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The Abortion Paradox: How States Fail to Reconcile Their Parens Patriae Duty to Protect Minors with the Lack of Sexual Assault and Incest Exceptions in Stringent Abortion Regulations

Adina Abrahami*

The right to maintain bodily autonomy has been a tenet of the women's rights movement for almost half a century having enjoyed growing freedom in this country in the years following Roe v. Wade. That right, however, is not absolute, as demonstrated by a collective attempt on behalf of a number of states to overturn Roe in the past several years. Fueled by a conservative agenda, many states have endeavored to enact appallingly stringent abortion regulations—most of which excise sexual assault and incest exceptions—that are largely justified by the states' interest in protecting fetal rights, an interest that falls within the parameters of control granted by their parens patriae authority to govern.

A state's right to interfere with a woman's decision to terminate her pregnancy is, according to the state, concomitant with an interest in protecting the state's youth, an interest that by extension includes the unborn child. In the context of adolescent parenting, and where the unborn child is a product of sexual assault or incest, the ramifications of carrying to full-term and raising the unwanted child are as indelible as they are devastating for both the minor and society at large. Thus, a state's regulatory scheme barring a minor's access to abortion deeply conflicts with its driving rationale to protect the minor.

This Comment argues that Congress can and should formulate legislation enforceable under the Commerce Clause to address those stringent state abortion regulations that exclude exceptions for sexual assault and incest. By focusing on the economic repercussions of forcing a minor to carry to full-term, and the extent to which teenage pregnancies represent a considerable financial burden on society, Congress is well-positioned to enact federal legislation that will offer relief to adolescent victims impregnated as a result of wanton acts of sexual violence.

INTRODUCTION

In May 2019, an eleven-year-old from Ohio made headlines when news outlets reported that she was pregnant as a result of a sexual assault by a man over twice her age.[1] A month earlier, Ohio enacted the Human Rights Protection Act, a law prohibiting women (or, in this instance, children) from obtaining an abortion after the detection of a fetal heartbeat.[2] Under this newly-enacted bill, an eleven-year-old would be effectively barred from aborting a product of rape.[3] Governor Mike DeWine of Ohio defended the state's law by emphasizing that "[t]he essential function of government is to protect the most vulnerable among us, those who don't have a voice," and that the "[g]overnment's role should be to protect life from the beginning to the end."[4] Ohio's Human Rights Protection Act was introduced as one of many in a series of state-enacted fetal "heartbeat bills"—laws that seek to prohibit abortions beyond a six-week gestation period[5]—that did not incorporate an exception for pregnancies resulting from sexual assault or incest.[6]

Using Justice Kavanaugh's recent appointment to the Supreme Court as an opportunity to craft abortion regulations that would ultimately serve to overturn *Roe v. Wade*,[7] several states joined Ohio in 2019 in a far-reaching crusade against reproductive rights.[8] These regulations, at their core, were and are predicated on the State's interest in preserving the life of the unborn fetus[9]—an interest fundamentally invoked by the State's authority pursuant to its duty under the *parens patriae*

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1 Kate Smith, *A Pregnant 11-Year-Old Rape Victim in Ohio Would No Longer Be Allowed to Have an Abortion Under New State Law*, CBS NEWS (May 14, 2019, 9:29 PM), https://www.cbsnews.com/news/ohio-abortion-heartbeat-bill-pregnant-11-year-old-rape-victim-barred-abortion-after-new-ohio-abortion-bill-2019-05-13/.

2 Gabe Rosenberg, *A Bill Banning Most Abortions Becomes Law in Ohio*, NAT'L PUB. RADIO (Apr. 11, 2019, 6:37 PM), https://www.npr.org/2019/04/11/712455980/a-bill-banning-most-abortions-becomes-law-in-ohio.

3 Smith, *supra* note 1.

> Though the 11-year-old in this case won't be subject to the state's pending law, thousands of other women in the future would be. More than 4,000 women were raped in Ohio in 2017, according to data compiled by the FBI. Of those, more than 800 victims were assaulted by a family member. In the future, if women became pregnant as a result of such crimes, Ohio's so-called 'fetal heartbeat bill' would prohibit them from receiving an abortion any time after about six weeks . . . .

Id.

4 Rosenberg, *supra* note 2.

5 The Human Rights Protection Act "outlaw[ed] abortions as early as five or six weeks into a pregnancy, before many women know they're pregnant." *Id.*

6 *Id.*

7 *See* Scott Lemieux, *Yes,* Roe *Really Is in Trouble*, VOX (May 15, 2019, 11:00 AM), https://www.vox.com/2019/5/15/18623073/roe-wade-abortion-georgia-alabama-supreme-court.

8 Alabama, Kentucky, Louisiana, Mississippi, and Missouri adopted and fashioned their versions of fetal heartbeat bills in 2019, each state excluding exceptions for pregnancies resulting from sexual assault and incest. Mara Gordon & Alyson Hurt, *Early Abortion Bans: Which States Have Passed Them?*, NAT'L PUB. RADIO (June 5, 2019, 3:08 PM), https://www.npr.org/sections/health-shots/2019/06/05/729753903/early-abortion-bans-which-states-have-passed- them.

9 "Under the *parens patriae* and police powers, a state may intervene to prevent harm to an unborn child after viability." Sam S. Kepfield, *Perinatal Substance Abuse: The Rhetoric and Reality of 'Rights,' and Beyond*, 1 CARDOZO WOMEN'S L.J. 49, 96 (1993) (citing Joyce Lind Terres, *Prenatal Cocaine Exposure: How Should the Government Intervene?*, 18 AM. J. CRIM. L. 61 (1990)).

doctrine.[10] The "doctrine relies on an assumption that minors require a greater degree of care and protection, and thus a lesser degree of liberty, than do adults."[11] Under *parens patriae*, states have the duty and authority to enforce regulations consistent with their interest in ensuring the protection and development of minors.[12] The Supreme Court explained the justification underlying *parens patriae* in *Bellotti v. Baird*: "[D]uring the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them."[13]

In the name of *parens patriae*, "a minor's freedoms may be restricted by the State in order to 'preserv[e] and promote [her] welfare.'"[14] To that end, the discretion conferred on states under *parens patriae* permits the enforcement of stringent abortion regulations—for example, laws that exclude exceptions for sexual assault and incest—for the purpose of protecting the fetus[15] but at an indisputably high cost to the victims of wanton acts of sexual violence.[16] This is especially true in instances in which the victim is a minor.[17] In assuming its role as an advocate for the minor's well-being, the State should arguably acknowledge its duty to protect a minor's best interests, health, and welfare when she is confronted with an unwanted pregnancy resulting from sexual assault or incest. Because it is unlikely that the states advocating for strict abortion legislation will amend laws prohibiting abortion even in the most dire of circumstances, it is ultimately up to Congress to provide recourse in the form of nationwide legislation either requiring states to have sexual assault and incest exceptions in state laws or, in the alternative, prohibiting states from excluding these exceptions.

This Comment argues that Congress can, and should, formulate legislation enforceable under the Commerce Clause to address stringent abortion regulations. This could be done by zeroing in on the interstate economic activity inherent in the rearing of unwanted children and the adverse effects on foster care and family support.[18] Preferably, federal legislation should require every state to include sexual assault and incest exceptions in its abortion regulatory scheme. Under this theory, states aiming to enforce severe abortion regulations would be required to modify state laws to reflect the need for these exceptions, with such exercise of federal legislative power justified by the deleterious economic effects of forcing minors to proceed with unwanted pregnancies resulting from sexual assault and incest. Those who would derive the most benefit from a congressionally mandated inclusion of sexual assault and incest exceptions are sexual assault and incest survivors impregnated by their assailants. Others who would benefit are those expected to care for the resultant

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10 *See* Heather M. White, *Unborn Child: Can You Be Protected?*, 22 U. RICH. L. REV. 285, 289 (1988).

11 Claudia Worrell, *Pretrial Detention of Juveniles: Denial of Equal Protection Masked by the* Parens Patriae *Doctrine*, 95 YALE L.J. 174, 177 (1985).

12 *See* Prince v. Massachusetts, 321 U.S. 158, 166 (1944). "Acting to guard the general interest in youth's well-being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways." *Id.*

13 Bellotti v. Baird, 443 U.S. 622, 635 (1979).

14 Steven Friedland, *The Rhetoric of Juvenile Rights*, 6 STAN. L. & POL'Y REV. 137, 139 (1995) (quoting Santosky v. Kramer, 455 U.S. 745, 766 (1982)).

15 *See* Kepfield, *supra* note 9, at 96.

16 Pooja Lakshmin, *Rape, Pregnancy, and Mental Health: What the Politics Ignores*, MEDSCAPE (Sept. 16, 2019), https://www.medscape.com/viewarticle/918068.

17 Catherine Grevers Schmidt, *Where Privacy Fails: Equal Protection and the Abortion Rights of Minors*, 68 N.Y.U. L. REV. 597, 600–01 (1993) (discussing the devastating effects of teenage pregnancy on minors).

18 *See* Jordan Goldberg, *The Commerce Clause and Federal Abortion Law: Why Progressives Might Be Tempted to Embrace Federalism*, 75 FORDHAM L. REV. 301, 301–02 (2006).

children, such as the minor's family or a state-funded foster care agency, many of which are already operating at full capacity and are largely subsidized by taxpayers' dollars.[19] Communities as a whole can avoid the economic repercussions of raising children born as products of sexual assault and incest, and those children can avoid the repercussions—emotional and otherwise—of being born under the trauma triggered by such circumstances.[20]

Part I of this Comment discusses the State's interest and duty under *parens patriae* and how states have historically interpreted the extent of authority granted under this doctrine. This Part explores the evolution of the doctrine, how our jurisprudence has fashioned the scope of its application, and the limitations imposed on its application by our Constitution. This Part also addresses states' arguments against abortion in the context of the doctrine and the means by which states use their power pursuant to the doctrine to justify stringent abortion regulations for the sake of preventing harm to the unborn fetus.[21]

Next, Part II delves into the history of the Supreme Court's interpretation of abortion regulations since *Roe v. Wade*, focusing on the development of the undue burden standard, its intended function as a legislative drafting guideline, and how states have broadly interpreted their authority subject to this standard for the purpose of controlling access to abortion.[22] This Part analyzes the minor's right to abortion and discusses that right through the lens of arguments supporting judicial bypass and parental consent/notification statutes.[23] Part II also discusses the validity of state-enacted heartbeat bills and why the doctrine of stare decisis cannot be relied upon to prevent the Supreme Court from abandoning the position it established in *Roe*.

Part III argues that Congress, through its power under the Commerce Clause, should act to protect minors from stringent state abortion regulations that exclude sexual assault and incest by placing a nationwide ban on damaging state legislation, or in the alternative, forcing states to include exceptions in their statutory schemes. This Part lays out arguments for the inclusion of these exceptions, and discusses why they were traditionally upheld as valid exceptions to abortion laws.[24] This Part also explores Commerce Clause jurisprudence and analyzes inconsistencies in the Supreme Court's adjudication of congressional plenary authority to regulate economic activity.[25] This analysis suggests that a judicial interpretation of congressional authority can and should extend to encompass laws that affect the economic well-being of minors forced to parent children.

