counties, noting that many counties have hundreds of voting precincts but only a handful of BMVs. By way of example, Souter noted that the 565 voting precincts in Lake County were served by only eight BMVs. Souter further observed that individuals without photo identification are more likely to lack cars, and he proceeded to marshal great detail regarding the limited availability of public transit in Indiana. Souter pointed out, for example, that twenty-one of ninety-two Indiana counties have no public transportation, while only eighteen counties provide countywide public transit. The lack of public transportation is thus a significant obstacle, he concluded, for many voters who must travel to a BMV to execute an affidavit.

The federal district court in Texas v. Holder was even more attentive to distance, and explicitly sympathetic to rural voters. The case was vacated and remanded for further consideration in light of Shelby County v. Holder, 133 S. Ct. 2886 (U.S. 2013).
assessment of Texas’s application for pre-clearance of its voter identification law under Section 5 of the Voting Rights Act. Noting that Crawford was a facial challenge, Judge David Tatel explained that the “general principle” of Crawford—that “for most voters . . . the inconvenience of making a trip to the BMV . . . does not qualify as a substantial burden on the right to vote”—“yields when the closest office is 100 to 125 miles away,”164 the distance of some voters from the nearest Department of Public Safety (DPS) office.165 The court noted that the state did not contest these distances, and it highlighted the fact that nearly a third of Texas counties (81 of 254) lacked a DPS office. This distribution of DPS offices meant that significant numbers of voters—specifically those who were without a driver’s license, which is why they lacked photo identification—would struggle to meet the law’s requirement for voting.166 The Holder court also discussed the availability of public transportation, highlighting testimony from a state senator that DPS offices are not “easily accessible by public transportation” in his “inner city” Houston district and observing that “rural areas . . . presumably . . . are less likely to have public transportation infrastructure.”167 The court concluded that “[e]ven the most committed citizen, we think, would agree that a 200 to 250 mile round trip—especially for would-be voters having no driver’s license—constitutes a ‘substantial burden’ on the right to vote.”168

Thus Texas v. Holder, while sympathetic to the burden of distance on rural voters in particular, differentiated between inconvenience and “substantial burden” at about the 200-mile round-trip mark, a point remarkably similar to where the Fifth Circuit drew a (temporary) line in the sand in Abbott and Lakey. Interestingly, in October 2014, the U.S. Supreme Court upheld a Fifth Circuit decision not to enjoin a more recent and more onerous Texas voter ID law. In her dissent from that ruling, Justice Ruth Bader Ginsburg took up the spatiality issue, protesting that “more than 400,000 eligible voters face round-trip travel times of three hours or more to the nearest DPS office.”169 Justice Ginsburg found such a burden on voting constitutionally unacceptable.

Lastly, the U.S. Supreme Court in the 2014 decision in Town of Greece v. Galloway failed to recognize another feature of rurality: lack of anonymity. In upholding the practice of an opening prayer at the town council meeting in Greece, New York, population 94,000 (as of 2010),170 the Court treated prayer in that setting as tantamount to prayer before a state or national legislature, calling

164. Id. at 139-40 (citing Crawford v. Marion Cnty., 553 U.S. 181, 198 (2008)) (emphasis added).
165. Id. at 139.
166. Id. at 139.
167. Id. at 140-41.
168. Id. at 139-40.
the latter practice a “national tradition.” Justice Kennedy did not seem concerned about the desirability of inviting differing viewpoints, writing that the town need not “search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing.”

But Justice Kennedy overlooked how the lack of anonymity associated with small towns can stifle dissent. Numerous obstacles to both political participation and local representation confront the residents of small towns and rural townships, obstacles not present for those participating in large legislative bodies operating at higher scales of government. As one of us has observed in a different context, “[r]arely are rural residents nameless or faceless among their neighbors.” Because pressure to conform tends to be heightened within small population clusters, even individuals who feel deeply uncomfortable with prayer in local government may not resist the public expectation of participation in the religious ritual. Further, the Court failed to recognize that, while many rural communities are increasingly diverse, this diversity may be less apparent than in urban centers.

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171. *Id.* at 1825. Justice Kennedy envisions a solemn scene in a state legislature, where the nation’s lawmakers are invited to reflect on the gravity of their work. *Id.* at 1823. Justice Kennedy uses “prayers offered to Congress” as a comparative example stating, “The prayers delivered in the Town of Greece do not fall outside the tradition this Court has recognized.” *Id.* at 1824. Justice Kennedy sidesteps the concern expressed by amici regarding small towns and instead focuses on the fact that attendees are not technically forced to participate. He states, “The inquiry remains a fact-sensitive one that considers both the setting in which the prayer arises and the audience to whom it is directed.” Ironically, he fails to take seriously either.*Id.*

172. *Id.* at 1824.


177. Amar and Brownstein observe: “[I]t is common in modern America (especially outside big
Decisions such as Kadrmas, Crawford, and Town of Greece manifest a distinctly urban perspective on the part of the U.S. Supreme Court. By focusing on the coercive element of public prayer but failing to recognize the heightened coercion that residents of small towns and rural areas are likely to feel by virtue of lack of anonymity, the Court in Town of Greece failed to address a legally salient difference between rural and urban—one that might have dictated a different outcome. In so doing, the Court articulated an urbanormative holding regarding the Establishment Clause of the First Amendment. Kadrmas and Crawford are more akin to Casey and the Fifth Circuit’s decisions in Abbott and Lakey in that they fail to take seriously the obstacle of material distance for rural residents, especially those who are also low-income and therefore without the means to overcome that obstacle. In the next parts, we return to the federal judiciary’s articulation of an increasingly urbanormative jurisprudence on the right to an abortion, with a focus on the Fifth Circuit’s decision in Abbott. We clarify the ways in which this metrocentric perspective undermines rural women attempting to access abortion services, and we call for renewed attention to rural-urban difference by the federal bench, and also among its members.

II. THE UNDUE BURDEN STANDARD UNDER CASEY

A. The Casey Framework

As noted at the outset, the 2011–2013 period saw the passage of more antiabortion regulation than during the prior ten years combined. As of mid-2014, thirteen states had adopted twenty-one new restrictions. More bills were pending in other states.


Since the landmark 1992 U.S. Supreme Court decision, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, courts have used the “undue burden” test for determining the constitutionality of laws that restrict a woman’s constitutional right to obtain an abortion prior to the viability of the fetus. *Casey* permits abortion regulations to restrict a woman’s ability to obtain an abortion, as long as the regulation does not create an undue burden. As the *Casey* Court explained, “[a] finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.” While the *Casey* plurality articulated a five-point summary explaining this standard, it gave precious little guidance regarding the meaning of the phrase “substantial obstacle.”


183. *Casey*, 505 U.S. at 877 (emphasis added).

184. *Casey* summarized the standard as follows:

(a) To protect the central right recognized by *Roe v. Wade* while at the same time accommodating the State’s profound interest in potential life, we will employ the undue burden analysis as explained in this opinion. An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.

(b) We reject the rigid trimester framework of *Roe v. Wade*. To promote the State’s profound interest in potential life, throughout pregnancy the State may take measures to ensure that the woman’s choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion. These measures must not be an undue burden on the right.

(c) As with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion. Unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.

(d) Our adoption of the undue burden analysis does not disturb the central holding of *Roe v. Wade*, and we reaffirm that holding. Regardless of whether exceptions are
For example, in applying the standard to two different aspects of the Pennsylvania law at bar, the U.S. Supreme Court took seriously the threat of violence associated with the spousal notification provision, finding that it constituted an undue burden. Regarding the Pennsylvania requirement of a twenty-four-hour waiting period, however, the *Casey* Court held that it was not an undue burden, even in the face of arguments that the requirement would impose on rural women long travel times, overnight stays, and increased cost. Arguments by plaintiff and amici cited evidence regarding the burden of obtaining an abortion on rural women as a group and emphasized the aggravated burden for women who were both poor and rural. The American Psychological Association’s amicus brief cited research demonstrating that the greater a woman’s distance from a provider, the less likely she is to procure an abortion. The National Association for the Advancement of Colored People (NAACP) expressed particular concern for poor women, both urban and rural. It noted that “women with family incomes under $11,000 are nearly four times more likely to have an abortion than women with family incomes over $30,000.”

made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.

e) We also reaffirm *Roe’s* holding that “subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.” *Roe v. Wade*, 410 U.S. at 164–165. *Casey*, 505 U.S. at 878-79.

185. *Id.* at 893-94 (“The spousal notification requirement is thus likely to prevent a significant number of women from obtaining an abortion. It does not merely make abortions a little more difficult or expensive to obtain; for many women, it will impose a substantial obstacle.”).


187. *Casey*, 505 U.S. at 887; see also *Pruitt, Toward, supra* note 7, at 465-66.

188. Reproductive rights is thus one of few contexts in which rural women have received explicit judicial attention as a group. See *Pruitt, Toward, supra* note 7, at 458. See also infra note 222 (discussing the *Casey* Court’s explanation of the need to identify the relevant population or interest group). This population has also received some attention from pro-choice groups in the wake of *Casey*. For example, a search on the Center for Reproductive Rights’ website of the word “rural” brought up more than 600 hits. A number of these mentioned rural women in the context of international human rights advocacy or in the context of non-U.S. laws. Those that involved domestic laws were typically in letters the Center for Reproductive Rights sent to the governors of states whose legislatures were considering abortion regulations. These letters mentioned the proposed laws’ likely impact on rural women. See, e.g., Letter from Joanne Goldberg, State Advocacy Counsel, to Governor Rick Snyder, Re: House Bill 5711 (Dec. 13, 2012), available at http://reproductiverights.org/sites/crr.civicactions.net/files/documents/crr_HB_5711_%20veto_%20letter.pdf.

189. See infra notes 190-192.

$25,000.”

Several members of Congress also filed an amicus brief urging the Court to consider the situation of poor and rural women.

But most of the Justices in the *Casey* plurality were unmoved by these arguments. Indeed, the Justices used the word “rural” only once in 168 pages of opinions. The Court concluded that while the increased cost, delay, and inconvenience to women might make it difficult for them to get abortions, it would not actually *deter* them from doing so. In so holding, the *Casey* Court effectively converted the requirement of a substantial obstacle into an insurmountable encumbrance.

*Toward a Feminist Theory of the Rural* offers a ruralist critique of *Casey*

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192. Brief for Representatives Don Edwards, Patricia Schroeder, Les Aucoin, Vic Fazio, Bill Green & Constance A. Morella; Senators Alan Cranston, Bob Packwood, Howard Metzenbaum, John Cheafe, Timothy E. Wirth, William S. Cohen, Brock Adams, & Barbara Mikulski; and Certain Other Members of the Congress of the United States as Amici Curiae in Support of Petitioners at 26, *Casey*, 505 U.S. 833 (Nos. 91-744, 91-902), 1992 WL 12006400 (“Other burdensome restrictions on access to pre-viability abortions, short of an outright ban, would have the practical effect of withdrawing the right recognized in *Roe* from millions of poor and rural women.”). An amicus brief filed by 250 American historians reminded the court:

In the first half of the twentieth century, a two-tiered abortion system emerged in which quality of medical care depended on the class, race, age and residence of the woman. Poor and rural women obtained illegal abortions performed by people (including some physicians) willing to defy the law out of sympathy for the woman or for the fee. More privileged women pressed private physicians for legal abortions and many obtained them. . . . The dilation and curettage procedure effective for abortion was indicated for numerous other gynecological health problems, allowing the word “abortion” to remain unspoken between patient and doctor—even as the procedure went forward.


193. In spite of the attention paid by the district court and plaintiffs to rural women, only Justice Blackmun mentions “rural” women in his separate opinion, quoting the district court’s finding that the waiting period “would pose especially significant burdens on women living in rural areas and those women that have difficulty explaining their whereabouts.” *Casey*, 505 U.S. 833, 937 (1992) (Blackmun, J., concurring in part and dissenting in part) (citing Planned Parenthood of Sc. Pa. v. *Casey*, 744 F. Supp. 1323, 1378–79 (E.D. Pa. 1990)). However, the plurality did quote the district court as having found “that for those women who have the fewest financial resources, those who must travel long distances, and those who have difficulty explaining their whereabouts to husbands, employers, or others, the twenty-four-hour waiting period will be ‘particularly burdensome.’” *Id.* at 886 (quoting district court in *Casey*, 744 F. Supp. at 1352).

194. *Id.* at 887.

