

# THE INTERSTATE COMMERCE OF ABORTION: A CONSTITUTIONAL ARGUMENT FOR THE FEDERAL INVALIDATION OF RESTRICTIVE STATE ABORTION LAWS

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In a conversation at the University of Minnesota Law School in September of 2014, Justice Ruth Bader Ginsburg astutely noted that “[t]here will not be a time in the United States again when a woman of means does not have access to a safe abortion.” This post-*Roe* fact is comforting to the privileged few whose reproductive rights are neither in imminent nor remote jeopardy. However, as Justice Ginsburg sagely warned, “the women who don’t have that wherewithal . . . will suffer.”<sup>2</sup> Although *Roe v. Wade* legalized abortion in the United States over forty years ago,<sup>3</sup> state legislatures have been able to dangerously encroach upon the ability of women to exercise this right through the imposition of Targeted Regulations of Abortion Providers (TRAP), limits on the provision of medication abortion, bans on private insurance coverage of abortion, and increasingly narrow pre-viability bans.<sup>4</sup> In the last four years, hundreds of these antiabortion laws have been enacted at the state level.<sup>5</sup> Thus, Justice Ginsburg’s bleak prognosis of the abortion rights landscape is becoming increasingly accurate due to the demonstrably disproportionate effects these severely restrictive laws have on the health and economic wellbeing of low-income women.<sup>6</sup> This obstructive and hostile legal environment has given rise to a subversive efforts to

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<sup>2</sup> U.S. Supreme Court Justice Ruth Bader Ginsburg, “A Conversation between Justice Ruth Bader Ginsburg and Professor Robert A. Stein” (Sept. 16, 2014).

<sup>3</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>4</sup> See Heather D. Boonstra & Elizabeth Nash, *A Surge of State Abortion Restrictions Puts Providers-And the Women They Serve-in the Crosshairs*, 17 GUTTMACHER POL’Y REV. 9 (2014) (describing how the 205 abortion restrictions enacted by 30 different state legislatures between 2011 and 2013 have “dramatically shifted the abortion policy landscape”); Angela Hooton & Aram Schvey, *50 States of Denial: States Deny Women Reproductive Rights*, 40-JUL HUM. RTS. 15 (2014) (surveying the “reality of abortion access today,” including the types of state restrictions passed since 2010).

<sup>5</sup> Tara Culp-Ressler, *In the Past 3 Years, We’ve Enacted More Abortion Restrictions Than During the Entire Previous Decade*, THINKPROGRESS (Jan. 2, 2014), <http://thinkprogress.org/health/2014/01/02/3112081/abortion-restrictions-2011-2013/>

<sup>6</sup> For a discussion of the detrimental health implications of restrictive abortion laws, see Dorothy Roberts, *KILLING THE BLACK BODY: RACE, REPRODUCTION AND THE MEANING OF LIBERTY* (1997); Tara Culp-Ressler, *Abortion Restrictions Could Put More Women at Risk for Domestic Violence*, THINKPROGRESS (Sept. 30, 2014), <http://thinkprogress.org/health/2014/09/30/3573649/banning-abortion-domestic-violence/>; Tara Culp-Ressler, *Women and Children Are Less Healthy in States With More Abortion Restrictions*, THINKPROGRESS (Oct. 1, 2014), <http://thinkprogress.org/health/2014/10/01/3574383/women-children-health-abortion-laws/>. For a discussion of the economic ramifications of abortion restrictions on low-income women, see Tara Culp-Ressler, *Polling Confirms That Voters See Abortion Access As An Economic Issue for Women*, THINKPROGRESS (Oct. 16, 2014), <http://thinkprogress.org/health/2014/10/16/3580240/abortion-economic-issue-voters/>; George Kocharkov, *Abortions and Inequality* (University of Konstanz Department of Economics, Working Paper, 2012), available at [http://georgikocharkov.com/wp/wp-content/uploads/2011/03/georgikocharkov\\_jmp.pdf](http://georgikocharkov.com/wp/wp-content/uploads/2011/03/georgikocharkov_jmp.pdf); Jacoba Urist, *Social and Economic Benefits of Reliable Contraception*, THE ATLANTIC (July 2, 2014), <http://www.theatlantic.com/health/archive/2014/07/social-and-economic-benefits-of-reliable-contraception/373856/>; Laia Font-Ribera et al, *Socioeconomic Inequalities in Unintended Pregnancy and Abortion Decision*, 85 J. URBAN HEALTH: BULLETIN N.Y. ACAD. MED. 125 (2007).

transport low-income women and teens into more liberal or permissive states to receive abortion services, not unlike the underground networks that existed to serve women pre-*Roe*.<sup>7</sup>

This paper seeks to delineate several legal arguments in an effort to protect, and in many instances create, access to the right to an abortion for low-income women. Introduced into both houses of Congress on January 21, 2015, the Women’s Health Protection Act is the most recent bill in a long history of federal legislative attempts to codify the Supreme Court’s pro-choice decisions, invalidate state antiabortion regulations, and prevent the subsequent enactment of similarly restrictive laws.<sup>8</sup> If Congress were to enact such legislation, the access to abortion *Roe* and its progeny guaranteed would be insulated should the Court hear a challenge to a state restrictions.<sup>9</sup> This paper will argue that the resulting interstate market for reproductive resources could provide a constitutional foundation for a federal invalidation of these exceptionally harsh antiabortion laws.

Part I of this paper describes the immense deluge of antiabortion regulations since 2010 and details the disproportionately negative affect those laws have on low-income women. Part II examines the long history of abortion Tourism and underground networks of reproductive resources that have existed to provide necessary healthcare to low-income and rural women. Part III chronicles legislative attempts at the federal level to protect the right to abortion against restrictive state regulations, including the several variations of the Freedom of Choice Act and the Women’s Health Protection Act. Considering the divided appeals court decisions on the issue of the legitimacy of state antiabortion regulation,<sup>10</sup> Part IV considers the constitutionality of a federal protection of abortion rights under Section 5 of the Fourteenth Amendment and the Commerce Clause in light of the current underground efforts to provide women safe abortion services outside of their home states.

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<sup>7</sup> Janessa L. Bernstein, *The Underground Railroad to Reproductive Freedom: Restrictive Abortion Laws and the Resulting Backlash*, 73 BROOK. L. REV. 1463 (2008).

<sup>8</sup> Women's Health Protection Act of 2015, S. 217, 114th Cong. (1st Sess. 2015) (hereinafter “Women’s Health Protection Act”); Women's Health Protection Act of 2015, H.R. 448, 114th Cong. (1st Sess. 2015).

<sup>9</sup> See Anthony Dutra, Note, *Men Come and Go, But Roe Abides: Why Roe v. Wade Will Not Be Overruled*, 90 B.U. L. REV. 1261, 1297 (2010).

<sup>10</sup> *Compare* Planned Parenthood Ariz., Inc. v. Humble, 753 F.3d 905, 914 (9th Cir. 2014) (holding that the lower court abused its discretion in denying a preliminary injunction against an Arizona statute requiring that medication abortions be administered in compliance with the Food and Drug Administration’s outdated and comparatively unsafe on-label regimen for administering medication abortions), *and* Planned Parenthood of Wisc., Inc. v. Van Hollen, 738 F.3d 786, 791–99 (7th Cir. 2013) (affirming the lower court’s preliminary injunction against enforcement of a Wisconsin statute because the law would have “wreaked havoc with the provision of abortions” in the state), *with* Planned Parenthood of Greater Tex. Surgical Health Services v. Abbott (Abbott II), 748 F.3d 583, 593–94, 597 (5th Cir. 2014) (reversing the lower court’s decision and holding that Texas law HB2 was constitutional because it had a rational basis in protecting patients’ health and did not constitute an undue burden), *Planned Parenthood Sw. Ohio Region v. DeWine*, 696 F.3d 490, 515 (6th Cir. 2012) (finding no evidence that an Ohio law that criminalized the distribution of mifepristone imposed an undue burden on a woman’s ability to make the decision to have an abortion and that the right to choose abortion did not necessarily “encompass[] the right to choose a particular abortion method”), *Greenville Women’s Clinic v. Bryant*, 222 F.3d 157 (4th Cir. 2000) (finding that a South Carolina TRAP law was constitutional because it served a valid state interest, did not “strike at the abortion right itself,” and did not impose an undue burden on the ability to make the decision to have an abortion), *and* *Women’s Health Center of W. Cnty., Inc. v. Webster*, 871 F.2d 1377 (8th Cir. 1989) (affirming the district court’s finding that a Missouri abortion regulation was constitutional because it did not significantly limit a patient’s choices or interfere with the doctor-patient relationship).

## I. State Restriction of Abortion Services

The Supreme Court has consistently held that the right of a woman to choose to have an abortion before viability and without undue burden should be preserved.<sup>11</sup> However, the ability of a woman to exercise that right today is as intimately connected to her economic privilege and geographic location as it was in the days preceding the Court’s landmark ruling in *Roe v. Wade*.<sup>12</sup> In *Roe*, the Court struck down a Texas antiabortion law as unconstitutional, holding for the first time that the constitutional right to personal privacy protected a woman’s right to terminate her pregnancy.<sup>13</sup> Weighing the relevant private and state interests in abortion, the Court preserved the power of state legislatures to regulate the procedure after the fetus is “capab[le] of meaningful life outside the mother’s womb.”<sup>14</sup> While the Court acknowledged a fundamental right to abortion, it declined to grant women an absolute right to “abortion on demand.”<sup>15</sup> Instead, the Court held that a state may, in some instances, restrict that right if the regulation is narrowly tailored to a compelling state interest, such as the safety of the pregnant woman or the preservation of the “potentiality of human life.”<sup>16</sup>

Nearly twenty years later, this state regulatory power was further defined in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, in which the Court developed a more lenient standard for assessing the constitutionality of state abortion restrictions in light of the principles expressed in *Roe*.<sup>17</sup> Prior to *Casey*, abortion had been considered a fundamental right subject to strict scrutiny.<sup>18</sup> However, a plurality of the Court eschewed both strict scrutiny and rational-basis standard of review in favor of a new “undue burden” analysis.<sup>19</sup> Under the level of constitutional review set forth in *Casey*, a state abortion law may be struck down only if it “imposes a substantial obstacle to obtaining an abortion for a large number of women.”<sup>20</sup> In 2007, the Supreme Court

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<sup>11</sup> Ian Millhiser & Tara Culp-Ressler, *The Greatest Trick the Supreme Court Ever Pulled Was Convincing the World that Roe v. Wade Still Exists*, THINKPROGRESS (Feb. 28, 2014), <http://thinkprogress.org/default/2013/11/08/2919111/> (quoting *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) (“[T]he essential holding of *Roe v. Wade* should be retained and once again reaffirmed.”)).

<sup>12</sup> *Id.*

<sup>13</sup> *Roe v. Wade*, 410 U.S. at 153 (“This right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”).

<sup>14</sup> *Id.* at 154–57, 162–65.

<sup>15</sup> *Doe v. Bolton*, 410 U.S. 179, 189 (1973) (holding certain procedural restrictions on abortion providers unconstitutional). See Dutra, *supra* note 9, at 1267 (2010) (“The Court decided a companion case, *Doe v. Bolton*, at the same time as *Roe v. Wade*. These two decisions “are to be read together” (quoting *Doe v. Bolton*, 410 U.S. at 165)).

<sup>16</sup> Dutra, *supra* note 9 at 1266–67.

<sup>17</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 929 (1992).

<sup>18</sup> Dutra, *supra* note 9 at 1269.

<sup>19</sup> *Casey*, 505 U.S. at 874 (5–4 decision) (O’Connor, Kennedy, Souter, JJ, plurality opinion). In his dissent, Chief Justice Rehnquist condemned *Casey*’s new method of analysis, asserting that the plurality’s threshold “undue burden” test had transformed the Court’s holding in *Roe* into “little more than a hollow façade.” *Casey*, 505 U.S. at 944 (Rehnquist, C.J., dissenting).