Finally, Part III(D) discusses the potential implications of the argument proposed in Part III(C). This Section serves to emphasize the benefit derived from legislation mandating the inclusion of exceptions. The proposed legislation will remove the burden placed on sexual assault and incest survivors impregnated by

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19 Emily Buss, *The Parental Rights of Minors*, 48 BUFF. L. REV. 785, 788–90 (2000); Schmidt, *supra* note 17, at 600–01.

20 Buss, *supra* note 19, at 788–90.

21 Kepfield, *supra* note 9, at 96 (citing Joyce Lind Terres, *Prenatal Cocaine Exposure: How Should the Government Intervene?*, 18 AM. J. CRIM. L. 61 (1990); Ellen L. Townsend, Note, *Maternal Drug Use During Pregnancy as Child Neglect or Abuse*, 93 W. VA. L. REV. 1083 (1991)).

22 *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 876–79 (1992) (discussing the undue burden standard); Roe v. Wade, 410 U.S. 113, 163–65 (1973) (discussing viability and the trimester system).

23 *See* Bellotti v. Baird, 443 U.S. 622, 635 (1979).

24 Mary Ziegler, *The End of the Rape and Incest Exception*, N.Y. TIMES (June 11, 2019), https://www.nytimes.com/2019/06/11/opinion/abortion-rape-incest-exception.html.

25 *See* Goldberg, *supra* note 18, at 302–03.

their assailants to care for the resultant children while reducing the number of children suffering the repercussions of having been born out of acts of sexual violence.[26]

I. THE STATE INTEREST UNDER THE *PARENS PATRIAE* DOCTRINE

Parens patriae, which literally translates to mean "parent of the country,"[27] is "derive[d] from English common law, linked to the idea that the King has the right to intervene in the biological family on behalf of the child."[28] While the Crown's authority pursuant to the doctrine was initially limited to the protection of children and incompetents, "*parens patriae* later evolved into a 'sweeping common-law theory of Prerogative Regis' whereby the king had broad authority to regulate and control 'almost everything' that happened within his jurisdiction."[29] "During the 19th century, courts in the United States resorted to the doctrine in upholding early versions of child neglect and juvenile delinquency statutes and compulsory education laws."[30]

However, as American courts adopted the doctrine, its application continued to evolve into an all-encompassing code lacking well-defined borders[31] and was, for the most part, "unaccompanied by any meaningful constitutional scrutiny."[32] Scholars have noted that the "expansion of *parens patriae* occurred 'incrementally and almost stealthily,' and that the body of law was, for a time, a 'precedential miasma.'"[33] Accordingly, "for much of its history as part of American jurisprudence, the boundaries and appropriate uses of *parens patriae* have been poorly defined" by courts.[34] It was not until the twentieth century that the U.S. Supreme Court recognized that the State's assertion of its "*parens patriae* power in traditional family matters, such as education and child labor, implicated constitutionally protected interests."[35]

This Part serves as a discussion of the state's authority pursuant to the parens patriae doctrine, distinguishing between instances where the state's authority to intervene has been upheld as valid and instances where that authority has been curtailed. This Part also examines the ways in which a state legislature has the potential to intercede on behalf of the fetus under the guise of its parens patriae duty to protect the welfare of the state's youth.

A. Parens Patriae*: Why and When the State Steps In*

Within the context of the duty to protect minors, the State's *parens patriae*

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26 *See* Buss, *supra* note 19, at 789–91.

27 John B. Hoke, Parens Patriae*: A Flawed Strategy for State-Initiated Obesity Litigation*, 54 WM. & MARY L. REV. 1753, 1759 (2013).

28 Amy Wilkinson-Hagen, Note, *The Adoption and Safe Families Act of 1997: A Collision of* Parens Patriae *and Parents' Constitutional Rights*, 11 GEO. J. ON POVERTY L. & POL'Y 137, 149 n.94 (2004).

29 Hoke, *supra* note 27, at 1759 (quoting Jack Ratliff, Parens Patriae*: An Overview*, 74 TUL. L. REV. 1847, 1850 (2000)).

30 Gregory Thomas, *Limitations on* Parens Patriae*: The State and the Parent/Child Relationship*, 16 J. CONTEMP. LEGAL ISSUES 51, 52 (2007).

31 Hoke, *supra* note 27, at 1759.

32 Thomas, *supra* note 30, at 52–53.

33 Hoke, *supra* note 27, at 1759 (quoting Ratliff, *supra* note 29, at 1850, 1852).

34 *Id.*

35 Thomas, *supra* note 30, at 53.

power over children has traditionally been justified by the presumption that children "cannot act in [their] own best interest[s] due to incapacity and immaturity.[36] However, by acknowledging that "[t]he child is not the mere creature of the State,"[37] the Supreme Court has formally recognized the State's duty to intervene "only upon a showing that such authority is necessary" when the child's parent or custodian has demonstrated that they are "unfit, unable, or unwilling to care for the child."[38] In *Prince v. Massachusetts*, for example, the Court reviewed the constitutionality of a state statute prohibiting a Jehovah's Witness from furnishing her nine-year-old niece, over whom she was granted custody, with magazines to be sold on the street—an activity violative of the state's child labor policies.[39] The Court held that the "lawful exercise of the right to engage in propagandizing the community," while a suitable undertaking for adults, created situations "wholly inappropriate for children" in light of the "crippling effects of child employment, more especially in public places, and the possible harms arising from . . . activities subject to all the diverse influences of the street."[40]

The Court stressed that the State's *parens patriae* duty to intercede was subject to the guardian's claim to authority in their own household and in the rearing of children under their care.[41] Despite this limitation, however, the Court made it clear that a statute "appropriately designed to reach [the] evils" of employing a child in a public milieu was within the state's police power.[42] By barring the child's potential exposure to danger, the state's power would operate to further the general interest of the child's well-being.[43] Because the state's duty to intercede is limited by the presumption that a fit parent acts in the best interests of their child,[44] intervention is appropriate only when the parent's decisions or conduct cause actual harm or the imminent risk of harm to the child.[45] Accordingly, the state's duty pursuant to its *parens patriae* authority is limited by the state's obligation to further the best interests of the minor when the parent is unable to fill that role.[46]

But just as the state interest can be curtailed, so, too, can the parental interest.[47] The Court's opinion in *Prince* emphasized that "basic in a democracy, stand the interests of society to protect the welfare of children, and the state's assertion of authority to that end . . . is valid."[48] The Court opined it is ultimately in "the interest of . . . the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-

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36 Daniel B. Griffith, *The Best Interests Standard: A Comparison of the State's* Parens Patriae *Authority and Judicial Oversight in Best Interests Determinations for Children and Incompetent Patients*, 7 ISSUES L. & MED. 283, 290 (1991).

37 Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925).

38 Griffith, *supra* note 36, at 290.

39 Prince v. Massachusetts, 321 U.S. 158, 160 (1944). Sarah Prince, the appellant and a Jehovah's Witness, predicated her argument on the First Amendment's Religious Freedom Clause and the Fourteenth Amendment's Due Process Clause. *Id.* at 161, 164.

40 *Id.* at 168–70.

41 *Id.* at 165.

42 *Id.* at 169.

43 *See id.* at 166.

44 Troxel v. Granville, 530 U.S. 57, 69 (2000).

45 Kimberly M. Mutcherson, *No Way to Treat a Woman: Creating an Appropriate Standard for Resolving Medical Treatment Disputes Involving HIV-Positive Children*, 25 HARV. WOMEN'S L.J. 221, 251 (2002).

46 Griffith, *supra* note 36, at 290.

47 *See Prince*, 321 U.S. at 165.

48 *Id.*

developed . . . citizens."[49] Thus, the state's authority over a child's activities is broader than its authority over adult activities because "[a] democratic society rests . . . upon the healthy, well-rounded growth of young people into" fully mature and productive citizens.[50] As such, "[a]cting to guard the general interest in youth's well-being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways."[51] The Court thus conceded that, for the purposes of protecting the child and promoting the community's derived benefit from the child's growth into a productive adult,[52] "the state has a wide range of power for limiting parental freedom and authority" over activities adversely impacting the child's welfare.[53]

B. Constitutional Limitations on State Intervention

It is a well-established principle that "freedom of personal choice in matters of family life is one of the fundamental liberty interests protected by the Due Process Clause of the Fourteenth Amendment."[54] That freedom encompasses "the decision to marry, use contraceptives," and, most importantly, the "freedom of a parent and child to maintain, cultivate, and mold their ongoing relationship."[55] As the Supreme Court stated in *Princ*e, "the custody, care and nurture of the child reside first in parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."[56]

The Supreme Court's opinion in *Prince* acknowledged that the State has a compelling interest in protecting children under the *parens patriae* doctrine, but this is not an interest that remains unchecked.[57] Just as the Supreme Court has recognized the State's power pursuant to its interest in securing the well-being of its youth, the Court has duly recognized constitutional safeguards established to prevent the State from impinging on the parent's right to foster a relationship with their child under the Due Process Clause of the Fourteenth Amendment.[58] It is "only when the state has evidence that the parent is unfit [that] the fundamental right of a parent falters under the Constitution."[59] Accordingly, when the State acts to impinge on this right, it will be required to prove that its action of intervening in the privacy of the family is in the best interests of the child.[60]

One of the first Supreme Court cases to address the parent's rights pursuant to the Due Process Clause of the Fourteenth Amendment was *Meyer v. Nebraska*.[61] In

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49 *Id.*
50 *Id.* at 168.
51 *Id.* at 166.
52 The state's authority is not invalidated "merely because the parent grounds his claim to control the child's course of conduct on religion or conscience." *Id.* at 166. The parent "cannot claim freedom from compulsory vaccination for the child . . . on religious grounds." *Id.* "The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death." *Id.* at 166–67.
53 *Id.* at 167.
54 Daan Braveman & Sarah Ramsey, *When Welfare Ends: Removing Children from the Home for Poverty Alone*, 70 TEMP. L. REV. 447, 450 (1997).
55 *Id.* (quoting Franz v. United States, 707 F.2d 582, 595 (D.C. Cir. 1983)).
56 *Id.* (quoting *Prince*, 321 U.S. at 166).
57 Wilkinson-Hagen, *supra* note 28, at 149.
58 *Id.* at 147–48.
59 *Id.* at 149.
60 *Id.*
61 Meyer v. Nebraska, 262 U.S. 390 (1923).

