CONGRESSIONAL POWER AND THE RIGHT TO CHOOSE: A CONSTITUTIONAL ANALYSIS OF THE FREEDOM OF CHOICE ACT

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I. INTRODUCTION: THE DEVELOPMENT AND SUBSEQUENT EROSION OF THE RIGHT TO CHOOSE - THE NEED FOR A FEDERAL ABORTION LAW

In 1973 the Supreme Court established a woman's right to choose as a fundamental right.[1] The Court based its landmark decision in *Roe v. Wade* on the guarantee of personal privacy recognized in earlier opinions.[2] The Court considered the right of privacy to be founded in the Fourteenth Amendment's concept of personal liberty, as developed in *Meyer v. Nebraska*; or alternatively to arise from the Ninth Amendment's reservation of rights to the people, recognized in *Griswold v. Connecticut*.[3] "This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[4]

The right was not absolute, however, and the state's interests in safeguarding health, in maintaining medical standards, and in protecting potential life had to be taken into consideration.[5] "At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision."[6] Only after the first trimester does the state's interest in protecting maternal health become "compelling," thus allowing regulation to preserve and protect the mother's health. "This is so

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[1] Roe v. Wade, 410 U.S. 113 (1973).

[2] *Id.* at 152 ("In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment, Stanley v. Georgia, 394 U.S. 557, 564 (1969); in the Fourth and Fifth Amendments [citations omitted]; in the penumbras of the Bill of Rights, Griswold v. Connecticut, 381 U.S. at 484-85; in the Ninth Amendment, *id.* at 486; or in the concept of liberty guaranteed by . . . the Fourteenth Amendment, *see* Meyer v. Nebraska, 262 U.S. 390, 399 (1923).").

[3] Roe v. Wade, 410 U.S. at 152-53 ("[T]he right has some extension to activities relating to marriage, Loving v. Virginia, 388 U.S. 1, 12 (1967); procreation, Skinner v. Oklahoma, 316 U.S. 535, 541-42 (1942); contraception, Eisenstadt v. Baird, 405 U.S. at 453-54; family relationships, Prince v. Massachusetts, 321 U.S. 158 (1944); and child rearing and education; Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); and *Meyer* [citation omitted in original].").

[4] *Id.* at 153.

[5] *Id.* at 154.

[6] *Id.*

because of the now-established medical fact that . . . until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth."[7]

The state's interest in protecting potential life becomes compelling at viability, which the Court defined as "the interim point at which the fetus . . . [is] potentially able to live outside the mother's womb, albeit with artificial aid."[8] Subsequent to viability, a state can regulate or even proscribe abortion, except when necessary to preserve the life or health of the mother.[9] *Roe* thus established a trimester framework, which left the abortion decision to the woman and her attending physician for essentially the first trimester, without state interference.

Over the ensuing fifteen years the Court uniformly applied a standard of strict scrutiny to review state abortion regulations, consistent with its recognition of the fundamental nature of the woman's right to choose.[10] Regulation limiting this right could be justified only by a compelling state interest, and legislative enactments had to be narrowly drawn to express only the legitimate state interests at stake.[11] A variety of state restrictions have been overturned under this strict scrutiny analysis. These include laws that forced women to wait a specified period of time before obtaining an abortion, imposed biased "mandated-content" counseling requirements, and required women to obtain their spouse's consent before obtaining an abortion.[12]

The Court also upheld a number of regulations on the grounds that they were necessary to protect the woman's health or did not restrict the right to choose. Requirements upheld as medically necessary included written consent requirements, confidential record-keeping and reporting requirements, and pathology reports.[13] Some restrictions were upheld on the ground that they did not interfere with a woman's right to choose, such as limitations on public funding of abortions, and a parental consent requirement for minors seeking the procedure.[14] The state, however, could involve parents in a minor's abor-

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[7] *Id.* at 163.

[8] *Id.* at 160.

[9] *Id.* at 164-65.

[10] *Id.* at 155-56.

[11] *Id.* at 155. *See* Mark H. Woltz, *A Bold Reaffirmation?* Planned Parenthood v. Casey *Opens the Door for States to Enact New Laws to Discourage Abortion*, 71 N.C. L. REV. 1787, 1792 n.38 (1993) ("To survive strict scrutiny review, regulations limiting fundamental rights must be narrowly drawn to serve a compelling state interest . . . . Under rational basis review, however, a law need only be rationally related to a valid state objective to be constitutional.") (citations omitted).

[12] Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986) (counseling requirement); City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416 (1983) [hereinafter *Akron II*] (mandatory 24 hour waiting period); Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (spousal consent requirement).

[13] Planned Parenthood v. Ashcroft, 462 U.S. 476 (1983); *Danforth*, 428 U.S. at 52.

[14] *Ashcroft*, 462 U.S. 476; Harris v. McRae, 448 U.S. 297 (1980); Beal v. Doe, 432 U.S. 438 (1977).

tion decision if it also provided an "alternative procedure" in order to prevent parental involvement from becoming an "absolute, and possibly arbitrary, veto."[15] As late as 1986, the Court reaffirmed its *Roe* decision, stating that "[f]ew decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision . . . whether to end her pregnancy."[16]

Beginning with *Webster v. Reproductive Health Services* in 1988, the trimester framework adopted in *Roe* began to suffer substantial decay.[17] The plurality opinion written by Chief Justice Rehnquist asserted that the trimester framework had proved "unsound in principle and unworkable in practice."[18] In upholding the viability testing provision of the Missouri law, he indicated that the state's interest in the fetus was compelling throughout the pregnancy, and that the regulations "permissibly furthered" the state's interest in potential human life.[19] The plurality was unwilling to invoke the strict scrutiny analysis required under the trimester framework of *Roe*.

This rejection of the trimester approach to abortion regulations was affirmed in the recent Court decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[20] In *Casey*, the majority opinion reaffirmed a woman's right to terminate her pregnancy before viability, but recognized that the trimester framework was inconsistent with the notion that the state has a substantial interest in potential life throughout the pregnancy. The majority opinion thus adopted an "undue burden" standard of review, which prevents a state from placing a "substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[21] Judicial scrutiny of a state regulation would be limited to whether the law bears a rational relationship to legitimate purposes, such as ensuring maternal health and protecting fetal life, with strict scrutiny reserved for instances in which the state has imposed an undue burden on the abortion decision.[22]

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[15] This alternative procedure often took the form of a "judicial bypass," whereby a minor could seek the consent of a judge rather than her parents. Bellotti v. Baird, 443 U.S. 622, 643 (1979) (citing *Danforth*, 428 U.S. at 74).

[16] *Thornburgh*, 476 U.S. at 772.

[17] Webster v. Reproductive Health Servs., 492 U.S. 490 (1989), upheld provisions of a Missouri law that forbade use of public facilities or employees to perform abortions, and required that the doctor perform tests to determine fetal gestational age before performing an abortion on a woman believed to be more than 19 weeks pregnant.

[18] *Id.* at 518 (citing Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546 (1985)).

[19] *Id.* at 519.

[20] 112 S. Ct. 2791 (1992).

[21] *Id.* at 2820 ("A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it.").

[22] *Id.* at 2801, 2821. This requirement of an initial finding by the Court before invoking strict scrutiny analysis was first suggested by Justice O'Connor in *Akron II*, 462 U.S. at 462 (O'Connor, J., dissenting). She cited as support for this approach San

In *Casey* the undue burden approach resulted in the approval of state regulations previously held unconstitutional under the trimester approach in *Roe*.[23] Since these regulations did not amount to an undue burden, the Court did not invoke strict scrutiny analysis of the pre-viability requirements. This raised congressional concern that the new Supreme Court analysis of restrictive abortion regulations might substantially erode the right first established in *Roe*.[24] In addition, four of the dissenting justices in the *Casey* Court stated their willingness to overrule the *Roe* decision, without regard to precedent.[25] Although fears of an outright reversal have been allayed by the Court's recent refusal to review the overruling of Guam's sweeping abortion law, there is still concern that the "liberty interest" of a woman's right to choose may be diminished under the undue burden standard.[26]

II. A CONGRESSIONAL EFFORT TO SUPPORT THE RIGHT TO CHOOSE: THE PROPOSED FREEDOM OF CHOICE ACT

The Freedom of Choice Act, as reported from the Senate Committee on Labor and Human Resources, proposes to establish in federal statutory law the same limitations upon the power of states as existed under the strict scrutiny standard of review enunciated in *Roe v. Wade*.[27] The Act codifies the principles established in *Roe*, prohibiting states from restricting a woman's

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Antonio School District v. Rodriguez, 411 U.S. 1 (1973) (dealing with equal protection), and Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1963) (dealing with the First Amendment).

[23] *Casey* considered requirements that women notify their husbands before having an abortion, forced women to delay 24 hours after making their decision, compelled doctors to relate specific state-mandated information, and required the reporting of information that may, in certain circumstances, be made publicly available. All but the spousal notification requirement were upheld. *Casey*, 112 S. Ct. at 2822-33.