<sup>20</sup> *Id.* at 874.

provided some guidance to lower courts in applying the test to state abortion legislation in *Gonzales v. Carhart*.<sup>21</sup> Observing the balance struck by *Casey*, the Court held that “a state may ‘regulat[e] the medical profession in order to promote respect for life,’ so long as the state does not act irrationally or ‘impose an undue burden’ on a woman’s right to abortion.”<sup>22</sup> Furthermore, the *Gonzales* court held that, in reviewing abortion legislation, a court “must determine whether the [regulation] furthers the legitimate interest of the Government in protecting the life of the fetus that may become a child.”<sup>23</sup>

As a result of the great deference assigned to state legislatures by *Roe* and its progeny, pro-life activists and elected officials in a majority of states have been able to enact a startling array of increasingly restrictive anti-abortion laws in the last two decades.<sup>24</sup> While many states either reformed or entirely repealed their anti-abortion laws in the wake of the Court’s decision in *Roe*,<sup>25</sup> the lenient standard of review set forth in *Casey* sparked a new wave of abortion legislation, aimed at imposing tougher restrictions on the procedure than ever before.<sup>26</sup> In many ways, the capacity for a woman to exercise the fundamental right to choose to terminate her pregnancy today, resembles the ability for women to access abortion in the years preceding those decisions.<sup>27</sup> As neighboring states often have divergent abortion policies, many of which continue to push the limits of the *Casey* undue burden standard, a woman’s right to abortion bears a direct correlation to her zip code, and consequently her privilege.<sup>28</sup> Thus, due to the Court’s preservation of significant state power to regulate abortion, conservative lawmakers have been able to chip away at the ability for women to access the procedure.

This has become increasingly true in the last few years: a “seismic shift in anti-abortion legislative zealotry” have occurred, leaving 56 percent of all women of reproductive age living in states “hostile” to abortion.<sup>29</sup> Under the guise of protecting women from the “harms inherent in abortion,” major conservative gains in the 2010 elections resulted in hundreds of anti-abortion measures flooding a majority of state legislatures.<sup>30</sup> While state-based antiabortion legislation is

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<sup>21</sup> *Gonzales v. Carhart*, 550 U.S. 124 (2007) (addressing the constitutionality of the Partial Birth Ban of 2003 on its face).

<sup>22</sup> *Id.* at 158.

<sup>23</sup> *Id.* at 146.

<sup>24</sup> Culp-Ressler, *In the Past 3 Years*, *supra* note 5 (Back in 2000, Guttmacher defined 13 states as “hostile” to abortion rights.... and about 31 percent of U.S. women of reproductive age lived in those places. By 2013, the number of hostile states swelled to 27 states — and now, over half of women in need of reproductive health care live in a place where they will likely struggle to terminate a pregnancy.”)

<sup>25</sup> Ada Kozicz, Note, *Repealing Physician-Only Laws: Undoing the Burden of Gestational Age Limits*, 42 HOFSTRA L. REV. 1263, 1271 (2014).

<sup>26</sup> *Id.* at 1271–74.

<sup>27</sup> *Id.* at 1265.

<sup>28</sup> Hooton & Schvey, *supra* note 4 at 17 (“The sad reality is that for women in the United States today, the ability to exercise their fundamental right to reproductive decision making and to obtain abortion care very much depends on zip code.”). See also Eric Eckholm, *Access to Abortions Falling as States Pass Restrictions*, N.Y. TIMES (Jan. 4, 2014), <http://www.nytimes.com/2014/01/04/us/women-losing-access-to-abortion-as-opponents-gain-ground-in-state-legislatures.html> (quoting Jennifer Dalven, director of the reproductive freedom project at the American Civil Liberties Union, “Increasingly, access to abortion depends on where you live . . . That’s what it was like pre-*Roe*”).

<sup>29</sup> Hooton & Schvey, *supra* note 4, at 16; Boonstra & Nash, *supra* note 4 at 12–13.

<sup>30</sup> Eckholm, *Access to Abortions Falling*, *supra* note 30. As a result of the 2010 midterm elections, the Tea Party and GOP controlled twenty-six state legislatures. Janet Reitman, *The Stealth War on Abortion*, ROLLING STONE

less than novel, the political environment cultivated after the enactment of the Affordable Care Act in March 2010 and the conservative gains in the aftermath of that year’s midterm election prompted a majority of state’s legislature to pass an unprecedented number of harsh new restrictions on when, how, and even whether women may access abortion services.<sup>31</sup> These laws are also substantially more obstructive than their predecessors; thus, for low-income women, the economic impact of these restrictive regulations is extremely harmful.<sup>32</sup>

Although states have previously sought to deter women from seeking abortions through parental notification laws, required waiting periods, and similar regulations, four unique mandates have composed the bulk of this new wave of state-based abortion legislation. This genus of restrictions have successfully closed down reproductive health clinics across the country and have made it even more difficult, and in many instances impossible, for economically disadvantaged women to access their rights to choose to terminate a pregnancy.<sup>33</sup> The coming sections will outline the ways in which states have designed and enforced each of the four categories of regulations outlined above and describe the uniquely damaging effects these provisions have on low-income women residing in those states.

### A. Targeted Regulation of Abortion Providers (TRAP)

Targeted regulations of abortion providers, or TRAP laws, pose a threat to low-income women’s right to receive an abortion.<sup>34</sup> According to a recent review conducted by the Guttmacher Institute, twenty-four states have abortion provider regulations that “go beyond what is necessary to ensure patients’ safety.”<sup>35</sup> These targeted regulations of abortion providers commonly restrict

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(Jan. 15, 2014), <http://www.rollingstone.com/politics/news/the-stealth-war-on-abortion-20140115#ixzz2r9Rwp7PA>. For a discussion of the 2010 midterm election’s effects on the anti-abortion movement, see Hooton & Schvey, *supra* note 4 at 15–16; John A. Robertson, *Abortion and Technology: Sonograms, Fetal Pain, Viability, and Early Prenatal Diagnosis*, 14 U. PA. J. CONST. L. 327, 330 (2011) (asserting that, because many newly elected governors and legislators were “solidly anti-abortion,” the midterm elections of 2010 reinvigorated the right-to-life movement); Erik Eckholm, *Across Country, Lawmakers Push Abortion Curbs*, N.Y. TIMES, Jan. 22, 2011, at A14 (suggesting that Republican victories in the November 2010 midterm elections energized conservative state lawmakers to push for legislation limiting abortion).

<sup>31</sup> Boonstra & Nash, *supra* note 4. In fact, the record-breaking number of state anti-abortion regulations enacted since 2011 substantially exceeds the total number of similar measures passed throughout the previous decade. *See, e.g.*, Culp-Ressler, *In the Past 3 Years*, *supra* note 5 (noting that, although states passed just 189 abortion restrictions between 2001 and 2010, between 2011 and 2013, states passed 205 restrictions on reproductive rights); Boonstra & Nash, *supra* note 4 at 9 (“No year from 1985 through 2010 saw more than 40 new abortion restrictions; however, every year since 2011 have topped that number.”). For a summary of current abortion restrictions in effect across the country, see *State Policies in Brief: An Overview of Abortion Laws (as of May 1, 2015)*, GUTTMACHER INST. (2015), [www.guttmacher.org/statecenter/spibs/spib\\_OAL.pdf](http://www.guttmacher.org/statecenter/spibs/spib_OAL.pdf).

<sup>32</sup> Hooton & Schvey, *supra* note 4; Heather D. Boonstra & Elizabeth Nash, *A Surge of State Abortion Restrictions Puts Providers-And the Women They Serve-in the Crosshairs*, 17 GUTTMACHER POL’Y REV. 9 (2014) (“Unquestionably, abortion restrictions fall hardest upon the poorest women, the very group bearing a disproportionate burden of unintended pregnancies.”).

<sup>33</sup> Tara Culp-Ressler, *GOP-Controlled States Are Already Busy Preparing New Abortion Restrictions for 2015*, THINKPROGRESS (Nov. 18, 2014), <http://thinkprogress.org/health/2014/11/18/3593452/abortion-restrictions-being-prepared/>.

<sup>34</sup> Boonstra & Nash, *supra* note 4, at 10–11; Guttmacher Institute, *Targeted Regulation of Abortion Providers, State Policies in Brief* (2016), [http://www.guttmacher.org/statecenter/spibs/spib\\_TRAP.pdf](http://www.guttmacher.org/statecenter/spibs/spib_TRAP.pdf).

<sup>35</sup> *Id.* at 10.

where abortions may be performed and who may perform them.<sup>36</sup> The most popular form of these doctor and clinic regulations mandates that abortions procedures only be performed at “sites that are the functional equivalent of ambulatory surgical centers” or hospitals.<sup>37</sup> Compounded with laws requiring clinicians at abortion facilities to have admitting privileges at a local hospital, these regulations are incredibly burdensome, pushing many clinics to close in light of the arduous standards.<sup>38</sup> Such restrictions have left several states with only one clinic.<sup>39</sup>

At least one circuit has attempted to strike down TRAP laws as unconstitutional. In reviewing a claim brought by Wisconsin physicians and abortion clinic operators challenging a state admitting privileges statute, the Seventh Circuit upheld a district court’s issuance of a preliminary injunction against the regulation.<sup>40</sup> However, numerous courts of appeal have not followed Wisconsin’s example.<sup>41</sup> For instance, after the controversial Texas statute, HB2, took effect in late 2013 and over a dozen clinics were forced to shut their doors for failure to meet the surgical center and admitting privileges requirements, the Fifth Circuit held in early October 2014 that the requirements did not impose an undue burden on women seeking an abortion.<sup>42</sup>

## B. Limits on the Provision of Medication Abortion

The Food and Drug Administration (FDA) first approved the use of medication to perform abortions in 2000.<sup>43</sup> Previously, most first-trimester abortions were surgically performed through a “vacuum aspiration” or “suction curettage” procedure.<sup>44</sup> However, the advent of medication abortion, 41% of all first-trimester abortions performed by Planned Parenthood clinics nationwide are now conducted using a combination of two prescription drugs, mifepristone and misoprostol.<sup>45</sup> When properly administered, medication abortion is exceptionally safe — even more so than surgical abortions, which are especially safe in their own right.<sup>46</sup>

<sup>36</sup> *Id.* See also, *Daily Kos: Attention NYT Corrections Desk*, CTR. FOR REPROD. RIGHTS (Sept. 9, 2009), <http://www.dailykos.com/story/2009/8/31/774874/-Attention:-NYT-Corrections-Desk> (Ambulatory surgical center (“ASC”) requirements...go far beyond the recommendations of the national health organizations in the field of abortion care, and converting a physician’s office or outpatient clinic into an ASC can be too expensive for many providers.”).

<sup>37</sup> *Id.*

<sup>38</sup> In 2013, four states – Alabama, North Dakota, Texas, and Wisconsin – enacted laws requiring abortion providers to have admitting privileges at local hospitals. Elizabeth Nash et al, *Laws Affecting Reproductive Health and Rights: 2013 State Policy Review*, GUTTMACHER INST. (2013),

<http://www.guttmacher.org/statecenter/updates/2013/statetrends42013.html> (explaining that “These measures effectively give hospitals veto power over clinics’ ability to provide services.”).

<sup>39</sup> *E.g.*, Hooton & Schvey, *supra* note 4, at 17 (“As a result of these laws, Mississippi, along with Arkansas, Missouri, North Dakota, and South Dakota, are left with only a single provider offering surgical abortions.”).

<sup>40</sup> Van Hollen, 738 F.3d 786.

<sup>41</sup> See, *e.g.*, Abbott II, 748 F.3d 583; DeWine, 696 F.3d 490; Bryant, 222 F.3d 157; Webster, 871 F.2d 1377.

<sup>42</sup> *Whole Woman’s Health v. Lakey*, 769 F.3d 285 (5th Cir. 2014), *vacated in part*, 135 S. Ct. 399 (2014).

<sup>43</sup> *Humble*, 753 F.3d at 907.

<sup>44</sup> *Id.* See also *Planned Parenthood Sw. Ohio Region v. DeWine*, 696 F.3d 490, 494 (6th Cir. 2012); *Planned Parenthood Cincinnati Region v. Taft*, 444 F.3d 502, 505 (6th Cir. 2006)).

<sup>45</sup> *Humble*, 753 F.3d at 908.