Meyer, the appellant was a German language teacher who was convicted for violating a Nebraska law barring citizens from teaching a foreign language to children who had yet to pass the eighth grade.[62] On appeal, the Supreme Court was tasked with evaluating whether Nebraska's statute infringed upon the appellant's right to due process guaranteed by the Fourteenth Amendment—that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law."[63] In holding that the statute was violative of the appellant's substantive right to due process, the Court stated that "liberty may not be interfered with, [even] under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect."[64] The Court thus held that the Nebraska law was unconstitutional because it infringed on the liberty interest of the parents of the students by limiting their right to direct the education and upbringing of their children.[65] In recognizing that a due process violation occurs when the State enacts a law that infringes upon the parent's right to enforce upon their children a knowledge of a language other than English, the Court established that a state could only go so far in its enforcement of legislation subject to constitutional restraints imposed by the Fourteenth Amendment.[66]

The Supreme Court's view in *Meyer* was reiterated two years later in *Pierce v. Society of Sisters*.[67] In *Pierce*, the State of Oregon appealed an order enjoining the state from threatening or attempting to enforce the Compulsory Education Act, a law ordering parents and guardians to send their children aged eight to sixteen to a public school in the district where the child resided.[68] The appellees, two private education institutions, alleged that the Act restricted parents from choosing where their children would go to school.[69] Consistent with its opinion in *Meyer*, the Supreme Court held that the Act "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control."[70] It was here that the Court recognized that "[t]he child is not the mere creature of the State" and that "those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[71] The parents' right to raise their children in accordance with their beliefs and values is, thus, one that is constitutionally enshrined.[72] However, as established in *Prince*, state interference is nonetheless permissible where a child's maturation into a productive and contributing member of society is materially hindered.[73]

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62 *Id.* at 396–97.
63 *Id.* at 399.
64 *Id.* at 399–400.
65 *Id.* at 400.
66 *See id.* "Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life; and nearly all the States, including Nebraska, enforce this obligation by compulsory laws.**"*** *Id.*
67 Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925).
68 *Id.* at 529–30.
69 *Id.* at 531–34. Suits were brought by Society of Sisters and Hill Military Academy, both private Oregon corporations that administered education to children between the ages of eight and sixteen. *Id.* Both of the appellees' suits were initially precipitated by their respective businesses' profit loss as a consequence of the statute's enforcement. *Id.*
70 *Id.* at 534–35.
71 *Id.* at 535.
72 *See id.*
73 Prince v. Massachusetts, 321 U.S. 158, 167 (1944).

C. The "State's Interest" Argument

Ensuring that children mature into productive members of society that will ultimately contribute to a robust economy is consistent with government "interest in maintaining a steady population, because such constancy [in population] promotes economic stability and growth."[74] In other words, both goals serve the same purpose. "In arguing for the constitutionality of various limitations on abortions, states have long argued that a [number of compelling] state interests apply," most of which are driven by similar economic goals.[75] Such interests "include protecting potential life, promoting child birth, and the [overall] promotion of life and dignity generally."[76] In the context of abortion, fetal rights advocates have asserted that state intervention to protect the fetus is legally justifiable because it is an exercise of traditional state police powers as lawfully applied under *parens patriae* authority.[77] In fact, this is "the most common legal rationale" and, consequently, the foundational argument "for state intervention on behalf of the fetus."[78]

Relying on *Mormon Church v. United States*, one of the earliest United States cases to address the State's *parens patriae* authority, fetal rights advocates have asserted that the Supreme Court exceeds its jurisdiction when imposing limits on the State's power to extend its interest to encapsulate the protection of fetal life.[79] In *Mormon Church*, the Court endorsed an expansive interpretation of the *parens patriae* power when it held that the doctrine "is inherent in the supreme power of every State . . . [as a] most beneficent function, and often necessary to be exercised in the interests of humanity, and for the prevention of injury to those who cannot protect themselves."[80] For the purpose of preventing injury to "those who cannot protect themselves," fetal rights advocates have reasoned that the State's interest in protecting the fetus is necessarily implicated by virtue of its defenseless nature.[81] Accordingly, "[i]f the state has the authority to intervene on behalf of [older children who are] comparatively autonomous, state action on behalf of the unborn is even more justifiable" under this theory.[82]

The question, then, is to what extent does fetal protection allow for the State's interference? Similar to how parents' right to familial privacy in the realm of child-rearing is balanced against the State's right to intrude pursuant to its police powers, the concept of fetal rights—and whatever right the state has within this sphere—naturally implicates the rights of pregnant women to bodily autonomy.[83] The Supreme Court has formally "recognized the 'sacred' and 'carefully guarded' right to exercise control over one's body[,] [and] [t]his right has since been invoked in various contexts to protect individuals from unwarranted governmental intrusions."[84]

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74 Meghan Boone, *Reproductive Due Process*, 88 GEO. WASH. L. REV. 511, 531 (2020).
75 *Id.* at 530.
76 *Id.*
77 Jean Reith Schroedel, Pamela Fiber & Bruce D. Snyder, *Women's Rights and Fetal Personhood in Criminal Law*, 7 DUKE J. GENDER L. & POL'Y 89, 100 (2000).
78 *Id.* at 101.
79 *Id.* at 101–02.
80 *Id.* (quoting Mormon Church v. United States, 136 U.S. 1, 57 (1890)).
81 *Id.* at 102 (quoting Mormon Church, 136 U.S. at 57).
82 *Id.*
83 *See* Shanon K. Such, *Lifesaving Medical Treatment for the Nonviable Fetus: Limitations on State Authority Under* Roe v. Wade, 54 FORDHAM L. REV. 961, 973 (1986).
84 *Id.* at 970 (quoting Union Pac. Ry. v. Botsford, 141 U.S. 250, 251 (1891)). "[P]ersons suspected of criminal activity may refuse to have their stomachs pumped. Adult patients or their guardians may refuse blood

This protection has also afforded women control over the way they manage their pregnancies, regardless of whether their choices culminate in termination of fetal life—for example, refusal to undergo medical treatment purported to save or preserve the life of the fetus.[85] However, "not all such intrusions by the state are constitutionally barred," as some courts have permitted "bodily intrusion[] where [it was believed to] further[] a compelling state interest."[86] Because courts apply a balancing test to determine "whether the state can intrude on a person's right to bodily integrity," the state's interest in preserving the life of the fetus is weighed against any infringement on the pregnant woman's right to privacy in her own body.[87] And in cases in which the state's interest is deemed sufficiently legitimate, the state may intercede.[88] Having established that the state's authority affords it the right to intervene where a legitimate interest is implicated, Part II's discussion below shifts the focus to what that interest looks like in the context of abortion regulations and reproductive rights.

II. ABORTION RIGHTS AND MINORS' ACCESS TO THOSE RIGHTS

There are only a few areas of this country's legislation that have managed to generate the level of heated public scrutiny and zealous outrage that abortion law has triggered during the past fifty years. As fraught with controversy as it is brief, abortion jurisprudence has consistently been determinative of the degree of division inherent in our political culture and the degree to which we allow a religious framework to dictate that culture. As one scholar noted, "[a]bortion is an issue so charged with emotion that it is probably the most misrepresented subject in the history of Anglo- American law."[89]

"The practice of abortion was [fairly] common throughout history," as records dating back to the Roman Empire "show that the Romans relied on the juice of the now extinct silphium plant to induce abortions."[90] "[T]he common law afforded women the right to have an abortion" in England between the fourteenth and nineteenth centuries and in the United States between the seventeenth and nineteenth centuries.[91] In cases in which an abortion resulted from acts of violence perpetrated against a pregnant woman, courts were reluctant to criminally convict the offender by characterizing such acts as felonious.[92] This was the fundamental argument in favor

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transfusions, amputations, continued life support intervention and other medical treatment on the basis of their protected interest in bodily integrity." *Id.* at 970–71.

85 *Id.* at 971. In *Taft v. Taft*, "the Massachusetts Supreme Judicial Court vacated a lower court's judgment ordering a surgical procedure necessary to save the life of a sixteen-week-old fetus." *Id.* at 966–67. "The court stated that the woman's privacy and religious interests were 'established on the record' and that the 'circumstances' of the case were not sufficiently compelling to outweigh her constitutional rights." *Id.* at 967 (quoting Taft v. Taft, 446 N.E.2d 395, 397 (1983)).

86 *Id.* at 971. For example, courts have upheld "regulations establishing mandatory vaccinations against contagious disease in the interest of public health and safety." *Id.*

87 *Id.* at 972.

88 *Id.* at 973. Goals that the courts have recognized as legitimate in medical treatment cases include those that further the state's interests in protecting life and health. *See id.*

89 Sybil Shainwald, *Reproductive Injustice in the New Millennium*, 20 WM. & MARY J. WOMEN & L. 123, 124 (2013).

90 *Id.* at 127.

91 *Id.*

92 *Id.* "(1) 'The Twinslayer's Case' . . . involved a defendant who had beaten a woman in an advanced stage of pregnancy, terminating her pregnancy with twins . . . .; (2) 'The Abortionist's Case' . . . involved a defendant who was indicted for killing a child in a mother's womb, but was not convicted because of the difficulty in proving his responsibility for the death." *Id.*

of *not* criminalizing abortion, thus waiving a need for courts to definitively determine issues of legality.[93]

The question of whether the fetus becomes a person while inside the womb was germane to court decisions from as early as the thirteenth century.[94] Some legal critics and judges believed that
because an unborn child was not a person *in rerum natura*,[95] its death should not be characterized as a homicide.[96] Henry de Bracton, an English jurist in the mid-thirteenth century, however, maintained that homicide had been committed where someone "[hit] a pregnant woman or g[ave] her poison in order to procure an abortion, if the foetus [was] already formed or quickened, especially if it [was] quickened."[97] The term quicken was used to identify the point at which the fetus had a soul and was generally synonymous with the moment at which some form of fetal movement could be detected.[98]

Abortion did not become a felony in England until 1803, and prosecution for abortion in the United States remained nearly nonexistent until 1821, when Connecticut became the first state to ban post-quickening abortions.[99] Missouri, Illinois, and New York adopted anti-abortion legislation similar to the Connecticut statute in the following decade.[100] "During the anti-abortion movement of the mid-nineteenth century, more states introduced statutes that made abortion illegal at all stages of pregnancy."[101] This was largely due to a growing awareness that existing abortion procedures posed grave risks to the life and health of the mother,[102] coupled with the propagation of literature supporting the theory that a fetus is a living person from the moment of conception.[103]

Anti-abortion legislation was firmly ingrained in American law by the early twentieth century.[104] Abortion was outlawed in every state except for Kentucky by 1910, and it was classified as a felony offense in forty-nine states and the District of Columbia until 1967.[105] The possibility of facing grave consequences was a risk assumed by anyone who violated these laws, with physicians facing the harshest penalties, such as "losing their licenses to practice and facing criminal charges."[106] States did, however, recognize the need for exceptions where pregnancies posed a

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93 *See id.*

94 *Id.*

95 "In the nature of things; in existence." *In rerum natura,* BLACK'S LAW DICTIONARY (10th ed. 2014).

96 Shainwald, *supra* note 89, at 128. These views had been expressed in the writings of Sir William Staunford (1509–1558), a judge of the Court of Common Pleas, and William Lambarde (1536–1601), a legal critic. *Id.*

97 *Id.* at 127. (alteration in original) (quoting the writings of Henry de Bracton, an English jurist in the mid-thirteenth century).