[24] *See, e.g.*, 138 CONG. REC. S9089-04 (daily ed. June 29, 1992) (Remarks of Sen. Cranston) ("Although the Court has stopped short of overturning *Roe*, it has continued to whittle away at these fundamental rights until they have become a hollow shell."); 138 CONG. REC. H5376-01 (daily ed. June 29, 1992) (Remarks of Rep. Lowey) ("[The Court's] strategy is clear. It is to chip away at *Roe* bit by bit and restriction by restriction, until abortion services are unavailable, and the Government controls this most personal of decisions.").

[25] *Casey*, 112 S. Ct. at 2855 (Rehnquist, C.J., dissenting).

[26] The Court refused to review a district court's overruling of Guam's abortion law, which bans all abortions except where a continuing pregnancy would kill a woman or "gravely impair" her health. Guam Soc'y of Obstetricians & Gynecologists v. Ada, 962 F.2d 1366 (9th Cir. 1992), *cert. denied* 113 S. Ct. 633 (1992); *cf.* Sojourner T. v. Louisiana, 974 F.2d 27 (5th Cir. 1992) (overturning Louisiana's strict abortion law).

[27] S. 25, 103d Cong., 1st Sess. § 2(b) (1993) [hereinafter Appendix]. A copy of S. 25 is included in the Appendix provided at the end of this Article. The House version of the bill, H.R. 25, is substantively identical to the Senate version. The bill is pending before both the House and Senate as of this writing.

freedom to choose whether to terminate a pregnancy prior to fetal viability.[28] It clarifies that under the strict scrutiny standard of review, states have the authority to protect unwilling individuals from participating in the performance of abortions, to decline to pay for the procedure, and to require minors to involve a parent, guardian or other responsible adult prior to terminating a pregnancy.[29]

Consistent with *Roe v. Wade*, the Act would allow state regulation of post-viability abortions, unless the procedure is necessary to preserve the life or health of the mother.[30] There is no attempt to define fetal viability in the Act, leaving the definition to decided case law. *Roe* defined fetal viability as the point at which the fetus is "potentially able to live outside the mother's womb, albeit with artificial aid."[31] However, the Court's later opinion in *Danforth* made it clear that viability is a medical determination, and that it is not the proper function of the legislature or the courts to place viability, which is essentially a medical concept, at a specific point in the gestation period.[32] The bill does not establish a particular time because "the point of fetal viability must be determined by physicians on a case-by-case basis."[33]

The Act would also permit regulations that are "medically necessary" in order to protect the woman's health. The definition of "medically necessary" is left open to interpretation under principles established by the Court. However, the state bears the burden of demonstrating the medical necessity of the regulation.[34] It must be designed to protect a woman's health, not to influence her choice.[35] It must also be consistent with established medical practice for comparable procedures.[36] Finally, the state must show under a strict scrutiny standard of review that the regulation would in fact contribute to the woman's health and is the least restrictive alternative.[41]

The proposed Act details many problems the legislature seeks to correct.[42] Congress found that in response to the new Court standard, certain states have restricted the right of women to seek abortions and to utilize certain forms of contraception. These restrictions operate cumulatively to burden interstate commerce and travel, and infringe upon women's full enjoyment of rights

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[28] *See* Appendix, § 3(a).

[29] *See* Appendix, § 3(b).

[30] 410 U.S. at 154.

[31] *Id.*

[32] 428 U.S. at 64.

[33] The Freedom of Choice Act of 1992, S. REP. No. 321, 102d Cong., 2d Sess. 41 (1992) [hereinafter SENATE REPORT].

[34] *See* Doe v. Bolton, 410 U.S. 179, 195 (1973).

[35] *Thornburgh*, 476 U.S. at 760.

[36] *Bolton*, 410 U.S. at 199-200. *But see Akron II*, 462 U.S. at 430 (citing Planned Parenthood v. Danforth, 428 U.S. 52, 77-78 (1976)). In *Danforth* two statutory provisions were upheld "even though comparable requirements *were not* imposed on most medical procedures." *Danforth*, 428 U.S. at 65-67, 79-81 (emphasis added).

[41] *See Akron II*, 462 U.S. at 430; *Bolton*, 410 U.S. at 198.

[42] *See* Appendix, § 2(a).

secured to them by federal and state law, and interfere with medical professionals' ability to provide health services. Finally, Congress found the restrictions to be discriminatory against women in general, and poor women in particular.[43]

The Act would stem the erosion of *Roe v. Wade* caused by recent Supreme Court review of state regulations. The Act addresses Congress's concern that while the core of *Roe* remains intact, it is being substantially undermined by the undue burden analysis employed by the Court.[44]

This article will analyze the constitutionality of the proposed Freedom of Choice Act. In addition, the possibility of overruling *Roe* must be considered in any analysis of the Act's constitutionality, although the Court's recent refusal to hear *Ada* has dispelled notions that *Roe* will be completely overturned in the near future. This paper will explore both the Commerce Clause and Section Five of the Fourteenth Amendment as alternative sources of congressional power to determine whether the Freedom of Choice Act falls within constitutional limits.

III. THE FOURTEENTH AMENDMENT AS A BASIS FOR THE FREEDOM OF CHOICE ACT: CONGRESSIONAL POWER UNDER SECTION FIVE

Section Five of the Fourteenth Amendment specifically grants Congress the power "to enforce by appropriate legislation all the provisions" of the Fourteenth Amendment.[45] Cases interpreting congressional power under Section Five give a potentially broad scope to Congress's ability to protect constitutional rights.[46] This power is coextensive with the Necessary and Proper Clause of the Constitution, and it allows Congress to strike down certain state statutes and procedures.[47] Congress may remove obstacles that in themselves do not violate equal protection, in order to secure access to government services.[48] The wide latitude granted Congress to secure equal protection through legislation is suggested in cases involving the Civil Rights Amendments of the

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[43] *See* SENATE REPORT, *supra* note 33, at 20-24.

[44] *Id.*

[45] Its sponsor, Senator Howard, noted that Section Five "casts upon Congress the responsibility of seeing to it, for the future, that all sections of the amendment are carried out in good faith, and that no State infringes the rights of persons or property." CONG. GLOBE, 39th Cong., 1st Sess. 2766, 2768 (1866).

[46] *See, e.g., Ex parte* Virginia, 100 U.S. 339, 345-46 (1880) ("Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.").

[47] Katzenbach v. Morgan, 384 U.S. 641, 650 (1966); *cf.* South Carolina v. Katzenbach, 383 U.S. 301, 323-27 (1966) (affirming Congress's power to proactively enact legislation which is necessary and proper to secure equal protection).

[48] *Morgan*, 384 U.S. at 651.

late 1800s, as well as in cases involving other constitutional amendments.[49] The abortion debate raises a number of Fourteenth Amendment issues and implicates the use of Congress's Section Five power in addressing the controversy.

A. *Interests Implicated in the Right to Choose*

The Freedom of Choice Act is an attempt to address Congress's concerns with both the equal protection rights of women and their due process right to the "liberty interest" recognized in *Casey*. Since the "enforcement" powers in Section Five apply to the due process clause in Section One of the Fourteenth Amendment, as well as to the equal protection guarantees, Congress can legislate under Section Five to secure access to the right to choose. In addition, the freedom to choose an abortion may be essential to the effective exercise of other rights guaranteed to women under federal and state laws.[50] A state, by inhibiting the abortion decision, can interfere with these rights either by forcing a woman to seek illegal or less-safe abortions, or by inhibiting the abortion decision and imposing a lifestyle that would obstruct her later exercise of these rights. Thus, the proposed Act can also be viewed as "essential to protecting the ability of women to exercise a broad range of other rights secured to them by Federal and State laws."[51]

One of the additional interests involved in the abortion decision is a right to procreate, which can be hampered by the restriction of an abortion earlier in her life.[52] If a woman is forced by a state law to undergo a medically unsafe or

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[49] *See, e.g.*, James Everard's Breweries v. Day, 265 U.S. 545 (1924) (upholding congressional power under § 2 of the Eighteenth Amendment); *see also* Branzburg v. Hayes, 408 U.S. 665 (1972) (dealing with the First Amendment). "Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned [under federal law] . . . ." *Branzburg* at 706.

[50] *See* SENATE REPORT, *supra* note 33, at 28.

> Women who are compelled to leave their homes and travel to other States or foreign countries to obtain safe and legal abortions may be forced to give up employment, educational opportunities, and even the ability to participate in the political process. Those who resort to illegal and medically less safe abortions risk permanent physical impairment, including the loss of reproductive capacity and even death. Some may face criminal prosecutions and incarceration. Others, who are required against their will to carry a pregnancy to term may be subjected to permanent physical disabilities as well as experience loss of employment, educational and other opportunities.

Id.

[51] *Id.*

[52] *See Freedom of Choice Act of 1991: Hearing on S. 25 Before the Subcommittee on Labor of the Senate Committee on Human Resources*, 102d Cong., 2d Sess. 34 (1992) (testimony of Laurence H. Tribe) [hereinafter *Hearing on S. 25*].