195. Another court consequently found that the “travel burden is not a factor of state law[,] . . . getting to a clinic has absolutely nothing to do with the constitutional inquiry here.” Utah Women’s Clinic, Inc. v. Leavitt, 844 F. Supp. 1482, 1491 n.11. (D. Utah 1994) (upholding a twenty-four-hour waiting period as constitutional), *rev’d in part on other grounds*, 75 F.3d 564 (10th Cir. 1995).
and its progeny and observes that the Supreme Court in *Casey* effectively articulated a dichotomy of adverse effects. 196 Whereas physical violence is a calamity that requires judicial attention because of its apparent deterrent effect, the threat of a financial catastrophe was not found to constitute an “undue burden” or “substantial obstacle” because the Court did not see lack of funds as a sufficiently weighty deterrent. 197 In spite of this apparent dichotomy, the *Casey* Court expressed the possibility that “at some point increased cost could become a substantial obstacle.” 198 Unfortunately, U.S. Courts of Appeals have since consistently denied or dismissed the significance of socio-spatial and socioeconomic obstacles that effectively prevent many rural women from exercising their constitutional rights to obtain abortions. 199

Yet spatiality remains highly relevant for many women seeking abortion services. 200 Requiring a waiting period before performing an abortion is a common strategy in the anti-choice playbook, 201 and it is one with a particularly negative impact on rural women’s constitutional right to an abortion. 202 As of

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197. Note that the American Psychological Association in its amicus brief cited research showing that the greater a woman’s distance from a provider, the less likely she is to procure an abortion. Brief for American Psychological Ass’n as Amicus Curiae Supporting Petitioners at 29, *Casey*, 505 U.S. 833 (Nos. 91-744, 91-902), 1992 WL 12006399; see also Pruitt, *Toward*, supra note 7, at 463; cf. PEASE, supra note 85, at 97 (citing EVAN STARK, COERCIVE CONTROL: HOW MEN ENTRAP WOMEN IN PERSONAL LIFE (2007)) (“To challenge men’s coercive control of women will be even more difficult than preventing men’s violence because it involves challenging the normative foundations of men’s privilege and their sense of entitlement to make claims upon women.”).
198. *Casey*, 505 U.S. at 901. Further, in *Mazurek v. Armstrong*, 520 U.S. 968, 974 (1997), the Supreme Court indicated that the travel distance for a woman to obtain an abortion is a factor in the analysis of whether a law imposes an undue burden on a woman’s right to choose an abortion. In holding that a Montana law prohibiting non-physicians from performing abortions was constitutional, the Court bolstered its conclusion by noting that “no woman seeking an abortion would be required by the new law to travel to a different facility than was previously available.” *Id.*; see also Pruitt, *Toward*, supra note 7, at 463-67; Burksstrand-Reid, *supra* note 43.
199. See Pruitt, *Toward*, supra note 7, at 423 (discussing *A Woman’s Choice-East Side Women’s Clinic v. Newman*, 305 F.3d 684, 689–90 (7th Cir. 2002)); *Karlin v. Foust*, 188 F.3d 446 (7th Cir. 1999); Pro-Choice Miss. v. Fordice, 716 So.2d 645 (Miss. 1998); Utah Women’s Clinic, Inc. v. Leavitt, 844 F. Supp. 1482 (D. Utah 1994) (upholding a twenty-four-hour waiting period as constitutional), rev’d in part on other grounds, 75 F.3d 564 (10th Cir. 1995).
200. Other significant socio-spatial factors include lack of anonymity, depressed socioeconomic landscape, gendered division of labor, social stasis, transportation challenges, and lower housing mobility, each contributing their share in creating difficulty for rural women seeking abortion. See Pruitt, *Toward*, supra note 7, at 426-39.
202. See Pruitt, *Toward*, supra note 7, at 421, 437-41, 464. See also Lakey and Lakey I, discussed *infra* at Part III.C (addressing the spatial implications of Texas H.B.2 and the Fifth Circuit’s
2005, ninety-seven percent of U.S. nonmetropolitan counties had no abortion provider, and the number of providers is decreasing virtually by the day in this new era of TRAP regulations. Many rural women will thus be unable to obtain an abortion if a mandatory waiting period requires that she travel not once, but twice (or even thrice, as we shall see, under new medication-abortion rules) for several hours each way to reach an abortion provider. Despite those barriers, more than twenty-five states currently require a waiting period ranging from eighteen to seventy-two hours before an abortion procedure may be performed.

As explained in Toward a Feminist Theory of the Rural, the deterrent effect of regulations that require multiple visits to an abortion provider increases with a woman’s distance from the provider. A woman’s particular socioeconomic hardships further aggravate the deterrent effects of mandating multiple visits. To illustrate the spatial and economic obstacles that burden rural women’s abortion rights, that article contrasted the situation of a woman living in Salt Lake City, the site of Utah’s only abortion provider, with that of a woman living in remote Boulder, Utah. The latter woman would have to travel to Salt Lake City, the locale of the nearest abortion provider. The burden on the

holdings in Abbott II).


204. See Greenblatt, supra note 4; Debbie Elliott, Mississippi’s Lone Abortion Clinic Fights For Its Survival, NPR.ORG (Apr. 28, 2014), http://www.npr.org/2014/04/28/307487327/mississippis-lone-abortion-clinic-fights-for-its-survival; Esmé E. Deprez, Abortion Clinics Close at Record Pace After States Tighten Rules, BLOOMBERG (Sept. 3, 2013, 5:52 AM), http://www.bloomberg.com/news/2013-09-03/abortion-clinics-close-at-record-pace-after-states-tighten-rules.html (“The reporting by Bloomberg, coupled with data from Guttmacher, which surveys providers every few years, show that clinics have closed at a record pace since 2011. During the past three years, an average of nineteen closed each year. That’s more than double the rate in the decade ending in 2008.”).

205. See infra Part III.B (discussing details of law regulating medication-induced abortion).

206. Pruitt, Gender, Geography, supra note 5, at 360.

207. See Dabney Bailey, More States Require Wait for Abortion than Wait for Guns, OPPOSING VIEWS (June 20, 2013), http://www.opposingviews.com/i/society/guns/more-states-require-wait-abortion-wait-guns# (noting that, as of 2013, twenty-six states including Texas and Virginia require a waiting period for abortion.).

208. See also supra note 190 and accompanying text.

209. It is well documented that waiting periods and increasing licensing regulations increase the cost of obtaining an abortion, disproportionately so for poor and/or rural women. Christine Dehlendorf & Tracy Weitz, Access to Abortion Services: A Neglected Health Disparity, 22 J. HEALTH CARE FOR POOR & UNDERSERVED 415, 416-17 (2011). Difficulty in financing an abortion was found to contribute to undue delay in obtaining one. Diana G. Foster et al., Predictors of Delay in Each Step Leading to an Abortion, 77 CONTRACEPTION 289, 291 (2008).
hypothetical woman in rural, southern Utah was highly detailed in practical terms, documenting, for example, the need for a private vehicle to get at least as far as the Greyhound bus route, and the limited bus services from southern Utah to Salt Lake City. If the woman had to make the trip twice because of a waiting period, or if she had to spend several nights in Salt Lake City waiting out Utah’s seventy-two-hour waiting period, her costs would increase considerably.210

B. The New Spate of Regulations

Recent TRAP regulations have a similarly detrimental impact on a rural woman’s right to reproductive choice because they effectively eliminate abortion providers, thus situating more women farther from their nearest provider.211 A typical TRAP regulation is an admitting-privileges requirement. At least fourteen states now require that a provider of abortion services be able to admit patients at a nearby hospital, and nine states require that the hospital be within a specific distance of or in a county adjacent to the provider.212 Another such regulation is the requirement that abortion clinics meet the exacting building and equipment standards of ambulatory surgical centers.213 Both result in clinic closures, placing providers farther from or entirely out of reach of many women.

Restrictions on medicine-induced abortions214 and on the use of telemedicine215 to deliver such abortion services216 are also significant in their

210. See Dehlendorf & Weitz, supra note 209, at 416 (“These waiting periods are a significant obstacle to low-income and geographically-isolated women for whom travel and time represent significant barriers to care.”).

211. See, e.g., Extremism in Overdrive, CENTER FOR REPROD. RTS. (June 20, 2013), http://reproductiverights.org/en/feature/north-dakota-clinic-extremism-in-overdrive (describing proposed North Dakota legislation that would require any doctor performing an abortion to have admitting privileges in a local hospital). At the time of this writing, twenty-eight states place some restrictions on abortion providers that are unique to the abortion procedure, and twenty-six states require that an abortion facility be equipped at a level equivalent to a full surgical facility. Casey also opened the floodgates to legislative measures for banning certain procedures of abortion, as in the Partial-Birth Abortion Ban Act. See Gonzales v. Carhart, 550 U.S. 124 (2007); Tracy A. Weitz & Susan Yanow, Implications of the Federal Abortion Ban for Women’s Health in the United States, 16 REPROD. HEALTH MATTERS 99 (2008).


214. At the time of this writing, fourteen states restrict access to medication abortions by requiring that a physician be present during the procedure, thereby requiring additional visits to complete the abortion. Two states, Texas and Ohio, require that medication abortions be performed according to FDA protocol, which also requires an additional visit for the administration of medication. Medication-abortion locations are also subject to TRAP regulation in eighteen states. See infra Part III.B.

215. “Telemedicine” refers to the process of using a telephonic or video-conference consultation with a remote physician who may order further tests and/or prescribe medication. Dan Grossman et al., Changes in Service Delivery Patterns After Introduction of Telemedicine Provision of Medical Abortion in Iowa, 103 AM. J. PUB. HEALTH 73 (2013). The medication
impact on rural populations. That is, rural women seeking to avoid a lengthy trip (or multiple trips, if waiting periods are required) to clinics where surgical abortions are performed may benefit the most from the option of medication abortion. As the Guttmacher Institute has observed, telemedicine dispensation of medication abortion is particularly helpful for rural women: “[A] rural patient is able to visit a local health clinic and be examined by an on-site healthcare professional, then talk with a physician working remotely who can review her health records, answer her questions, and provide the necessary medication.” When telemedicine delivery is foreclosed, rural women are right back where they were prior to this medical advancement—usually facing not only the more invasive surgical method of abortion, but also waiting periods and thus multiple, lengthy trips to an abortion provider.

C. The Numbers Game: How Many Women Must Be Unduly Burdened Before a Regulation is Unconstitutional?

While Casey attempted to articulate a comprehensive structure for assessing abortion regulations, several inconsistencies in Casey’s plurality opinion left ample room for interpretation. Courts have taken the latitude Casey provided to uphold onerous restrictions on the right to obtain an abortion. For example, the Casey Court begins with the premise that a state regulation unduly burdening a woman’s right to obtain an abortion is unconstitutional.

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216. To date, eleven states prohibit the use of telemedicine for abortion procedures. Kimberly Railey, New Abortion Restrictions Take a Digital Turn, USA TODAY (Aug. 11, 2013), http://www.usatoday.com/story/news/nation/2013/08/11/more-states-ban-telemedicine-abortion/2632581/ (“The Guttmacher Institute and other supporters of abortion rights say it is safe and legal, and it expands abortion access in rural areas where no doctors offer them.”).

217. Recognizing this, an arguably progressive California legislature expanded the availability of telemedicine and added the dispensation of medication-abortion drugs to local nurse practitioners. Ian Lovett, California Expands Availability of Abortions, N.Y. TIMES (Oct. 9, 2013), http://www.nytimes.com/2013/10/10/us/california-expands-availability-of-abortions.html?_r=0 (allowing “nurse practitioners, midwives and physician assistants to perform a common type of the procedure, an aspiration abortion, during the first trimester”).


Continuing the trend that began in 2010, a number of states have targeted rural women’s access to care by prohibiting the use of telemedicine in providing medication abortion. For rural and low-income individuals, telemedicine has become a critical delivery method for healthcare, enhancing the accessibility of quality care for many people in the United States.

Id. 219. Id. 220. Pruitt, Toward, supra note 7, at 463. 221. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 837 (1992). “An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains
analysis of the Pennsylvania statute at bar, the Supreme Court actually applied a more rigorous standard. Applying the undue burden standard to the spousal notification requirement, the Court first cautioned that the constitutional inquiry must begin with identifying the group of persons affected by the provision: “The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.”222 Yet, as the Court continued, it introduced a new element to the undue burden analysis, assigning significance to the fact that the spousal notification requirement affects a “large fraction” of a particular group of women seeking abortion: married women who are victims of spousal abuse. Many of these women understandably want to avoid spousal notification. The number of women affected thus became an important inquiry.223

The consequences of this subtle shift from “a woman’s right to choose” to calculating the number or proportion of women affected by an abortion restriction proved dramatic for the cases that followed Casey, especially those regarding restrictions that were particularly burdensome for rural women.224 After all, rural women are—almost by definition—not numerous, scattered as they are across large swaths of land. Certainly rural women are far less numerous

viability.” Id.

222. Id. at 894.

223. Id. at 895 ("The unfortunate yet persisting conditions we document above will mean that in a large fraction of the cases in which § 3209 is relevant, it will operate as a substantial obstacle to a woman’s choice to undergo an abortion. It is an undue burden, and therefore invalid."). Post Abbott I, two federal district courts have discussed at length the significant number of women who would likely be affected by an abortion regulation. The judge in Lakey emphasized the number of women of reproductive age who would be 50 miles, 100 miles, 150 miles, and 200 miles from an abortion provider if the ASC requirement went into effect. Lakey, No. 1:14-CV-00284-LY, 2014 WL 4346480, at *8-9 (W.D. Tex. Aug. 29, 2014); see also infra Part III.C. In Strange, the judge explained that the admitting-privileges requirement would have a greater impact on urban women than on rural women. Planned Parenthood Se., Inc. v. Strange, No. 2:13cv405–MHT, 2014 WL 3809403, at *27-28 (M.D. Ala. Aug. 4, 2014) (finding that the Alabama admitting-privileges law constituted an undue burden on many Alabama women, but with a particular focus on urban women who previously had abortion more readily available to them, and simultaneously discounting the added burden that the law would pose for rural women, who are more accustomed to the burdens of distance); see also Veasey v. Perry, 135 S. Ct. 9, 11 (2014) (Ginsburg, J., dissenting) (observing that “more than 400,000 eligible voters face round-trip travel times of three hours or more to the nearest DPS office” to get the requisite identification); cf. Texas v. Holder, 888 F. Supp. 2d 113, 139-140 (D.D.C. 2012), vacated and remanded, 133 S. Ct. 2886 (2013) (expressing solicitude for voters who would have to travel up to 125 miles each way to secure requisite voter identification, but not assessing percentage or numbers of voters who would bear this burden). This seems a peculiar argument—certainly a counterintuitive one—unless the judge was concerned with establishing the law’s impact on a higher proportion of women.