<sup>46</sup> *Id.* Twenty years of studies on the safety and effectiveness of medication abortion have shown no long-term risks associated with the method. *Medical Abortion*, UCSF MED. CTR., [http://www.ucsfhealth.org/treatments/medical\\_abortion/](http://www.ucsfhealth.org/treatments/medical_abortion/). Furthermore, surgical abortions are one of the safest medical procedures. Susan Dudley & Beth Kruse, *Safety of Abortion*, NAT. ABORTION FED’N 1 (2006)

Despite the demonstrably low risk involved in the procedure, states have enacted limitations on women’s ability to access medication abortion.<sup>47</sup> These regulations have taken several forms.<sup>48</sup> Currently thirty-eight states require clinicians who perform medication abortions to be licensed physicians; of those thirty-eight, sixteen states mandate that only physicians who are in the same room as the patient may dispense medication abortions.<sup>49</sup> These regulations, granting physicians the exclusive ability to provide medication abortion, generate disadvantages for underprivileged women. Critically jeopardizing access to early reproductive care, these detrimental consequences include increased waiting time for appointments and extended travel distances to visit clinics attended by an available physician.<sup>50</sup> Furthermore, medication abortion limitations that require physicians to be in the same room effectively prohibit the use of virtual consultation with a physician (telemedicine) to treat patients in rural areas or across state lines.<sup>51</sup> This preclusion of the use of telemedicine for the provision of medication abortion disproportionately affects poor women in rural areas who lack the funds to travel somewhere where abortion, surgical or medicinal, is legally available.<sup>52</sup>

Another form of limitation on medication abortion is also related to the administration of the abortive drugs, but is arguably more aggressive than its peers. Three states—Arizona, Ohio, and Texas—currently require that clinics adhere to an outmoded FDA regimen for administering mifepristone (sometimes referred to as RU-486).<sup>53</sup> Known as the “on-label regimen” for its placement on the drug’s packaging, the FDA-approved regimen requires a woman seeking a medication abortion to make three visits to a clinic within the first seven weeks after fertilization in order to safely and effectively terminate her pregnancy.<sup>54</sup> She must first visit the clinic to take 600 milligrams of mifepristone orally. She must then return two days later to take 400 micrograms of misoprostol orally. Finally, she is required to make a third visit to the clinic for a follow-up appointment.<sup>55</sup> At the same time as the FDA was reviewing the on-label regimen, studies were revealing a safer, more effective technique for administering mifepristone. Currently used by virtually all medication abortion providers, this “evidence-based regimen” not only requires a

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[http://prochoice.org/wp-content/uploads/safety\\_of\\_abortion.pdf](http://prochoice.org/wp-content/uploads/safety_of_abortion.pdf). Contrary to state laws that suggest abortions are high-risk procedures, at least one study demonstrates that early surgical abortions are safer than giving birth. Genevra Pittman, *Abortion Safer Than Giving Birth: Study*, REUTERS (2012) (citing Elizabeth Raymond & David Grimes, *The Comparative Study of Legal Induced Abortion and Childbirth in the United States*, 119 OBSTETRICS & GYNECOLOGY 1271 (2012)).

<sup>47</sup> *Medication Abortion: State Policies in Brief*, GUTTMACHER INST. (2016)

[http://www.guttmacher.org/statecenter/spibs/spib\\_MA.pdf](http://www.guttmacher.org/statecenter/spibs/spib_MA.pdf) (providing a frequently updated record of state medication abortion laws).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> Boonstra & Nash, *supra* note 4, at 11.

<sup>51</sup> Guttmacher Inst., *Medication Abortion*, *supra* note 47. Nash et al., *supra* note 4 (“In 2013 alone, eight states moved to ban the use of telemedicine in administering the medication...[and] seven states (Alabama, Indiana, Louisiana, Mississippi, Missouri, North Carolina and Texas) enacted laws effectively banning the use of telemedicine for medication abortion.”).

<sup>52</sup> *Id.* at 11.

<sup>53</sup> *Id.*

<sup>54</sup> *Humble*, 735 F.3d at 907.

<sup>55</sup> *Id.*

lower dosage of the drug, reducing the risk of hemorrhage, but it also entails only two trips to the clinic, made within nine weeks of pregnancy.<sup>56</sup>

Regardless of the demonstrated effectiveness, safety, and general popularity of the evidence-based regimen, several states continue to require providers to adhere to the outdated and arguably hazardous on-label regimen approved by the FDA in 2000.<sup>57</sup> In 2012, the Arizona state legislature approved several amendments to their abortion regulations, including a mandate that “any medication, drug or other substance used to induce an abortion is administered in compliance with the protocol that is authorized by the United States [F]ood and [D]rug [A]dministration and that is outlined in the final printing labeling instructions for that medication, drug or substance.”<sup>58</sup> Paradoxically, the legislature maintained that the regulation was enacted to “[p]rotect women from the dangerous and potentially deadly off-label use of abortion-inducing drugs, such as, for example, mifepristone.”<sup>59</sup>

In reviewing Planned Parenthood Arizona’s challenge to the law, the Ninth Circuit in *Humble* affirmed a District Court finding that the evidence-based regimen was scientifically more advantageous for the health and safety of Arizona women.<sup>60</sup> Applying *Casey*’s undue burden test, as detailed in *Gonzales v. Carhart*,<sup>61</sup> the *Humble* court considered a non-exhaustive list of factors previously developed by the court to determine whether a regulation is unnecessary and has the “purpose or effect of presenting a substantial obstacle to a woman seeking an abortion.”<sup>62</sup> Taking into consideration the significant increase in cost of abortion, delays in procuring the procedure, stigmatization of abortion, and the law’s negative interaction with the lives of Arizona women, the Ninth Circuit held that the plaintiffs in *Humble* had “shown a likelihood of success on their claim that [the on-label regimen] imposes an undue burden on a women’s right to abortion.”<sup>63</sup>

*Humble* provides an example of the impacts state mandates requiring the administration of medication abortion by means of the outmoded FDA on-label regimen have on low-income

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<sup>56</sup> *Id.* (“This regimen requires taking 200 milligrams (instead of 600 milligrams) of mifepristone orally at the clinic, taking 800 micrograms of misoprostol two days later at home (instead of at the clinic) by dissolving the drug between the cheek and gum, and then returning to the clinic for a follow-up visit.”).

<sup>57</sup> As of May 1, 2015, North Dakota, Ohio, and Texas enforce laws requiring health care providers to use the FDA on-label regimen for administering medication abortion. Guttmacher Inst., *Medication Abortion*, *supra* note 47.

<sup>58</sup> H.B. 2036, 50th Leg., 2d Sess. (Ariz. 2012).

<sup>59</sup> *Humble*, 735 F.3d at 909–10.

<sup>60</sup> *Id.* at 908 (quoting the lower court’s finding that “there is a clear advantage to the current protocol because it may be used through the 9th week of pregnancy . . . which is significant because many women do not discover their pregnancies until approximately 49 days, which is the end of [the] 7th week. . . Also, risk factors from medical abortions . . . have been reduced or eliminated by the current [evidence-based] regimen.”).

<sup>61</sup> *Gonzales v. Carhart*, 550 U.S. 320, 323 (2006).

<sup>62</sup> The list of factors relevant to whether an abortion restriction imposes an undue burden used by the Ninth Circuit in *Humble* include (1) “[a] significant increase in the cost of abortion or the supply of abortion providers and clinics;” (2) “evidence that a law ‘delays and deters patients obtaining abortions, and that delay in abortion increases health risks;” (3) “a law’s ‘stigmatizing of abortion practice and usurping of providers’ ability to exercise medical judgment;” and (4) “the ways in which an abortion regulation interacts with women’s lived experience, socioeconomic factors, and other abortion regulations.” *Humble*, 735 F.3d at 915 (quoting *Tucson Woman’s Clinic v. Eden*, 379 F.3d 531, 542 (9th Cir. 2004)).

<sup>63</sup> *Id.* at 918.

women.<sup>64</sup> As the Ninth Circuit noted, under this regimen, women are required to ingest higher doses of mifepristone, subjecting as many as 8% of women to subsequent surgical abortion procedures due to either heavy bleeding caused by the over dosage of the medication or failure to terminate the pregnancy.<sup>65</sup> Comparatively, fewer than 2% of women following the evidence-based regimen require such subsequent medical treatment. In addition to the risk of future ameliorative surgical measures, the increased dosage and clinic visits involved in the on-label regimen significantly increases the cost of the procedure in comparison to that of evidence-based regimen.<sup>66</sup> Thus, through a confluence of factors—including multiple visits to clinics, increased cost, and an escalated risk of failure to terminate a pregnancy—such regulations could make medication abortion an unpredictable and hazardous option for women choosing to exercise their right to abortion.

### C. Bans on Insurance Coverage of Abortion

Since 2010, a number of states have enacted limitations on private insurance coverage of surgical and medication abortion procedures.<sup>67</sup> Although the federal government barred the use of federal funds for abortion under almost all circumstances nearly four decades ago through the Hyde Amendment of 1977,<sup>68</sup> since the enactment of the Affordable Care Act (“ACA”) in the spring of 2010, twenty-five states have gone further, banning abortion coverage in plans offered through the Act’s insurance exchanges.<sup>69</sup> Additionally, twenty-one state legislatures have passed bans on coverage for abortions for state public employees to date.<sup>70</sup> At the most extreme end of the spectrum, ten states have categorically prohibited state-regulated private insurance plans from covering abortion procedures.<sup>71</sup> Due to these bans on abortion coverage, women who do not have the income to pay for abortions out-of-pocket are forced to postpone the procedure in order to build necessary capital.

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<sup>64</sup> *Id.* at 905 (reversing and remanding a district court’s denial of plaintiff’s motion for a preliminary injunction and holding that plaintiffs have shown a likelihood of success on their claim that the Arizona law imposes an undue burden on a woman’s right to abortion). *Contra* 696 F.3d at 513–18 (holding that an Ohio statute adhering to the FDA on-label regimen did not impose an undue burden on a woman’s ability to make the decision to have an abortion).

<sup>65</sup> *Id.* at 908.

<sup>66</sup> *Id.* (noting that, in addition to the expense of a third clinic visit, the drugs required for medication abortions under the on-label regimen cost \$160 more than under the lower dosage of the evidence-based regimen).

<sup>67</sup> Boonstra & Nash, *supra* note 4 at 10, 12.

<sup>68</sup> Medicaid funds may only be used in cases of rape, incest, or endangerment of the life of the mother. Dep’t of Labor, Health and Hum. Serv., and Educ. and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-78, §§ 509-510, 111 Stat 1467 (1997). *See also*, Hooton & Schvey, *supra* note 4 (explaining that “under the Hyde Amendment, since 1977 the federal government has barred use of federal funds for abortion under almost all circumstances for women in the Medicaid program and the Supreme Court upheld this discriminatory provision in *Harris v. McRae*, 448 U.S. 297 (1980).”). For a discussion of how the Hyde Amendment burdens poor women, see *Whose Choice: How the Hyde Amendment Harms Poor Women*, CTR. FOR REPROD. RIGHTS (Sept. 13, 2010), available at

[http://reproductiverights.org/sites/crr.civicactions.net/files/documents/Hyde\\_Report\\_FINAL\\_nospreads.pdf](http://reproductiverights.org/sites/crr.civicactions.net/files/documents/Hyde_Report_FINAL_nospreads.pdf).

<sup>69</sup> *Restricting Insurance Coverage of Abortion: State Policies in Brief (as of May 1, 2015)*, GUTTMACHER INST. (2015), [http://www.guttmacher.org/statecenter/spibs/spib\\_RICA.pdf](http://www.guttmacher.org/statecenter/spibs/spib_RICA.pdf).

<sup>70</sup> *Id.*

<sup>71</sup> Guttmacher Inst., *Restricting Insurance Coverage of Abortion*, *supra* note 69. *See also* Boonstra & Nash, *supra* note 4, at 12.

## D. Gestational Age Limits

Finally, gestational age limits, or previability bans, are one of the most commonly used methods for restricting access to abortion services.<sup>72</sup> Although the *Roe* Court did not specifically define “viability,” it did assert that there might be instances in which a state’s interest in the life of the fetus may, without undue burden, outweigh the pregnant woman’s interest in obtaining an abortion.<sup>73</sup> Currently, forty-two states prohibit abortions after a specific time in the pregnancy, typically twenty-four weeks after fertilization, except to save the life of the pregnant woman.<sup>74</sup> Currently, eighteen states ban abortion procedures after a certain number of weeks.<sup>75</sup> Of those states, ten prohibit abortions at twenty weeks post-fertilization, or its functional equivalent.<sup>76</sup> In 2010, Nebraska became the first state to successfully pass such a ban, initiating a profusion of similar legislation in nine other states based on scientifically unfounded allegations of fetal pain at that stage of pregnancy.<sup>77</sup> Some states have pushed the gestational age limit even further into the first trimester.<sup>78</sup> The most extreme gestational age limit enacted by a state was North Dakota’s controversial ban on abortions after six weeks, the point at which a fetal heartbeat is said to exist.<sup>79</sup> While it ultimately failed the standard set forth in *Casey*, the North Dakota ban serves as a telling illustration of how far state legislators will attempt to push the gestational age limit for abortions.<sup>80</sup>

<sup>72</sup> Kozicz, *supra* note 25, at 1274.