> It is a long-settled aspect of personal "liberty" under the Fourteenth Amendment, dating back to *Meyer v. Nebraska*, *Pierce v. Society of Sisters*, and *Skinner v.*

illegal abortion, she may be permanently damaged, physically or psychologically, which could impair her ability to have children later in life. The trauma of an unexpected pregnancy and the subsequent birth and adoption of the baby may have the same effect.[53]

The proposed Freedom of Choice Act also expresses concern over the availability of contraception. Some state laws may be drafted so as to preclude the use of abortifacients as methods of birth control, while others may prevent the use of devices such as the IUD, which prevent the implantation of the fetus in the uterus. Since some state regulations may attempt to limit or prevent access to certain types of contraceptive devices, Congress may act to protect the right of privacy recognized in *Griswold v. Connecticut*.[54] By removing state restrictions to birth control the Act would secure access to this liberty interest as well as protect other Fourteenth Amendment guarantees from state interference.

The Freedom of Choice Act thus represents a situation where Congress is exercising its broad discretion to deal with what it perceives as a threat to a woman's right to choose. Is Congress's Section Five power broad enough to encompass this legislation?

B. *Congressional Action to Protect Due Process Interests*

In *Katzenbach v. Morgan* the Supreme Court upheld section 4(e) of the Voting Rights Act of 1965, which overrode New York's English literacy voting requirement.[55] The Court found the provision a valid exercise of congressional power under Section Five of the Fourteenth Amendment, and described Section Five 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."[56] The Court applied the formulation first enunciated in *McCulloch v. Maryland*,[57] to determine whether the Act's provision was "appropriate legislation."[58]

Oklahoma, that each person is guaranteed the right to . . . choose to have children, to procreate, and to decide how to bring them up. The freedom of a woman to make that decision, and of a man to make the decision with her, may be seriously impaired if the woman has been prevented at an earlier point in her life from safely and legally terminating a pregnancy that she did not feel she could continue.

Id. (citations omitted).

[53] *Id.*

[54] Griswold v. Connecticut, 381 U.S. 479, 480-86 (1965) (invalidating Connecticut statute forbidding use of contraceptives).

[55] Katzenbach v. Morgan, 384 U.S. 641, 658 (1966).

[56] *Id.* at 651; *cf.* South Carolina v. Katzenbach, 383 U.S. 301 (1966) (upholding constitutionality of Voting Rights Act under § 2 of the Fifteenth Amendment).

[57] 17 U.S. (4 Wheat.) 316 (1819).

[58] "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not

1. The first branch of *Katzenbach v. Morgan*: the remedial power

The first theory proposed by Justice Brennan in *Morgan* to support the Voting Rights Act rested on Congress's ability to protect constitutionally recognized rights.[59] Congress, by removing New York's literacy requirement, could significantly increase the political power of the Puerto Rican community, even though the literacy requirement itself might not violate the Equal Protection Clause.[60] "This enhanced political power will be helpful in gaining nondiscriminatory treatment in public services for the entire Puerto Rican community."[61] The Voting Rights Act provision could thus be regarded as a prophylactic measure, intended to secure the guarantees of the Fourteenth Amendment. Congress considered the various conflicting interests involved, and the Court deferred to the congressional determination of an appropriate means to an end.[62] Congress can thus prescribe necessary safeguards which are not themselves required by the Fourteenth Amendment, but which are appropriate ways of implementing its guarantees.

The Freedom of Choice Act presents two aspects of this remedial power. The first is Congress's due process power to secure for women the "liberty interest" recognized in *Casey* and other Fourteenth Amendment rights as well. The second is Congress's power to ensure equal protection guarantees. The concern over access to the right to choose arises from Congress's view that the undue burden analysis now employed by the Court allows too much state restriction over this right. "It is the Committee's view . . . that any restriction of a woman's right to terminate a pregnancy which would have been invalidated under the strict scrutiny standard of *Roe* will make it significantly harder to exercise the very 'liberty' that a majority of the Court in *Casey* recognized was involved."[63] Thus, by establishing in federal law the trimester

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prohibited, but consist with the letter and spirit of the Constitution, are constitutional." *Id.* at 421.

[59] *Morgan*, 384 U.S. at 641.

[60] *Id.*

[61] *Id.* at 652.

[62] The Court in *Morgan* stated:

> It was well within congressional authority to say that this need of the Puerto Rican minority for the vote warranted federal intrusion upon any state interests served by the English literacy requirement. It was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations - the risk or pervasiveness of the discrimination in governmental services, the effectiveness of eliminating the state restriction on the right to vote as a means of dealing with the evil, the adequacy or availability of alternative remedies, and the nature and significance of the state interests that would be affected by the nullification of the English literacy requirement as applied to residents who have successfully completed the sixth grade in a Puerto Rican school. It is not for us to review the congressional resolution of these factors.

Id. at 653.

[63] SENATE REPORT, *supra* note 33, at 32.

framework and its required strict scrutiny analysis, the Act proposes to secure the constitutional "liberty interest" recognized in *Roe*.

As "remedial" legislation, however, the Act arguably expands upon the current definition of the right to choose articulated by the Court in *Casey*. By mandating a strict scrutiny analysis of pre-viability state regulations, the effect of the Act may be to overturn certain state regulations since upheld under *Webster* and *Casey*, notwithstanding the Court's finding of no "undue burden." These provisions include record-keeping requirements, waiting periods, state-mandated counseling, all upheld in *Casey*, and the restriction of the use of public facilities upheld in *Webster*.[64] The Court has previously found the record-keeping requirements and waiting period unconstitutional under a strict scrutiny analysis.[65] Because regulation of the manner of performing abortions has been held by the Court to be permitted by the Fourteenth Amendment under the undue burden analysis and the Act would protect a right free from these allowable restrictions, the Act would actually expand upon the definition of the right to choose. This expansive effort would not be supported by the first branch of *Morgan*, if Congress's purpose is to secure access to the right to choose, since it would alter the definition of that right. "Allowing Congress to protect constitutional rights statutorily that it has independently defined fundamentally alters our scheme of government."[66] Although Congress can provide broad safeguards to the right to choose, the question remains whether it can strike down state regulations that are facially permissible under the Fourteenth Amendment.[67]

Congress's concern is that the practical effect of these state restrictions is to

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[64] *Id.* at 35.

[65] The record-keeping requirements at issue in *Casey* were struck down in *Thornburgh*, since they raised the "specter of public exposure and harassment of women who choose to exercise their personal, intensely private right, with their physician, to end a pregnancy." *Thornburgh*, 476 U.S. at 767. A 24-hour waiting period was struck down in *Akron II*, where the Court said, "If a woman . . . is prepared to give her written informed consent and proceed with the abortion, a State may not demand that she delay the effectuation of that decision." *Akron II*, 462 U.S. at 450-51.

[66] EEOC v. Wyoming, 460 U.S. 226, 262 (1983) (Burger, C.J., dissenting).

[67] If the proposed Act cannot be considered a valid enactment to secure access to the "liberty interest" of *Casey*, without altering the Court's current definition of that right, what other Fourteenth Amendment rights might Congress be seeking to protect through a broad guarantee of reproductive freedom? Professor Laurence Tribe proposed that securing access to abortion would protect both the general right of "procreation," articulated in cases such as *Skinner* and *Meyer*, and the freedom to use birth control, developed in *Griswold* and *Carey*. *See Hearing on S. 25*, *supra* note 52. However, there are a multitude of factors that influence both a woman's later choice to bear children, and a state's decision whether to allow use of a particular type of birth control. It is not a conclusive presumption that securing women's access to abortion through the Freedom of Choice Act would necessarily provide women with greater access to either of these Fourteenth Amendment "rights," given the different state and personal interests involved in these areas.

completely erase a woman's right to choose in many cases. To forbid the use of public facilities and impose a twenty-four hour waiting period on women can essentially deny them the right to choose, particularly in states with limited abortion facilities. In addition, the failure of a state's record-keeping requirements to protect a woman's confidentiality can also interfere with the exercise of the liberty interest recognized in *Casey*, since the potential public exposure and harassment can effectively negate a woman's choice. The question remains whether Congress, under its Section Five power, can determine that the practical effect of these regulations necessitates legislation that could remove them as obstacles to a woman's freedom of choice.

2. The second branch of *Katzenbach v. Morgan*: a substantive power?

The alternative basis for support of Section Five power given in *Katzenbach v. Morgan* was Congress's ability to decide, based on its "specially informed legislative competence," whether the literacy requirement was necessary for effective exercise of the franchise.[68] In *Morgan* Congress determined that conditions were such that one could be an informed voter, even without English-speaking capabilities.[69] Therefore, to prevent educated Puerto Ricans from voting amounted to a violation of equal protection.[70] Since the federal and state statutes presented inconsistent evaluations of the underlying conditions, the Court granted deference to Congress's superior fact-finding ability.[71] The principles of this second rationale for congressional power under Section Five can also apply to support the Freedom of Choice Act.

The second branch of *Morgan* asserts that Congress can evaluate the conditions underlying restrictive state abortion regulations, and determine for itself that these restrictions infringe upon the right to choose, as well as a number of other statutory and constitutional rights.[72] *Morgan* proposes a substantial degree of judicial deference to legislative judgments, particularly with respect to the practical importance of relevant facts.[73] "[T]he Court has long been committed both to the presumption that facts exist which sustain congressional legislation and also to deference to congressional judgment upon questions of

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[68] *Morgan*, 384 U.S. at 654-56.