224. See, e.g., Utah Women’s Clinic, Inc. v. Leavitt, 844 F. Supp. 1482, 1491 n.11. (D. Utah 1994) (upholding twenty-four-hour waiting period as constitutional and deeming travel requirement inconsequential for constitutional review), rev’d in part on other grounds, 75 F.3d 564 (10th Cir. 1995).
than urban women in twenty-first-century America.\textsuperscript{225} The \textit{Casey} Court considered one percent of all women—married women seeking abortions who are also experiencing domestic violence—and deemed the portion of those women for whom spousal notification is an undue burden a sufficiently “large fraction” to invalidate the spousal notification requirement.\textsuperscript{226} Indeed, the \textit{Casey} majority rejected Pennsylvania’s argument that, because the law “imposes almost no burden at all on the vast majority of women seeking abortions,” it could not be invalid on its face.\textsuperscript{227}

But later decisions have gradually increased the proportion required to invalidate a provision. According to \textit{Abbott II}, a regulation may pass constitutional muster, even if it burdens 10-13\% of women.\textsuperscript{228} Under the Fifth Circuit’s decision in \textit{Lakey I}, which in October 2014 declined to enjoin H.B. 2’s ambulatory surgical center requirement, 17\% of Texas’s reproductive-age women is also not the requisite “large fraction.”\textsuperscript{229} Indeed, the Fifth Circuit in both decisions equated large fraction with what rhetorically seems a much higher standard: “the vast majority of Texas women.”\textsuperscript{230} Recall that \textit{Casey} rejected this “vast majority” standard.\textsuperscript{231}

Similarly, the escalating costs of obtaining an abortion,\textsuperscript{232} or the distance a

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\item \textsuperscript{226} \textit{Casey}, 505 U.S. at 895.
\item \textsuperscript{227} \textit{Id.} at 894 (“Respondents attempt to avoid the conclusion that § 3209 is invalid by pointing out that it imposes almost no burden at all for the vast majority of women seeking abortions. They begin by noting that only about 20 percent of the women who obtain abortions are married. They then note that of these women about 95 percent notify their husbands of their own volition. Thus, respondents argue, the effects of § 3209 are felt by only one percent of the women who obtain abortions. Respondents argue that since some of these women will be able to notify their husbands without adverse consequences or will qualify for one of the exceptions, the statute affects fewer than one percent of women seeking abortions. For this reason, it is asserted, the statute cannot be invalid on its face. We disagree with respondents’ basic method of analysis.” (citations omitted)).
\item \textsuperscript{228} \textit{Abbott I}, 734 F.3d 406, 415 (5th Cir. 2013) (indicating that the 10\% of women who have no abortion provider within a hundred miles do not constitute a sufficiently “large fraction of relevant cases”); A Woman’s Choice-E. Side Women’s Clinic v. Newman, 305 F.3d 684, 699 (7th Cir. 2002) (disputing dissenting judge’s calculation of 1\% of relevant population in \textit{Casey} and finding constitutional statute that would “reduce by 10\% to 13\% the number of abortions performed in Indiana”).
\item \textsuperscript{229} \textit{Lakey I}, 769 F.3d 285, 298 (5th Cir. 2014).
\item \textsuperscript{230} \textit{Id.} at 298 n.14 (disputing the finding of Judge Higginson, concurring and dissenting, that the large fraction test is satisfied, and referring to the “baseline from which the large fraction test was derived” and to “\textit{Abbott II}’s guidance that a burden that ‘does not fall on the vast majority of Texas women’ does not meet the large fraction test.” (citations omitted)).
\item \textsuperscript{231} See \textit{infra} note 227 (quoting \textit{Casey}, 505 U.S. at 894).
\item \textsuperscript{232} See, \textit{e.g.}, Planned Parenthood Sw. Ohio v. DeWine, 696 F.3d 490, 497, 507-08 (2012); \textit{cf. id.} at 513 (Moore, J., dissenting).
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woman must travel without implicating a substantial obstacle, have been gradually increased by subsequent decisions. The following case study, of facial challenges to the constitutionality of the most recent Texas antiabortion legislation, illustrates these points.

III. ABBOTT AND THE IMPACT OF JUDICIAL BLIND SPOTS ON A CONSTITUTIONAL RIGHT

In July 2013, the Texas legislature passed House Bill 2 (H.B. 2), which placed restrictions on abortion procedures, providers, and facilities, while also providing penalties for violations of those restrictions. An alliance of abortion providers led by Planned Parenthood filed a complaint alleging that two provisions of the act must be held unenforceable because they would fail constitutional review. The plaintiffs sought a permanent injunction against

majority again feels comfortable resolving these fact questions on summary judgment against Planned Parenthood due to the [slight] price difference between surgical abortions and medical abortions. But the majority ignores the fact that the very reason surgical abortions are now less expensive is because the Act requires the medical abortions to use more medicine.

Id. Compare Jones & Kooistra, supra note 73, at 48 (stating that in 2009 the median charge for abortion was $470 at ten weeks gestation and $1,500 at twenty weeks gestation), with Jones et al., supra note 74, at 14 (stating that in 2006 the median charge for abortion was $430 at ten weeks gestation and $1,260 at twenty weeks gestation).

233. See, e.g., Greenville Women’s Clinic v. Bryant, 222 F.3d 157, 170 (4th Cir. 2000) (indicating that, even though a clinic in Beaufort might have to close, “no evidence suggests that women in Beaufort could not go to the clinic in Charleston, some 70 miles away”); Abbott I, 734 F.3d at 415 (“For residents of the Rio Grande Valley, it is also undisputed that physicians with hospital privileges would be available in Corpus Christi to perform abortions if H.B. 2 went into effect and that the distance from the Rio Grande Valley to Corpus Christi is less than 150 miles . . . . An increase in travel distance of less than 150 miles for some women is not an undue burden on abortion rights.”).

234. At least one court, however, disapproved of such a literal reading and comparing of the facts of Casey to the situation at hand. In Planned Parenthood Southeast v. Strange, No. 2:13CV405-MHT, 2014 WL 3809403, at *88-89 (M.D. Ala. Aug. 4, 2014), the district court explained that the increased travel distance for an urban woman from five miles to thirty-five miles is a greater relative burden than increasing the travel distance for a rural woman from sixty to ninety miles. Thus, the district court reversed the numbers game, and used the large number of affected urban women in finding the TRAP regulations unconstitutional. Id. The court stated:

Casey did not set out to establish any bright-line legal rule about travel distances, but merely reached a conclusion, ‘on the record before [it],’ about the additional distances in that case. . . . Courts, like the Abbott courts, err when they seek to transform that factual conclusion into a simplistic legal rule. As this case demonstrates, in assessing the burdens imposed by a regulation, the factual details are critical.

Id. (citations omitted).


Gregory Abbott, Attorney General of Texas, and other state entities from enforcing those provisions of H.B. 2.\(^{237}\) The provisions in dispute were a TRAP provision requiring abortion providers to have active admitting privileges at a hospital within thirty miles of the location of the abortion,\(^{238}\) and a provision that restricted medication abortions.\(^{239}\) A third regulation, set to become effective in September 2014, required abortion providers to meet the requirements of ambulatory surgery centers.\(^{240}\) We discuss these in turn.

### A. Hospital-Admitting Privileges

Following a bench trial in October 2013,\(^{241}\) the federal district court for the Western District of Texas held that the TRAP requirement that abortion providers have hospital-admitting privileges failed both rational basis scrutiny\(^{242}\) and the undue burden standard.\(^{243}\) The court analyzed the abortion restrictions under a three-prong test,\(^{244}\) first subjecting the regulation to a rational basis review to determine whether the law’s purpose or effect is rationally related to

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238. Id. Laws restricting abortion procedures to facilities where the physician has hospital-admitting privileges (or some other similar restrictive arrangement with a hospital) exist in fourteen states. See Targeted Regulation of Abortion Providers, supra note 212. Eleven states require that an abortion facility be within a specified distance (fifteen or thirty miles) or driving time (fifteen or thirty minutes) from a hospital, or that a hospital be within an adjacent county. See id.
241. Abbott, 951 F. Supp. 2d at 896. Because Planned Parenthood filed the complaint on September 26, 2013 and H.B. 2 would become operative on October 29, 2013, the court combined the hearing on preliminary injunction with the trial on the merits. Id.
242. Id. at 896-97. In overruling the trimester framework of Roe v. Wade, the Casey Court replaced Roe’s strict scrutiny standard of review with rational basis review. See Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 873 (1992) (“We reject the trimester framework, which we do not consider to be part of the essential holding of Roe.”). The Court then examined whether the challenged measure passed the “undue burden” test. Id.
244. The court characterized the test as a two-prong test, but then analyzed the second prong, the undue burden test itself, as a two-prong test. Id. at 898-99. Thus, in fact, the court used a three-prong test: (1) whether a rational basis exists for the regulation, (2) whether it has an impermissible purpose separate from a rational basis analysis, and (3) whether it results in a substantial obstacle (i.e., an undue burden effect). Id.
the state’s legitimate interest as balanced against the woman’s interest. If the regulation survives the rational basis inquiry, the court must review whether either the law’s purpose or effect places an undue burden on a woman seeking an abortion. The court noted that the purpose question required inquiry into “whether the state’s purpose is to hinder autonomous reproductive choice, distinct from a rational-basis analysis.” The evaluation of the law’s effects, on

245.  *Id* at 899 (citing *Stenberg v. Carhart*, 530 U.S. 914, 914 (2000); *Casey*, 505 U.S. at 876–77, 882, 885; *Gonzales v. Carhart*, 550 U.S. 124, 158 (2007)).

246.  *Id.* (citing *Casey*, 505 U.S. at 877). The inquiry is whether the law places a “substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.” *Casey*, 505 U.S. at 877.

247.  *Abbott*, 951 F. Supp. 2d at 899 (citing *Casey*, 505 U.S. at 878). See also Burksbrand- Reid, *supra* note 43, at 110 (arguing that the “purpose” prong of undue burden has fallen away and that courts now use only an “effects” test and, after that, a balancing test); Caitlin E. Borgmann, *In Abortion Litigation, It’s the Facts That Matter*, 127 HARV. L. REV. F. 149, 150 (2014) (“It’s hardly a secret that the anti-abortion-rights movement views restrictions such as parental involvement laws, waiting periods, and clinic facility regulations as steps on the path to dismantling the right to abortion entirely. But to prove that this movement’s goal amounts to an unconstitutional purpose behind a particular law has been virtually impossible.”). This is all the more surprising because the desire to limit abortion availability is evident in the legislative records of these measures. See *Tex. S. Journal*, 83d Leg., 2d Sess. 49 (2013). Senator Williams wrote a statement discussing how “what we know today about fetal development” supports the measures taken by H.B.2, and Senator Lucio extensively quoted two churches in support of the legislation, discussing the dignity of life of the “child in the womb and the life of the woman enduring the procedure.” *Id.* at 49-50. Notably, the Patient Protection and Affordable Care Act also excludes abortion from its scope. Pub. L. No. 111-148 § 1303(a)(1)(B)(i) (codified at 42 U.S.C. § 18023(b)(1)(B)(i)); Nicole Huberfeld, *With Liberty and Access for Some: The ACA’s Disconnect for Women’s Health*, 40 FORDHAM URB. L.J. 1357, 1374 (2013) (“The ACA restricts abortion access by placing limitations on federal funding for any abortion except those resulting from life endangerment for the pregnant woman, rape, or incest.”). Furthermore, as the media report, anti-choice activists openly admit that the purpose of innocuous-sounding regulations is to end abortion access entirely. See, e.g., Jeremy Alford & Eric Eckholm, *With New Bill, Abortion Limits Spread in South*, N.Y. TIMES (May 21, 2014), http://www.nytimes.com/2014/05/22/us/politics/new-bill-spreads-abortion-limits-in-south.html?_r=0#; Katie McDonough, *Finally, a Little Honesty: Anti-Choice Group Admits Abortion Regulations Are About Ending Abortion—Not Safety*, SALON (May 8, 2014), http://www.salon.com/2014/05/08/finally_a_little_honesty__anti_choice_group_admits_abortion_regulations_are_about_ending_abortion_not_safety/; Greenblatt, *supra* note 4. Interestingly, the federal district court in *Lakey* specifically criticized the Texas legislature for its improper purpose in passing H.B. 2. Judge Lee Yeakel wrote: [T]he court concludes, after examining the act and the context in which it operates, that the ambulatory-surgical-center requirement was intended to close existing licensed abortion clinics. The requirement’s implementing rules specifically deny grandfathering or the granting of waivers to previously licensed abortion providers. This is in contrast to the ‘frequent’ granting of some sort of variance from the standards which occur in the licensing of nearly three-quarters of all licensed ambulatory surgical centers in Texas. Such disparate and arbitrary treatment, at a minimum, suggests that it was the intent of the State to reduce the number of providers licensed to perform abortions, thus creating a substantial obstacle for a woman seeking to access an abortion. This is particularly apparent in light of the dearth of credible evidence supporting the proposition that abortions performed in ambulatory surgical centers have better patient health outcomes compared to clinics
the other hand, queries whether the regulation imposes a “substantial obstacle” on a woman seeking abortion services.\textsuperscript{248}

Because a hospital cannot lawfully refuse to provide emergency care,\textsuperscript{249} the district court found that “a lack of admitting privileges on the part of an abortion provider is of no consequence when a patient presents at a hospital emergency room.”\textsuperscript{250} The court further found that a lack of admitting privileges has no impact on the quality of care an abortion patient receives should she need to go to the hospital emergency room.\textsuperscript{251} Nor do admitting privileges or the lack thereof affect communications between patients and providers or between providers and emergency rooms, patient handoff or abandonment, timeliness of care in the emergency room, patient outcomes, hospital costs, or accountability.\textsuperscript{252} Thus, the district court found the provision at bar failed the rational basis test.\textsuperscript{253}

The district court nevertheless continued its analysis of the provision under the undue burden standard as well and found it to be an unconstitutional

\textsuperscript{248}\textit{Abbott}, 951 F. Supp. 2d at 899. It is worth noting that the federal district court in \textit{Lakey} discarded the testimony of four expert witnesses offered by the State of Texas. \textit{Lakey}, 2014 WL 4346480, at *7, n.3 (“The credibility and weight the court affords the expert testimony of the State’s witnesses Drs. Thompson, Anderson, Kitz, and Uhlenberg is informed by ample evidence that, at a very minimum, Vincent Rue, Ph.D., a non-physician consultant for the State, had considerable editorial and discretionary control over the contents of the experts’ reports and declarations. The court finds that, although the experts each testified that they personally held the opinions presented to the court, the level of input exerted by Rue undermines the appearance of objectivity and reliability of the experts’ opinions. Further, the court is dismayed by the considerable efforts the State took to obscure Rue’s level of involvement with the experts’ contributions.”). See also \textit{Hunter}, Judge Blasts ‘Expert Witnesses’ Called to Defend Texas Anti-Abortion Law, DAILY KOS (Sept. 3, 2014), http://www.dailykos.com/story/2014/09/03/1326895-Judge-blasts-expert-witnesses-called-to-defend-Texas-anti-abortion-law?detail=email; Molly Redden, Texas Slammed for Paying Discredited Abortion Foe, MOTHER JONES (Sept. 3, 2014), http://www.motherjones.com/politics/2014/09/federal-judge-texas-abortion-clinic-vincent-rue.