<sup>73</sup> *Roe v. Wade*, 410 U.S. at 162–65.

<sup>74</sup> *State Policies on Later Abortions: State Policies in Brief*, GUTTMACHER INST. (2016), [http://www.guttmacher.org/statecenter/spibs/spib\\_PLTA.pdf](http://www.guttmacher.org/statecenter/spibs/spib_PLTA.pdf). (2015(201520162015)), [http://www.guttmacher.org/statecenter/spibs/spib\\_PLTA.pdf](http://www.guttmacher.org/statecenter/spibs/spib_PLTA.pdf).

<sup>75</sup> Guttmacher Inst. *supra* note 4 at 2.

<sup>76</sup> *Id.* (showing that eight states –Alabama, Arkansas, Indiana, Louisiana, Nebraska, North Dakota, Oklahoma, and Texas – have bans on abortions occurring twenty weeks post-fertilization, while Mississippi and North Carolina have previability bans prohibiting abortions twenty weeks after the woman’s last menstrual period).

<sup>77</sup> *State Laws Regulating Reproductive Rights*, LAW STUDENTS FOR REPROD. JUSTICE (2013), [http://lsrj.org/documents/factsheets/13\\_State\\_Laws\\_Regulating\\_Repro\\_Rights.pdf](http://lsrj.org/documents/factsheets/13_State_Laws_Regulating_Repro_Rights.pdf). Studies have revealed that the assertion that fetuses can feel pain at twenty weeks of gestation is a myth. Both the Royal College of Obstetricians and Gynecologists and the American Congress of Obstetricians and Gynecologists agree that fetuses cannot perceive pain until at least the twenty-fourth week of pregnancy. *Fetal Awareness: Review of Research and Recommendations for Practice*, Royal Coll. of Obstetricians and Gynecologists (Mar. 2010), available at <https://www.rcog.org.uk/globalassets/documents/guidelines/rcogfetalawarenesswpr0610.pdf>. *Facts Are Important: Fetal Pain*, Am. Cong. of Obstetricians & Gynecologists (June 20, 2013), available at <http://www.acog.org/-/media/Departments/Government-Relations-and-Outreach/FactAreImportFetalPain.pdf> (“A rigorous 2005 scientific review of evidence...concluded that fetal perception of pain is unlikely before the third trimester. Although ultrasound monitoring can show intrauterine fetal movement, no studies since 2005 demonstrate fetal recognition of pain”) (citing Susan J. Lee et al, *Fetal Pain: A Systematic Multidisciplinary Review of the Evidence*, 294 J. AM. MED. ASS’N. 947, available at <http://jama.jamanetwork.com/article.aspx?articleid=201429>).

<sup>78</sup> See Ushma D. Upadhyay et al., *Denial of Abortion Because of Provider Gestational Age Limits in the United States*, 104 AM. J. PUB. HEALTH 1687, 1692 (2014) <http://www.aphapublications.org/doi/pdf/10.2105/AJPH.2013.301378>.

<sup>79</sup> *MBK Mgmt. Corp. v. Burdick*, 954 F. Supp. 2d 900 (D.N.D.2013) (federal judge permanently struck down North Dakota’s six-week gestational age limit as invalid and unconstitutional...).

<sup>80</sup> *Burdick*, 954 F. Supp. 2d 900. Explaining that many women do not realize they are pregnant and do not have enough time to make the decision whether to have an abortion before the end of the time limit set forth in North Dakota’s previability ban.

Pro-choice opponents frequently point to the *Doe* court’s rejection of “abortion on demand” to substantiate the contention that the procedure is a “mere ‘convenience for people too irresponsible to plan ahead.’”<sup>81</sup> However, state legislatures have made it increasingly difficult for low-income women to do just that through the imposition of increasingly narrow gestational age limits. Scholars argue that these limits are clearly unconstitutional, under the undue burden standard due to their injurious effect on low-income women, who often run the risk of passing the gestational time limit due to the amount of time it takes to raise the funds necessary to pay for the procedure.<sup>82</sup>

In September 2014, a research team at the University of California San Francisco estimated that each year more than 4,000 women in the United States were denied abortions under more lenient state-based gestational age limits.<sup>83</sup> Of those women surveyed by the researchers, nearly six out of ten pointed to the amount of time needed to arrange and fund travel to a clinic, or to pay for the procedure itself as the primary barriers to procuring an abortion before their states’ deadlines.<sup>84</sup> However, this study was conducted using data collected between 2008 and 2010; because eleven states have imposed viability bans since that time. Researchers warn that the number of women at risk of being turned away from clinics is now much higher.<sup>85</sup> Considering the simultaneous imposition of waiting periods and similar regulations “with the express purpose of delaying women’s ability to access abortion care,”<sup>86</sup> for the “most economically disadvantaged women” in America, viability bans effectively eliminate abortion as a feasible family planning option.<sup>87</sup>

## II. Abortion Tourism and Underground Networks of Reproductive Resources

Before the Supreme Court handed down its decision in *Roe*, two important underground support systems existed to connect women in need to resources an illegal abortion providers, Society for Humane Abortion (“SHA”) in California, and “Jane” in Chicago.<sup>88</sup> Circumventing the

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<sup>81</sup> Cornelia T. Pillard, *Our Other Reproductive Choices: Equality in Sex Education, Contraceptive Access, and Work-Family Policy*, 56 EMORY L.J. 941, 963 (2007) (citing Robert H. Bork, *Inconvenient Lives*, 68 FIRST THINGS 9, 11–13 (1996)).

<sup>82</sup> Kozicz, *supra* note 25 at 1265–66.

<sup>83</sup> Upadhyay et al., *supra* note 78, at 1962.

<sup>84</sup> See Tara Culp-Ressler, *Low-Income Women Often Can't Get an Abortion Because It Takes Too Long to Save Up the Money for It*, THINKPROGRESS (Aug. 16, 2013, 11:05 AM), [www.thinkprogress.org/health/2013/08/16/2479431/law-income-women](http://www.thinkprogress.org/health/2013/08/16/2479431/law-income-women). (For more information regarding the detrimental affect increased time needed to procure funds for travel and procedures has on low-income women, see Janessa L. Bernstein, Note, *The Underground Railroad to Reproductive Freedom: Restrictive Abortion Laws and the Resulting Backlash*, 73 BROOK. L. REV. 1463,1501 (2008).

<sup>85</sup> Culp-Ressler, *supra* note 84 at 1 (citing Rebecca Wind, *Thousands of U.S. Women Denied Abortions Annually Due to Limitations on Abortion at Later Gestations* GUTTMACHER INST., (Aug. 16, 2013), <http://www.guttmacher.org/media/nr/2013/08/16/index.html>.)

<sup>86</sup> Boonstra & Nash, *supra* note 4 at 1.

<sup>87</sup> Kozicz, *supra* note 25; Bernstein, *supra* note 7 at 1501 (explaining that due to restrictions pushing women into more liberal states to seek out abortions past a given gestational age limit, “the extraordinary costs associated with late-term abortions procedures in many instances ensure that poor women and girls who desire abortions are instead forced to carry unwanted pregnancies to term.”).

<sup>88</sup> Bernstein, *supra* note 7; Leslie J. Reagan, *WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867–1973* 223 (U. of Cal. Press ed., 1997).

medical establishment of the 1960s, these covert organizations served as illegal abortion networks for thousands of women.<sup>89</sup> In addition to providing abortion classes in the San Francisco area, SHA facilitated an early trend of abortion tourism.<sup>90</sup> Handing out leaflets with the names of abortionists in Mexico, Sweden, and Japan, the underground arm of the organization sent approximately 12,000 women outside the country by the end of the decade.<sup>91</sup> Halfway across the country, women in Illinois began a female-run underground abortion service out of the Abortion Counseling Service of the Chicago Women's Liberation Union ("CWLU") called "Jane."<sup>92</sup> Operating from 1969 to 1973, Jane provided counseling and helped women obtain approximately 3,000 safe, affordable abortions each year.<sup>93</sup> Jane assisted women of all kinds until New York legalized abortion in 1970, adopting the nation's most liberal abortion law three years before *Roe*.<sup>94</sup> After this monumental step for women's reproductive health, Jane's clientele shifted almost exclusively to low-income women of color as women of means chose instead to travel to New York in order to receive legal abortions.<sup>95</sup>

Low-income and minority women are not significantly better off now than they were in the pre-*Roe* era of Jane and the Society for Humane Abortion.<sup>96</sup> Due to a confluence of factors, including lower levels of education and a lack of access to information on effective methods of birth control, the rate of unintended pregnancy for women living below the poverty line is more than five times higher than that of women in the highest income level.<sup>97</sup> When women without sufficient access to sex education and reliable contraception become pregnant unintentionally, this deficiency further perpetuates a cycle of poverty as income inequality grows across the United

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<sup>89</sup> Reagan, *supra* note 88 at 223.

<sup>91</sup> *Id.* at 224.

<sup>92</sup> Raina Lipsitz, Opinion, *Bring Back the Abortion Underground Railroad*, AL JAZEERA AMERICA (Oct. 23, 2014), <http://america.aljazeera.com/opinions/2014/10/texas-abortion-clinicwomensrights.html>. (The name "Jane" originated from the clandestine process of obtaining illegal abortion services through the CWLU). *See also*, Reagan, *supra* note 88 at 225 ("The Chicago Women's Liberation Union, a citywide coalition, advertised its abortion service through underground newspapers, women's liberation papers, and school papers. When a woman called the union about an abortion, she was given a local telephone number and told to ask for 'Jane.'").

<sup>93</sup> Reagan, *supra* note 88 at 225.

<sup>94</sup> *See* Richard Perez-Pena, '70 Abortion Law: New York Said Yes, Stunning the Nation, N.Y. TIMES (Apr. 9, 2000), <http://www.nytimes.com/2000/04/09/nyregion/70-abortion-law-new-york-said-yes-stunning-the-nation.html>. The New York abortion law came at an important time in women's reproductive history, as observers estimated that in 1970 over a million illegal abortions were performed nationwide. *See also* Reagan, *supra* note 888, at 240.

<sup>95</sup> Reagan, *supra* note 888, at 225 ("As one woman recalled, 'about 70[%] were women of color [,] most of whom were living on a subsistence wage or welfare with very poor health care.'"). Over forty years later, women in need are still flocking to New York to procure abortion procedures. *See* Ctr. for Disease Control, *Abortion Surveillance – United States, 2011*, 63 SURVEILLANCE SUMMARIES (2014) (showing that 8.4% of abortions performed in New York City in 2011 were procured by out-of-state women). *See also* Jennifer Block, *Emergency Landing*, VILLAGE VOICE (July 2, 2002), <http://www.villagevoice.com/content/printVersion/170574/>.

<sup>96</sup> Lipsitz, *supra* note 92 ("Conflating abortion's legality with its availability to those who need it masks an injustice so deep that it justifies the kind of civil disobedience widely practiced before *Roe*.")

<sup>97</sup> *Unintended Pregnancy in the United States*, GUTTMACHER INST. (Dec. 2013), <http://www.guttmacher.org/pubs/FB-Unintended-Pregnancy-US.pdf>; Tara Culp-Ressler, *Unintended Pregnancies Are Increasingly Concentrated Among Poor Women Who Lack Birth Control Access*, THINKPROGRESS (Sept. 9, 2013), <http://thinkprogress.org/health/2013/09/09/2593011/unintended-pregnancies-poor-women/>.