[69] *Id.*

[70] *Id.*

[71] *Id.* This view of the second branch of *Morgan* is emphasized by Professor Archibald Cox: "The Court, forced to choose between conflicting presumptions, applied the rule of deference to Congress and required the State to yield to the federal enactment." Archibald Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199, 229 (1971).

[72] *Morgan*, 384 U.S. at 641.

[73] *Id.* These findings were not only upon the relation of means to end, but also upon legislative balancing between intrusion into state interests and the statute's desired purpose. *See* Archibald Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 104 (1966).

degree and proportion."[74] Provided that the second branch of *Morgan* is still good law, based on the fact-finding theory of Congressional power, are the facts determined under the Freedom of Choice Act akin to those in *Morgan*?

In *Morgan*, the Court questioned the state's interests in providing an incentive to learn English and assuring intelligent exercise of the franchise and considered the relative importance of these interests compared to the "precious and fundamental" right to vote.[75] Congress also determined that the availability of Spanish newspapers and radio programs made an ability to read Spanish as effective as an ability to read English in informing a potential voter.[76] "Since Congress undertook to legislate so as to preclude the enforcement of state law, and did so in the context of a general appraisal of literacy requirements for voting . . . it was Congress's prerogative to weigh these competing considerations."[77] The Court thus deferred to congressional judgment on balancing these considerations, including the intrusion upon state interests. This broad degree of judicial deference was suggested in the first branch of *Morgan* as well.[78]

In the proposed Freedom of Choice Act, Congress makes a general appraisal of state abortion restrictions, determining that the practical effect of these regulations is to prevent the exercise of the right to choose. Although the regulations at issue in *Casey* did not create a "substantial obstacle" to a woman's choice in Pennsylvania, and thus placed no "undue burden" on her, these same regulations can have harsher effects when applied on a national level.[79] The Freedom of Choice Act, however, is not directed at any particular state regulation. It is a broad effort to establish strict scrutiny of pre-viability abortion regulations, the result of which nevertheless may end up overturning the noted state restrictions. Given its broader perspective of the practical effect of these abortion regulations, Congress is seeking to prevent unnecessary

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[74] Cox, *supra* note 73, at 107.

[75] *Morgan*, 384 U.S. at 655.

[76] *Id.* at 654-55.

[77] *Id.* at 655-56.

[78] *Id.* at 653.

[79] *See* SENATE REPORT, *supra* note 33, at 19.

> State laws that severely restrict access to abortions will force some women to resort to illegal and unsafe abortions. Time-consuming and costly State restrictions such as mandatory waiting periods or requirements that all abortions be performed in full service hospitals can foreclose access to legal abortions as surely as absolute bans. In light of the existing shortage of abortion providers in many parts of the country and the violence, harassment and blockades at clinics that provide abortions, imposing additional restrictions on access to safe and legal abortions will drive many women to desperate acts. Low-income women, young women, women from rural areas, and other vulnerable women, such as battered spouses, will have great difficulties in surmounting these state-imposed barriers. These women in particular will become the prey of the back-alley abortionists willing to provide quick and cheap abortions or will be forced to resort to dangerous self-induced abortions.

Id.

infringement of a constitutional liberty interest.[80]

A congressional inquiry on a national scale would consider and weigh facts that were not available to the Court in *Casey*. This inquiry would consider, among other things, the number of women living distant from abortion clinics nationwide, the availability of abortion services in all of the fifty states, and the problems engendered by imposing waiting periods or restricting the use of public facilities in any of the states, particularly upon women from rural areas and without the means to travel.[81] Through investigation and testimony, the legislature could certainly reach a different conclusion on the effect of these regulations.[82] The Supremacy Clause dictates that a congressional finding is superior to a state's, and the second branch of *Morgan* asserts that the Court should defer to this determination by the Congress.[83] Provided that the fact-finding theory of *Morgan* is still tenable, the Freedom of Choice Act could be considered a valid assertion of power by Congress under these Fourteenth Amendment principles.

It is arguable, however, that "[i]t is a judicial question whether the condition with which Congress has thus sought to deal is in truth an infringement of the Constitution, something that is the necessary prerequisite to bringing the § 5 power into play at all."[84] In some contexts, congressional determination may rest on specific facts, such as the availability of services in a specific area, but there will always be a balancing of the state interests involved and the

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[80] *See* William Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603, 614 (1975) ("[A] congressional judgment resolving at the national level an issue that could - without constitutional objection - be decided in the same way at the state level, ought normally to be binding on the courts, since Congress presumably reflects a balance between both national and state interests and hence is better able to adjust such conflicts."). Professor Cohen argues that Congress's power is based on its superior ability to make judgments concerning federalism, and distinguishes "liberty" judgments as the province of the Court. *Id.* at 613-614. *See also* Stephen L. Carter, *The Morgan "Power" and the Forced Reconsideration of Constitutional Decisions*, 53 U. CHI. L. REV. 819 (1986).

[81] There is also considerable emphasis in the Act and the Senate Report on the detrimental effects on women's health caused by restricting access to abortion. *See* Appendix, § 2(a)(2)(A)(i).

[82] The state restrictions "will in fact constitute an impermissible burden on the liberty, particularly when considered in cumulation with the other, similar restrictions of which Congress, as a legislature, may take notice in a manner impossible for a federal court reviewing the record in an individual case." SENATE REPORT, *supra* note 33, at 32. For the Court to consider these facts on a case-by-case basis would lead to dozens and dozens of cases brought in individual states, each with separate factual conditions.

[83] Professor Cox observes, "Congressional supremacy, over the judiciary in the areas of legislative fact finding and evaluation and over the state legislatures under the supremacy clause in any area within federal power, would seem to be a wiser touchstone . . . than judicially-defined areas of primary and secondary state and federal competence." Cox, *supra* note 73, at 107.

[84] *Morgan*, 384 U.S. at 666 (Harlan, J., dissenting).

conditions underlying the regulation.

This problem is particularly acute when considering regulations such as the state-mandated counseling and record-keeping requirements, which turn not on a question of fact but on a balancing of interests, the judiciary's primary area of concern.[85] Thus, the same problem that occurred under the first branch of *Morgan* is also raised under the second branch, namely that the Freedom of Choice Act goes beyond the limits articulated in the case, and beyond those allowed under Section Five.

3. Validity of the second branch of *Katzenbach v. Morgan*

There is also a question as to the availability of the second branch of *Morgan* as a viable rationale for congressional power, since it arguably goes beyond mere "remedial" power and allows Congress to make substantive determinations of constitutional rights.[86] The viability of the second branch was questioned in *Oregon v. Mitchell* in which a majority of the Justices refused to read *Morgan* as allowing Congress the latitude to determine the substantive content of the Civil War Amendments.[87] In his dissenting opinion in *Oregon v. Mitchell*, Justice Stewart noted that Congress only has the power under the Fourteenth Amendment to "provide the means of eradicating situations that amount to a violation of The Equal Protection Clause," but not to "determine as a matter of substantive constitutional law what situations fall within the ambit of the clause."[88] Justice Rehnquist in his dissent in *City of Rome v. United States* echoed this criticism of the "substantive" power of Congress: "The Court emphasized that the power conferred [by the Fourteenth Amendment] was 'remedial' only . . . . This construction has never been refuted by a majority of the Members of this Court."[89] Thus, it is doubtful that a congressional determination of the practical effect of restrictive state laws would support the enactment of the Freedom of Choice Act, since the Court itself has never completely adopted the second branch as a viable rationale for congressional power.[90]

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[85] Chief Justice Marshall in *Marbury v. Madison* asserted that "[i]t is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[86] *Morgan*, 384 U.S. at 667 (Harlan, J., dissenting) ("The question here is not whether the statute is appropriate remedial legislation to cure an established violation of a constitutional command, but whether there has in fact been an infringement of that constitutional command . . . . That question is one for the judicial branch ultimately to determine.").

[87] Oregon v. Mitchell, 400 U.S. 112 (1970).

[88] *Id.* at 296; *see also* City of Rome v. United States, 446 U.S. 156 at 219-21 (1980) (Rehnquist, J., dissenting).

[89] *City of Rome*, 446 U.S. at 220 (1980) (Rehnquist, J., dissenting); *see also* EEOC v. Wyoming, 460 U.S. at 226 (four Justices refused to recognize Congress's affirmative power to extend the Age Discrimination in Employment Act to the states).

[90] Commentators are mixed in their analysis of the second branch of the *Morgan*

C. *Congressional Action to Ensure Equal Protection*

Restrictive state abortion laws may also raise an equal protection problem, one which Congress can address under the Fourteenth Amendment. A state, by restricting access to abortion, could itself be engaged in sex discrimination by preventing equal participation in society. The joint opinion in *Casey* recognized that "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."[91] Restricted access to abortions precludes women from maintaining control over their lives and careers, thus preventing their equal participation in the social, political and economic development of the Nation. In addition, a patchwork of restrictive abortion laws impacts hardest on low-income women, since they often lack the resources to travel out of state to obtain the procedure.