\textsuperscript{249}\textit{Abbott}, 951 F. Supp. 2d at 899-900 (citing Emergency Medical Treatment and Active Labor Act (EMTALA), 42 U.S.C.A. § 1395dd (West 2011)); Planned Parenthood of Wis., Inc. v. Van Hollen, 738 F.3d 786, 788 (7th Cir. 2013) (same); Dana E. Schaffner, \textit{EMTALA: All Bark and No Bite}, 2005 U. Ill. L. Rev. 1021, 1025 (2005) (“Congress was concerned that hospitals were dumping patients in order to cut costs and therefore decreasing the quality of care given to indigent or uninsured patients.”); Lynn Healey Scaduto, The Emergency Medical Treatment and Active Labor Act Gone Astray: A Proposal to Reclaim EMTALA for Its Intended Beneficiaries, 46 UCLA L. Rev. 943, 948 (1999) (“The legislative history strongly supports the conclusion that the intent behind EMTALA was to deter what Congress perceived to be the burgeoning practice among hospital emergency rooms of dumping indigent and uninsured patients.”).

\textsuperscript{250}\textit{Abbott}, 951 F. Supp. 2d at 899-900.

\textsuperscript{251} Id. at 900.

\textsuperscript{252} Id.

\textsuperscript{253} Id.
restriction under the scheme established by *Casey.*\(^{254}\) The court concluded that the provision places an undue burden on a woman seeking abortion services in Texas because it “necessarily has the effect of presenting a substantial obstacle to access to abortion services.”\(^{255}\) The court deemed it significant that, according to the evidence in the record, “twenty-four counties in the Rio Grande Valley would be left with no abortion provider because those providers do not have admitting privileges and are unlikely to get them.”\(^{256}\) The court made findings of fact indicating that a substantial majority of abortion providers are unlikely to get hospital-admitting privileges because hospitals typically require those with such privileges to meet a minimum annual hospital admission threshold. Abortion providers are unlikely to meet such thresholds because their low-risk abortion practices do not generally yield any hospital admissions.\(^{257}\)

Refuting counterarguments from the state of Texas, the district court also concluded that the “state failed to show a valid purpose for requiring that abortion providers have hospital privileges within 30 miles of the clinic where they practice.”\(^{258}\) Therefore, the court declared that “the hospital-admitting provision does not survive the undue-burden ‘purpose’ inquiry.”\(^{259}\) The court reasoned that, under *Casey*, a TRAP regulation may be unnecessary, and thus invalid, if it also presents a substantial obstacle: “Unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.”\(^{260}\) Because *Casey* requires a law restricting abortion to have a valid purpose that is “not designed to strike at the right itself,”\(^{261}\) the court enjoined the enforcement of the admitting-privilege provisions.\(^{262}\)

The State appealed the district court’s decision the same day the final judgment was entered.\(^{263}\) The Fifth Circuit Court of Appeals first considered the State’s request for a stay of the district court’s permanent injunction pending appeal. The Fifth Circuit has since made a decision on the merits,\(^{264}\) but even its analysis of the stay revealed dismissive attitudes toward the substantial obstacle created by a requirement of traveling hundreds of miles.\(^{265}\) In ruling to stay the

254. *Id.*
255. *Id.* (citing Planned Parenthood of Se. Pa. v. *Casey*, 505 U.S. 833, 878 (1992)).
256. *Id.*
257. *Id.* at 901.
258. *Id.*
259. *Id.*
261. *Id.* at 874.
263. *Id.*
264. See *infra* notes 268, 270-272, 274, 276, and 281 and accompanying text; see also *infra* note 293 for a brief discussion of the January 6, 2014 oral arguments in *Abbott*.
265. This could suggest an ideological bias against abortion access in the Fifth Circuit. According to Lee Epstein’s empirical research, appellate judges are more likely to decide cases based on
injunction granted by the district court, the Fifth Circuit held that “[t]he State offered more than a ‘conceivable state of facts that could provide a rational basis’ for requiring abortion physicians to have hospital admission privileges.”

These “facts” include a host of measures the Fifth Circuit saw as designed to protect women, supporting a woman’s ability to seek consultation and treatment for complications directly from her physician; preventing patient abandonment; and requiring a higher level of provider credentialing, thus maintaining quality medical staff and quality patient care. Applying the great deference to state legislatures that the rational basis inquiry usually requires, then, the federal appellate court overruled the district court’s finding that the admission-privilege requirement failed the rational basis test.

Turning to the undue burden test, the Fifth Circuit relied on *Gonzales v. Carhart,* the Supreme Court’s most recent abortion decision, which addressed a facial attack on federal legislation banning so-called “partial-birth” abortions.

That decision had stated that “[t]he question is whether the Act, measured by its text in this facial attack, imposes a substantial obstacle to late-term, but previability, abortions.” Applying that “measured by its text” standard, the Fifth Circuit found “no doubt” that the State of Texas had a legitimate government interest in “protecting the integrity and ethics of the medical profession,” as well as protecting the health of women who undergo abortion procedures.

The court next turned to the question of whether the effect of the statute is to place a substantial obstacle before women who seek to obtain an abortion. Without specifying the burden of persuasion on the parties who brought the}

ideological preferences than are district court judges. EPSTEIN, supra note 136, at 241.


268. *Abbott I,* 734 F.3d at 411-12. The appellate court also criticized as speculative the district court’s findings that annual admissions thresholds would impede the abortion providers’ ability to obtain admission privileges, as the criteria for granting admitting privileges varies from hospital to hospital. Id. at 416.

269. But see Romer v. Evans, 517 U.S. 620 (1996) (holding that a state constitutional amendment preventing state laws establishing protected group status based upon homosexuality or bisexuality did not pass the rational basis test).

270. *Abbott I,* 734 F.3d at 411 (citing F.C.C. v. Beach Commc’ns, Inc., 508 U.S. 307, 315 (1993)) (“The district court’s finding to the contrary is not supported by the evidence, and in any event, ‘a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.’”).

271. 550 U.S. 124 (2007); see *Abbott I,* 734 F.3d at 413.


273. *Abbott I,* 734 F.3d at 413 (quoting Gonzales v. Carhart, 550 U.S. 124, 156 (2007)).

facial challenge against H.B. 2, the Fifth Circuit found that the State had shown sufficient likelihood of succeeding on the merits against the challenge. For this purpose, the appellate court referred to Casey’s requirement that the court consider whether there is an undue burden “in a large fraction of the cases in which” the admitting privilege is relevant.

Yet, this was not an accurate statement of Casey, which specifically rejected the “vast majority” standard proposed by the State of Pennsylvania and found 1% of women a sufficiently “large fraction” affected by a regulation to render it unconstitutional on its face. Nevertheless, from this point on, the Abbott I court focused on this “large fraction” analysis, largely ignoring the substance of the “undue burden” and “substantial obstacle” tests as they might apply to individual women. The court wrote:

To place the district court’s findings with regard to 24 counties in the Rio Grande Valley into perspective, there are 254 counties in Texas, and Planned Parenthood’s evidence showed that well before H.B. 2 was to take effect, abortions were performed in only 13 counties in Texas. There was evidence offered by Planned Parenthood that more than 90% of the women seeking an abortion in Texas would be able to obtain an abortion from a physician within 100 miles of their respective residences even if H.B. 2 went into effect. This does not constitute an undue burden in a large fraction of the relevant cases.

The court of appeals thus deemed the 10% of women who would not have an abortion provider within 100 miles of their residence an insufficient fraction of the relevant cases to signal an undue burden. But setting as a baseline the 100-mile mark for 10% of women was just the starting point. By the time the it decided Lakey I, the Fifth Circuit had concluded that, even if H.B. 2’s ASC requirement has an impact on nearly one million women (17% of Texas’s reproductive-age female population), an increase of 150 miles in one-way travel does not constitute an undue burden.

These decisions—which dismiss the needs of mostly rural women—are
Urbanormativity, Spatial Privilege and Judicial Blind Spots

blatantly and unapologetically urbanormative. Further, the discussion of 10% and 17% are in sharp contrast with *Casey*, in which the Supreme Court considered a deleterious impact on just *one* percent of women seeking abortions—those who were victims of spousal abuse and therefore unable to safely notify their spouses—sufficient to invalidate the spousal notification requirement.285

Just as astounding, the *Abbott I* court went on to state that traveling “less than 150 miles” does not rise to the level of an “undue burden.”286 The court found the twenty-four-hour waiting period provisions upheld in *Casey*, which required multiple trips over “long distances,” comparable to the requirement of travel in the case at bar.287 Thus, the *Abbott I* court determined that clinic closures would result in a travel requirement of “less than 150 miles” from the Rio Grande Valley to Corpus Christi, where both parties conceded abortions could be provided under the terms of H.B. 2.288 Concluding that traveling “less than 150 miles” would not be a significant obstacle for a woman seeking abortion, the Fifth Circuit overruled the district court’s injunction.289 The court never mentioned that “150 miles” refers to just the one-way journey,290 either to

Budget uses that word. Some women will live in rural population clusters, with populations smaller than 2500, within extended metropolitan areas or within 100 miles of a metropolitan area with an abortion provider. Some women will live in nonmetropolitan counties, those with fewer than 100,000 people and within 100 miles of a metropolitan area with an abortion provider.

286.  *Abbott I*, 734 F.3d at 415 (“For residents of the Rio Grande Valley, it is also undisputed that physicians with hospital privileges would be available in Corpus Christi to perform abortions if H.B. 2 went into effect and that the distance from the Rio Grande Valley to Corpus Christi is less than 150 miles. . . . An increase in travel distance of less than 150 miles for some women is not an undue burden on abortion rights.” (emphasis added)); see also Women’s Med. Pro’l Corp. v. Baird, 438 F.3d 595, 605 (6th Cir. 2006) (“Like the waiting period requirement at issue in *Casey*, the fact that women may have to travel farther to obtain abortion services may be burdensome but it is not a substantial obstacle.”).
287.  *Casey*, 505 U.S. at 885-86.
288.  See *Abbott I*, 734 F.3d at 415.
289.  Id.
290.  Planned Parenthood applied to the U.S. Supreme Court for an order to vacate the stay put in place by the Fifth Circuit. Planned Parenthood of Greater Tex. Surgical Health Servs. v. *Abbott (Abbott III)*, 134 S. Ct. 506 (2013). Holding that the Fifth Circuit correctly found all four requirements for granting a stay, the Court denied this application in a one-sentence opinion. Id. A four-justice dissent was filed by Justices Breyer, Ginsburg, Sotomayor, and Kagan, and refuted by a three-justice concurring opinion by Justices Scalia, Thomas, and Alito. Id. The concurring opinion focuses exclusively on the requirements for granting stay, which, according to the majority, the Fifth Circuit has met. Id. at 506-07. The dissenting opinion, however, attempts to balance the interest of women seeking abortion in the state of Texas with the interest of the state in having its laws enforced. Id. at 508. The dissent cites six practical and judicial considerations supporting the dissenting justices’ opinion that the stay should be vacated, preserving the status quo in Texas, and preventing the closing of clinics performing abortion until the merits of the case could be adjudicated. Thus, only the dissent considers the fact that a significant number of women, as many as 20,000, will have to go elsewhere to obtain an abortion, even if one was already scheduled. Id. at 509.
or from the clinic.292

Indeed, regarding this very point, Judge Edith Jones displayed her spatial and socioeconomic privilege during the January 6, 2014 oral arguments on the merits of Abbott. As part of the three-judge panel considering the constitutionality of Texas H.B. 2, Judge Jones asked the attorney for Planned Parenthood:

Do you know how long [driving 150-300 miles, the distance between the Rio Grande Valley and the nearest abortion provider in Corpus Christi] takes in Texas at 75 miles per hour? And this is a peculiarly flat and not congested highway.293

Judge Jones’s question assumes that the person making the journey has access to a private vehicle and is not relying, for example, on Greyhound or whatever other means of transportation might be available to one without a car.294 Second, the reference to traffic congestion—a mostly metropolitan

2011) (“Furthermore, approximately 30 percent of the women who chose to undergo an abortion during this time period traveled more than 150 miles to the abortion clinic, for a total of 300 miles.”). This language might be a useful counterpoint to the Fifth Circuit’s discussion of 150 miles and its failure to stipulate that this is only a one-way trip.

292. Regarding another spatio-legal obstacle, the opinion reveals thinly veiled hostility to the undocumented immigrant population of the Rio Grande Valley in its determination that concerns for passing certain immigration checkpoints while traveling is a separate inquiry from the substantial obstacle inquiry. Abbott I, 734 F.3d 406, 415 (citing K.P. v. LeBlanc, 729 F.3d 427, 442 (5th Cir. 2013)).