States.<sup>98</sup> The majority of women living below the poverty line are women of color, thus members of this underprivileged group are at an even deeper disadvantage than pregnant women in the middle and upper classes.<sup>99</sup> When low-income women of color decide to terminate their unintended pregnancies, they are not likely to live near the resources they need. Less than 10% of abortion providers nationwide are located in areas where a majority of residents are Black, and approximately 13% of providers can be found in communities where Hispanic residents comprise more than half of the population.<sup>100</sup> Since poor women and women of color are more likely than their economically-privileged. White counterparts to lack access to resources to prevent pregnancy, the type of women who acquire abortion services today are often the most likely to need them.<sup>101</sup>

State-based antiabortion legislation further exacerbates the difficulty of low-income women to access reproductive healthcare. In response to state regulations of abortion providers and procedures, reproductive health clinics nationwide have been forced to either “comply with increasingly demanding requirements or, more realistically, shut down, leaving miles and miles between clinics across the country.”<sup>102</sup> Recently, Texas reproductive health clinics in particular have felt the harsh ramifications of such laws. The enactment of the multipronged antiabortion bill, HB2, in late 2013 forced over half of the state’s clinics to shut their doors.<sup>103</sup> Although the Supreme Court allowed thirteen of those clinics to reopen in October of 2014, the locations of those providers only increased the capacity of clinics in areas where abortion was already available.<sup>104</sup> This deficit of abortion providers has left many Texas women with limited options,

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<sup>98</sup> See Jacoba Urist, *Social and Economic Benefits of Reliable Contraception*, THE ATLANTIC (July 2014), <http://www.theatlantic.com/health/print/2014/07/the-broader-benefits-of-contraception/373856> (“As income inequality grows families without access to reliable contraception are potentially at a greater disadvantage. Poorer children experience more health problems, live in more dangerous neighborhoods and have higher rates of delayed academic development...limiting their earning potential as adults.”). See also Catherine Rampell, *Is Sex Only for Rich People?* WASH. POST (Oct. 16, 2014), [http://www.washingtonpost.com/opinions/catherine-rampell-family-...to-do/2014/10/16/862f0e0e-5570-11e4-892e-602188e70e9c\\_story.html](http://www.washingtonpost.com/opinions/catherine-rampell-family-...to-do/2014/10/16/862f0e0e-5570-11e4-892e-602188e70e9c_story.html) (“[W]e don’t even teach [low-income] kids how contraception works. We also don’t want them to have easy access to abortions when they inevitably get pregnant because they’re not using birth control...[and] instead publicly chastis[e] irresponsible single mothers for having babies they can’t afford.”)

<sup>99</sup> Joan Entmacher, Katherine Gallagher Robbins, Julie Vogtman, & Lauren Frohlich, *Insecure and Unequal: Poverty and Income Among Women and Families 2000–2012*, NAT’L WOMEN’S LAW CTR. (Sept. 2013), [http://www.nwlc.org/sites/default/files/pdfs/final\\_2013\\_nwlc\\_povertyreport.pdf](http://www.nwlc.org/sites/default/files/pdfs/final_2013_nwlc_povertyreport.pdf).

<sup>100</sup> *Claim that Most Abortion Clinics Are Located in Black or Hispanic Neighborhoods Is False*, GUTTMACHER INST. (June 2014), <http://www.guttmacher.org/media/evidencecheck/provider-location.html>. “Antiabortion activists often claim that most abortion clinics are located in predominantly black or Hispanic neighborhoods. However, this claim – offered as supposed proof that abortion providers ‘target’ minority women – is false. Furthermore, about six in ten abortion providers are located in neighborhoods with a majority of White residents.”

<sup>101</sup> Lipsitz, *supra* note 92.

<sup>102</sup> Eesha Pandit, *Abortion’s Underground Railroad*, IN THESE TIMES (June 4, 2014), [http://inthesetimes.com/article/16687/abortions\\_underground\\_railroad](http://inthesetimes.com/article/16687/abortions_underground_railroad).

<sup>103</sup> Lipsitz, *supra* note 92; Tara Culp-Ressler, *Court Ruling Devastates Texas’ Abortion Clinic Infrastructure*, THINKPROGRESS (Oct. 3, 2014), <http://thinkprogress.org/health/2014/10/03/3575477/court-ruling-texas-asc/> (“Before the Texas law took effect, the state had 40 licensed abortion clinics. Now there are eight.”).

<sup>104</sup> Robin Marty, *The Long Road to a Safe and Legal Abortion*, SLATE (Oct. 20, 2014), [http://www.slate.com/articles/double\\_x/doublex/2014/10/abortion\\_clinic\\_crisis\\_women\\_of\\_texas\\_could\\_have\\_to\\_drive\\_up\\_to\\_600\\_miles.html](http://www.slate.com/articles/double_x/doublex/2014/10/abortion_clinic_crisis_women_of_texas_could_have_to_drive_up_to_600_miles.html); Lipsitz, *supra* note 92; *Texas Clinics Closed by Fifth Circuit Can Reopen in Light of*

including traveling hundreds of miles into their (slightly) more liberal bordering states, such as Oklahoma, Louisiana, New Mexico, and Arkansas.<sup>105</sup> In order to help facilitate the interstate movement of Texas women seeking abortion services, several organizations have sprouted across the state. In the same spirit as Jane and SHA before them, underground groups such as Fund Texas Choice<sup>106</sup> and Clinic Action Support Network (“CASN”)<sup>107</sup> have developed to provide funding, lodging, and transportation to women in need.

The increasingly restrictive abortion environment of the twenty-first century has given rise to similar networks across the United States. Attempting to “close the gap between the legal right to an abortion and the ability to get one,”<sup>108</sup> organizations in Texas and across the country reflect the structure of the modern post-*Roe* clandestine networks of reproductive resources. These modern organizations exist in two forms: overnight lodging for women traveling to receive abortions (especially two-day operations), and funding for procedures, housing, and travel expenses.<sup>109</sup> The online database National Network of Abortion Funds (“NNAF”) provides contact information for over eighty organizations, endowments, and support systems in thirty-eight states and the District of Columbia for low-income women seeking abortions.<sup>110</sup> Because of the lower cost of services, New York City has become a haven for out-of-state women seeking safe and legal abortion procedures, especially second-trimester abortions.<sup>111</sup> In 2004, the Center for Disease Control calculated that out-of-state patients comprised 7% of all abortions performed in the city.<sup>112</sup> By 2011, this rate had increased to 8.2%, with minority patients comprising a significant majority of the procedures.<sup>113</sup> In response to the plight of out-of-state women sleeping on streets in order to obtain “safe, legal, and comparatively inexpensive” abortion care, New York City women created the Haven Coalition in 2001.<sup>114</sup> Since its founding, the Haven Coalition has hosted approximately 700 women in need.<sup>115</sup> Currently, the Haven Coalition is comprised of twenty-five volunteers who offer housing, nourishment, and transportation for women who travel to the city to safely terminate pregnancies.<sup>116</sup>

Due to the growing national movement of restricting access to abortion services, the ability to obtain the procedure increasingly depends on having time, money, and proximity to reproductive resources. Around the world and throughout history, covert organizations have

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*Supreme Court Ruling*, CTR. FOR REPROD. RTS. (Oct. 14, 2014), <http://www.reproductiverights.org/en/press-room/texas-clinics-closed-by-fifth-circuit-can-reopen-in-light-of-supreme-court-ruling>.

<sup>105</sup> Marty, *supra* note 104.

<sup>106</sup> FUND TEX. CHOICE, <http://fundtexaschoice.org/>.

<sup>107</sup> CLINIC ACTION SUPPORT NETWORK, <https://casnhtx.wordpress.com>.

<sup>108</sup> Pandit, *supra* note 102.

<sup>109</sup> Bernstein, *supra* note 7 at 1497.

<sup>110</sup> *Explore Funds by State*, NAT’L NETWORK OF ABORTION FUNDS (last visited Dec. 1, 2014), [http://www.fundabortionnow.org/explore/by\\_state](http://www.fundabortionnow.org/explore/by_state).

<sup>111</sup> Bader, *supra* note 2 (“Despite the relative rarity of second- trimester abortions, New York has become a late-term abortion mecca. The reason: price...Even with travel fees, it is often more affordable to come to New York City for these procedures.”). *See also* Block, *supra* note 95.

<sup>112</sup> Ctr. for Disease Control, *supra* note 95.

<sup>113</sup> Ctr. for Disease Control, *supra* note 95.

<sup>114</sup> Haven Coalition, NAT’L NETWORK OF ABORTION FUNDS, <http://www.fundabortionnow.org/funds/havencoalition>.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

developed to combat anti-abortion legislation and provide women in need with support, resources, and access to abortion procedures across borders.<sup>117</sup> Recognizing this trend, Congress has attempted several times to create a federal invalidation of such state obstructions of the right to abortion.<sup>118</sup> The next section will survey those legislative attempts, including the several variations of the Freedom of Choice Act and the recent introduction of the Women’s Health Protection Act of 2015.

### III. Federal Attempts to Protect Access to Abortion Services

#### A. Freedom of Choice Act(s)

Three years before the Supreme Court’s establishment of the undue burden standard in *Casey*, it upheld parts of a restrictive Missouri antiabortion law in *Webster v. Reproductive Health Services*.<sup>119</sup> An indication to pro-choice activists that the judiciary was no longer a viable option to counteract state-based antiabortion, *Webster* prompted members of Congress to propose the first of many versions of the Freedom of Choice Act (FOCA) in 1989 under the legislative body’s Commerce Clause and Fourteenth Amendment regulatory powers.<sup>120</sup> A direct response to the judiciary’s endorsement of the Missouri law, the act aimed to codify the Court’s holding in *Roe* by prohibiting any state from restricting “the right of a woman to choose to terminate a pregnancy” prior to viability, or at any time “if such termination is necessary to protect the health or life of the woman.”<sup>121</sup> Supporters of the act were ambitious and forward-looking, expecting it to prevent the enactment of antiabortion regulations the *Roe* court would have struck down.<sup>122</sup>

However, the 1989 version of FOCA failed to successfully navigate the legislative process and was never able to prevent such state restrictions<sup>123</sup> and a similar fate awaited subsequent attempts to pass versions of the act in 1993 and 2004.<sup>124</sup> Although the most recent version of the act earned a strong endorsement from then-presidential nominee Barack Obama, it ultimately suffered the same bureaucratic death as its predecessors in 2007.<sup>125</sup> It was not until six years later, after the “pro-life spring” of increasingly restrictive state-based antiabortion legislation was in full swing, that pro-choice members of Congress once again endeavored to pass a federal act protecting the right to abortion.<sup>126</sup>

#### B. Women’s Health Protection Act

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<sup>117</sup> Bernstein, *supra* note 7.

<sup>118</sup> Bernstein, *supra* note 7.

<sup>119</sup> Mary Ziegler, *The Price of Privacy, 1973 to the Present*, 37 HARV. J. L. & GENDER 285, 304–5 (2014).

<sup>120</sup> *Id.* at 306.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 309.

<sup>124</sup> Freedom of Choice Act of 1993; Freedom of Choice Act of 2004.

<sup>125</sup> Freedom of Choice Act of 2007; Dutra, *supra* note 9, at 1296.

<sup>126</sup> Women's Health Protection Act, S. 1696, 113th Cong. (1st Sess. 2013); Women's Health Protection Act, H.R. 3471, 113th Cong. (1st Sess. 2013). For a discussion of the “pro-life spring” of 2011–2013, see Lynn D. Wardle, *The Pro-Life Spring and the Future of Roe v. Wade*, 89 N.D. L. REV. 415 (2013).

In response to the “seismic shift” in the abortion law landscape that occurred after the 2010 elections, legislators introduced the first version of the Women’s Health Protection Act on November 13, 2013.<sup>127</sup> Although the original act died at the close of the 113th Congress, legislators quickly introduced a second version, the Women’s Health Protection Act of 2015 (“WHPA”), to both houses at the start of the first session of the 114th Congress.<sup>128</sup> The structure and goals of WHPA strongly resemble the several versions of the Freedom of Choice Act that preceded it. However, WHPA goes farther than its predecessors to protect the reproductive rights of women in its efforts to combat restrictive state-based abortion legislation. The act was designed to reverse the current trend by which “a woman’s ability to exercise her constitutional rights is dependent on the state in which she lives.”<sup>129</sup> To that end, it notes that access to safe, legal abortion procedures has been hindered by state restrictions such as bans on insurance coverage, parental notification laws, and “requirements and restrictions that single out abortion providers and those seeking their services, and which do not further women’s health or the safety of abortion, but harm women by reducing the availability of services.”<sup>130</sup>

Perhaps most important to the present inquiry, the act also includes a finding that protecting access to “safe, legal abortion procedures” is “essential to women’s health and central to women’s ability to participate equally in the economic and social life of the United States.”<sup>131</sup> In order to protect and promote this ability, the act includes several key provisions to invalidate and prevent restrictive state-based antiabortion regulations.<sup>132</sup> For instance, WHPA specifically seeks to invalidate pre- and post-viability bans that do not include exceptions to save the life of the pregnant woman, mandatory waiting periods, and limitations on providing telemedicine.<sup>133</sup> Most notably, however, the act includes sweeping provisions for the invalidation of state laws and regulations that “single out the provision of abortion services for restrictions that are more burdensome than those restrictions imposed on medically comparable procedures,” that “do not significantly advance women’s health or the safety of abortion services,” and that “make abortion services more difficult to access.”<sup>134</sup>

Not unlike the bills that came before it, WHPA finds its regulatory authority to invalidate these regulations under the Commerce Clause and section 5 of the Fourteenth Amendment.<sup>135</sup> In

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<sup>127</sup> Hooton & Schvey, *supra* note 4, at 15.