1. Restrictive abortion laws: pregnancy as an improper sex-based classification

An equal protection problem occurs when a state regulation works by way of an improper classification. But does a regulation of abortion amount to a facial classification based on sex? To support this contention pregnancy must itself be viewed as an improper classification. "While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification . . . ."[92] In *Geduldig v. Aiello*, the Court considered an equal protection challenge to California's disability insurance program and determined that the state could legitimately exclude pregnancy as a covered item.[93] The legislature was free to make distinctions based on pregnancy, "[a]bsent a showing that [these] distinctions are mere pretexts designed to effect an invidious discrimination against the members of one sex."[94] The dissent, however, found that "[s]uch dissimilar treat-

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rationale. In addition to Professor Cox's fact-finding theory, *supra* note 83, and Professor Cohen's federalism perspective, *supra* note 80, some scholars favor congressional power as a type of "revisory authority," limited to defining the boundaries of judicially-recognized rights. *See* Robert A. Burt, *Miranda and Title II: A Morganatic Marriage*, 1969 SUP. CT. REV. 81, 118 ("[T]he Court will set the basic terms. Congress can only fill in the blanks."); Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975); *see also* Carter, *supra* note 80, at 819; Stephen R. Munzer & James W. Nickel, *Does the Constitution Mean What It Always Meant?*, 77 COLUM. L. REV. 1029, 1047-48 (1977) (arguing that the framers of the Constitution did not intend to give Congress the power to define the substantive scope of the Equal Protection Clause). *See generally* Samuel Estreicher, *Congressional Power and Constitutional Rights: Reflections on Proposed "Human Life" Legislation*, 68 VA. L. REV. 333, 414 (1982).

[91] *Casey*, 112 S. Ct. at 2809.

[92] Geduldig v. Aiello, 417 U.S. 484, 496-97 n.20 (1974).

[93] *Id.*

[94] *Id.*

ment of men and women, on the basis of physical characteristics inextricably linked to sex, inevitably constitutes sex discrimination."[95] Nevertheless, according to *Aiello*, pregnancy is not an improper classification under the Fourteenth Amendment, unless the law is a "mere pretext" for sex discrimination.[96]

Congress, however, enacted the Pregnancy Discrimination Act in 1978, amending the definitions of Title VII to include pregnancy as a form of gender-based discrimination.[97] The Court recognized the Pregnancy Discrimination Act as a congressional rejection of the idea that differential treatment of pregnancy is not gender-based discrimination because only women can become pregnant.[98] The Court opined that "the appropriate classification was 'between persons who face a risk of pregnancy and those who do not.' "[99] Thus, as a statutory matter, if not as a constitutional matter, distinctions based on pregnancy can indeed be a form of sex-based classification.

Can this analysis be extended to restrictive state abortion laws? In *Newport News* the insurance plan at issue removed pregnancy from the list of covered items, thereby infringing upon women's equal participation in the workplace.[100] Classification on the basis of pregnancy was an improper sex-based classification, between "persons who face a risk of pregnancy and those who do not."[101] In the abortion context the situation is similar, in that restrictive regulations hinder women's ability to control their reproductive lives. The result of the regulations can be to infringe not only upon women's participation in the workplace, but in society as well.[102] Thus, restrictive state abortion laws, classifying on the basis of pregnant individuals, can amount to an improper sex-based classification.

However, state regulations may well be gender-neutral on their face, regulating only the performance of abortions, and not those who seek to obtain them. Nevertheless, the effects of the regulation are borne solely by women. The question then arises whether the apparent disproportionate impact upon women is enough to establish an improper classification in violation of equal

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[95] *Id.* at 501 (Brennan, J., dissenting).

[96] *Id.* at 497.

[97] Pub. L. No. 95-555, 92 Stat. 2076 (amending 42 U.S.C. § 2000e(k) (1976 ed., Supp. V) in response to the Court's decision in General Electric Co. v. Gilbert, 429 U.S. 125 (1976), where the Court applied the *Aiello* analysis to a case arising under Title VII); *see Aiello*, 417 U.S. at 497.

[98] *See* Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 676-78 (1983).

[99] *Id.* at 678 (quoting General Electric Co. v. Gilbert, 429 U.S. at 161 n.5 (Stevens, J., dissenting)).

[100] *Newport News*, 462 U.S. at 669.

[101] *Id.* at 678 (quoting General Electric Co. v. Gilbert, 429 U.S. at 161 n.5 (Stevens, J., dissenting)).

[102] The SENATE REPORT cites a litany of effects upon participation in employment, education, the political process, and interstate travel. *See* SENATE REPORT, *supra* note 33.

protection.[103] The Court in *Feeney* examined a statute gender-neutral on its face for disproportionately adverse effects on women.[104] The Court applied a two tiered analysis to determine if the adverse effects amounted to unconstitutional discrimination:

> The first question is whether the statutory classification is indeed neutral in the sense that it is not gender-based. If the classification itself, covert or overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination. In this second inquiry, *impact provides an important starting point, but purposeful discrimination is the condition that offends the Constitution.*[105]

Unless one is willing to say that the purpose of these abortion laws is in fact to effect an invidious sex discrimination on women, notwithstanding the recognized state interests in women's health and fetal protection, the pregnancy classification would certainly not be improper. Even if the state regulations are gender-specific, they may well pass the quasi-intermediate level of scrutiny employed by the Court since its decision in *Craig v. Boren*, based on the state's motive of protecting the health of the woman.[106]

2. Application of the *Morgan* power

It is unlikely that a restrictive state abortion regulation would itself constitute an improper classification based on sex. The question remains whether Congress may overrule these regulations as a prophylactic measure, to prevent state restrictions of abortion from restricting women's equality.[107] The first branch of *Morgan* would lend itself toward this type of analysis, since the Court there allowed Congress to forbid English literacy requirements for voting, without actually holding that the requirements violated equal protection.[108] This remedial power has been repeatedly recognized. "The power to 'enforce' may at times also include the power to define situations which Congress determines threaten principles of equality and to adopt prophylactic rules to deal with those situations."[109]

In addition, *City of Rome* indicates that Congress may legislate based solely

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[103] *See* Personnel Admin. of Mass. v. Feeney, 442 U.S. 256, 273-74 (1979) ("[T]he Fourteenth Amendment guarantees equal laws, not equal results," and this rule applies "with equal force to a case involving alleged gender discrimination.").

[104] *Id.*

[105] *Id.* at 274 (citations omitted and emphasis added).

[106] 429 U.S. 190 (1976); *see* Michael M. v. Superior Court, 450 U.S. 464 (1981); *see also* Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982).

[107] *See* Fullilove v. Klutznick, 448 U.S. 448, 483 (1980) ("It is fundamental that in no organ of government, State or Federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees.").

[108] Katzenbach v. Morgan, 384 U.S. 641, 662 (1966).

[109] City of Richmond v. J.A. Croson Co., 488 U.S. 469, 490 (1989).

on effects, in order to prevent legislation that is actually purposeful sex discrimination.[110] Both Congress and the Court have noted the effect of abortion regulation on women's participation in society, and the Freedom of Choice Act can be viewed as a prophylactic attempt to prevent infringement of their equal protection rights. This consideration is supported by the past history of criminalized abortion in the United States and the facially discriminatory laws that existed prior to *Roe v. Wade*.[111] The Freedom of Choice Act can be seen as a prophylactic attempt to protect equal opportunity for women by removing state restrictions that do not themselves violate equal protection, where removing them will secure for women equal participation in society.

However, the equal protection argument finds little support under the second branch of *Morgan*, even if that line of reasoning is still valid. What Congress seeks to do in the proposed Freedom of Choice Act is significantly different from considering voter qualifications as it did in *Morgan* or considering the availability of abortion services and the impact of regulations on that availability. In the proposed Freedom of Choice Act, Congress, by reviewing the facts underlying restrictive state abortion laws, specifically found that the laws deprive women of equal opportunities. Accordingly, Congress has determined that the state regulations may amount to a violation of equal protection.[112] It is doubtful that the second branch of *Morgan*, if indeed it is still good law, could reach this far in sustaining the federal abortion law on equal protection principles. Clearly the Freedom of Choice Act is a case where Congress would be making substantive determinations of constitutional rights.

3. The problem with availability: an improper wealth or racial classification

Is it enough that a state abortion regulation may lead some women to seek medical care out of state, while exposing women of lesser means to a difficult situation in obtaining help? Although there may well be a disparate impact upon poorer women, in particular those of racial and ethnic minorities, it is not manifest that this amounts to a violation of equal protection rights. The regulations do not purport to restrict access to abortions only to those able to afford them, although that may well be the result of the regulations. The disparate impact upon poorer women in and of itself is insufficient to establish an equal protection violation.[113]

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[110] In *City of Rome*, the Court upheld the prohibition of measures whose effect would be discriminatory, as an appropriate way of preventing purposeful discrimination. City of Rome v. United States, 446 U.S. 156, 173 (1980).

[111] *See* SENATE REPORT, *supra* note 33, at 24 ("If State laws severely restricting access to legal abortion are enacted, they will have to be enforced, and the draconian tactics used in the past to enforce these kinds of laws will be reinstituted.").

[112] *See* Appendix, § 2(a).