293. Oral Argument at 25:09, Abbott II, 748 F.3d 583 (5th Cir. 2014) (No. 13-51008), available at http://www.ca5.uscourts.gov/oral-argument-information/oral-argument-recordings (enter “13-51008” into Docket Number form). Indeed, a few other references to “rural,” “urban,” and “distance” were made in the oral argument. For example, Judge Haynes asked the attorney for Planned Parenthood:

And you’re back to Texas is a big place, it’s got rural areas, it’s got urban areas. It doesn’t appear that House Bill 2 has been a problem in Dallas, or Houston, or apparently San Antonio. It may be a problem in the Rio Grande Valley. Why not then bring an as-applied post-enactment or post-going into effect challenge and address the Rio Grande Valley or the southern part of Texas if there really is a problem there? Id. at 21:54. In fact, such an as-applied challenge was brought in Lakey, discussed infra, Part III.C. However, the Fifth Circuit ruled in Lakey I that this as-applied challenge was barred by res judicata. Lakey I, 769 F.3d 285, 301 (5th Cir. 2014).

294. For example, a Greyhound trip from Brownsville, Texas to Corpus Christi, Texas may take as little as three hours and five minutes or as long as five hours and ten minutes, depending on the route. See Greyhound Tickets and Travel Info, GREYHOUND.COM, http://www.greyhound.com (enter “Brownsville, Texas” into “Leaving From” field and enter “Corpus Christi, Texas” into “Going To” field) (last visited Nov. 1, 2014). The cost of the trip varies depending on ticket option: standard fare ranges from $34 to $37 one-way, or $65 to $74 round-trip, while web-only priced tickets are much cheaper, at $6.50 to $16.50, one-way, or $10.50 to $29.50, round-trip. Id. The same trip by automobile takes two hours and twenty-six minutes. Driving Directions from Brownsville to Corpus Christi, TX, GOOGLE MAPS, http://maps.google.com (follow “Get Directions” hyperlink; then search “A” for “Brownsville, TX” and search “B” for “Corpus Christi, TX”; then follow “Get Directions” hyperlink) (last visited Nov. 1, 2014).
phenomenon—suggests a metro-centrism that takes heavy traffic seriously, while dismissing the burden of sheer distance. Third, the question ignores the part of the journey that many women would have to make on secondary roads to reach the interstate. Judge Jones’s apparent “blind spot” about the burden of distance is presumably a reflection of her upbringing in urban San Antonio. Like her colleagues on the panel deciding Abbott I, Jennifer Walker Elrod and Catharina J.H.D. Haynes, Jones is a product of metropolitan life.

Indeed, another insight into the judges’ understanding of spatiality is found in Judge Elrod’s suggestion that burdens of distance vary from state to state and that—counter-intuitively—Texas’s vast physical size diminishes rather than enhances the burden of distance in the state. Regarding the requirement of admitting privileges within thirty miles of an abortion provider, Judge Elrod queried:

In a state the size of Texas, 30 miles seems a little bit . . . short. Can you explain the magic of the 30 miles—where that comes from, what is the rationality of that 30 miles? . . . Now, as you know, Texas is a state you know, where people commute from you know, I don’t know, McKinney down to south Dallas, whatever, which is farther than 30 miles routinely every day. So 30 miles just seem like a fairly short distance in a state that big. In some states, that would be quite a vast area.

While this line of questioning appeared to favor the plaintiffs, Judge Elrod’s suggestion that distance is more onerous in some states than in others strikes us as curious. Indeed, it runs contrary to the oft-heard adage that “everything is bigger in Texas,” an adage used to support a finding that the burden of distance should be taken seriously in the voting rights context. We maintain that


distance is distance, whether in Connecticut or Texas, Vermont or Montana. We do acknowledge, however, that the availability of public transportation ameliorates the burden of distance, especially for low-income women, and public transportation may be more readily available in rural parts of the northeast than in rural regions of other states. But this leads us to a different conclusion than that reached by the Fifth Circuit. We see thirty miles—or one hundred miles for that matter—as a more onerous distance in rural Texas than in, say, rural New England, because we presume greater availability of public transit in the latter.

Also noteworthy is the fact that the judicial frame of reference was again an urban one: greater metropolitan Dallas-Fort Worth. Meanwhile, the court apparently overlooked another spatial phenomenon: the fact that most counties up and down the Rio Grande River, from El Paso to McAllen, cover more territory than the average Texas county. It is the women in those mostly nonmetropolitan counties who will be most impacted by the closure of abortion clinics as a consequence of H.B. 2, as only clinics in major metropolitan areas like Dallas, Fort Worth, Houston, San Antonio, and Austin survived the law’s requirements. Indeed, Abbott II and Lakey I appear to expressly exclude from constitutional protection—at least in the context of a facial challenge—women from these nonmetropolitan counties who might well be considered “discrete and insular”: a subset of rural women who are poor. If we further narrow that subset to include only poor, rural women in the four Rio Grande Valley counties who were previously served by the McAllen clinic, the discrete and insular claim is strengthened because of the high percentage of women who are Latina (90%) and the extraordinarily high poverty rate (38%). This is illustrated in Map 1.

remains-spotlight-554), vacated, 133 S. Ct. 2886 (2013).


301. See Pruitt., Constitutional Infirmity, supra note 149, at 95-98 (sketching an argument that the rural poor are a discrete and insular minority, as that term is used in equal protection doctrine). See generally Caitlin E. Borgmann, Abortion Exceptionalism and Undue Burden Preemption, 71 WASH. & LEE L. REV. 1047 (2014) (observing how application of the undue burden standard is typically seen as preempting equal protection and other constitutional issues in abortion litigation).

302. See infra notes 319-21 and accompanying text.
Even *Casey*—miserly as it was in its application of the undue burden standard to rural women—warned that the increased cost of an abortion restriction may eventually become a significant obstacle for a woman seeking an abortion.\(^{303}\) But the *Abbott I* court seemed unfamiliar with the old adage that time equals money—never mind that distance implicates both time and money.\(^{304}\) Just how far a woman must travel for the distance to be deemed significant by the appellate court remains an open question.\(^{305}\)

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304. Again, district courts tend to be more empathetic regarding the burden of travel that these regulations exacerbate. In a suit seeking a temporary restraining order regarding Alabama TRAP regulations, an Alabama district court in 2013 found that the absence of abortion providers created by the legislation was problematic not only because of the distance, but because of the cost of travel:

   This absence would add not only the onus of distance for most women in Alabama (women in some parts of the State could have to travel up to 200 miles in order to obtain an in-state abortion), but also the accompanying burden of increased travel costs. As a majority of the plaintiffs’ patients are poor and many do not have any access to a car, it appears that, for a significant number of women, this distance would be no mere encumbrance, but an insurmountable barrier to obtaining an abortion.

   Planned Parenthood Se, Inc. v. *Bentley*, 951 F. Supp. 2d 1280, 1286 (M.D. Ala. 2013). See also *Lakey*, No. 1:14-cv-00284-LY, 2014 WL 4346480, at *11-13 (W.D. Tex. Aug. 29, 2014) (discussing the range of considerations that may combine to deter a woman from getting an abortion, including distance, lack of child care, lack of transportation, inability to get time off from work, immigration status, and poverty level, among others); infra Part III.C; infra note 309; Burkstrand-Reid, *supra* note 43.

305. In *Lakey*, the state of Texas argued that *Abbott* “established a de facto ‘safe harbor’ of 150 miles and that no abortion regulation that increases travel distances alone could act as an undue burden.” The federal district court in *Lakey* rejected that argument. *Lakey*, 2014 WL 4346480, at *11. The Fifth Circuit in *Lakey I* cited *Abbott* for the proposition that traveling
Courts have minimized the effect of distance to uphold abortion regulations in other recent cases, gradually increasing the constitutionally acceptable distance a woman may be required to travel to obtain an abortion. In *Women’s Medical Professional Corp. v. Baird*, 306 for example, the Sixth Circuit in 2006 held that the availability of another clinic at a distance of “approximately 45 to 55 miles” from the Dayton clinic meant that the closing of the Dayton clinic would not be a substantial burden upon women seeking an abortion. 307 In *Jackson Women’s Health Organization v. Currier*, 308 the state identified at least four abortion facilities ranging from 121 to 209 miles from Jackson, the location of the state’s sole clinic, asserting “that closing the Clinic would require an additional two to three hours of travel for Mississippi women seeking abortions, and [arguing] that this minimal additional travel is a minor inconvenience, not an unconstitutional undue burden.” 309 The federal district court in Mississippi enjoined enforcement of the admitting-privileges requirement. 310 The Fifth Circuit upheld that injunction in 2014, though it focused not on sheer distance, but rather on the fact that a woman would have to leave the State of Mississippi if the Jackson clinic closed. 311 On the other hand, a federal district court in Alabama in *Planned Parenthood Southeast, Inc. v. Bentley*, considering a TRAP regulation, held in 2013 that having to travel up to 200 miles each way to obtain an abortion would constitute “an insurmountable burden” not only because of the distance, but because of the cost of travel. 312 The composite picture from these

150 miles is not an undue burden. *Lakey I*, 769 F.3d 285 (5th Cir. 2014). Cf. *Women’s Med. Prof’l Corp. v. Baird* 438 F.3d 595, 604-05 (6th Cir. 2006) (“[E]ven though a clinic in Beaufort might have to close, ‘no evidence suggests that women in Beaufort could not go to the clinic in Charleston, some 70 miles away’” (quoting Greenville Women’s Clinic v. Bryant, 222 F.3d 157, 170 (4th Cir. 2000)); *Fargo Women’s Health Org. v. Schafer*, 18 F.3d 526, 533 (8th Cir. 1994) (“Although the distance a woman must travel to obtain an abortion may be a factor in obtaining an abortion, it is not a result of the state regulation. We do not believe a telephone call and a single trip, whatever the distance to the medical facility, create an undue burden.” (emphasis added))).

307. *Id. at 605-06.*

Evidence in the record establishes that there are abortion clinics in Cincinnati, Columbus, Cleveland, and Akron. WMPC itself operates an abortion clinic in Cincinnati, which is approximately forty-five to fifty-five miles from the Dayton clinic. Thus, potential patients of the Dayton clinic could still obtain an abortion in Ohio and, more significantly, could obtain an abortion at a WMPC-owned clinic within a reasonable distance from the Dayton clinic.

*Id. at 605.*

309. *Id. at 421* (emphasis added) (internal quotation marks omitted).
310. *Id. at 424.*
311. *Jackson Women’s Health Org. v. Currier*, 760 F.3d 448, 455-59 (5th Cir. 2014). The court did not discuss what *Abbott II* treats as the “large fraction” requirement for a facial challenge.
312. *Planned Parenthood Sc., Inc. v. Bentley*, 951 F. Supp. 2d 1280, 1286, 1289 (M.D. Ala. 2013); see *supra* note 294 (detailing potential travel costs for a woman without access to a personal car)
cases across circuits, then, is that 200 miles would be sufficient to constitute an undue burden, but 150 miles would not. Somewhere between the two distances apparently lies the magic threshold between constitutionality and unconstitutionality. We submit that it is far too high a threshold, and that the undue burden standard should be satisfied by a much lower threshold.

In its appellate review of the merits of the Abbott case, the Fifth Circuit primarily expressed its agreement with the decision of the motions panel, reiterating its arguments regarding the district court’s misapplication of the rational basis standard to support its holding that the hospital admission requirement does not impose a substantial burden on a woman’s right to abortion. In doing so, however, the court found it significant that “Texas exempts from its 24-hour waiting period after informed consent those women who must travel more than 100 miles to an abortion facility.”

Ironically, then, the court acknowledged the burden of material spatiality for this limited purpose, just as the Texas legislature had in that prior legislation.

As for the purpose and effect prongs of Casey, the Abbott II court found no evidence on the record offered by Planned Parenthood that the regulation was motivated by an unconstitutional purpose to limit abortion. Turning to examine the effects prong of Casey, the appellate court’s scathing opinion lectured the district court not only about law, but about Texas geography. The Fifth Circuit overruled the district court’s finding that H.B. 2 affected twenty-four counties in the Rio Grande Valley:

To put this “finding” into perspective, of the 254 counties in Texas only thirteen had abortion facilities before H.B. 2 was to take effect. The Rio Grande Valley, moreover, has four counties, not twenty-four, and travel between those four counties and Corpus Christi, where abortion services are still provided, takes less than three hours on Texas highways (distances up to 150 miles maximum and most far less).

The Fifth Circuit applied the moniker “Rio Grande Valley” to just four counties: Starr, Hidalgo, Willacy, and Cameron. Doing so led to the court’s use of these

313. Abbott II, 748 F.3d 583 (5th Cir. 2014).
314. Id. at 593-99.
315. Id. at 598 (“As the motions panel correctly concluded, based on the trial court record, an increase of travel of less than 150 miles for some women is not an undue burden under Casey.” (emphasis added)).
316. Id. at 598-99 (citing TEX. HEALTH & SAFETY CODE ANN. § 171.012(a)(4) (West 2011)).
317. Id.
318. Id. at 597. This point, however, was conceded by Planned Parenthood in their Reply Brief. Id. But see Borgman, supra note 247, at 152 (“A standard that looks skeptically at plaintiffs’ fact-based predictions of harm, while smiling generously upon the state’s fact-based assertions of legislative need, has things backwards.”).
319. Abbott II, 748 F.3d at 597 (second emphasis added).
320. See Brief for Appellant at 18, Abbott II, 748 F.3d 583 (5th Cir. 2014) (No. 13-51008), 2013
four counties in the lower Rio Grande Valley to estimate travel time to Corpus Christi, where an abortion clinic would presumably be able to keep its doors open. This shift in counties to just those in the lower valley, which is relatively near Corpus Christi, dramatically decreased the distances required to reach the abortion provider there. For example, the distance from Marfa, Texas, the county seat of Presidio County, bordering the upper Rio Grande River in West Texas, is 548 miles from Corpus Christi. Contrast this with the distance from one of the lower “Rio Grande Valley” counties, Cameron County. Brownsville, Texas, the county seat of Cameron County, is 160 miles from Corpus Christi—still a considerable distance, but not nearly as far as from Presidio County. Maps 1 and 2 illustrate the point.