98 *Id.* at 128. "The doctrine of quickening was originally developed by St. Thomas Aquinas in the twelfth century." *Id.* "Aquinas taught that the fetus did not have a soul until the point of quickening, that fetal movement should be used to differentiate between pregnancy stages, and that abortion prior to this point was not the same as killing a person." *Id.* at 128–29.

99 *See id.* at 130–31. "[T]he first reported abortion cases took place in Massachusetts in 1812." *Id.* at 131. "[T]he Supreme Judicial Court dismissed the charges when the prosecution failed to prove that the woman had quickened." *Id.*

100 *Id.*

101 *Id.* at 136.

102 *See id.* at 132–33. "[D]anger of infection and death due to the lack of antiseptic procedures" triggered widespread safety concerns. *See id.* at 124. "Abortions performed in New York as late as 1884, by competent physicians during the early stages of pregnancy, were ten to fifteen times more dangerous than childbirth." *Id.* at 134.

103 *Id.* at 136.

104 *Id.* at 137.

105 *Id.*

106 *Id.* at 141.

severe health risk.[107] Thus, abortions were permitted under "therapeutic" exception provisions and were most commonly invoked when necessary to save the life of the mother.[108]

Abortions began to receive greater attention during the 1950s when health organizations, medical professionals, and scholars observed that abortion procedure rates were still high, despite their illegality.[109] Moreover, improper procedures used in many illegal abortions continued to raise issues of public health that needed to be addressed.[110] However, the 1950s also saw a surge in medical advances that drastically reduced the dangers that initially sparked the nineteenth-century abortion ban.[111] By 1955, "[w]ith the combined effects of improved medical techniques, analgesics, antibiotics, and antiseptics," abortions were deemed "safer than delivering a child."[112] Because abortions were inherently dangerous prior to the advent of these medical advances, resorting to the practice was formerly considered to have been done out of desperation.[113] It was these medical advances that "'precipitated . . . a deep culture-wide debate on abortion'" because, for the first time, women were given a choice.[114]

Part II is a discussion of the ways in which a woman's right to choose was adopted by states, the U.S. Supreme Court's interpretation of that choice as a substantive Fourteenth Amendment due process right, and how the Court's jurisprudence has shaped and extended that right to include access to minors.

A. The Evolution of Abortion Jurisprudence

The American Law Institute published its Model Penal Code in 1962.[115] Included in the code was an abortion statute in which justifiable reasons for obtaining an abortion were extended to cover "the risk of grave impairment to the mother's physical or mental health, the risk of bearing a child with a grave physical or mental defect, and pregnancy resulting from" sexual assault and incest.[116] From 1966 through 1972, thirteen states amended their abortion statutes in accordance with the recommendation endorsed by the American Law Institute's code, with "Alaska, Hawaii, New York, and Washington repeal[ing] their abortion laws altogether."[117] The late 1960s and early 1970s saw a flurry of reproductive rights and healthcare cases making their way through the United States judicial system, with the Supreme Court's decision in *Griswold v. Connecticut* serving as the primary catalyst to spark a stream of constitutional challenges to state regulations.[118] *Griswold*, a 1965 case involving a clinic that distributed contraceptives and provided birth control counseling, threw the abortion debate into the political spotlight.[119] By stressing that

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107 *See id.* at 138.
108 *Id.* at 139 n.155.
109 *Id.* at 139.
110 *Id.*
111 *Id.*
112 *Id.*
113 *Id.* at 140.
114 *Id.*
115 *Id.* at 141.
116 *Id.*
117 *Id.* at 142.
118 Shainwald, *supra* note 89, at 141.
119 *See* Shainwald, *supra* note 89, at 141. Appellant Griswold was the Executive Director of the Planned Parenthood League of Connecticut, and Appellant Buxton was a licensed physician "who served as Medical

this case "concern[ed] a relationship lying within the zone of privacy created by several fundamental constitutional guarantees," the Supreme Court essentially opened the door for states to extend the concept of privacy to include a woman's right to choose.[120]

"By 1973, abortion statutes had been challenged on several constitutional grounds, including vagueness, privacy, and equal protection of the laws."[121] Based on these developments, the Supreme Court granted certiorari to hear two companion cases challenging a state's right to limit access to abortion: *Roe v. Wade* and *Doe. v. Bolton*.[122] In both cases, the Court considered challenges to state laws—Texas and Georgia, respectively—that criminalized abortions except where the pregnancy posed a risk to the life or health of the mother.[123] In both *Roe* and *Doe*, "lower federal courts had declared the statutes unconstitutional, holding that denying a woman the right to decide whether to carry a pregnancy to term violated basic privacy and liberty interests enumerated by the Constitution."[124]

The Court's landmark 7–2 decision in *Roe* upheld a woman's fundamental right to terminate her pregnancy as one that was constitutionally enshrined.[125] Justice Blackmun, writing for the majority, recognized that the right of privacy was "broad enough" to encompass a woman's right to choose and that the State would be imposing a serious "detriment" upon a woman by denying her that right.[126] The majority further observed that this was especially true in cases in which neither the woman nor society was prepared to deal with the repercussions of being forced to raise an unwanted child:

> The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her

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Director for the League at its Center in New Haven." *Griswold*, 381 U.S. at 480. Both Appellants were arrested for "[giving] information, instruction, and medical advice to *married persons* as to the means of preventing conception." *Id.* (emphasis in original).

120 *See* Shainwald, *supra* note 89, at 141–42 (alteration in original) (quoting *Griswold*, 381 U.S. at 485). The California Supreme Court incorporated the privacy doctrine in its decision in *People v. Belous*, where it held that "[t]he fundamental right of the woman to choose whether to bear children follow[ed] from the Supreme Court's . . . acknowledgment of a 'right of privacy' or 'liberty' in matters related to marriage, family, and sex." 458 P.2d 194, 199–200 (Cal. 1969) (citing *Griswold*, 381 U.S. at 485–86, 500); Loving v. Virginia, 338 U.S. 1, 12, 87 (1967); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 536, 541 (1942); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925); Meyer v. Nebraska, 262 U.S. 390, 399–400 (1923); Perez v. Sharp, 198 P.2d 17, 19 (Cal. 1948)).

121 Shainwald, *supra* note 89, at 147.

122 *Id.*

123 *Id.*

124 *Id.*

125 Roe v. Wade, 410 U.S. 113, 152–53 (1973).

126 *Id.* at 153. "This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.* at 153.

responsible physician necessarily will consider in consultation.[127]

However, the Court also conceded that because the State had an "important and legitimate interest in preserving and protecting the health of the . . . woman" and "the potentiality of human life" inside her, a "compelling" state interest could justify the enactment of laws limiting her right to terminate her pregnancy.[128]

According to the Court, fetal viability aptly determined the point at which a state's legitimate concern for the safety of the mother and fetus rose to a "compelling" level such that interference with a woman's pregnancy could be justified.[129] Because the fetus "presumably has the capability of meaningful life outside the mother's womb" at the point of viability, state regulations protective of fetal life after this point would be valid on "both logical and biological" grounds.[130] A woman's right to terminate her pregnancy was thus subject to restraints substantiated by the "established medical fact . . . that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth."[131]

In accordance with these restraints, the Court devised the trimester framework: a system in which a woman's right to access abortion was governed by how far along she was in her pregnancy.[132] This system established the trimester in which a woman could undergo an abortion, absent state intervention to regulate her decision, based on the fetus' viability and the corresponding state interest in preserving the health and life of both the mother and fetus.[133] If a woman wished to undergo the procedure prior to the end of the first trimester, her right to do so generally remained free from state interference.[134] If she wished to undergo the procedure during the second trimester, the state was permitted to intercede to the extent that a state-enforced regulation was reasonably related to the "preservation and protection of maternal health."[135] And if she wished to undergo the procedure after the end of the second trimester, the point at which the fetus was deemed viable, the state was permitted to proscribe the procedure altogether unless the mother's health or life were at risk.[136]

In *Doe*, the same seven-justice majority echoed its opinion in *Roe* by concluding that "state regulations that create[d] procedural obstacles to abortion, such as the requirement that an abortion be performed in a hospital or be approved by two doctors, violated a woman's right to terminate her pregnancy."[137] But there, as in *Roe*, the Court reinforced its position that a woman's constitutional right to terminate her pregnancy was not absolute.[138] Consequently, in the years immediately following *Roe*, the Court's somewhat malleable stance implicitly gave states permission to

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127 *Id.*

128 *Id.* at 162–63.

129 *Id.* at 163. A fetus was deemed viable at around the six-to-seven-month mark, or approximately twenty-four to twenty-eight weeks. *Id.*

130 *Id.*

131 *Id.*

132 *Id.*

133 *Id.*

134 *Id.*

135 *Id.* Examples of permissible state regulation in this area are requirements as "to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like." *Id.*

136 *Id.* at 163–64.

137 Shainwald, *supra* note 89, at 148.

138 Doe v. Bolton, 410 U.S. 179, 189 (1973).

circumvent the case's holding and create new barriers to abortion access such as requiring "parental consent, spousal consent, and waiting periods for women seeking abortions."[139]

Planned Parenthood of Southeastern Pennsylvania v. Casey was one such case. In *Casey*, the Supreme Court considered the constitutionality of a Pennsylvania law requiring a woman seeking an abortion to give her informed consent, wait twenty-four hours, and, if married, obtain the consent of her spouse before undergoing the procedure.[140] The law also mandated that minors obtain the informed consent of at least one parent, though judicial bypass remained available as an alternative option.[141] In maintaining that the Due Process Clause of the Fourteenth Amendment protected a woman's right to terminate her pregnancy, the Court's 5-4 decision reaffirmed the constitutional framework that was dispositive of its conclusion in Roe.[142] While Casey's holding was largely predicated on stare decisis,[143] the Court rejected *Roe*'s trimester framework on the grounds that it was "incompatible with the recognition [of] a substantial state interest in potential life throughout pregnancy."[144] This approach, the Court stressed, contradicted the assumption of a valid state interest in protecting fetal life by rendering any intervention prior to the point of viability unwarranted.[145] The Court thus introduced a new standard to be applied when assessing the constitutionality of state laws that functioned as barriers to abortion access: the undue burden test.[146]

Under the Court's novel scheme, state laws designed to foster the health of a woman seeking an abortion passed constitutional muster so long as they did not impose an undue burden on a woman's right to terminate her pregnancy prior to the point of fetal viability.[147] In delineating the scope of an undue burden, the Court held that a state regulation imposing "a substantial obstacle" in the path of a woman seeking an abortion prior to fetal viability was invalid on the grounds that it furthered the state's interest in potential life by hindering a woman's free choice.[148] To that end, laws that would "do no more than create a structural mechanism by which [a] state . . . [could] express profound respect for the life of the unborn" were accordingly valid absent a showing of unnecessary interference with the woman's right to exercise her freedom to choose.[149] In holding that the spousal notification requirement imposed an undue burden, whereas the informed consent requirement and the twenty-four hour waiting period did not, the Court's opinion offered examples of "slight" impediments that would all but fail to amount to a substantial obstacle in the path of a woman seeking an abortion.[150] Restrictions that would "merely make[] abortions a little more difficult or expensive to obtain" or "increase[] the cost of some

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139 Shainwald, *supra* note 89, at 149.