[113] *Cf.* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (upholding a statute that differentially funded public schools based upon revenue earned from property taxes in each district); James v. Valtierra, 402 U.S. 137 (1971) (upholding a stat-

IV. CONGRESSIONAL POWER UNDER THE COMMERCE CLAUSE TO ENACT THE FREEDOM OF CHOICE ACT: A BETTER ALTERNATIVE

A. *Early Development of Congress's Commerce Power*

It is well established that Congress has wide power and discretion to legislate under the Commerce Clause. Chief Justice Marshall in *Gibbons v. Ogden* interpreted commerce broadly, including more than just buying and selling, or the interchange of commodities.[114] Commerce "describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."[115] Chief Justice Marshall concluded that the congressional power to regulate interstate commerce included the ability to regulate matters occurring within a state, so long as the activity had some commercial connection with another state.[116]

"This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution."[117] The only restraints on this power stem from our representative form of government, and rely on the political process to prevent abuse. "The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections are . . . the sole restraints."[118] Marshall implicitly rejected the argument that the Tenth Amendment acts as an independent limit on Congress's power to regulate interstate commerce.[119]

Modern judicial analysis of the Commerce Clause power is found in *NLRB v. Jones & Laughlin Steel Corp.*[120] Here, the Court showed a greater willingness to defer to legislative decisions.[121] The Court in *Jones & Laughlin* decided that legislation regulating commerce will be upheld as long as the regulated activity has a substantial economic impact upon interstate

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ute that required referendum approval for low rent housing projects); Dandridge v. Williams, 397 U.S. 471 (1970) (declaring that regulation placing $250 limitation on AFDC [Aid to Families with Dependent Children] grants regardless of family size did not violate equal protection).

[114] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 189 (1824).

[115] *Id.* at 189-90.

[116] *Id.* at 194-95.

[117] *Id.* at 196.

[118] *Id.* at 197.

[119] This view was later espoused by Justice Holmes in his famous dissent in *Hammer v. Dagenhart* and has now been adopted as the majority view. Hammer v. Dagenhart, 247 U.S. 251, 277-81 (1918) (The Child Labor Case) (Holmes, J., dissenting). *See, e.g.*, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546 (1985).

[120] 301 U.S. 1 (1937).

[121] "The fundamental principle is that the power to regulate commerce is the power to enact all appropriate legislation for its protection and advancement; to adopt measures to promote its growth and ensure its safety; to foster, protect, control and restrain." *Id.* at 36-37 (citations omitted).

commerce.[122]

Congress may even regulate individual activity, which considered alone may not be sufficient to affect interstate commerce. In *Wickard v. Filburn* the Court introduced the "cumulative effects" principle.[123] Under this principle Congress can regulate individual acts which, taken together as a class, would have a substantial effect on interstate commerce.[124] For instance, an individual's private consumption of wheat may seem insignificant, but "taken together with that of many others similarly situated, [it] is far from trivial."[125] Justice Jackson thus referred to the "embracing and penetrating nature" of the commerce power, recalling Chief Justice Marshall's comment that effective restraints on its exercise must proceed from political rather than from judicial processes.[126]

Congress has used its broad commerce power to impose protective conditions on the privilege of engaging in an activity that affects interstate commerce or that utilizes the channels or instrumentalities of such commerce.[127] These forms of federal commerce regulation have been extended to the application of the 1964 Civil Rights Act, preventing discrimination in places of public accommodation.[128] *Heart of Atlanta Motel v. United States* involved a place of public accommodation which served interstate travelers but discriminated against blacks.[129] Because the discrimination had the effect of dissuading blacks from interstate travel, the Supreme Court held that the application of the Civil Rights Act was a valid use of Congress's commerce power.[130] The Court took this analysis one step further in *Katzenbach v. McClung* by approving the application of the Civil Rights Act to a local restaurant which discriminated against blacks.[131] The *Katzenbach* Court noted that a substantial percentage of the food served by the restaurant had traveled in interstate

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[122] *Id.* at 37 ("Although activities may be intrastate in character when separately considered, if they 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, Congress cannot be denied the power to exercise that control.").

[123] Wickard v. Filburn, 317 U.S. 111, 126 (1942).

[124] *Id.* at 127.

[125] *Id.* at 128. This rationale was used again in the context of police power regulations to uphold the anti-loan sharking provisions of the Consumer Credit Protection Act. *See* Perez v. United States, 402 U.S. 146 (1971).

[126] *Wickard*, 317 U.S. at 120.

[127] *See, e.g.*, United States v. Darby, 312 U.S. 100 (1941) (upholding the legislative exclusion of goods from interstate commerce which were produced in plants where employee's wages and hours failed to meet federal standards); Champion v. Ames, 188 U.S. 321 (1903) (upholding legislative ban on the interstate transport of lottery tickets).

[128] Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964).

[129] *Heart of Atlanta Motel*, 379 U.S. at 241.

[130] *Id.* at 252-53, 261.

[131] Katzenbach v. McClung, 379 U.S. at 294.

commerce, and found that, in the aggregate, the discriminatory conduct clearly had an effect on interstate commerce.[132]

In sum, congressional legislation regulating commerce should be upheld as constitutional under the Commerce Clause if it meets the following two requirements. First, the regulated activity must have a significant effect on interstate commerce.[133] Second, the means selected by Congress must be reasonably adapted to the end sought to be achieved by the regulation.[134]

B. *Effects on Interstate Commerce of Restrictive Abortion Laws*

The first question for determination of the constitutionality of the proposed Freedom of Choice Act is whether the current "patchwork" of state abortion regulations results in "substantial economic affect" on interstate commerce. Congressional findings recognize a number of areas in which current abortion laws affect both the flow of goods and services, and the flow of people between the states.[135]

Restrictive state abortion laws can prevent access to contraceptive and other medical techniques that are a part of interstate and international commerce.[136] The goods used in providing abortion services are also obtained from interstate commerce, and restrictive regulations obviously constrict the flow of these goods across state lines.[137] Furthermore, these regulations interfere with the ability of medical professionals to provide health services and could prevent their training in the techniques necessary for the abortion procedure.[138] All of these results of abortion laws can have a significant effect on the health and pharmaceutical industries, both in obstructing goods and services for the abortion procedure itself and by preventing the implementation of new developments.

Variances in state abortion laws may also affect the movement of people between states. Some women may be forced to travel to another state or foreign country due to restrictions in their home state. This forced displacement would "burden the medical and economic resources of states that continue to provide women with access to safe and legal abortion."[139] There would likely be an increase in the number of later, more complicated procedures for out of state women due to delays in obtaining money or logistical problems in locating abortion facilities.[140] The disproportionate impact created would both

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[132] *Id.* at 304-05.

[133] Wickard v. Filburn, 317 U.S. at 111.

[134] *Heart of Atlanta Motel*, 379 U.S. at 262.

[135] *See* Appendix, § 2(a).

[136] *See* Appendix, § 2(a)(2)(B). The state regulations could also affect the availability of contraceptives such as abortifacients, or possibly the French drug RU-486. *See also* SENATE REPORT, *supra* note 33, at 25.

[137] *See* Katzenbach v. McClung, 379 U.S. at 294.

[138] *See* SENATE REPORT, *supra* note 33, at 25; Appendix, § 2(a)(2)(A)(v).

[139] *See* Appendix, § 2.

[140] In 1972, 23% of out-of-state women who obtained abortions in New York had

strain already overburdened health care systems and increase the danger to the woman. Restrictive state laws can also inhibit travel, rather than redirect it to other states.[141]

There is also the danger of an increase in illegal or medically less-safe abortions, often resulting in injury or death to the woman.[142] Obstructing access to abortions would inevitably lead to an upsurge in "back-alley" abortionists, thereby stimulating the growth of an illegal trade. Congress, under the Commerce Clause, can act to prevent the illegal activities of a class of individuals, when the illegal activity can have effects on interstate commerce.[143] The Freedom of Choice Act would ensure that the abortion procedure remains available, thus preventing the growth of a black market trade in illegal and unsafe abortions.

A distinction must be made between the current situation where the core right to an abortion remains and the situation that would result if *Roe v. Wade* were overturned. All of the noted effects would be exacerbated if the right to choose an abortion were left solely to the states, as it was in the years before *Roe* was decided. For example, in 1972, close to 80% of all legal abortions in the United States were performed in either California or New York, with 44% of them obtained outside a woman's state of residence.[144] In addition, before *Doe v. Bolton*, residency requirements were used by states to further limit access to the procedure.[145] The disproportionate impact on goods and services and the dislocation of people would be more pronounced than where the core right to choose remains intact. Therefore, a stronger economic effect would result if *Roe v. Wade* were overturned, and control of the abortion procedure were left to the states.

However, the proposed Freedom of Choice Act is an attempt to deal with the current situation under *Casey*, and its findings determine that the restrictive laws allowed under the new standard operate cumulatively to burden interstate commerce. While some may query whether the noted effects are sufficient to amount to a burden on commerce, particularly in the absence of a reversal of the *Roe* decision, Congress is entitled to a great degree of deference

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the abortion after 12 weeks of pregnancy, compared with only 10% of New York City residents. SENATE REPORT, *supra* note 33, at 25.

[141] Although *Doe v. Bolton* found residency requirements unconstitutional, states have acted to prevent advertising the availability of the abortion procedure in other states, thus preventing women the opportunity to pursue this option. *See Bolton*, 410 U.S. at 179. *But see* Bigelow v. Virginia, 421 U.S. 809 (1975).