Some justification for this shift may be found in the Fifth Circuit’s exclusion of West Texas from its calculation because other abortion providers are nearer to the upper Rio Grande, a region referred to in the Lakey case as West Texas. That rationale does not survive further scrutiny, however, because of H.B. 2’s other consequences for abortion providers in the middle Rio Grande Valley and West Texas, as discussed in Part III.C. Presidio, Texas is 196 miles from El Paso, certainly closer than than the distance to Corpus Christi, but El Paso’s two abortion providers are expected to close if the ambulatory surgical center requirement of H.B. 2 goes into effect. If H.B. 2 is fully implemented, then the law will force Presidio County women to travel to San Antonio, 405 miles away, where a clinic is expected to survive the law’s multiple TRAP

WL 6228857. The obvious explanation for the district court’s mistake regarding Texas geography is a typographical error, as pointed out in the Appellee’s Brief: “Appellants also argue that the court’s finding as to the Rio Grande Valley is clearly erroneous because the court referred to 24, rather than 4, counties in the Rio Grande Valley. This argument overlooks the obvious explanation that this was likely a typographical error.” Brief of Plaintiffs-Appellees at 24 n.16, Abbott II, 748 F.3d 583 (5th Cir. 2014) (No. 13-51008), 2013 WL 6729236 (internal citations omitted). That the Fifth Circuit scolded the district court about Texas geography seems odd given Planned Parenthood’s suggestion that this was a typographical error. That is, the scolding suggests that the Fifth Circuit did not read the briefs by Planned Parenthood.

321. The abortion clinic in El Paso, one of only two clinics west of San Antonio, TX, was one of the clinics slated to close as the result of the hospital admission requirement in H.B. 2. Marty Schladen, supra note 14.

322. If the “24 counties” in the district court’s opinion was a typographical error, than the district court also excluded West Texas from its consideration. See supra note 320 (quoting Planned Parenthood’s brief).


324. Both abortion clinics will close as a result of H.B. 2, one because of the admitting-privileges provision and the other because of a provision requiring the facility to meet the building and equipment standards of ambulatory surgical centers. See Schladen, supra note 14. The Center for Reproductive Rights, which is suing on the El Paso clinics’ behalf, said in a statement:

If these legislative attacks on women’s health care continue to take effect, fewer than 10 clinics will be available to provide abortion care to Texas’s 13 million women . . . . Many women will suddenly face a round trip as far as 1,000 miles from their homes to obtain abortion care in their own state.

restrictions. Thus, the Fifth Circuit’s focus on the distances between just the lower Rio Grande Valley and Corpus Christi appears to be a disingenuous sleight of hand.\footnote{325}

Further, the focus on distance alone—detached from socioeconomic status—overlooks the fact that eleven of the fourteen counties contiguous to the Rio Grande are persistent poverty counties, including the four counties closest to Corpus Christi, which previously had abortion access in McAllen: Starr, Hidalgo, Willacy, and Cameron.\footnote{326} As noted earlier, the average poverty rate among these four counties is an astonishing \footnote{327}38%.\footnote{328} Map 1 depicts the economic lay of the land in that region. Further, nearly 20% of the residents of the counties live in “deep poverty,” meaning they live on less than half of the poverty-line income.\footnote{329} These counties are thus home to some of the most intensely concentrated pockets of poverty counties in the nation.\footnote{329} Finally, the population of each of those counties is roughly 90% Hispanic.\footnote{330}

The court went on to find that the record did “not indicate that the admitting-privileges requirement imposes an undue burden by virtue of the potential increase in travel distance in the Rio Grande Valley.”\footnote{331} The court appeared to compare the burden of increased travel or overnight stay imposed by Casey’s twenty-four-hour waiting requirement for women living in the forty-five

\footnote{325. This is in sharp contrast to the federal district court in \textit{Lakey}, No. 1:14-cv-00284-LY, 2014 WL 4346480 (W.D. Tex. Aug. 29, 2014); see also infra Part III.C. There the court revisited the collective impact of the admitting-privileges requirement and the ASC requirement on the Rio Grande Valley, concluding that the two combined to “create[e] a brutally effective system of abortion regulation that reduces access to abortion clinics thereby creating a statewide burden for substantial numbers of Texas women.” \textit{Id.} at *13. One of the court’s three specific conclusions was that “the act’s ambulatory-surgical-center and admitting-privileges requirements, as applied to the McAllen and El Paso clinics, place an unconstitutional burden on women in the Rio Grande Valley, El Paso and West Texas and must be enjoined.” \textit{Id.} at *4.}


\footnote{328. See supra note 327 for links to statistical information about these counties.}

\footnote{329. \textit{Id.}}

\footnote{330. \textit{Id.}}

\footnote{331. \textit{Abbott II}, 748 F.3d 583, 598 (5th Cir. 2014).}
rural Pennsylvania counties among the state’s sixty-four total with the requirement that women in four out of Texas’s 254 counties must travel long distances to reach an abortion provider. This comparison ignores the significant difference in land area between the two states: Texas covers nearly six times as much land area as Pennsylvania. Nevertheless, the Abbott II court concluded that “Casey counsels against striking down a statute solely because women may have to travel long distances to obtain abortions.”

As if it were a helpful defense of the law, the Abbott II court reiterated the finding of the motions panel that as many as 90% of Texas women would be able to obtain an abortion procedure within 100 miles of their homes even if H.B. 2 went into effect. The court then took that 100-mile distance as a baseline of constitutional acceptability and then built on it, holding that an “increase of 150 miles” also would not create an undue burden. The court thus met so-called incremental abortion restrictions with an incremental approach to the undue burden standard. Such an accretive approach to distance whittles away at women’s reproductive rights, with dramatic consequences for hundreds of thousands of women.

By two key metrics, then, the Fifth Circuit abruptly departed from Casey. First, deeming 10% of Texas women to be inconsequential for constitutional purposes was a far cry from the 1% who were worthy of the Supreme Court’s solicitude in striking down Pennsylvania’s spousal notification law in Casey. Second, by increasing the distance to an abortion provider that would be constitutionally acceptable, the court took a dramatic step beyond Casey and its progeny, which have upheld the constitutionality of lesser distances (e.g., seventy miles in Greenville Women’s Clinic). Most troubling, though, may be the court’s embrace of moving baselines on both of these metrics, a result of the court’s insistence on viewing each restriction and its consequences in isolation from prior restrictions, however recently those restrictions went into effect.


333. Abbott II, 748 F.3d at 598 (emphasis added). The decision does not mention that the women who need to travel long distances are rural. Indeed, the decision uses neither the word “rural” nor “nonmetropolitan”; it also does not use the term “urban.”

334. Id.

335. Id. A page later, the court appears to require a “significant” fraction of women to be affected by the regulation in order to strike it down. Id. at 600. In a small victory for abortion advocates, however, the court held that the admitting-privileges requirement may not be enforced against abortion providers who applied for admitting privileges within the 100-day grace period allowed by H.B. 2, but who have yet to receive a response from a hospital. Id. In Texas, hospitals are authorized by statute to process admitting-privilege applications for up to 170 days. TEX. HEALTH & SAFETY CODE § 241.101 (West, Westlaw through 2013 Legis. Sess.).
B. Medication-Abortion Restrictions

The medication-abortion provisions of Texas’s H.B. 2 effectively outlawed the “off-label” administration\(^\text{336}\) of two separate medication-abortion drugs, a treatment endorsed by the American College of Obstetricians and Gynecologists.\(^\text{337}\) That part of H.B. 2 mandated that abortion providers in Texas follow the FDA protocol, which requires three visits to a doctor: two for the administration of the two drugs at separate times, as well as a follow-up visit.\(^\text{338}\) Both the district court and the Fifth Circuit Court of Appeals in Abbott II upheld these provisions as constitutional under Casey’s undue burden test.

The district court found that the FDA protocol is clearly more burdensome to a woman than the off-label protocol.\(^\text{339}\) Nevertheless, relying on Casey,\(^\text{340}\) the court found that the additional visit to the physician required by the FDA protocol, the additional discomfort and inconvenience visited upon a woman, and the additional cost imposed by the higher dose of medicine required were “incidental effects,” insufficient to invalidate the provision.\(^\text{341}\) Importantly, however, the district court echoed Casey’s assertion that “at some point increased cost could become a substantial obstacle”\(^\text{342}\): “At some point, the totality of incidental effects may become an undue burden.”\(^\text{343}\) As we have asserted already, the combined impact of these regulations may add up to create an insurmountable burden, one that increases in proportion to a woman’s distance from an available abortion provider. The Abbott II court, however, did not find the totality of regulations in H.B. 2 sufficient to meet that threshold.\(^\text{344}\)

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337. *Id.*

338. *Id.* (“In contrast, the FDA protocol requires three separate visits to the clinic: one for the administration of mifepristone, one for the administration of the misoprostol, and one for a follow-up to ensure the pregnancy was successfully terminated.”).

339. *Id.* at 906-07.

340. “[T]he incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate [a law].” *Casey*, 505 U.S. at 874. *See also* Planned Parenthood Sw. Ohio Region v. DeWine, No. 1:04-CV-493, 2011 WL 9158009 at *17 (S.D. Ohio, May 23, 2011) (upholding constitutionality of a state statute regulating the use of medical abortion-inducing drug mifepristone based on Casey, stating, “While an additional clinic visit and a higher dose of medication may increase the cost of the procedure, Casey instructs that “[t]he fact that a law . . . has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it.”) (quoting Casey, 505 U.S. at 874), aff’d, 696 F.3d 490 (6th Cir. 2012).


342. *Casey*, 505 U.S. at 901.


344. *Id.*
The district court further found that, because a safe alternative in the form of surgical abortion is available to most women, requiring the FDA protocol for the administration of a medication abortion merely inconveniences women but does not rise to the standard of an undue burden. Thus, the district court found that the additional visit to a physician associated with a medication abortion is not a significant obstacle that runs afoul of the Constitution. Again, the court gave cursory consideration to the burden of multiple visits over long distances, essentially ignoring the spatial burden on rural women.

The district court did find the medication-abortion provisions an undue burden and effective prohibition of abortion for those women who, for medical reasons, cannot undergo surgical abortions. Yet, in that regard the district court also identified in H.B. 2 “a general health-of-the-mother exception applicable to the act as a whole.” That exception was seen as curing any constitutional infirmities of the medication-abortion provision. Furthermore, H.B. 2 contained a broad severability clause that exempted those applications of the statute that impose an undue burden as applied to a particular woman seeking abortion. The court therefore enjoined application of the medication-abortion provision only if it operated to “ban a medication abortion where a physician determines, in appropriate medical judgment, such a procedure is necessary for the preservation of the life or health of the mother.”

On appeal, the Fifth Circuit found that the State did not meet its burden of showing success on the merits in its appeal of the limited permanent injunction regarding medication abortion. Nevertheless, the appeals court further narrowed the scope of the limited permanent injunction to align it with the district court’s basis for declaring the medication-abortion provisions unconstitutional. The appellate court thus limited the injunction’s application to those “situations where medication abortion is the only safe and medically sound option for women with particular physical abnormalities or preexisting conditions.”

347. Id. at 908. (“The legislature also included a broad severability clause, stating that if ‘the application of the statute is found to impose an impermissible undue burden on any pregnant woman or group of pregnant women, the application of the statute to those women shall be severed. . . .’”)
348. Id.
349. Id.
350. Id.
351. Id.
352. Abbott I, 734 F.3d at 418. (“The State’s arguments present complex issues, and we cannot say that the State has made the necessary strong showing of a likelihood of success on the merits. In so saying, we do not prejudge the outcome of these issues on appeal. We conclude only that a stay of the injunction on these grounds pending appeal is not appropriate.”).
353. Id. at 417 (quoting Abbott, 951 F. Supp. 2d at 907). The Fifth Circuit wrote:

Pending appeal, we stay the injunction in the Final Judgment pertaining to medical abortions with this exception: the district court’s injunction continues to apply
In its review of the *Abbott* case on the merits, the Fifth Circuit disagreed with the motion panel’s conclusions and found that the medication-abortion provision of H.B. 2 does not impose, on its face, an undue burden on the right of a woman to choose an abortion. The court thus upheld the medication-abortion provision in its entirety. Further, the court did so without considering the additional travel burden a surgical abortion may impose on a woman, especially on one who lives far from an abortion clinic.

The Fifth Circuit focused its decision on the group of women affected by the difference between the FDA protocol and the off-label administration of the drug (i.e., women between fifty and sixty days of gestation who, for various medical reasons, cannot safely undergo surgical abortion). The court disputed several factual findings of the district court, such as whether for that particular subset of women medication abortion was the only safe method of abortion. The Fifth Circuit further disagreed with the trial court’s so-called “speculative” findings of the comparative safety of a medication abortion, and declared that H.B. 2, like the Partial-Birth Abortion Ban Act in *Gonzales*, did not require a health-of-the-mother exception. Further, the Fifth Circuit found a facial challenge—as opposed to an “as-applied” challenge—inappropriate for pending appeal with respect to a mother who is 50 to 63 days from her last menstrual period if the physician who is to perform an abortion procedure on the mother has exercised appropriate medical judgment and determined that, due to a physical abnormality or preexisting condition of the mother, a surgical abortion is not a safe and medically sound option for her.

*Abbott I*, 734 F.3d at 419.

354. *Abbott II*, 748 F.3d 583 (5th Cir. 2014).