<sup>128</sup> Women’s Health Protection Act.

<sup>129</sup> Women’s Health Protection Act, §2(a)(8). *See also* Press Release, Richard Blumenthal: United States Senator for Connecticut, *Blumenthal, Baldwin, Boxer, Chu, Fudge, Frankel Announce Legislation To Protect Access To Reproductive Care* (Nov. 13, 2013), available at <http://www.blumenthal.senate.gov/newsroom/press/release/blumenthal-baldwin-boxer-chu-fudge-frankel-announce-legislation-to-protect-access-to-reproductive-care> (describing the purpose and components of the original version of WHPA, which have not been substantially or substantively changed in the 2015 version of the act) (“State laws eroding access to abortion create unnecessary hurdles and jeopardize women’s health. We’re introducing the Women’s Health Protection Act today to ensure every woman can access safe medical care regardless of where she lives.”).

<sup>130</sup> Women’s Health Protection Act, §2(a)(2).

<sup>131</sup> Women’s Health Protection Act, §2(a)(1).

<sup>132</sup> Women’s Health Protection Act, §4.

<sup>133</sup> Women’s Health Protection Act, §4(a)(1)–(7).

<sup>134</sup> Women’s Health Protection Act, §4(a).

<sup>135</sup> Women’s Health Protection Act, §2(a)(9).

their contemporaneous analyses of past attempts to pass the Freedom of Choice Act(s), some scholars have argued against the constitutionality of a congressional invalidation of state abortion legislation on the basis of an insufficient showing of regulatory power under these powers.<sup>136</sup> However, the underpinnings of these evaluations have shifted in the last decade and new arguments exist for the constitutionality of the Women’s Health Protection Act or similar legislation. The next section will delineate several constitutional arguments in support of a federal action to protect the right to abortion.

#### IV. A Constitutional Defense of Congressional Action

It is imperative to discuss the constitutionality of the Women’s Health Protection Act of 2015 in light of the propensity of such federal legislation to insulate past abortion jurisprudence and the current composition of the Supreme Court. Due to the Court’s policy against deciding constitutional questions unless “absolutely necessary,”<sup>137</sup> if a party were to challenge the legality of a state abortion restriction after the enactment of a federal invalidation of such regulations, *Roe* and its progeny would not be implicated. Stated differently, the basic right to an abortion would not be in danger of being diluted even further because the Court could not consider such a restriction as a constitutional issue. Rather, it would be limited to reviewing the question under applicable federal legislation.<sup>138</sup>

The current political composition of the justices suggests that insulating the Court’s preceding abortion jurisprudence is of particular importance. The continued right to abortion “likely rests on a mere 5–4 majority in the U.S. Supreme Court, with Justice Kennedy the protector” of an increasingly narrowed account of that right.<sup>139</sup> Although Justice Kennedy has earned a reputation for providing the “swing vote” in cases involving ideological issues,<sup>140</sup> he has only voted to strike down one of the twenty-one abortion restrictions that have come before the Court in his career as a justice.<sup>141</sup> For example, while Justice Kennedy voted to strike down part of a Pennsylvania antiabortion law requiring husband notification in *Casey*, he provided the quintessential example of the Court’s condescension towards women seeking abortions in *Gonzalez v. Carhart*.<sup>142</sup> Therefore, any constitutional analysis of a state restriction, without the insulation of a federal regulation such as WHPA, would be predisposed to a more conservative reading of *Roe* and its progeny. Compounded by the developing circuit split on the issue,<sup>143</sup> it is

<sup>136</sup> Ziegler, *supra* note 119; Dutra *supra* note 9.

<sup>137</sup> *Burton v. United States*, 196 U.S. at 295 (“It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.”).

<sup>138</sup> Dutra, *supra* note 9, at 1297 (discussing the constitutionality of the Freedom of Choice Act of 2007).

<sup>139</sup> Priscilla J. Smith, *Give Justice Ginsburg What She Wants: Using Sex Equality Arguments To Demand Examination of the Legitimacy of State Interests in Abortion Regulation*, 34 *Harv. J. L. & Gender* 377, 403 (2011).

<sup>140</sup> Robert Barnes, *Justice Kennedy: The Highly Influential Man in the Middle*, *WASH. POST* (May 13, 2007), [http://www.washingtonpost.com/wp-dyn/content/article/2007/05/12/AR2007051201586\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2007/05/12/AR2007051201586_pf.html).

<sup>141</sup> Millhiser & Culp-Ressler, *supra* note 11.

<sup>142</sup> Millhiser & Culp-Ressler, *supra* note 11 (quoting *Carhart*, 550 U.S. at 159 (“While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained.”)).

<sup>143</sup> Ian Millhiser, *If You Are Pro-Choice, This Is The Single Most Ominous Paragraph You Will Read Today*, *THINKPROGRESS* (Oct. 3, 2014), <http://thinkprogress.org/justice/2014/10/03/3575547/if-you-are-pro-choice-this-is-the-single-most-ominous-paragraph-you-will-read-today/>.

vital that the Women’s Health Protection Act or similar legislation is enacted and that it is not struck down on constitutional grounds.

The following sections will address the two enforcement powers found in WHPA and FOCA, including section 5 of the Fourteenth Amendment and the Commerce Clause.

### **A. Federal Invalidation of State Abortion Restrictions is Constitutional under the Enforcement Clause**

The Enforcement Clause guarantees Congress the power “to enforce, by appropriate legislation,” the provisions of the Fourteenth Amendment.<sup>144</sup> This power is seen as a “positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.”<sup>145</sup> This power is limited, however, as the Court has repeatedly held that Section 5 does not grant Congress the ability to determine the meaning of the substance of the Amendment, a task that remains firmly within the judiciary’s purview.<sup>146</sup> In *City of Boerne v. Flores*, the Court explicitly held that the power described in Section 5 was purely remedial in nature:

The design of the [Fourteenth] Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the [Fourteenth] Amendment’s restrictions on the states . . . Congress does not enforce a constitutional right by changing what the right is. It has been given the power “to enforce,” not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the “provisions of [the Fourteenth Amendment].”<sup>147</sup>

Finding that the Religious Freedom Restoration Act of 1993 (RFRA) exceeded Congress’ Section 5 enforcement power, the *Boerne* Court held that “[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”<sup>148</sup>

The Supreme Court further defined the framework of this “congruence and proportionality” test in its subsequent enforcement clause jurisprudence. In three successive cases, the Court held that Congress must identify a pattern of constitutional violations of the Fourteenth Amendment’s substantive provisions and demonstrate that it “tailor[ed] its legislative scheme to remedying or preventing such conduct” prior to exercising its power under Section 5.<sup>149</sup> Thus, the congruency of a statute under Section 5 is determined by the scope of the harm it seeks to rectify and courts must focus their inquiry on the closeness of the fit between the remedy and the violation.

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<sup>144</sup> U.S. CONST, amend. XIV, § 5.

<sup>145</sup> *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966).

<sup>146</sup> *Morgan*, 383 U.S. 641; *City of Boerne*, 521 U.S. 507 (1997); *United States v. Morrison*, 529 U.S. 598 (2000); *Nevada Dept. of Human Res. v. Hibbs*, 538 U.S. 721 (2003); *Coleman v. Ct. App. Md.*, 132 S. Ct. 1327 (2012) (plurality opinion).

<sup>147</sup> *City of Boerne*, 521 U.S. 507, 519 (1997).

<sup>148</sup> *City of Boerne*, 521 U.S. at 520.

<sup>149</sup> *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 639 (1999); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001).

Furthermore, in order to pass muster under *City of Boerne* and its progeny, statutes must not invalidate more laws than necessary and courts must analyze a given statute's proportionality in reference to the overall impact of its remedy.<sup>150</sup>

Under this test, enactment of WHPA or similar legislation would be a proper exercise of Congress's Section 5 power to enforce the substantive provisions of the Fourteenth Amendment. The Supreme Court found in *Roe*, and affirmed in *Casey*, that a woman's right to choose to terminate her pregnancy is firmly rooted in the privacy right of the Due Process Clause of the Fourteenth Amendment.<sup>151</sup> While it has been argued that by limiting the types of abortion restrictions states may enact, Congress would be substantively modifying the abortion right and thus would exceed its Section 5 enforcement power,<sup>152</sup> this argument fails to take into consideration the cumulative effects of such state laws. Congress has previously determined through its "specially informed legislative competence"<sup>153</sup> that certain state regulations, which may be constitutional by their own force, will collectively result in the deprivation of individual rights guaranteed by the Fourteenth Amendment.<sup>154</sup> The authors of WHPA specifically included a list of factors a court should consider in determining whether a measure impedes access to abortion services,<sup>155</sup> echoing the *Casey* Court's holding that a state regulation imposes an undue burden when it has the "purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."<sup>156</sup> Furthermore, WHPA does not stray from the *Casey* Court's viability standard,<sup>157</sup> does not purport to invalidate previously judicially determined constitutional restrictions—such as the twenty-four hour waiting period upheld in *Gonzales v. Carhart*,<sup>158</sup> and provides great deference to the medical community—in harmony with the *Roe* Court's emphasis on the significance of the medical judgment of the pregnant woman's attending physician.<sup>159</sup>

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<sup>150</sup> Tiffany C. Graham, *Rethinking Section Five: Deference, Direct Regulation, and Restoring Congressional Authority to Enforce the Fourteenth Amendment*, 65 RUTGERS L. REV. 667, 693 (2013).

<sup>151</sup> See *Roe v. Wade*, 410 U.S. 113, 153 (1973) ("This right of privacy, . . . founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."); *Planned Parenthood v. Casey*, 505 U.S. 833, 874 (1992) ("Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.").

<sup>152</sup> Dutra, *supra* note 9, at 1299 (analyzing the constitutionality of the Freedom of Choice Act of 2007, the author held that "because the Court has held that many types of abortion restrictions are constitutional, FOCA's apparent invalidation of these statutes would be a substantive modification of the right to choose to have an abortion.").

<sup>153</sup> Douglas A. Axel, *The Constitutionality of the Freedom of Choice Act of 1993*, 45 HASTINGS L. J. 641, 660–61 (1994) (citing *Morgan*, 384 U.S. at 656 (stating that, because of Congress's 'specially informed legislative competence,' it may often be better situated than the judiciary to weigh and assess the competing considerations involved in determining what legislation is appropriate in a given instance)).

<sup>154</sup> *Id.* at 660–61 ("FOCA is a valid exercise of Congress's Section 5 power under the first *Morgan* rationale...[because] FOCA can be seen as a preventative law, aimed at states that pass laws which, though constitutional themselves, may result in Fourteenth Amendment violations through their cumulative operation.").

<sup>155</sup> Women's Health Protection Act of 2015 § 4(b)(3)(A)–(G).

<sup>156</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 877. (1992).

<sup>157</sup> Women's Health Protection Act of 2015 § 3(8) ("The term 'viability' means the point in a pregnancy at which, in good-faith medical judgment of the treating health care professional, based on the particular facts of the case before her or him, there is a *reasonable likelihood of sustained fetal survival outside the uterus* with or without artificial support") (emphasis added).

<sup>158</sup> *Gonzales v. Carhart*, 550 U.S. 124, 145 (2007).

<sup>159</sup> *Roe*, *supra* note 151 at 163.

Therefore, Congress has identified the constitutional right to privacy at issue in the regulation of state restrictions on abortion services and WHPA satisfies the first step of the *Boerne* inquiry.