140 Planned Parenthood of Se. Pa v. Casey, 505 U.S. 833, 844 (1992).

141 *Id.* Judicial bypass is a method of bypassing the requisite parental or guardian involvement in a minor's decision to undergo an abortion by receiving permission from a court. Wendy-Adele Humphrey, *Two-Stepping Around a Minor's Constitutional Right to Abortion*, 38 CARDOZO L. REV. 1769, 1773 (2017).

142 *Casey*, 505 U.S. at 846.

143 *Id.* at 853.

144 *Id.* at 876, 878.

145 *Id.* at 876.

146 *Id.* at 876–77.

147 *Id.* at 878.

148 *Id.* at 877.

149 *Id.* at 877.

150 Marlow Svatek, *Seeing the Forest for the Trees: Why Courts Should Consider Cumulative Effects in the Undue Burden Analysis*, 41 N.Y.U. REV. L. & SOC. CHANGE 121, 124 (2017).

abortions by a slight amount" would not constitute an undue burden, but "at some point increased cost could become a substantial obstacle."[151] The scheme's latitude and lack of specified guidance as to what did constitute an undue burden thus left open the door for federal appellate courts to articulate the standard through a free lens and for states to adopt a loose interpretation of the standard for the purpose of fashioning abortion legislation.[152]

B. Minors' Access to Abortion and the Law

At the forefront of the abortion debate rests the contention that a parent's involvement over a minor's decision to access abortion should be state mandated.[153] In fact, in many states, a minor's choice to terminate her pregnancy does require one of two forms of parental control: consent or notification.[154] "Parental consent laws require a pregnant minor to obtain the consent, usually written, of at least one parent or custodial guardian prior to undergoing an abortion procedure."[155] Parental notification laws do not require parental or custodial consent but instead demand that a "pregnant minor . . . notify at least one parent or custodial guardian of her intention to undergo an abortion prior to the procedure."[156]

The tension between the rights of minors and the rights of parents or custodians has shaped the development of adolescent abortion jurisprudence for nearly fifty years.[157] Three years after deciding *Roe*, "the Supreme Court first addressed the constitutionality of state-mandated parental consent [requirements] for unmarried pregnant minors in [the seminal case] *Planned Parenthood of Central Missouri v. Danforth*."[158] In *Danforth*, the Court invalidated a Missouri law requiring unmarried pregnant minors to seek written parental consent before obtaining an abortion on the grounds that it violated the trimester framework established in *Roe*.[159] In an opinion consistent with *Roe*, the Court held that the state did "not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the [woman's] decision . . . to terminate [her] pregnancy" during the first trimester.[160] And because "[m]inors, as well as adults, are protected by the Constitution and possess constitutional rights," a woman's right to decide the fate of her pregnancy does not "mature and come into being magically only when [she] attains the state-defined age of majority."[161]

The Court's opinion in *Danforth* was echoed three years later in *Bellotti v. Baird* when it invalidated a Massachusetts law requiring a pregnant minor to obtain parental consent or, in the alternative, parental notification prior to seeking judicial permission to undergo an abortion.[162] Because it was conceivable that a parent beholden to their own views on abortion would make reasonable efforts to obstruct or

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151 *Id.* (quoting *Casey*, 505 U.S. at 893–94, 901).
152 *Id.* at 121, 124.
153 *See* Amanda M. Lanham, Note, *Parental Notification Under the Undue Burden Standard: Is a Bypass Mechanism Required?*, 37 RUTGERS L.J. 551, 551 (2006).
154 *Id.*
155 *Id.*
156 *Id.*
157 *See id.* at 551.
158 *Id.* at 554.
159 *Id.*
160 Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74 (1976).
161 *Id.*
162 Lanham, *supra* note 153, at 555.

altogether prevent their daughter's access to the judicial system, thus placing an undue burden on her right to obtain an abortion, the Court conceded that "[i]t would be unrealistic . . . to assume that the mere existence of a legal right to seek [judicial] relief" would adequately offer the relief sought by those who would "need it most."[163] The Court articulated, in dicta, the criteria for a constitutional judicial bypass provision as an alternative to parental consent:

> (1) allow the minor to bypass the consent requirement if she establishes that she is mature enough and well enough informed to make the abortion decision independently; (2) allow the minor to bypass the consent requirement if she establishes that the abortion would be in her best interests; (3) ensure the minor's anonymity; and (4) provide for expeditious bypass procedures.[164]

However, consistent with its opinion in *Prince*, the Court's plurality opinion in Bellotti maintained that "the State [was] entitled to adjust its legal system to account for [a child's] vulnerability."[165] The State's power to "limit the freedom of children to choose for themselves in the making of important, affirmative choices . . . [has] been grounded in the recognition that . . . minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them."[166] Accordingly, "[a]s immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences," a state may impinge on the minor's freedom to circumvent parental consultation prior to obtaining judicial permission if doing so would promote "the best interest of the minor."[167] Thus, the minor's "best interest" and the State's authority to act as an agent in pursuit and protection of those interests became critical to the Court's evaluation of a minor's autonomous decision-making as balanced against a state's intervention.[168]

The Court's discussion of the minor's best interest was characterized by an in-depth consideration of the injurious impact on the minor when compelled to carry an unwanted pregnancy to full-term:

> [T]he potentially severe detriment facing a pregnant woman . . . is not mitigated by her minority. Indeed, considering her probable education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor. In addition, the fact of having a child brings with it adult legal responsibility, for parenthood, like attainment of the age of majority, is one of the traditional criteria for the termination of the legal disabilities of minority. In sum, there are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible.[169]

With these considerations in mind, the Court drew on an appreciation for the wide range of circumstances in which the minor's decision to undergo an abortion

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163 Bellotti v. Baird, 443 U.S. 622, 647 (1979).
164 Lanham, *supra* note 153, at 556.
165 *Bellotti*, 443 U.S. at 635–36.
166 *Id.* at 635.
167 *Id.* at 640.
168 *See id.*
169 *Id.* at 642.

would undoubtedly vary.[170] Where marrying the child's father, putting the child up for adoption, or taking on motherhood with the solidarity of family remained practical alternatives, the choice to carry to full term could be made in accordance with the best interests of the minor.[171] However, where the minor was unable to access, and thus benefit from, these options, her best interests were served by choosing to terminate the pregnancy rather than bear the consequences of having a child whom she was ill-prepared to raise.[172] Nonetheless, the Court pointed to an "important state interest in encouraging a family" that a reviewing court could take into account when called upon to determine whether abortion was in fact in a minor's best interests.[173]

Eleven years later, in *Ohio v. Akron Center for Reproductive Health* and *Hodgson v. Minnesota*, the Court was tasked with assessing the constitutional validity of the judicial bypass provision requirements articulated in *Bellotti*.[174] In *Akron*, the Court upheld Ohio's judicial bypass procedure, which the state required as an alternative to parental notification statutes, as valid on the grounds that it satisfied the four factors enumerated in *Bellotti*.[175] In *Hodgson*, the Court essentially upheld a Minnesota statute requiring a pregnant minor to notify both parents of her intent to undergo an abortion on the grounds that the statute's judicial bypass provision negated the damaging effects conferred on a minor and her family by the two-parent notification requirement.[176] Though the two-parent notification requirement was rendered unconstitutional on the grounds that it "[did] not reasonably further any legitimate state interest,"[177] Justice O'Connor's concurring opinion stressed that the state's judicial bypass provision effectively removed the statute's constitutional defects.[178] The judicial bypass provision thus passed muster on the grounds that "interference with the internal operation of the family required by [the two-parent notification provision] simply [did] not exist where the minor [could] avoid notifying one or both parents by use of the bypass procedure."[179]

While judicial bypass has since been recognized as a viable alternative to consent or notification requirements, its procedural shortcomings have not gone unnoticed. The length of the judicial process, from initiating proceedings to awaiting a judge's decision, can cause substantial delays that ultimately render the procedure

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170 *Id.*

171 *Id.* at 642–43.

172 *See id.*

173 *Id.* at 648.

> If, all things considered, the court determines that an abortion is in the minor's best interests, she is entitled to court authorization without any parental involvement. On the other hand, the court may deny the abortion request of an immature minor in the absence of parental consultation if it concludes that her best interests would be served thereby, or the court may in such a case defer decision until there is parental consultation in which the court may participate. But this is the full extent to which parental involvement may be required.

Id.

174 Planned Parenthood of Se. Pa. v. Casey, 497 U.S. 502, 510 (1990).

175 *Id.* at 511.

176 Lanham, *supra* note 153, at 559–60.

177 Hodgson v. Minnesota, 497 U.S. 417, 450 (1990). The Court emphasized that the state did not rely on the best interests of the minor in defending the two-parent notification requirement. *Id.* at 451. Instead, the state

> argue[d] that, in the ideal family, the minor should make her decision only after consultation with both parents who should naturally be concerned with the child's welfare and that the State has an interest in protecting the independent right of the parents 'to determine and strive for what they believe to be best for their children.'

Id. at 451–52.

178 Lanham, *supra* note 153, at 560.

179 *Id.* (quoting *Hodgson*, 497 U.S. at 461 (O'Connor, J., concurring)).

unobtainable as the pregnancy advances: the procedure becomes risky, its costs increase, and physicians become less willing to provide the service.[180] Moreover, young women who, for a number of conceivable reasons, are unable to depend on their parents or guardians for emotional or financial support find little relief in reluctantly revealing the intimate "details of their private lives" to judges, thus fundamentally reducing the option's potential to succeed as an adequate alternative.[181]

The option's ineffectiveness is even more pronounced where the minor's pregnancy is a product of sexual assault or incest. In early 2019, Massachusetts lawmakers considered adopting the ROE Act[182]—legislation that would scrap the state's parental consent statute altogether—partially for this reason.[183] "The ROE Act . . . would reform [Massachusetts's] abortion laws, ensuring that anyone, regardless of age, income, or insurance, can access safe, legal abortion."[184] Recognizing that disclosing an unintended pregnancy could place minors at risk of physical or emotional violence in their homes, especially where the pregnancy resulted from an act of incest or sexual violence perpetrated by someone close to the family, the ROE Act serves to protect abortion access for young people and remove a number of barriers to abortion access, including the judicial bypass system.[185]

If passed, the ROE Act would group Massachusetts alongside twelve other states and the District of Columbia that, as of August 2020, allow women under the age of eighteen to obtain an abortion without first obtaining consent or notification from either one or both parents.[186] Of the states that continue to require parental involvement in a minor's decision to have an abortion, twenty-one states require parental consent while six states require both parental notification and consent.[187] Thirty-seven states that require parental involvement in some capacity provide judicial bypass as an alternative option to minors seeking abortions.[188] While thirty-five states that require any degree of parental involvement provide exceptions for medical emergencies, only sixteen states permit a minor to obtain an abortion without parental involvement in cases of abuse, assault, incest, or neglect.[189] Thus, in the

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180 *Laws Restricting Teenagers' Access to Abortion*, AM. CIV. LIBERTIES UNION, https://www.aclu.org/other/laws-restricting-teenagers-access-abortion (last visited Sept. 18, 2021).