355. *Id.* at 604-05. Cf. Planned Parenthood Ariz., Inc. v. Humble, 753 F.3d 905, 914 (9th Cir. 2014) (“In *Abbott*, the Fifth Circuit held that courts may not consider the strength of the state’s justification . . . We conclude that *Abbott* [is] inconsistent with the undue burden test as articulated and applied in *Casey* and *Gonzales*. The Fifth and Sixth Circuits’ approach fails to recognize that the undue burden test is context-specific, and that both the severity of a burden and the strength of the state’s justification can vary depending on the circumstances.”). Interestingly, that Ninth Circuit opinion noted the particular impact the law would have on women in northern Arizona, where only medication abortions are available at a Flagstaff clinic. *Id.* at 916. Northern Arizona is mostly nonmetropolitan, with a substantial American Indian population. The U.S. Supreme Court let the Ninth Circuit decision in *Humble* stand. Adam Liptak, *Supreme Court Lets Decision on Arizona Abortion Law Stand*, N.Y. TIMES (Dec. 16, 2014), http://www.nytimes.com/2014/12/16/us/politics/justices-let-stand-a-ruling-blocking-an-arizona-abortion-law.html.

356. *Id.* at 601. Again, Planned Parenthood did not contest the district court’s conclusion that women in the first forty-nine days of gestation are unaffected by the medication-abortion provisions of H.B. 2. *Id.*

357. *Id.* at 604 (“Moreover, there appears to be disagreement over whether medication abortions are actually safer for that same subset of women, at least when subsequent emergency surgical abortions are necessary.”).

358. *Id.*

359. Both *Roe v. Wade* in 1973 (challenging an outright abortion ban that criminalized the procedure), and *Casey* in 1992 (challenging informed-consent, twenty-four-hour waiting period, spousal notification, parental notification, and recordkeeping and reporting requirements), were facial challenges. In *Roe*, the plaintiff managed to tell her story against an already enforced regulation: that “she was unmarried and pregnant; that she wished to terminate her pregnancy by an abortion ‘performed by a competent, licensed physician,
defining the scope of an exception, if any. Lastly, the court misplaced the undue burden requirement, which, under *Casey*, should be *on the woman’s right* to obtain an abortion. Yet the *Abbott II* court wrote: “H.B. 2 on its face does not impose an undue burden *on the life and health of a woman*, and the district court erred in finding to the contrary.”

Throughout its analysis, the Fifth Circuit treated surgical abortion as equivalent to medication abortion, even implying it is the more convenient and safer option of the two. Indeed, the court of appeals appeared to treat medication abortions as highly suspect procedures that frequently require surgical intervention. Notably, however, the court did not consider the benefits of medication abortion relative to a surgical abortion in terms of reduced travel time and/or cost. By framing its analysis in sterile medical terminology and ignoring the human costs associated with the surgical abortions that it (somewhat ironically) endorsed, the Fifth Circuit disregarded the spatial and socioeconomic limitations on rural women’s agency.

C. Epilogue: The Early Legacy of *Abbott II* and Resistance to It

The significance of federal judicial attitudes toward spatiality and poverty in relation to the undue burden standard can hardly be overstated. This is especially true at the appellate level. These understandings, as reflected in *Abbott II* in March 2014, have already had a significant impact on abortion jurisprudence. For example, within a few months of the *Abbott II* decision, the Fifth Circuit in *Currier* said that it was bound by that case as precedent for the proposition that admitting-privileges laws satisfy the rational basis test. On the other hand, as this article goes to press, the Ninth Circuit has declined to follow the *Abbott II* decision, notably for the Fifth Circuit’s cursory review of the state’s

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under safe, clinical conditions”; that she was unable to get a ‘legal’ abortion in Texas because her life did not appear to be threatened by the continuation of her pregnancy; and that she *could not afford to travel to another jurisdiction in order to secure a legal abortion under safe conditions.* Roe v. Wade, 410 U.S. 113, 120 (1973), modified by Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (emphasis added). In *Casey*, however, the abortion providers challenged the regulations before they came into force, and their case lacked a highly personal story to give a human face to the legal arguments. The marked difference in outcome could signify the difficulties of bringing a pre-enforcement facial challenge because the latter does not employ an individual human narrative to convey the burden. Another significant peril is the risk that, as in *Lakey I*, a court will hold that res judicata will bar raising an as-applied challenge separate from a pre-enforcement facial challenge. See *Lakey I*, 667 F.3d at 301.

360. *Abbott II*, 748 F.3d at 604.
361. *Id.* at 605 (emphasis added).
362. Burkstrand-Reid, supra note 43.
proffered justification of the law and that court’s “fail[ure] to recognize that the undue burden test is context specific,” and the Supreme Court has let that decision stand. A federal district court has distinguished from *Abbott* a case litigating a Wisconsin admitting-privileges requirement. The most revealing judicial criticism leveled at *Abbott II*’s urbanormativity has come from a district court in Texas examining the ASC provisions of H.B. 2. In that case, too, however, *Abbott II* has thus far proved potent precedent.

In his Memorandum Opinion in *Lakey*, which litigated the ASC requirement of H.B. 2, Judge Yeakel sought to work around *Abbott II* as precedent by recognizing the cumulative effects of the barriers created by different parts of the Texas law. Judge Yeakel found that if all provisions of H.B. 2 come into force, only seven or eight Texas abortion clinics—all in Dallas, Fort Worth, Austin, San Antonio, and Houston, and all “located along the I-35 and I-45 corridors”—will remain open. No other facility will satisfy the ASC requirement. Prior to H.B. 2, forty facilities had provided abortion services, and half of these facilities closed as a result of the admitting-privileges provision of H.B. 2. These consequences are illustrated by Map 2.

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365. Planned Parenthood Ariz., Inc. v. Humble, 753 F.3d 905, 914 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 870 (2014) (“In *Abbott*, the Fifth Circuit held that courts may not consider the strength of the state’s justification . . . . We conclude that *Abbott* is inconsistent with the undue burden test as articulated and applied in Casey and Gonzales. The Fifth and Sixth Circuits’ approach fails to recognize that the undue burden test is context-specific, and that both the severity of a burden and the strength of the state’s justification can vary depending on the circumstances.”).

366. Planned Parenthood of Wis., Inc. v. Van Hollen, No. 13-CV-465-WMC, 2014 WL 2159517, at *10 (W.D. Wis. May 23, 2014). The court distinguished the Wisconsin regulation from Texas’s hospital admission provision because “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.” *Id.* In Texas, on the other hand, the decisions by hospitals to grant or deny hospital-admitting privileges are the decisions of private actors.


368. *Id.*

369. *Id.* at *7. The court concluded:

(1) the act’s ambulatory-surgical-center requirement places an unconstitutional burden on women throughout Texas and must be enjoined; (2) the act’s ambulatory-surgical-center and admitting-privileges requirements, as applied to McAllen and El Paso clinics, place an unconstitutional burden on women in the Rio Grande Valley, El Paso and West Texas and must be enjoined; and (3) the act’s ambulatory-surgical-center and admitting-privileges requirements operate together to place an unconstitutional undue burden on women throughout Texas and must be enjoined.

*Id.* at *4.

370. *Id.* at *7. Judge Yeakel found it suspect that other type of facilities are either “grandfathered” or granted some sort of variance from the ASC requirement, a benefit not provided for facilities providing abortion services.

371. *Id.* at *8.
Thus, Judge Yeakel observed, Texas would go from forty abortion providers to—at most—eight providers as a result of the combined effect of H.B. 2 provisions. This holistic approach in Lakey is a welcome departure from the appellate court’s method of calculating each incremental provision’s effect in relation to what is then the status quo. The latter approach, favored by the Fifth Circuit, obscures the cumulative effect of these regulations.

Furthermore, Judge Yeakel illustrated the spatiality of abortion access by, for example, focusing on the size of Texas—“nearly 280,000 square miles and ten percent larger than France”372—and noting that, if the ASC requirement of H.B. 2 were upheld, “approximately 2 million women will live further [sic] than 50 miles, 1.3 million further than 100 miles, 900,000 further than 150 miles, and 750,000 further than 200 miles” from an abortion provider.373 The court found “the cumulative effect of clinic closures and lessened geographic distribution of abortion providers” to be significant factors because they require the reproductive-age women of Texas to travel considerably farther in order to exercise their right to a legal abortion.374

372. The Fifth Circuit, overturning this decision, also observed that Texas is a “vast state.” Lakey I, 769 F.3d 285, 303 (5th Cir. 2014).
374. Id.
Judge Yeakel looked critically at the implications of the Abbott II decision and identified its urbanormativity, though not with that terminology. The State argued that Abbott II had established a “safe harbor” of a 150-mile travel requirement, and that “no abortion regulation that increases travel distance alone could act as an undue burden on the right to previability abortion.” Judge Yeakel refuted these arguments by talking not only about distance, but also the dynamic and exponentially potent relationship among sheer distance and a range of socioeconomic and legal factors:

[T]he record conclusively establishes that increased travel distances combine with practical concerns unique to every woman. These practical concerns include lack of availability of child care, unreliability of transportation, unavailability of appointments at abortion facilities, unavailability of time off work, immigration status and inability to pass border checkpoints, poverty level, the time and expense involved in traveling long distances, and other, inarticulable psychological obstacles. These factors combine with increased travel distances to establish a de facto barrier to obtaining an abortion for a large number of Texas women who might choose to seek a legal abortion.

Judge Yeakel further showed solicitude for “women in the border communities” up and down the Rio Grande, noting that they are burdened by spatiality, socioeconomic status, and “other issues uniquely associated with minority and immigrant populations.”

The district court thus refused to isolate the distance metric.

It is impossible to conclusively measure the individualized factors that act on each woman’s decision to seek or forgo an abortion due to the procedure’s relative unavailability. . . . It is also impossible to divine exactly how many women in Texas may be affected by an individual factor, or combination of factors to the point of not being able to exercise their right to obtain an abortion.

Finding that H.B. 2 necessarily operates in conjunction with Texas’s other regulations on abortion, and that it is impossible to know which of these individual provisions will prove to be the proverbial “last straw” that encumbers a woman’s choice, Judge Yeakel went on to state: “It is overly simplistic and reductionist to conclude that absolute distances or travel times measured under ideal circumstances act identically on a population as diverse as Texas’s.”

Thus, Judge Yeakel found that H.B. 2’s “requirements erect a particularly high

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375. Id. at *11 (citing Abbott II, 748 F.3d at 598).
376. Id.
377. Id. at *12.
378. See supra Part II.C.
380. Id.
barrier for poor, rural, or disadvantaged women throughout Texas, regardless of the absolute distance they must travel to obtain an abortion.” The district court concluded:

[T]he act’s ambulatory-surgical-center requirement combined with the already-in-effect admitting-privileges requirement, creates a brutally effective system of abortion regulation that reduces access to abortion clinics thereby creating a statewide burden for substantial numbers of Texas women. The obstacles erected for these women are more significant than the “incidental effect of making it more difficult to get an abortion.” The court concludes that the overall lack of practical access to abortion services resulting from clinic closures throughout Texas as a result of House Bill 2 is compelling evidence of a substantial obstacle erected by the act.

With this language, Judge Yeakel challenged the spatially privileged, urbanormative conclusion of the Fifth Circuit in Abbott II, and he also rejected that court’s putative creation of a 150-mile, one-way travel requirement as an undue burden “safe harbor.” Just as importantly, Judge Yeakel provided an example of intellectual rigor in evaluating H.B. 2’s provisions—intellectual rigor that drew on the spatial and economic realities of Texas’s reproductive-age women. Judge Yeakel further signaled that every Texas woman has a right to an abortion—even those in the colonias on the Mexican border, those who are disadvantaged by a potent cocktail of spatiality, socioeconomic disadvantage, ethnicity, and immigration status. In this way, he also refused to play the numbers game of Abbott II; in short, Judge Yeakel assumed that every Texas woman matters.

On appeal, however, the Fifth Circuit’s implicit bias against poor, rural, and Latina women again carried the day. Citing and quoting from Abbott II, Judge Elrod—who had also participated in Abbott II—wrote in Lakey I that, “under this circuit’s precedent, and Carhart, a ‘significant number’ is insufficient unless it amounts to a ‘large fraction.’” The court went on to conclude that the plaintiff had not provided sufficient evidence “at the four-day trial” that a “‘large fraction’ of women seeking abortions would face an undue burden” because of the ASC requirement.

The plaintiffs’ expert had testified that the ASC requirement would mean “900,000 out of approximately 5.4 million women of reproductive age in Texas would live at least 150 miles from the nearest clinic,” but the court complained that the expert “did not testify specifically about how many women seeking

381. Id. at *13.
383. Lakey I, 769 F.3d at 296. Further, because Lakey was a facial challenge, the court wrote that it can “succeed only where the plaintiff shows that there is no set of circumstances under which the statute would be constitutional.” Id. at 297-98 (citing Barnes v. Mississippi, 992 F.2d 1335, 1342 (5th Cir. 1995)).
384. Id. at 298.
abortions would have to drive more than 150 miles or whether that number would amount to a large fraction.”385 It is unclear exactly what hair the court is splitting here—between reproductive age women who live at least 150 miles from a clinic on the one hand and women seeking abortions who have to drive more than 150 miles on the other? Or, is the court highlighting the distinction between where one lives and how far one must drive? Or that between reproductive-age women and the subset of those women who would seek an abortion? Whatever the court was getting at, its purported interest in the expert’s opinion regarding what constitutes a “large fraction”—a legal standard—seems disingenuous at best. What is clear is that the court uses its Abbott II decision as precedent for treating the 150-mile threshold as a safe harbor, noting that Abbott II held such a distance not to create an undue burden.386

Adding insult to injury, Lakey I espouses the view that the undue burden analysis is only relevant in assessing the relative increase in burden associated with a given regulation. This approach renders the totality of burden irrelevant—even when one burden builds on another within just one year, as the admitting-privileges and ASC requirements were intended to do under H.B. 2. Thus, each additional 50 or 100 miles seem less onerous because each increment is distinct from the burden the woman faced due to a prior regulation and distinct from her own spatial and socioeconomic circumstances in relation to the market for abortion services. Even though the Supreme Court in Casey implicitly criticized this approach,387 the Fifth Circuit has made a moving target of the constitutional baseline of the undue burden standard, at least doubling the travel distance previously associated with that legal test.