In addition to addressing an identifiable constitutional right within the Fourteenth Amendment, if Congress were to enact WHPA, it would be able to provide considerable evidence of a pattern and history of state infringements leading to deprivation of due process. As previously stated, state legislatures have enacted over two hundred restrictions on the right to abortion in the past few years alone. Due in large part to this veritable explosion of antiabortion legislation, the proportion of reproductive-age women living in states considered “hostile” to abortion increased from 31% to 56% between 2000 and 2013.<sup>160</sup> Therefore, acknowledging the Court’s assertion in *City of Boerne* that “the appropriateness of remedial measures must be considered in light of the evil presented,”<sup>161</sup> a federal legislation such as WHPA would be both congruent and proportional to the remedying and preventing violations of a woman’s right to end a pregnancy free from unduly burdensome state restrictions.

### **B. Federal Invalidation of State Abortion Restrictions is Constitutional Under the Commerce Clause**

In addition to Section 5 of the Fourteenth Amendment, Congress invokes its power to regulate interstate commerce in introducing the Women’s Health Protection Act of 2015.<sup>162</sup> The broadest regulatory authority in the Constitution, the Commerce Clause grants Congress the power “[t]o regulate Commerce . . . among the several States.”<sup>163</sup> Originally, the Supreme Court narrowly construed this power to include only those activities that directly affected interstate commerce.<sup>164</sup> However, in the first half of the twentieth century, the Supreme Court expanded its view of Congress’s commerce power, holding that some local economic activities could be regulated under the Commerce Clause because of the “substantial effect” they have on interstate commerce.<sup>165</sup> Clarifying this rule in 1942, the Court held in *Wickard v. Filburn* that the congressional power to regulate local activities stems from the aggregate effect those intrastate activities had on interstate commerce.<sup>166</sup> The *Wickard* Court particularly concluded that in determining whether a purely local activity substantially affects interstate commerce, courts must not look to individual litigant’s

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<sup>160</sup> Boonstra & Nash *supra* note 4.

<sup>161</sup> *City of Boerne v. Flores*, 521 U.S. 507, 530. (1997); *See also* *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966).

<sup>162</sup> Women’s Health Protection Act of 2015 § 2(a)(9).

<sup>163</sup> U.S. CONST. art. I, § 8, cl. 3 (“The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”).

<sup>164</sup> *Gibbons v. Ogden*, 22 U.S. 1 (1824) (holding that Congress’s commerce power includes regulation of navigation).

<sup>165</sup> *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 40 (1937). *See also* Parker Douglas, Note, *The Violence Against Women Act and Contemporary Commerce Power: Principled Regulation and the Concerns of Federalism*, 1999 UTAH L. REV. 703, 713; Chad DeVeaux, *Perverved Liberty: How the Supreme Court’s Limitation of the Commerce Power Undermines Our Civil-Rights Laws and Makes Us Less Free*, 41 CAP. U. L. REV. 49, 63 (2013); *Gonzalez v. Raich*, 545 U.S. 1 (2005).

<sup>166</sup> *Wickard v. Filburn*, 317 U.S. 111, 119 (1942).

behavior.<sup>167</sup> Rather, the appropriate test is “whether the behavior of all regulated parties in the aggregate could substantially affect commerce.”<sup>168</sup>

Through the Court’s subsequent application of the *Wickard* “substantial effects” test to civil rights legislation, this commerce power eventually became so broad it could support virtually any regulation so long as the focus of such legislation touched upon interstate commerce.<sup>169</sup> For instance, through *Heart of Atlanta Motel, Inc. v. United States* and *Katzenbach v. McClung* in 1964, the Court ruled that regulation of a business that served mostly interstate travelers was within Congress’s authority because such local activity, in the aggregate, affected interstate commerce.<sup>170</sup> Furthermore, the Court found that a regulation’s purpose to correct a social problem did not preclude its validity as an exercise of the commerce power.<sup>171</sup> Instead, as long as Congress had a rational basis for concluding that a particular exercise removes impediments to interstate commerce, that legislation has a constitutional foundation in the Commerce Clause.<sup>172</sup>

However, the Court narrowed the congressional commerce power in 1995, subjecting regulation of non-economic activities to greater scrutiny under its “substantial effects” test. In *United States v. Lopez*, the Court limited the commerce power to regulating only three distinct categories of activity:

First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress’ commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, those activities that substantially affect interstate commerce.<sup>173</sup>

In *United States v. Morrison*,<sup>174</sup> the Court reaffirmed these three broad classifications, declaring the *Lopez* categories as the “standard by which all Commerce Clause issues are determined.”<sup>175</sup> Striking down the Violence Against Women Act of 1994 (“VAWA”), a narrow majority of the *Morrison* Court found that the statute’s federal civil rights remedy for victims of

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<sup>167</sup> *Id.* at 127–28.

<sup>168</sup> DeVeaux, *supra* note 165 at 65.

<sup>169</sup> Axel, *supra* note 154, at 643; Jodi Fowler Jayne, Note, *Constitutional Law: United States v. Morrison: The Gender Motivated Violence Act Takes a Beating by the Supreme Court’s New Commerce Clause Jurisprudence*, 54 OKLA. L. REV. 805, 807 (2001).

<sup>170</sup> *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) (upholding a section of the Civil Rights Act of 1964 which prohibited racial discrimination by places of public accommodation if their operations affected commerce); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (holding that Congress had the authority to prohibit restaurants that obtained food through interstate commerce from discriminating against customers based on race because such regulated activity had a substantial affect on interstate commerce in the aggregate.). See also Ira C. Lupu, *Statutes Revolving in Constitutional Orbits*, 79 VA. L. REV. 1, 15 (1993) (discussing the Court’s Commerce Clause jurisprudence).

<sup>171</sup> *Heart of Atlanta Motel*, 379 U.S. at 242; *Katzenbach*, 379 U.S. at 294.

<sup>172</sup> Axel, *supra* note 154 at 645.

<sup>173</sup> *United States v. Lopez*, 514 U.S. 549, 558–59 (1995).

<sup>174</sup> *United States v. Morrison*, 529 U.S. 598 (2000).

<sup>175</sup> Richard Deutsch, Note, *The Commerce Clause as a Shelter for Discrimination*, 67 J. Air L. & Com. 467, 476 (2002).

gender-motivated violence exceeded Congress’s power as defined in *Lopez*,<sup>176</sup> focusing its analysis on the third *Lopez* category.<sup>177</sup> Expounding upon the reasoning in *Lopez*, the Court in *Morrison* outlined four “significant” considerations to guide courts in determining whether a particular regulated activity substantially affects interstate commerce.<sup>178</sup> These four factors include the commercial nature of the activity, whether the statute includes a jurisdictional element, congressional findings, and the attenuation of the link between the regulated activity and interstate commerce.<sup>179</sup> Accordingly, the *Morrison* Court shifted the focus of the “substantial effects” inquiry from economic effects of the activity to the “nature” of that activity.<sup>180</sup>

Like the statute involved in *Morrison*, the regulated activity under WHPA, state antiabortion restrictions, are not channels or instrumentalities of interstate commerce.<sup>181</sup> Instead, WHPA falls under the third *Lopez* category of constitutionally regulated activities, those which substantially affect interstate commerce. Furthermore, in accordance with the analysis provided by the *Morrison* Court, the statute meets all four considerations that must be weighed in determining whether a regulated activity sufficiently affects interstate commerce.<sup>182</sup> First, unlike the statutes involved in *Lopez* and *Morrison*, WHPA bears a relation to commerce or economic activity. In *Lopez*, the Court’s conclusion that Congress lacked regulatory authority turned on the noneconomic, criminal nature of regulated activity, firearm possession in school zones.<sup>183</sup> Furthermore, the idea that gender-motivated crime is not economic activity in any sense underscored the *Morrison* Court’s decision to strike down VAWA in 2000.<sup>184</sup> In contrast, by applying to state regulations on the provision of abortion services, the Women’s Health Protection Act seeks to regulate economic activities.<sup>185</sup> Because those providers and procedures affected by these laws are engaged in commerce, and because performing and procuring abortion services involve the exchange of money for services, federal regulation of such state activity is necessarily commercial in nature.

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<sup>176</sup> *Morrison*, 529 U.S. at 609.

<sup>177</sup> *Id.* Because the regulated activity, domestic violence, was not “directed at the instrumentalities of interstate commerce, interstate markets, or things or persons in interstate commerce,” the Court analyzed VAWA under the third *Lopez* category, those activities which substantially affect interstate commerce.

<sup>178</sup> *Morrison*, 529 U.S. at 611–12 (citing *Lopez*, 514 U.S. at 563–67).

<sup>179</sup> *Id.*

<sup>180</sup> Elizabeth S. Saylor, *Federalism and the Family After Morrison: An Examination of the Child Support Recovery Act, The Freedom of Access to Clinic Entrances Act, and a Federal Law Outlawing Gun Possession by Domestic Violence Abusers*, 25 HARV. WOMEN’S L.J. 57, 76 (2002).

<sup>181</sup> *Morrison*, 529 U.S. at 609. First, the Court has previously held that “channels,” under the Clause, include the conduits through which interstate commerce travels, such as navigable waterways and highways. *See, e.g.*, *Gibbons v. Ogden*, 22 U.S. 1 (1824); *Heart of Atlanta Motel*, 379 U.S. 241 (1964). Although these channels are involved in the provision of abortion services, they are not directly incorporated in the Act’s regulations. Second, instrumentalities of interstate commerce have been defined by the Court to include persons or things in interstate commerce. *Lopez*, 514 U.S. at 558. Certainly state abortion regulations directly affect such persons or things, however these effects are the byproduct of the activity a federal invalidation of such laws would regulate. Because the regulated activity under WHPA is the enactment of unduly burdensome abortion restrictions by state legislatures, instrumentalities of interstate commerce are not implicated by the Act’s provisions.

<sup>182</sup> *Morrison*, 529 U.S. at 611–12 (citing *Lopez*, 514 U.S. at 563–67).

<sup>183</sup> *Lopez*, 514 U.S. at 561.

<sup>184</sup> *Morrison*, 529 U.S. at 613.

<sup>185</sup> Women’s Health Protection Act § 4(a)(1)–(7).

Second, WHPA includes an implicit jurisdictional hook, connecting the regulated activity – state restriction of abortion services – to interstate commerce.<sup>186</sup> In *Lopez* and *Morrison*, the Supreme Court struck down federal regulations, finding that the absence of a jurisdictional hook limiting the scope of Congress’s regulatory power in both statutes undercut their facial constitutionality.<sup>187</sup> This “jurisdictional hook” is a statutory clause requiring that the regulated activity have a connection with interstate commerce and thus ensures that courts are able to distinguish on an individualized basis that a given activity properly falls within the statute’s jurisdiction.<sup>188</sup> Typically, jurisdictional elements include specific language regarding the regulated activity’s relation to commerce.<sup>189</sup> Broad jurisdictional hooks merely require that the activity affect or involve commerce.<sup>190</sup> Narrower hooks more commonly demand that a “particular piece of property be ‘used in’ interstate commerce” or that a regulated activity “affect” interstate commerce.<sup>191</sup> Although WHPA does not explicitly include a jurisdictional element, the Act does include a list of factors for courts “to consider in determining whether a measure of action impedes access to abortion services,” and thus falls within its enumerated prohibited activities.<sup>192</sup> Within this list, the authors of the Act specifically note that a court should consider “whether the measure or action is reasonably likely to result in a decrease in the availability of abortion services in the State.”<sup>193</sup> One may argue that this implied, rather than explicit, jurisdictional element does not “actually limit [] the statute’s reach”<sup>194</sup> to activity that affects interstate commerce. However, as explored below, the object of the regulation in WHPA is intimately connected to interstate commerce regardless of the statute’s omission of specific language implicating that relationship.

Furthermore, the Supreme Court in *Gonzales v. Raich* suggested that the use of a jurisdictional hook is not the only way a statute may be facially constitutional.<sup>195</sup> In *Raich*, a majority of the Court held Congress could constitutionally regulate a local non-commercial activity so long as such legislation was part of a larger regulatory scheme and that Congress had a rational basis for concluding that failure to regulate the activity would undermine that scheme.<sup>196</sup> Some courts have used this principle to mitigate the constitutional adequacy of statutes with insufficient jurisdictional elements.<sup>197</sup> One such approach allows a court to retain an insufficient hook in its analysis while allowing for generous interpretation of a statute’s requirements to

<sup>186</sup> Women’s Health Protection Act § 4(b)(3)(E) (“Factors for a court to consider in determining whether a measure or action impedes access to abortion services for purposes of paragraph (2)(B) include . . . (E) Whether the measure or action is reasonably likely to result in a decrease in the availability of abortion services in the State.”).