181 *Id.*

182 S. 1209, 191st Gen. Ct. (Mass. 2019).

183 *See* Martha Bebinger, *Massachusetts May Drop Requirement that Minors Get Permission for Abortion*, NPR (Jan. 2, 2020, 7:20 AM), https://www.npr.org/sections/health-shots/2020/01/02/789966125/massachusetts-may-drop-requirement-that-minors-get-permission-for-abortion. A fifteen-year-old woman from Massachusetts whose pregnancy was the product of sexual assault relied on the state's judicial bypass law as a means of terminating her pregnancy. *Id.* Because the assailant was a "family friend," disclosing the pregnancy to her family offered neither a "safe" nor "healthy" solution at the time. *Id.* The judge issued an order granting her request, but the additional time it took to get that permission pushed the minor past the point that would allow her to take pills to induce an abortion, thus compelling her to undergo a risky and invasive surgery. *Id.*

184 *Expanding Abortion Access: The ROE Act*, NARAL PRO-CHOICE MASS., https://prochoicemass.org/issue/expanding-abortion-access/ (last visited Sept. 18, 2021) [https://web.archive.org/web/20210118012750/https://prochoicemass.org/issue/expanding-abortion-access/].

185 *Teen Access*, NARAL PRO-CHOICE MASS., https://prochoicemass.org/issue/teen-access/ (last visited Sept. 18, 2021). [https://web.archive.org/web/20210118005136/https://prochoicemass.org/issue/teen-access/].

186 *Parental Consent and Notification Laws*, PLANNED PARENTHOOD FED'N AM., https://www.plannedparenthood.org/learn/teens/stds-birth-control-pregnancy/parental-consent-and-notification-laws (last updated Aug. 2020). States that allow minors access to abortion absent parental involvement are Alaska, California, Connecticut, Hawaii, Maine, Nevada, New Jersey, New Mexico, New York, Oregon, Vermont, Washington, and the District of Columbia. *See id.*

187 *Parental Involvement in Minors' Abortions*, GUTTMACHER INST., https://www.guttmacher.org/state-policy/explore/parental-involvement-minors-abortions (last updated Sept. 1, 2021).

188 *Id.*

189 *Id.*

context of state abortion laws that actively serve to protect minors from further harm and abuse, the disparity among states is acutely felt and continues to grow.

C. The Constitutional Validity of the Heartbeat Bills

When Justice Kavanaugh's appointment to the Supreme Court in 2018 solidified a predominantly conservative and pro-life majority, a number of states rushed to enact their versions of abortion legislation specifically designed to penetrate the core of Roe v. Wade and, ultimately, gut the past fifty years of abortion jurisprudence.[190] The "heartbeat bill" derives its name from the point during pregnancy at which the bill mandates a near total prohibition on abortion—the stage at which the fetal heartbeat is first detected, which is usually around six weeks into gestation and often before a woman can confirm that she is in fact pregnant.[191] But heartbeat bills have been around for the past several years, with Ohio emerging as the first state to introduce a heartbeat bill in 2011 at the urging of a pro-life and pro-family group called Faith2Action.[192]

Though not signed into law, Ohio's heartbeat bill inspired anti-abortion legislators in states across the country to propose fetal heartbeat bills of their own, with North Dakota succeeding as the first state to enact its version of the bill in 2013.[193] The North Dakota bill was challenged in federal courts, where it was struck down at the appellate level before being appealed to the Supreme Court.[194] The Supreme Court declined to review the case, thus upholding the lower court's decision to block the bill.[195] Arkansas passed a similarly stringent law that same year, with Iowa following its lead five years later in 2018.[196]

Both Arkansas's and Iowa's bans were enjoined in courts,[197] and yet 2019 saw state after state adopting bills that sought to ban abortion procedures past the point of a fetal heartbeat detection.[198] While some states like Georgia introduced bills that included exceptions for sexual assault and incest,[199] laws in Alabama, Kentucky, Louisiana, Mississippi, Missouri, and Ohio made no such allowances.[200] As these states joined forces in a sweeping effort to erode women's collective constitutional right to self-autonomy and reproductive freedom, they did so by asserting an interest justified on the grounds of preserving life.[201]

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190 Lemieux, *supra* note 7.

191 Anna North & Catherine Kim, *The "Heartbeat" Bills that Could Ban Almost All Abortions, Explained*, VOX, https://www.vox.com/policy-and-politics/2019/4/19/18412384/abortion-heartbeat-bill-georgia-louisiana-ohio-2019 (last updated June 28, 2019, 9:50 AM).

192 Jessica Ravitz, *Courts Say Anti-Abortion 'Heartbeat Bills' Are Unconstitutional. So Why Do They Keep Coming?*, CNN, https://www.cnn.com/2019/01/26/health/heartbeat-bills-abortion-bans-history/index.html (last updated May 16, 2019, 9:28 AM).

193 *Id.*

194 *Id.*

195 *Id.*

196 *Id.*

197 Colleen Ahern, *Reproductive Rights: A Look at the Recent Legislation Passed Across the Country Aimed at Either Limiting or Protecting the Right to Abortion Procedures*, 25 LOY. PUB. INT. L. REP. 81, 82 (2020); Katherine Kubak, Shelby Martin, Natasha Mighell, Madison Winey & Rachel Wofford, *Abortion*, 20 GEO. J. GENDER & L. 265, 275 (2019).

198 Gordon & Hurt, *supra* note 8.

199 North & Kim, *supra* note 191.

200 Gordon & Hurt, *supra* note 8.

201 *See* Abigail Abrams, *Here's How Conservatives Are Using Civil Rights Law to Restrict Abortion*, TIME (Jan. 1, 2020, 12:01 AM), https://time.com/5753300/heartbeat-bill-civil-rights-law/. Supporters of Georgia's bill claimed that a "'heartbeat' was a sign of life and therefore personhood." *Id.* Thus, "if fetuses were living, they were a

When challenged in court, these bills and similar bills that sought to ban abortions at fifteen or even twenty weeks were struck down as unconstitutional.[202] A Fifth Circuit decision to strike down Mississippi's fifteen-week abortion ban, for example, rested on the Supreme Court's holding in *Roe* that established viability at twenty-four to twenty-eight weeks, thus rendering a prohibition on the procedure prior to that time unconstitutional.[203] Still, despite their flagrant unconstitutionality, states endeavored to pass anti-abortion regulations hoping that at least one would "stick."[204] Pro-life advocates pushing these bills—newly emboldened by optimism and faith in the Supreme Court's right-leaning majority—endeavored toward a specific goal: splits among circuits would prompt the Supreme Court to revisit the issue upon review, culminating in a departure from *Roe*.[205]

Whereas most stringent abortion regulations did not prevail past the first stage of appellate review, there was one case that managed to gain enough traction in the courts—and in the media— such that the U.S. Supreme Court granted certiorari to hear it.[206] In *June Medical Services v. Russo*, abortion providers challenged a Louisiana law requiring doctors who performed abortions to have admitting privileges at nearby hospitals.[207] In a 5-4 decision written by Justice Breyer, Louisiana's regulation was struck down as unconstitutional under precedent established in a 2016 case—*Whole Woman's Health v. Hellerstedt*[208]—in which a nearly identical Texas statute was challenged and subsequently struck down in violation of *Casey*'s undue burden standard.[209] Justice Roberts's concurring opinion made it clear, however, that his concurrence with the majority was not predicated on an agenda intended to champion the reproductive rights of women;[210] rather, his concurrence rested on the tenets of stare decisis and his appreciation for the Court's duty to maintain its "fidelity to precedent."[211]

As it stands and as can be acknowledged from the Supreme Court's split among justices in June Medical Services, the possibility that *Roe* might be overturned is not unrealistic, especially in light of the "well-documented hostility toward abortion" expressed by the Court's conservative majority.[212] With Justice Amy Coney Barrett's confirmation to the Court, the threat to women's reproductive freedom is now as palpable as it is imminent. If *Roe* and its progeny are all that stand to prevent anti-abortion lawmakers and activists from enforcing their conservative agenda, and if *Roe*'s fate hinges on the composition of a conservative majority, states are essentially one Supreme Court opinion away from achieving the legislative freedom to draft and enforce laws that can profoundly affect the lives and rights of American women for generations to come.

'vulnerable' class of people who deserve rights and protections." *Id.* Accordingly, the bill's advocates asserted "that Georgia should be allowed to expand rights and protections to this new group as a matter of states' rights." *Id.*

202 *See* Ravitz, *supra* note 192.

203 Jackson Women's Health Org. v. Dobbs, 951 F.3d 246, 248 (5th Cir. 2020) (per curiam).

204 *See* Ravitz, *supra* note 192.

205 *See* Ahern, *supra* note 197, at 85.

206 Bridget Winkler, *What About the Rule of Law? Deviation from the Principles of Stare Decisis in Abortion Jurisprudence, and an Analysis of* June Medical Services L.L.C. v. Russo *Oral Arguments*, 68 UCLA L. REV. DISCOURSE 14, 23 (2020).

207 140 S. Ct. 2103, 2113 (2020).

208 136. S. Ct. 2292 (2016).

209 *June Med. Servs.*, 140 S. Ct. at 2112–13.

210 *See id.* at 2133.

211 *Id.* at 2134.

212 Winkler, *supra* note 206, at 37.

III. CONGRESS SHOULD ACT TO PROTECT MINORS FROM STRINGENT ABORTION REGULATIONS

In the twenty years since presidential candidate Ralph Nader openly opined that the fate of abortion did not completely hinge on the liberal-to-conservative U.S. Supreme Court justice ratio, the issue has remained ripe for discussion among scholars in the legal community.[213] If *Roe* were to be overturned, states would then be in a position to assert total control over a woman's right to terminate her pregnancy.[214] However, scholars have speculated that, although the power to regulate abortion would revert to the states upon an overturning of *Roe*, Congress is not completely bereft of its ability to regain control and, in fact, may be able to do so under the Commerce Clause.[215]

The grant of federal legislative authority is limited to a litany of enumerated rights or "Power[s]" as laid out per Article I, Section 8 of the U.S. Constitution.[216] The Commerce Clause refers to one such power that bestows upon the federal government the authority to regulate matters affecting commercial activity among the states.[217] Where the exercise of state power is concerned, the Commerce Clause has consistently presented a challenge to the states' exertion of authority over a variety of matters "ranging from interstate shipping rates to restaurants to employment contracts."[218] Since its adoption, however, the Commerce Clause has also "become one of Congress's most significant sources of power" and the foundation for congressional authority over all economic-related activity.[219]

Commerce Clause jurisprudence has elicited a remarkably wide spectrum of constitutional interpretive theory that remains subject to an understanding of activity falling within the realm of commerce.[220] Because Congress has used the Commerce Clause to establish legislative authority over activities that, at least ostensibly, are only tenuously commercial, this plenary authority can theoretically extend to include abortion to the extent that abortions implicate economic activity on an interstate level.[221]

This Part serves as an exploration of commercial activity in the context of minors and their access to abortion, with an emphasis on the deleterious economic effects of excluding sexual assault and incest exceptions from stringent abortion regulations. A brief examination of those exceptions is followed by a discussion of Commerce Clause jurisprudence and inconsistencies therein. This Part also discusses the Comment's prescriptive claim—that under its plenary authority Congress should act to protect minors from stringent abortion regulations that make no exception for pregnancies resulting from acts of sexual violence.