At the same time, the Fifth Circuit has dramatically increased the percentage of women who must be burdened by the regulation in order for a facial challenge to succeed. Regarding that “large fraction” standard, the Lakey I majority further entrenched Abbott II’s peculiar revision of Casey, suggesting that Casey must be interpreted in light of Barnes v. Mississippi, a 1993 abortion decision of the Fifth Circuit which held that “standard principles of constitutional adjudication require courts to engage in facial invalidation only if no possible application of the challenged law would be constitutional.”388 Noting that, in light of Casey’s “large fraction” standard, it is unclear “whether the Supreme Court applies this general rule [of Barnes] in abortion cases,”389 the

385.  Id. (citing Abbott II, 748 F.3d at 594-96) (emphasis added).
386.  Id. (citing Abbott II, 748 F.3d at 598) (“[A]n increase of travel of less than 150 miles for some women is not an undue burden under Casey.”).
387.  Compare Lakey I, 769 F.3d at 303 (“We must determine whether the State is likely to prevail on its argument that this incremental increase of 100 miles in distance does not constitute an undue burden.” (emphasis added)), with Casey, 505 U.S. at 901 (“[A]t some point increased cost could become a substantial obstacle.” (emphasis added)).
388.  Id. (quoting Barnes, 992 F.3d at 588).
389.  Id. This could be seen as a form of “copy-paste” precedent. See Brian Soucek, Copy-Paste Precedent, 13 J. APP. PRAC. & PROCESS 153 (2012) (discussing the practice of federal appellate courts to use as precedent unpublished opinions that the court neither cites nor quotes). Here, the Fifth Circuit is doing something slightly different—using a phrase from a Supreme Court case as a term of art, but giving that term of art a different meaning than the
Lakey I court referred to Abbott’s “guidance that a burden that ‘does not fall on the vast majority of Texas women’ does not meet the large fraction test.” As we discussed above, the Supreme Court in Casey rejected a suggestion that in order to find an undue burden, the regulation has to affect a “vast majority” of women. Nevertheless, the Lakey I court clung to the 100% requirement associated with facial challenges generally, and it clarified that, in any event, it would not “interpret Casey as changing the threshold for facial challenges from 100% to 17%,” the latter percentage a reference to the 900,000 reproductive-age Texas women who would be at least 150 miles from an abortion provider if the ASC requirement goes into effect.

Even following Casey as precedent, the Lakey I court engaged in a sleight of hand regarding the denominator for the “large fraction.” Casey said the denominator should “encompass all women ‘for whom the law is a restriction.’” On this basis, the Lakey I majority held that the denominator must include “all women affected by these limited options,” and not only the women who are worse off with respect to distance to be traveled in the era of H.B. 2. Thus, the court determined that “all women in Texas who seek an abortion” are affected by the ASC requirement, making those women the denominator. The numerator, Lakey I held, was the women who would have to travel more than 150 miles, and the Fifth Circuit did not find those 17% of reproductive-age Texas women (more than one out of six women) to be a “large fraction.”

Yet this determination that the proper denominator is all Texas women runs contrary to another finding of the Fifth Circuit in Lakey I—that Texas abortion clinics that remain open in spite of the admitting-privileges and ASC requirements will not be affected by the closure of the other clinics—that is, the remaining clinics will experience no diminution in their ability to meet presumptively higher demand. On the one hand, then, the court says all Texas women are affected by the regulations, making all Texas women seeking an abortion the relevant denominator for purposes of the “large fraction” analysis. On the other, however, the court specifically finds that abortion access for most Texas women of reproductive age (up to 83%) is not, in fact, affected by the

390. Id. at n.14 (emphasis added).
391. See supra notes 227, 231, and 279, and accompanying text.
393. Id. at 299 (citing Casey, 505 U.S. at 894 (involving a spousal consent requirement that applied to married women who did not want to obtain consent)). To be precise, Casey invalidated a provision that affected about 1% of all women seeking an abortion. Casey, 505 U.S. at 894 (“Respondents attempt to avoid the conclusion that § 3209 is invalid by pointing out that it imposes almost no burden at all for the vast majority of women seeking abortions. . . . [R]espondents argue, the effects of § 3209 are felt by only one percent of the women who obtain abortions.” (emphasis added)).
394. Id. (“Here, the ambulatory surgical center requirement applies to every abortion clinic in the State, limiting the options for all women in Texas who seek an abortion.”).
395. Id.
396. Id. at 303-04.
regulations. Needless to say, the court cannot with integrity have it both ways. A more appropriate denominator would exclude—at a minimum—the women who live in the major metropolitan areas where clinics will remain open even if the ASC requirement goes into effect. Indeed, that denominator should exclude all women who were previously served by those clinics even before H.B. 2 was passed, those whose closest abortion provider was in a metropolitan clinic in Dallas, Fort Worth, Austin, San Antonio, or Houston.

Also noteworthy are differences in style and rhetoric between the federal district court and the Fifth Circuit. Whereas Judge Yeakel wrote with compassion of the multiple burdens on women who might seek abortions, the Fifth Circuit in *Lakey I* was quite callous, suggesting that poverty, child care, and such are not relevant because they are not the state’s responsibility. The court went as far as to quote the district court’s list of “practical concerns,” including child care, transportation, immigration status, unavailability of appointments, time off work and even “inarticulable psychological obstacles.” But the Fifth Circuit then wrote off these concerns as irrelevant to the inquiry at hand: “We do not doubt that women in poverty face greater difficulties. However, to sustain a facial challenge, the Supreme Court and this circuit require Plaintiffs to establish that the law itself imposes an undue burden on at least a large fraction of women.” The Fifth Circuit’s approach to facial challenges thus rendered constitutionally irrelevant one of the most disadvantaged groups of women in Texas. At the same time, the court denounced any state responsibility in relation to their plight—be it reproductive or socioeconomic.

Finally, the Fifth Circuit in *Lakey I* relied on *Abbott II* as precedent—however youthful that precedent might be—in criticizing Judge Yeakel’s use of a balancing test because, “[i]n our circuit, we do not balance the wisdom or effectiveness of a law against the burdens the law imposes.” The *Lakey I* court similarly cited *Abbott II* for the proposition that it should “not second guess the legislature regarding the law’s wisdom or effectiveness.”

Regarding numerous points, then, *Lakey I* relied on the fresh precedent of *Abbott II* to justify further incursions into the abortion right.

*Lakey I*’s tone and manipulation of precedent—most importantly, the “large fraction” and “vast majority” tests—have potentially profound implications for facial challenges to abortion restrictions. While the Roberts Court has shown a strong preference for as-applied challenges over facial ones, no one has a clear vision of what an as-applied challenge would look

397. *Id.* at 299 (emphasis added).
399. *Id.* at 297 (acknowledging that some circuits do use such a balancing test and citing cases from the Ninth, Seventh, Fifth, Fourth, and Eighth Circuits).
400. *Id.* at 294.
like in the abortion context. The nine-month term of a pregnancy makes it impractical at best for a pregnant woman burdened by these regulations to bring an as-applied challenge. Indeed, only three as-applied challenges (including one not permitted in Lakey I because of the Fifth Circuit’s application of res judicata), have been brought in the history of abortion litigation. Further, only one of these featured pregnant women (in addition to abortion providers) as plaintiffs: Hodgson v. Minnesota, a 1986 challenge to Minnesota’s parental consent requirement for minors.

Nevertheless, Lakey I nudges the pro-choice community toward such a litigation strategy. That strategy might best identify a poor rural woman from the Rio Grande Valley as plaintiff. Further, the litigation regarding that woman might use a narrative about her circumstances to highlight the sort of lived experiences that the Fifth Circuit seems unable to understand and with which it has yet to grapple in any meaningful way. Such litigation might better give a human face to the undue burden standard, moving beyond the relative abstraction of the facial challenges brought by abortion providers in Abbott and Lakey. Such an as-applied case could deploy the tactics suggested in Toward a Feminist Theory of the Rural by moving beyond the hypothetical to articulate a personal and highly detailed narrative of a woman’s struggle to exercise a constitutional right.

CONCLUSION

The critical lenses and tools associated with legal geography, privilege, and the rural studies concept of urbanormativity are useful in highlighting the role of socio-spatiality in the lives of rural women, including its impact on their access to reproductive health services. Rural women who are poor are doubly
disadvantaged because they are without the economic resources to overcome spatiality’s disabling force. Poor, rural, Latinas in the Rio Grande Valley’s persistent poverty counties are likely to be even more profoundly disadvantaged because their ethnicity and/or immigration status also limit their agency and, indeed, contribute to their socioeconomic and socio-spatial plight. For many such women, laws like Texas’s H.B. 2 are anything but incremental in their effect, undermining women’s reproductive health by restricting their reproductive choices as a function of a given woman’s distance from a major metropolitan area.

When we consider the impact of the new wave of abortion regulations in relation to where a given woman lives, we see more clearly the variegated nature of these laws and, indeed, the arbitrariness of their consequences. Spatiality skews on-the-ground operation of laws that effectively close abortion clinics and limit the administration of medication abortion. These laws thus govern unevenly, as the regulations and their consequences are “differently refracted through the social architecture of spatialities.” In short, the material spaces along the rural-urban continuum dictate how law happens or operates, “how law is projected” differently onto different “segment[s] of the material world.”

The Fifth Circuit’s decisions to uphold the constitutionality of different provisions of Texas H.B. 2 in 
Abbott and Lakey are the latest in a long line of U.S. Courts of Appeals cases that reveal many federal judges’ blind spots regarding how potent a force material spatiality can be. These cases—numerous in the two decades since Planned Parenthood of Southeastern Pennsylvania v. Casey—all follow from Casey’s articulation of the undue burden standard. They also follow Casey’s lead in downplaying the burden that abortion regulations create for rural women. Indeed, after 
Abbott and Lakey, numerous women who do not live in rural areas, but who live in smaller cities, are also greatly burdened by H.B. 2.

Like the U.S. Supreme Court plurality in Casey, the Fifth Circuit judges who decided 
Abbott appear oblivious to the socio-spatial and socioeconomic realities of rural women’s lives—in part because they are oblivious to their own socio-spatial and socioeconomic privilege. Even if these judges are not clueless about the conditions of rural women’s lives—even if their rulings are simply ideologically driven—the judges articulate an urbanormative jurisprudence when they discount the barrier of distance. They create urbanormative precedents. When such courts minimize the burden—a reality for at least 17% of Texas women—of traveling more than 150 miles each way to reach an abortion provider, they implicitly take for granted urban living conditions, including access to myriad services and public transportation. In so doing, they also display their socioeconomic privilege by assuming the availability of reliable transportation, disposable income, affordable child care, ease of obtaining time

off work, and available time on women's hands. If other appellate courts follow the Fifth Circuit's lead and assess only the burden of each incremental increase in distance, expense, or waiting period—as opposed to the accumulated burden associated with previously existing regulations (each of which was held, in isolation from others, to pass constitutional muster)—eventually no distance, expense, or waiting time will meet the ever-rising undue burden threshold.

Because the U.S. Supreme Court is likely to decide the constitutionality of the regulations at stake in *Abbott* and *Lakey*, either in these cases or others in which similar regulations are adjudicated, it is critically important to make clear the ways that these laws create undue burdens for numerous women, especially those living in rural places and especially those who are poor. *Toward a Feminist Theory of the Rural* suggested that advocates should be bold in "playing the rural card," in being explicit and detailed in litigation about the ways in which rural socio-spatiality constrains women's agency. It is conceivable that better advocacy on behalf of rural women would make their plight more visible or relatable to the federal judiciary, that doing so could awaken judicial empathy as we enter a new era of abortion litigation. Indeed, in the Roberts Court era, reproductive rights advocates may have no choice. Nonsensical as it may appear as a practical matter, these advocates need to identify poor rural women who could be plaintiffs—and not merely hypothetical figures—in the next round of abortion litigation. That litigation could draw on the model suggested in *Toward a Feminist Theory of the Rural* to detail the consequences of rural poverty for women seeking to exercise the constitutional right to terminate a pregnancy.

For now, some appellate courts—most notably the Fifth Circuit in *Abbott II* and *Lakey I*—are moving in the wrong direction when it comes to spatiality and the undue burden standard. When Judge Hamilton wrote his dissent in *Greenville Women's Clinic* in 2000, the distance at issue was 70 miles, that between Beaufort and Charleston, South Carolina. Now we have the Fifth Circuit suggesting that distances two to four times that great, between West Texas, the Rio Grande Valley, and major metropolitan areas like San Antonio, where abortion clinics remain open, do not constitute an undue burden. Still more striking, perhaps—and more blatantly urbanormative—is the *Abbott II* court's statement that the 10% of Texas women who are farther than 100 miles from an abortion provider do not matter for purposes of assessing the undue burden standard in the context of a facial challenge. Indeed, the urbanormativity of *Abbott II* is topped only by *Lakey I*’s application of its “vast majority” standard. *Lakey I*’s majority found that 17% of reproductive-age Texas women—some 900,000 women—whose distance to an abortion provider will be increased by up to 150 miles, are irrelevant in a facial challenge to the law’s constitutionality.

407. See Lee Epstein & Jack Knight, *The Choices Justices Make* (1997), for a discussion of policy influences on judicial decision-making. Epstein and Knight argue that Supreme Court Justices act strategically to achieve policy goals and that this strategic interaction is shaped by the institutions within which the Justices are operating. Significant for our purpose is their argument that the relationship between the Court and the public affects the policy goals that Justices strive to achieve. See id. at 114.
Something is surely amiss with a legal system when those interpreting laws with clear spatial implications are themselves so privileged by space and socioeconomic class, so far removed from where abortion law’s “worlded” impact will be greatest. Such socio-spatial privilege on the part of our federal judiciary bears acknowledgement and examination. These, in turn, will surely support not only greater diversity on the bench, but also a broader definition of diversity.

408. See supra note 54 and accompanying text.