<sup>187</sup> Tara M. Stuckey, *Jurisdictional Hooks in the Wake of Raich: On Properly Interpreting Federal Regulations of Interstate Commerce*, 81 NOTRE DAME L. REV. 2101, 2102 (2006).

<sup>188</sup> Jonathan E. Duckworth, *Rancho Viejo and GDF Reality: Extending Commerce Clause Powers to Intrastate Species by Defining the Precise Regulated Activity*, 50 WAYNE L. REV. 977, 981 n.40 (2004).

<sup>189</sup> Stuckey, *supra* note 187, at 2106–7.

<sup>190</sup> *Id.* (citing, for example, 9 U.S.C. § 2 (2000)).

<sup>191</sup> *Id.* (citing, for example, 18 U.S.C. § 844(i) (2000)).

<sup>192</sup> Women’s Health Protection Act § 4(b)(3)(A)–(G).

<sup>193</sup> Women’s Health Protection Act § 4(b)(3)(E).

<sup>194</sup> Stuckey, *supra* note 187, at 2106–7.

<sup>195</sup> *Gonzales v. Raich*, 125 S. Ct. 2195 (2005).

<sup>196</sup> *Raich*, 125 S. Ct. at 2208–15.

<sup>197</sup> *See, e.g.*, *United States v. Maxwell*, 446 F.3d 1210 (11th Cir. 2006) (disregarding a child pornography statute’s insufficient jurisdictional element and using *Raich* to permit regulation of all intrastate possession of such materials); *United States v. Forrest*, 429 F.3d 73 (4th Cir. 2005) (upholding a conviction under a statute regulating child pornography activity with an insufficient jurisdictional hook and relying on the Court’s holding in *Raich*).

determine whether there exists a substantial relationship between the regulated activity and interstate commerce.<sup>198</sup> Under this tactic, *Raich* may be cited for its “theory of aggregation or to provide added support to a case-by-case decision to regulate intrastate activity.”<sup>199</sup> A federal protection of abortion such as WHPA would necessarily be part of a larger regulatory scheme because the regulation of abortion and reproductive health services<sup>200</sup> comprises an important part of the federal government’s regulation of healthcare nationwide. Therefore, employing this approach, a court may interpret a future version WHPA liberally and conclude that its language invalidating only state abortion laws that are “likely to result in a decrease in the availability of abortion services in the [s]tate”<sup>201</sup> properly limits the Act’s reach.

While the Court’s commerce power jurisprudence suggests that the presence of a jurisdictional element supports the facial constitutionality of a statute,<sup>202</sup> it is not necessarily a guarantee of constitutionality.<sup>203</sup> Other *Morrison* factors may also tip the scales in favor of constitutionality, such as the third factor, congressional findings of a connection between the regulated activity and interstate commerce. A discussion of the Freedom of Access to Clinic Entrances Act of 1994 (FACE) informs this analysis. Two years after the Supreme Court handed down its decision in *Casey*, Congress successfully passed FACE to address the increasingly violent protests and blockades of abortion clinics of the early 1990s and to ensure that women could physically access those clinics’ services.<sup>204</sup> At least five state district and supreme courts found separately that reproductive health facilities were engaged in interstate commerce based on three findings: interstate travel of pregnant women to obtain those facilities’ services, interstate travel of doctors to perform abortions, and the interstate movement of supplies purchased by clinics.<sup>205</sup> These findings parallel Congress’s justifications for proposing the 2007 version of FOCA under the Commerce Clause.<sup>206</sup> In this final version of the act, Congress explicitly delineated three ways in which abortion clinics affect interstate commerce:

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<sup>198</sup> Stuckey, *supra* note 187 at 2136.

<sup>199</sup> Stuckey, *supra* note 187 at 2136.

<sup>200</sup> WHPA does not strictly apply to abortion restrictions, it additionally includes a finding that such restrictions “harm women’s health by reducing access . . . to other essential health care services . . . including contraceptive services.” Women’s Health Protection Act § 2(a)(7).

<sup>201</sup> Women’s Health Protection Act § 4(b)(3)(E).

<sup>202</sup> *Morrison*, 529 U.S. at 613 (“*Lopez* makes clear that such a jurisdictional element would lend support to the argument that § 13981 is sufficiently tied to interstate commerce.”)

<sup>203</sup> Stuckey, *supra* note 187 at 2111.

<sup>204</sup> Freedom of Access to Clinic Entrances Act, 18 U.S.C.A. § 248 (1994).

<sup>205</sup> See *United States v. Gregg*, 226 F.3d 253 (N.J. 2000) (concluding that reproductive health clinics were engaged in interstate commerce); *United States v. Weslin*, 156 F.3d 292 (N.Y. 1998) (finding that Congress had a rational basis for concluding that access to reproductive health services affected interstate commerce based on interstate travel of patients, doctors, and supplies); *United States v. Wilson*, 73 F.3d 675 (Wis. 1995) (holding that reproductive health facilities were engaged in interstate commerce); *United States v. Lucero*, 895 F. Supp. 1421 (D. Kan. 1995) (finding that the regulated activity under FACE substantially affects interstate commerce due to interstate movement and travel of supplies, providers, and patients); *Council for Life Coal. v. Reno*, 856 F.Supp.1422 (S.D. Cal. 1994) (concluding that clinics and other abortion service providers were involved in interstate commerce and many of patients seeking services from such facilities engaged in interstate commerce by traveling from one state to obtain services in another). *But see United States v. Bird*, 279 F. Supp. 2d 827 (S.D. Tex. 2003) (finding that Congress lacked authority under the Commerce Clause to enact FACE because the activity targeted occurred intrastate and had at most insubstantial or attenuated effects on interstate commerce).

<sup>206</sup> S. 1173, § 2(14)–(15).

(A) many women cross State lines to obtain abortions and many more would be forced to do so absent a constitutional right or Federal protection; (B) reproductive health clinics are commercial actors that regularly purchase medicine, medical equipment, and other necessary supplies from out-of-State suppliers; and (C) reproductive health clinics employ doctors, nurses, and other personnel who travel across State lines in order to provide reproductive health services to patients.<sup>207</sup>

More recently, WHPA specifically called attention to the correlation between the cumulative effect of numerous state restrictions and a woman’s dependency on her state residency to exercise her constitutional rights.<sup>208</sup>

Although the Court reviews congressional findings under a deferential standard, the Court has begun to subject Congress’s methodology in arriving at such findings to critical examination.<sup>209</sup> Thus, the Court has held that congressional findings, without more, are not sufficient to sustain a congressional act under the Commerce Clause.<sup>210</sup> However, a final analysis of WHPA in reference to the fourth *Morrison* factor, the attenuation of the link between the regulated activity and interstate commerce, demonstrates the constitutionality of a federal invalidation of state anti-abortion regulations under Congress’s commerce power.

In *NLRB v. Jones & Laughlin Steel Corp.*, the Supreme Court held that Congress has the power to regulate intrastate activities that “have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions.”<sup>211</sup> Under this standard, Congress properly invokes its Commerce Clause power to regulate state abortion restrictions for two reasons. First, as detailed above, Congress and several state courts have already found that obstruction of access to abortion services and clinics is an impediment to interstate commerce. Second, the interstate movement of providers and patients through the Underground Railroad of reproductive resources demonstrates that restrictive state abortion laws detrimentally affect the interstate market of abortion services. Therefore, due to the pervasive and damaging effects of state restrictions, Congressional invalidation of such laws through WHPA or similar legislation is constitutional under the Supreme Court’s Commerce Clause jurisprudence.

It may be argued that even if a federal legislation would be constitutional under the Commerce Clause, an act such as WHPA would run into validity issues with regard to Congress’s power under Article I of the Constitution because the act applies directly to the states.<sup>212</sup> Analyzing a take title provision of the Radioactive Waste Act, the Supreme Court held in *New York v. United States* that, “[w]hile Congress has substantial powers to govern the Nation directly, including in

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<sup>207</sup> S. 1173, § 2(15) (A)–(C).

<sup>208</sup> Women’s Health Protection Act § 2(a) (8) (“The cumulative effect of these numerous restrictions has been widely varying access to abortion services such that a woman’s ability to exercise her constitutional rights is dependent on the State in which she lives.”).

<sup>209</sup> See *Morrison*, 529 U.S., at 615.

<sup>210</sup> See *Morrison*, 529 U.S., at 615.

<sup>211</sup> *NLRB*, 301 U.S., at 37.

<sup>212</sup> Dutra, *supra* note 9 at 1299.

areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions."<sup>213</sup> Contrary to the provision under scrutiny in *New York*, which affirmatively commanded the states to enact legislation, WHPA and similar legislation would prevent the states from acting in a particular way. In this way, by enacting a federal protection of abortion rights, Congress would not be "hiding from the full view of the public behind the cloak of state regulation" as in *New York*.<sup>214</sup> Rather, it would be codifying decisions handed down by the Supreme Court regarding the contours of constitutionality of state interference with the right to choose to terminate a pregnancy.

## Conclusion

As debate over the constitutionality of increasingly restrictive state abortion regulations continues to gain momentum in circuit courts across the country,<sup>215</sup> the right to choose to have a safe abortion free from unduly burdensome state interference is in danger of being further circumscribed and dismantled by a narrow majority of conservative Supreme Court justices. Twenty-two states successfully enacted seventy anti-abortion measures in 2013 alone, including obstructive provisions such as targeted regulations of abortion providers, unconstitutionally narrow gestational age limits, bans on insurance coverage of abortion, and limits on the provision of medicine abortion.<sup>216</sup> Because of the constitutionally volatile nature of these regulations and the close relation of abortion services to interstate commerce, Congress would be within its enforcement powers to prohibit exceptionally restrictive state anti-abortion regulations that have made it impossible for underprivileged or impoverished women to access reproductive health services and, in turn, exercise their constitutional right to choose to have an abortion.

Due to these regulations, many women in states hostile to abortion rights have been forced to travel into other, more liberal states to receive reproductive health care and to procure necessary abortion services. While the movement of women interstate to receive abortion procedures is at least partially protected under the constitutional right to travel,<sup>217</sup> the emotional, physical, and monetary costs low-income women incur at the hands of these restrictive state antiabortion regulations remain unconscionable and unduly burdensome. In this hostile abortion environment, effective endeavors to connect disadvantaged women with necessary reproductive health services

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<sup>213</sup> *New York v. United States*, 505 U.S. 144, 162 (1992) (holding that the Act's "take title" provision, requiring states to accept ownership of waste or regulate according to instructions of Congress, lies outside Congress' enumerated powers and is inconsistent with Tenth Amendment).

<sup>214</sup> Axel, *supra* note 154 at 651.

<sup>215</sup> Millhiser, *supra* note 143.

<sup>216</sup> Boonstra & Nash, *supra* note 4.

<sup>217</sup> An individual's right to travel into a liberal abortion state is found under the protection of the right to comity under the Supreme Court's right to travel jurisprudence. The right of comity, or the right to be treated as a welcome guest when temporarily visiting another state, protects the procurement of medical services, such as abortion procedures and other reproductive health services. *Doe*, 410 U.S. 179 ("A contrary holding would mean that a State could limit to its own residents the general medical care available within its borders.") For a discussion of the right of comity component of the constitutional right to travel, see *Saenz v. Roe*, 526 U.S. 489 (holding that the right to travel embraces three different components: the right of locomotion (the right to enter and leave another State); the right of comity (the right to be treated as a welcome visitor while temporarily present in another State); and, for those travelers who elect to become permanent residents, the right of migration (the right to be treated like other citizens of that State)); Christopher S. Maynard, *Nine-Headed Caesar: The Supreme Court's Thumbs-Up Approach to the Right To Travel*, 51 CASE W. RES. L. REV. 297, 333 (2000) (quoting U.S. Const. art IV, § 2 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States"))).

and family planning tools are only becoming more imperative. Therefore, a federal invalidation of the particularly limiting and arguably unconstitutional state abortion laws that have emerged since 2010 could be the most effective method of protecting the reproductive rights of low-income women while insulating the Court's prior abortion jurisprudence from further winnowing by a conservative majority.