A. The Argument for Exceptions

Republican-governed states that have a longstanding history of supporting

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213 *See* Goldberg, *supra* note 18, at 301.
214 *See id.*
215 *Id.* at 301–02.
216 U.S. CONST. art. I, § 8.
217 *Id.*
218 Goldberg, *supra* note 18, at 306–07.
219 *Id.*
220 *See id.* at 302–03.
221 *See id.* at 322.

anti-abortion legislation have upheld exceptions in three circumstances—when the pregnancy is the result of sexual assault, incest, or when the pregnancy places the woman's life at risk.[222] But while it may seem intuitive to include exceptions under abortion mandates where a woman would otherwise be compelled to bear and raise a child resulting from an act of sexual violence, sexual assault and incest exceptions were surprisingly not always adopted or even viewed as standard.[223] These exceptions, first carved out in a model abortion law proposed by the American Law Institute in 1959,[224] were initially denounced by abortion opponents on the grounds that unborn children resulting from sexual assault or incest were innocent despite the circumstances under which they were conceived.[225]

Emphatically adhering to unconfirmed and unfounded scientific theory, some anti-abortion activists went so far as to cast doubt on whether sexual assault victims could in fact be impregnated by their assailants in the first place.[226] One theorist emphasized that, "as a scientific matter, it was nearly impossible for women to become pregnant as a result of rape" and that women would jump at the opportunity to "simply lie about sexual assault to get an abortion when they had consented to sex all along."[227] This sentiment was largely embraced within the anti-abortion movement and re- emphasized in 1976 when Congress passed the Hyde Amendment, a law banning federal funding of abortions except in cases of sexual assault and incest.[228] Anti-abortion activists argued that these exceptions should be eliminated lest a woman "cry rape" in order to receive funding for the procedure.[229]

It was not until the 1980s and 1990s that sexual assault and incest became largely accepted as valid exceptions to anti-abortion funding mandates.[230] When Republicans were pushing for a constitutional amendment that would effectively deny women their right to the procedure, abortion-rights advocates were quick to remind the American people that doing so would permit states to enforce regulations that would force victims of sexual assault and incest to bear their assailants' children.[231] Then, in 1990, the National Right to Life Committee, one of the nation's most prevalent anti-abortion groups, proposed a law that would ban most abortions while including exceptions for sexual assault and incest.[232] Yet, despite the progress made toward a general acceptance and appreciation for the necessity of these exceptions, the number of state legislatures that voiced their opposition to the inclusion of these exceptions in 2019 alone demonstrate their widely contentious reception.[233]

It should come as no surprise that forcing sexual assault and incest survivors to

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222 *See* Sarah McCammon, *Anti-Abortion-Rights Groups Push GOP to Rethink Rape and Incest Exceptions*, NPR (May 22, 2019, 2:50 PM), https://www.npr.org/2019/05/22/725634053/anti-abortion-rights-groups-push-gop-to-rethink-rape-and-incest-exceptions.

223 Ziegler, *supra* note 24.

224 *Id.*

225 *Id.*

226 *See id.*

227 *Id.* This theory was adopted in an influential article written by a lawyer named Eugene Quay. *Id.*

228 *See id.*

229 *Id.*

230 *Id.*

231 *Id.*

232 *Id.*

233 Alabama, Louisiana, Mississippi, Missouri, and Ohio passed abortion legislation in 2019 that excluded exceptions for rape and incest. *See* Tara Law, *Here Are the Details of the Abortion Legislation in Alabama, Georgia, Louisiana and Elsewhere*, TIME (July 2, 2019, 5:21 PM), https://time.com/5591166/state-abortion-laws-explained/.

bear the children of their assailants can lead to numerous undesirable consequences. "[Sexual assault] can cause bodily trauma, sexually transmitted diseases, and other physical injuries inflicted during the assault," as well as "[n]umerous psychological effects . . . [such as] anxiety, depression, suicidal tendencies, and phobias."[234] A resulting pregnancy then has the potential to "increase both the mental and physical trauma experienced by the victim when she undergoes further physical and psychological changes during her pregnancy."[235] Moreover, should the victim be compelled to carry the pregnancy to term, she is then confronted by the added pressure of choosing whether to maintain contact with the assailant as a result of shared parental rights—a troubling prospect that may heighten or "prolong the [negative] psychological effects of her situation."[236]

Severe psychological trauma aside, forcing victims of sexual violence to bear their assailants' children implicates practical concerns as well, especially where the victim is not in a position to financially care for the resultant child.[237] Emphasizing the "grave and indelible" consequences of forcing minors—some of whom have yet to complete high school—to have children, the Supreme Court decided to extend judicial bypass to minors in *Bellotti*. The decision hinged on a number of factors that included a minor's limited "education, employment skills, financial resources, and emotional maturity."[238] Recognition of these factors thus remains integral to a comprehensive discussion of abortion that covers sexual assault and incest exceptions, especially where the state's asserted claim under its *parens patriae* interest purports to uphold a duty to protect the best interests of its youth. If the state's interest as articulated in cases such as *Prince* and *Meyer* is truly concomitant with its goal of safeguarding children "from abuses" such that they can be given the opportunity to grow into healthy and productive individuals, then that interest should extend to include minors who are financially, emotionally, and legally burdened by the responsibility of bearing children born out of wanton acts of sexual violence.[239] Deliberate ignorance of these exceptions thus amounts to an irreconcilable impasse that puts states at odds with their *parens patriae* obligation to foster the well-being of their most vulnerable citizens.

B. Commerce Clause Jurisprudence and its Inconsistencies

The Supreme Court's interpretation of the breadth of authority granted by the Commerce Clause has considerably waxed and waned over time.[240] It is precisely the

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234 Margot E.H. Stevens, Note, *Rape-Related Pregnancies: The Need to Create Stronger Protections for the Victim-Mother and Child*, 65 HASTINGS L.J. 865, 874 (2014).

235 *Id.*

236 *Id.*

237 *See* Schmidt, *supra* note 17, at 600:

> Available data suggest that early motherhood, especially if unchosen, is potentially devastating to a teenager's short-term prospects for the future. Only half of all women who bear their first child at age seventeen or younger will have finished high school by the time they are thirty, and only one in fifty will finish college. Teenage mothers are also more likely to rely on welfare than mothers in their twenties. Indeed, sixty-seven percent of teenage mothers live in poverty. They are more likely than their childless peers to hold low-prestige jobs that offer lower income, lower job satisfaction, and less opportunity for advancement.

238 Bellotti v. Baird, 443 U.S. 622, 642 (1979).

239 *See* Prince v. Massachusetts, 321 U.S. 158, 165 (1944).

240 John W. Moorman, Note, *Conflicting Commerce Clauses: How* Raich *and* American Trucking *Dishonor Their Doctrines*, 15 WM. & MARY BILL RTS. J. 687, 688 (2006).

variations and inconsistencies within the Court's interpretations that have sparked confusion over the extent to which Congress can act to regulate activity that enters the realm of interstate commerce.[241] A fairly narrow interpretation of the clause prevailed between the late eighteenth century and early twentieth century.[242] *Gibbons v. Ogden*, decided in 1824, was the first seminal case to consider the type of commerce covered by the clause and, incidentally, the extent to which congressional authority was limited by that interpretation.[243] In *Gibbons*, the Court was tasked with determining whether congressional authority to regulate interstate steamboat navigation fell within the scope of the Commerce Clause such that a New York statute granting exclusive control over the transportation of passengers in a particular area of the Hudson River was deemed unconstitutional.[244] The Court invalidated the New York statute, holding that "the federal legislation was a legitimate use of [Congressional power pursuant to] the Commerce Clause" and that the transportation of passengers— as opposed to solely goods—fell within the scope of activity deemed sufficiently commercial in nature.[245]

In the years following its decision in *Gibbons*, the Court upheld a definition of interstate commerce that was, for the most part, narrowly confined to matters affecting transportation between the states, thus removing other activities that impacted the economy—such as the production of goods, labor, and employment—from Congress's regulatory influence.[246] This changed in 1937 when the Court decided the case *NLRB v. Jones & Laughlin Steel Corp*.[247] In *Jones & Laughlin*, the Court determined that the National Labor Relations Act (NLRA) of 1935—which created the National Labor Relations Board (NRLB) and gave employees across the nation the power to unionize and engage in collective bargaining practices[248]—was a valid exercise of congressional authority under the Commerce Clause.[249] Because the Act's "findings" section delineated the ways in which local unfair labor practices adversely impacted the national economy, the Court's holding acknowledged that activities that appeared "intrastate in character" fell within congressional reach "if they ha[d] such a close and substantial relation to interstate commerce that their control [was] essential or appropriate to protect that commerce from burdens and obstructions."[250] This decision marked a tectonic shift in the understanding of congressional authority under the Commerce Clause and expanded Congress's regulatory power to encompass a range of activities—both intrastate and interstate—if any one of those activities sufficiently implicated the economy in some tenable way.[251]

Two cases following *Jones & Laughlin* served to solidify this expansive interpretation of congressional Commerce Clause authority: *United States v. Darby*, decided in 1941, and *Wickard v. Filburn*, decided a year later, in 1942.[252] In *Darby*, the Court held that "[t]he power of Congress over interstate commerce is not confined

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241 *See* Goldberg, *supra* note 18, at 302.
242 *See id.* at 308.
243 *See* Moorman, *supra* note 240, at 689.
244 Gibbons v. Ogden, 22 U.S. 1, 240 (1824).
245 Goldberg, *supra* note 18, at 308–09; Moorman, *supra* note 240, at 689.
246 Goldberg, *supra* note 18, at 309; Moorman, *supra* note 240, at 689.
247 Goldberg, *supra* note 18, at 309.
248 NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 24 (1937). The Act granted the NLRB with the power to "prevent any person from engaging in any unfair labor practices . . . affecting commerce." *Id.* at 30.
249 *Id.*
250 *Id.* at 37; Goldberg, *supra* note 18, at 310.
251 *See* Goldberg, *supra* note 18, at 310.
252 *See* Moorman, *supra* note 240, at 690; Goldberg, *supra* note 18, at 310.