[142] *See* Appendix, § 2(a)(2)(A)(i)

[143] Perez v. United States, 402 U.S. 146, 155-56 (1971) (upholding a federal loan sharking law on the grounds that even intrastate loan sharking affected interstate commerce by financing criminal organizations which might operate in several states). "Back alley" abortionists could also potentially operate in more than one state, particularly in the rural midwestern states.

[144] *See* SENATE REPORT, *supra* note 33, at 33.

[145] *Id.*; *cf. Bigelow*, 421 U.S. at 809.

in its determination. "The Court must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding."[146] Even in the absence of specific congressional findings, where "the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary for the protection of commerce, [the court's] investigation is at an end."[147] The proposed Freedom of Choice Act does provide rational findings as to the burdens on interstate commerce, and the Court should uphold this determination of substantial economic effects.

C. *Problems with the Pretextual Use of the Commerce Power to Protect the Right to Choose*

Although the exercise of the commerce power can reach "deep into local problems", there should be a clear relation between the asserted power and one of the delegated powers.[148] "[S]hould Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land."[149] Oblique use of an enumerated power to achieve congressional ends which are substantively not within that power has long been a contentious issue for the Court.[150] *The Child Labor Case* contrasted two views of this problematic use of the commerce power, and the concern over its "indirect effects on state power."[151] Justice Holmes was later vindicated in his view that the motive and purpose of the regulation were irrelevant, so long as the "immediate effect" was to regulate commerce.[152]

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[146] Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276 (1981).

[147] Katzenbach v. McClung, 379 U.S. 294, 303-04 (1964).

[148] United States v. Oregon, 366 U.S. 643, 654 (1961) (Douglas, J., dissenting).

[149] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 423 (1819).

[150] *See e.g.* United States v. Kahriger, 345 U.S. 22 (1953) (upholding use of tax power to "penalize" illegal intrastate gambling); McCray v. United States, 195 U.S. 27 (1903) (upholding tax on colored oleomargarine); Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533, 548 (1869) (upholding tax on state notes, partly on grounds of federal power to provide a currency). *But cf.* Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922) (The Child Labor Tax Case) (tax was an unconstitutional attempt to regulate against child labor).

[151] The majority held the Act unconstitutional since it "not only transcends the authority delegated to Congress over Commerce but also exerts a power as to a purely local matter to which the federal authority does not extend." The Child Labor Case, 247 U.S. at 276. Justice Holmes, in his famous dissent, asserted that Congress could "carry out its views of public policy whatever indirect effect they may have upon the activities of the States." *Id.* at 281 (Holmes, J., dissenting).

[152] "Whatever their motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred by Congress by the Commerce Clause." United States v. Darby, 312 U.S. 100, 115 (1940).

In the context of the proposed Freedom of Choice Act, abortion regulation has long been the province of the states, and arguably a state has a strong interest in controlling the health and morals of its citizens. The question arises as to whether the Commerce Clause is merely a pretext, allowing Congress to impose its view of the abortion controversy upon the states. Instructive in this regard are Professor Gerald Gunther's comments on the 1964 Civil Rights Act then before Congress:

> [T]he substantive content of the commerce clause would have to be drained beyond any point yet reached to justify the simplistic argument that all intrastate activity may be subjected to any kind of national regulation merely because some formal crossing of an interstate boundary once took place, without regard to the aim of the legislation and interstate trade. The aim of the proposed anti-discrimination legislation, I take it, is quite unrelated to any concern with national commerce in any substantive sense.[153]

Professor Gunther's concern was that it would "pervert the meaning and purpose of the commerce clause to invoke it as the basis for the legislation."[154] Arguably the same situation is presented when considering the Freedom of Choice Act, since it is clearly an effort to enact a "social law," dealing with a moral issue.

However, Professor Gunther also provides a partial response to this criticism. "Most 'social laws' are not directly aimed at intrastate affairs, are not attempts to regulate internal activities as such . . . . Where immediate regulations of intrastate conduct have been imposed, a demonstrable economic effect on interstate commerce has normally been required."[155] In considering the applicability of the Commerce Clause to the Freedom of Choice Act, restrictive state abortion laws can obviously have a significant effect on interstate commerce. The history of abortion regulation demonstrates that a patchwork of restrictive state laws will lead to significant distortions in commerce and travel between the states. Even in the post-*Roe* world where the core right to an abortion remains, the effects detailed in the Senate Report provide a much more apparent connection with interstate commerce than those that occurred in the civil rights area.

The strongest rebuttal of the pretext argument lies in the history of the Commerce Clause itself. The Court in *Darby* asserted that "[t]he motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control."[156] The commerce power has often been invoked to enact obviously "social laws," and the Court has approved the

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[153] Letter from Gerald Gunther to the Department of Justice, (June 5, 1963), *quoted in* GERALD GUNTHER, CONSTITUTIONAL LAW 163 (11th ed. 1985).

[154] *Id.*

[155] *Id.*

[156] *Darby*, 312 U.S. at 115.

use of the commerce power in these areas. In addition to its use in the civil rights area, the commerce power has been used to impose uniform labor laws, to regulate union activity, and to ensure that goods are properly labeled.[157] Therefore, provided that the object of the legislation precipitates a substantial effect on interstate commerce, any ulterior motive or purpose is irrelevant. "There is an injustice that needs to be remedied . . . . We have to find the tools with which to remedy that injustice."[158] If legislation is sure to be challenged on constitutional grounds, it makes sense to rely on the most comprehensive power available to ensure the constitutionality of the Act.

D. *Scope of the Congressional Commerce Power: What Limits are Left?*

Is Congress's power broad enough to impose a uniform federal law, based solely on the effects on commerce of a "patchwork" of state laws? This would indeed be an expansive proposition, if the only constitutional requirement was that the subject of the regulation have some effect on interstate travel and shipment of goods, created by the differences in state laws. The argument could support federal regulation of gambling, which certainly creates a disproportionate amount of travel and shipments of playing cards to certain areas of the country. Alternatively, Congress may deem it necessary to impose a uniform divorce law, to prevent people from seeking a state for the most favorable resolution of their differences. This argument could even support the prohibition of a state income tax, to prevent people from living and working in two different states because of tax treatment. Although these examples represent significant extensions of the commerce power, they all arguably fall within the ambit of Congress's power, given the effect on interstate commerce.

It is difficult to persuasively distinguish abortion from the examples discussed. In the current situation presented under *Casey*, the burden on commerce is due to fringe erosion of the right to choose, but the right itself is intact. History demonstrates that if *Roe* were overturned the disparate effects on commerce and travel would be markedly more severe, making the need for uniformity more apparent in the commerce context. Current laws, however, do not forbid the right to choose altogether, although they make it more difficult economically and logistically to exercise this right. The distortions created by the restrictive state laws are less significant than if *Roe* had been overturned. If the proposed Freedom of Choice Act is within Congress's commerce power, and it arguably is, then federal gambling or divorce law would be as well.[159]

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[157] Katzenbach v. McClung, 379 U.S. at 294 (civil rights); *Heart of Atlanta Motel*, 379 U.S. at 241 (civil rights); *Darby*, 312 U.S. at 100 (regulation of wages); NRLB v. Jones & Laughlin, 301 U.S. at 1 (regulation of union activity); McDermott v. Wisconsin, 228 U.S. 115 (1913) (commerce power used to regulate goods transported into the state).

[158] *Hearings on S. 1732 Before the Senate Comm. on Commerce*, 88th Cong., 1st Sess. pt. 1, 2 (1963) (statement of Robert F. Kennedy, Att'y Gen.).

[159] Divorce, however, is a domestic issue long considered the domain of the individual states. *In re* Burrus, 136 U.S. 586, 593-94 (1890) ("The whole subject of the

The expansive nature of the proposed commerce basis for the Freedom of Choice Act becomes more readily apparent when one considers the possibility of overruling *Roe*. Even without a judicially recognized right to an abortion, Congress could still establish a federal right, albeit not a constitutional right, to a woman's abortion decision, since the sole consideration would be the effects on interstate commerce. This would certainly be a broad proposition of the congressional commerce power.

This issue carries serious implications, not only for the breadth of the power asserted, but also for the effect on the Tenth Amendment. Although *Garcia* asserts that the Tenth Amendment is not a limit on federal power, allowing Congress such sweeping powers to impose uniformity under the Commerce Clause would seem to foreclose any room for individual state control over the health and welfare of its citizens.[160] The commerce power could be used to regulate any "social issue" that Congress sees fit to address, and could impose uniform national regulations upon the states. What limits constrain Congress's determinations of "substantial economic effects"?

Judicial review provides one safeguard against legislation that is overly invasive of state powers, although the standard of review under the Commerce Clause seems relatively lenient. However, there is bite to this review: "Neither here nor in *Wickard* has the Court declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities."[161]

Although the Freedom of Choice Act would certainly engender debate as a commerce-based law, its effects, detailed in the Senate Report and the proposed Act itself, are expected results of restrictive abortion laws and have an established base in history.[162] Considering both the historical perspective and the cumulative effect of the numerous distortions, it would be difficult to characterize the effects as "trivial." In the context of gambling or divorce, the trivial effects criticism may be more valid. In the end, one must rely upon the representative system created by the Constitution and the political safeguards enumerated by Chief Justice Marshall in *Gibbons v. Ogden*.[163] There is ample judicial precedent recognizing a woman's right to choose, and the legislature simply proposes to codify this right into statutory law, while still allowing state regulation permissible under the strict scrutiny standard. The inevitable economic impact of excessive state restrictions on abortion necessitate the use of Congress's commerce power.

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domestic relations of husband and wife, parent and child, belongs to the laws of the States, and not to the laws of the United States.").

[160] *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 556 (1985).

[161] Maryland v. Wirtz, 392 U.S. 183, 197 n.27 (1968).

[162] *See generally* Appendix; SENATE REPORT, *supra* note 33.

[163] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 189 (1824).

V. CONCLUSION: CONGRESSIONAL ACTION IS CONSTITUTIONAL AND NECESSARY

It is difficult to determine the most appropriate enumerated power on which to base a federal abortion law. Restrictive state abortion laws clearly affect issues found in both Commerce Clause and Fourteenth Amendment analysis, and this overlapping indicates that a court may not be the best forum in which to address the myriad issues involved. However, as between the Commerce Clause and Section Five, the stronger argument is more likely to be under the Commerce Clause.

Support of the Freedom of Choice Act under Section Five suffers from the vagaries that are inherent in the debate on congressional power under the Fourteenth Amendment. Is Congress by enacting this legislation truly securing access to Fourteenth Amendment guarantees, or is it re-defining the right recognized in *Casey*? Although Congress is granted broad discretion in enacting prophylactic legislation, the Freedom of Choice Act could be considered a significant expansion beyond the current "undue burden" approach articulated in *Casey*. It is clearly a stretch of Congressional "remedial" power as an attempt to secure due process, and any substantive power under the second branch of *Morgan* is of questionable validity.

The most persuasive argument for use of the Section Five power stems from concern for equal protection, and a congressional attempt to secure equality for women. However, this rationale also raises concerns over the scope of congressional power under the Fourteenth Amendment. Although this question has not yet been decided, the current Court is unlikely to view it favorably.

The Commerce Clause provides a more readily ascertainable basis for protecting the right to choose. There are evident effects on both interstate commerce and travel, even if the substantiality of these effects is unsettled. Congress has made numerous findings from the history of abortion regulation to document its decision, and based on the totality of the effects, Congress's determination should be upheld. In addition, the Commerce Clause remains a viable theory even in the absence of *Roe*, since constitutional validity of the right to choose is not a necessary component of the legislation. Only the economic effects of restricting this choice need be considered. Although the breadth of the commerce power necessary to support this legislation is at first unsettling, the need for uniform protective regulation is apparent. The Fourteenth Amendment may provide a more suitable source of congressional power, but the commerce rationale presents a stronger argument with better support. In this case the Commerce Clause rationale is superior.

The proposed Freedom of Choice Act is a significant extension of the congressional authority under either the Fourteenth Amendment or the Commerce Clause, and neither provides a perfect footing for the legislation. However, one conclusion that can be drawn from the principles derived from both Commerce Clause and Section Five analysis is that Congress may be better equipped to study the numerous issues involved. Both Commerce Clause and Section Five analysis emphasize deference to congressional findings of fact and

legislative judgments of degree and proportion. Given the breadth of the economic and social effects that result from restrictive state abortion laws, it is difficult to conceive of a court equipped to handle the enormous documentation and testimony attendant to the issues raised. The proposed Freedom of Choice Act represents a congressional attempt to exercise its superior capability in this area and should be respected by the courts.[164]

When a court "pares down" the issues to bare-bones statements, it detracts from the reality of the abortion controversy.[165] All sides in this ongoing war of attrition feel that not only deeply personal rights but also lives are at stake. A disaffected party is more likely to feel victimized by a "dispassionate" court pronouncing a decision on this issue. The legislative branch at least offers the potential of accountability for a decision, rather than an unassailable declaration. Given the complex moral and social issues involved and the political safeguards inherent in our representative system, it may be wiser to leave this decision up to our elected representatives. The practical result of the current judicial regime is certainly less than a stable guiding principle, and the decisions being made are long-term in effect and short on accountability. While the composition of the national legislature could eventually change to provide a receptive forum for a restrictive abortion bill, such is the result of our representative form of government in which we have the freedom to choose our elected officials.

Justice Blackmun expressed concern that "there are certain fundamental liberties that are not to be left to the whims of an election. A woman's right to reproductive choice is one of those fundamental liberties. Accordingly, that liberty need not seek refuge at the ballot box."[166] Unfortunately, the right to choose already seeks refuge at the ballot box, as a national political debate centers on the personal views of incoming judicial appointments. Allowing Congress to address the issue would focus the political debate on the abortion issue, not the personal views of appointed justices, and the Court would continue to serve as a check on Congress's ability to alter the right to choose. The Freedom of Choice Act is a solid compromise to protect the right to choose and will bring stability and predictability to the abortion debate.

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[164] While some may argue that the stability of the right established in *Roe* may be better served through the state legislatures than the national legislature, reality seems inconsistent with that view. Although there would no doubt always be certain states with liberal laws, the women in states with more restrictive laws will suffer. If the right to choose is truly a "liberty interest," its availability should not depend on which side of a state line one resides.

[165] *See* Harris v. McRae, 448 U.S. 297, 325-26 (1980) ("It is not the mission of this Court or any other to decide whether the balance of competing interests . . . is wise social policy.").

[166] *Casey*, 112 S. Ct. at 2854 (Blackmun, J., concurring in part and dissenting in part).

APPENDIX

SELECTIONS FROM S.25, THE FREEDOM OF CHOICE ACT OF 1992

[A] BILL . . . To protect the reproductive rights of women, and for other purposes . . .

SEC 2. CONGRESSIONAL STATEMENT OF FINDINGS AND PURPOSE

(a) FINDINGS. - Congress finds the following:
(1) The 1973 Supreme Court decision in *Roe v. Wade* established constitutionally based limits on the power of States to restrict the right of a woman to choose to terminate a pregnancy. Under the strict scrutiny standard enunciated in *Roe v. Wade*, States were required to demonstrate that laws restricting the right of a woman to choose to terminate a pregnancy were the least restrictive means available to achieve a compelling State interest. Since 1989, the Supreme Court has no longer applied the strict scrutiny standard in reviewing challenges to the constitutionality of State laws restricting such rights.
(2) As a result of the Supreme Court's recent modification of the strict scrutiny standard enunciated in *Roe v. Wade*, certain States have restricted the right of women to choose to terminate a pregnancy or to utilize some forms of contraception, and these restrictions operate cumulatively to
(A)(i) increase the number of illegal or medically less safe abortions, often resulting in physical impairment, loss of reproductive capacity or death to the women involved;
(ii) burden interstate commerce by forcing women to travel from States in which legal barriers render contraception or abortion unavailable or unsafe to other States or foreign nations;
(iii) interfere with freedom of travel between and among the various States;
(iv) burden the medical and economic resources of States that continue to provide women with access to safe and legal abortion; and
(v) interfere with the ability of medical professionals to provide health services;
(B) obstruct access to and use of contraceptive and other medical techniques that are part of interstate and international commerce;
(C) discriminate between women who are able to afford interstate and international travel and women who are not, a disproportionate number of whom belong to racial or ethnic minorities; and
(D) infringe upon women's ability to exercise full enjoyment of rights secured to them by Federal and State law, both statutory and constitutional.
(3) Although Congress may not by legislation create constitutional rights, it may, where authorized by its enumerated powers and not prohibited by a constitutional provision, enact legislation to create and secure statutory rights in areas of legitimate national concern.
(4) Congress has the affirmative power both under section 8 of Article I of the Constitution of the United States and under section 5 of the Fourteenth Amendment to the Constitution to enact legislation to prohibit

State interference with interstate commerce, liberty or equal protection of the laws.

(b) PURPOSE. - It is the purpose of this Act to establish, as a statutory matter, limitations upon the power of States to restrict the freedom of a woman to terminate a pregnancy in order to achieve the same limitations as provided, as a constitutional matter, under the strict scrutiny standard of review enunciated in *Roe v. Wade* and applied in subsequent cases from 1973 to 1988.

SEC. 3. FREEDOM TO CHOOSE.

(a) IN GENERAL. - A State -

(1) may not restrict the freedom of a woman to choose whether or not to terminate a pregnancy before fetal viability;

(2) may restrict the freedom of a woman to choose whether or not to terminate a pregnancy after fetal viability unless such a termination is necessary to preserve the life or health of the woman; and

(3) may impose requirements on the performance of abortion procedures if such requirement are medically necessary to protect the health of the woman undergoing such procedures.

(b) RULES OF CONSTRUCTION. - Nothing in this Act shall be construed to -

(1) prevent a State from protecting unwilling individuals from having to participate in the performance of abortions to which they are conscientiously opposed;

(2) prevent a State from declining to pay for the performance of abortions; or

(3) prevent a State from requiring a minor to involve a parent, guardian, or other responsible adult before terminating a pregnancy.