to the regulation of commerce among the states" and that "[i]t extends to those activities intrastate which so affect interstate commerce . . . as to make [their] regulation . . . appropriate means to the attainment of a legitimate end."[253]

This holding was echoed a year later in *Wickard* when the Court concluded that Congress's regulation of intrastate activity was a valid exercise of its Commerce Clause authority where the aggregate effect of any local activity implicated the economy on a national level.[254] In *Wickard*, a farmer challenged the Agricultural Adjustment Act of 1938 after he was fined for growing wheat "in excess of [the amount permitted per] the marketing quota established for his farm."[255] The Act purported to "control the volume [of wheat] moving in interstate and foreign commerce in order to avoid surpluses and shortages and the consequent abnormally low or high wheat prices and obstructions to commerce."[256] The farmer contested the Act on the grounds that his wheat production was "local in character" such that its effect upon interstate commerce was "at most 'indirect'" and thus "beyond the reach of Congressional power under the Commerce Clause."[257] The Court rejected this argument, predicating its holding on the principle that the farmer's excess wheat production while "trivial by itself [was] not enough to remove him from the scope of federal regulation where . . . his contribution, taken together with that of many others similarly situated, [was] far from trivial."[258]

For over fifty years following *Wickard*, it seemed as though Congress had been given plenary authority to implement and enforce legislation so long as its connection to interstate commerce was justifiable on nominally rational grounds.[259] That not a single federal statute was struck down between 1937 and 1995 as exceeding its grant of authority under its Commerce Clause power stands as proof of Congress's near total control to regulate interstate and intrastate commerce during this time.[260] It was also during this period that the federal government purported to act pursuant to its constitutionally sanctioned authority for the purpose of regulating against social harms, such as racial discrimination, and environmental harms, such as the depletion of natural resources.[261] The Civil Rights Act, the Endangered Species Act, and the Clean Water Act are examples of how Congress, under an expansive interpretation of its constitutional power to regulate commerce, succeeded in passing legislation intended to adequately address national problems otherwise ineffectually solved at the local or state level.[262]

When the Court vindicated Congress's enforcement of the Civil Rights Act of 1964 in *Heart of Atlanta Motel v. United States*, it did so on the grounds that interstate commerce was implicated where "racial discrimination had the effect of

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253 United States v. Darby, 312 U.S. 100, 118 (1941). The Court here was again tasked with determining whether federal legislation—this time the Fair Labor Standards Act (FLSA) of 1938—fell within Congress's power to control interstate commerce. The FLSA mandated the exclusion from interstate commerce of goods produced "under conditions detrimental to the maintenance of the minimum standards of living necessary for health and general well-being" to prevent the "spreading and perpetuating [of] such substandard labor conditions among the workers of several states." *Id.* at 109–10. Darby, a lumber manufacturer, was charged with violating the labor practices set forth in FLSA after shipping lumber out of state. *Id.* at 111.

254 Moorman, *supra* note 240, at 690.

255 Wickard v. Filburn, 317 U.S. 111, 113 (1942).

256 *Id.* at 115.

257 *Id.* at 119.

258 *Id.* at 127–28.

259 *See* Goldberg, *supra* note 18, at 303.

260 *See id.*

261 *Id.* at 312.

262 *Id.*

discouraging [interstate] travel" within the African American community.[263] In a unanimous decision written by Justice Clark, the Court outlined the extent to which Congress was permitted to regulate interstate activity where racial discrimination was implicated:

> [T]he power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce. One need only examine the evidence which we have discussed above to see that Congress may—as it has—prohibit racial discrimination by motels serving travelers, however 'local' their operations may appear.[264]

Throughout the latter half of the twentieth century, Congress's freedom to regulate in accordance with a broad interpretation of its Commerce Clause power seemed virtually limitless.[265] This freedom, however, came to a halt in 1995 when the Court's decisions in *United States v. Lopez* prescribed a narrower application of Congressional Commerce Clause authority, thus curtailing the expansive legislative liberty Congress had previously enjoyed.[266] In *Lopez*, the Court addressed the validity of the Guns-Free School Zone Act of 1990, a criminal statute in which Congress made it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone."[267] Because the Act did not "regulate[] a commercial activity []or contain[] a requirement that the possession be connected in any way to interstate commerce," the Court held that enforcement of the Act fell outside the scope of authority granted to Congress under the Commerce Clause.[268]

The Court's discussion of the statute's attenuated link to economic activity signified a return to an interpretation of Commerce Clause jurisprudence consistent with cases predating *Jones & Loughlin*.[269] *Lopez* thus identified and established a new framework to be applied when evaluating federal legislation that purported to serve as an extension of congressional Commerce Clause authority[270]:

> Congress may regulate the use of the channels of interstate commerce . . . Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only
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> from intrastate activities . . . Congress' commerce authority includes the power to regulate those activities having a substantial relation to

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263 *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 253 (1964). The appellant was an owner of an Atlanta motel who contested Title II of the Civil Rights Act of 1964 as exceeding the scope of congressional authority pursuant to the Commerce Clause. *Id.* at 242–44. Title II provided that "[a]ll persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation . . . without discrimination or segregation on the ground of race, color, religion, or national origin." *Id.* at 247. The Act went on to list classes of business establishments that purported to serve the public within the meaning of Title II, which included "any inn, hotel, motel, or other establishment which provides lodging to transient guests." *Id.*

264 *Id.* at 258.

265 *See* Goldberg, *supra* note 18, at 302.

266 *See id.*

267 United States v. Lopez, 514 U.S. 549, 551 (1995) (quoting 18 U.S.C. § 922(q)(1)(A)).

268 *Id.*

269 *See id.* at 567.

270 Goldberg, *supra* note 18, at 313.

interstate commerce.[271]

The Court further determined that in order for an activity to fall within the scope of Congress's power to regulate it under the Commerce Clause, it is insufficient for the activity to merely "affect" interstate commerce.[272] Rather, for an activity to fall within Congress's regulatory reach, the proper test is "whether the regulated activity 'substantially affect[s]' interstate commerce."[273]

The Court's decision five years later in *United States v. Morrison* cemented the narrow interpretation of the Commerce Clause that was cemented in *Lopez*.[274] In *Morrison*, a victim of sexual assault filed a civil suit against her assailants alleging that the attack violated the Violence Against Women Act (VAWA), which provided a federal civil remedy for the victims of gender-motivated violence.[275] The district court dismissed the suit on the grounds that neither the Commerce Clause nor the Fourteenth Amendment granted Congress the authority to enact and enforce the statute.[276] The Court affirmed the lower courts' decision to grant the appellee's motion to dismiss on the grounds articulated in *Lopez*—that an "interpretation of the Commerce Clause has changed as [the] Nation has developed" and "that even under [a] modern, expansive interpretation of the Commerce Clause, Congress's regulatory authority is not without effective bounds."[277] Applying the three-part framework established in *Lopez*, the Court maintained that "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity" and that "Commerce Clause regulation of intrastate activity [should be upheld] only where that activity is economic in nature."[278]

In defense of the contested section of VAWA, Congress argued that gender-motivated violence affected interstate commerce "by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved in interstate commerce . . . by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products."[279] The Court dismissed this argument on the grounds that its reasoning was "unworkable" where the only relevant question was whether Congress's agenda under VAWA was demonstrative of activity that impacted interstate commerce in a substantial way.[280]

Joined by Justices Ginsburg, Stevens, and Breyer, Justice Souter's dissent called into question the majority's rejection of a jurisprudential tradition in which Congress held the reins to control matters that, at least from a purely textual view, fell outside the scope of its enumerated power to regulate economic activity among the states.[281] Under the old theory of federal Commerce Clause jurisprudence, congressional power to legislate would have extended to gender-based violence where it implicated interstate commerce by precluding "its most likely target—women—from

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271 *Lopez*, 514 U.S. at 558–59; Goldberg, *supra* note 18, at 313.
272 *Id.* at 559.
273 *Id.* at 559 (emphasis added).
274 United States v. Morrison, 529 U.S. 598, 608–09 (2000).
275 *Id.* at 601–02, 604–05.
276 *See id.* at 604.
277 *Id.* at 602, 607–08.
278 *Id.* at 613.
279 *Id.* at 615 (alteration in original) (quoting H.R. Conf. Rep. No. 103-711, at 385 (1994)).
280 *Id.* at 615. Here, the Court opined that "[t]he Constitution requires a distinction between what is truly national and what is truly local." *Id.* at 617–18.
281 *See id.* at 637 (Souter, J., dissenting).

full partic[ipation] in the national economy."[282] In fact, the dissenting opinion wholly acknowledged that VAWA "would have passed muster at any time between *Wickard* in 1942 and *Lopez* in 1995, a period in which the law enjoyed a stable understanding that congressional power under the Commerce Clause . . . extended to all activity that, when aggregated, has a substantial effect on interstate commerce."[283]

Justice Souter drew on an analogy to the Agricultural Adjustment Act that was challenged in *Wickard* in order to illustrate the dissenters' contention that "[t]his new characterization of substantial effects" was lacking in precedential support and that an interpretation of federal Commerce Clause authority that upheld VAWA as valid was warranted under the Court's previous standard[284]:

> In *Wickard*, we upheld the application of the Agricultural Adjustment Act to the planting and consumption of homegrown wheat. The effect on interstate commerce in that case followed from the possibility that wheat grown at home for personal consumption could either be drawn into the market by rising prices, or relieve its grower of any need to purchase wheat in the market. The Commerce Clause predicate was simply the effect of the production of wheat for home consumption on supply and demand in interstate commerce. Supply and demand for goods in interstate commerce will also be affected by the deaths of 2,000 to 4,000 women annually at the hands of domestic abusers, and by the reduction in the work force by the 100,000 or more rape victims who lose their jobs each year or are forced to quit. Violence against women may be found to affect interstate commerce and affect it substantially.[285]

By illustrating a vacillating history of the Commerce Clause's jurisprudential interpretation, Justice Souter underscored the fragility of the Court's stance on governmental plenary authority to regulate interstate commerce[286]—a fragility exemplified five years later in the 2005 case *Gonzales v. Raich*.[287] The Court's holding in *Raich* represented a departure from the *Morrison*/*Lopez* era interpretation of interstate commerce and a return to an earlier understanding of economic activity as defined in *Wickard* and its progeny.[288] In *Raich*, the Court held that even if an activity is purely local it may still "be reached by Congress if it exerts a substantial economic effect on interstate commerce."[289] Furthermore, Congress was essentially given the authority to regulate any activity where a rational basis existed for believing that such activity had a substantial effect on interstate commerce.[290]

Courts have struggled to definitively determine whether an abortion procedure itself falls into a class of activity that is categorically commercial.[291] While paying a

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[282] *Id.* at 636 (alteration in original) (quoting S. Rep. No. 103–138, 54 (1993)).

[283] *Id.* at 637 (emphasis added).

[284] *Id.* at 638.

[285] *Id.* at 636 (citations omitted). The dissent also compared VAWA to the Civil Rights Act of 1964, which was challenged in *Heart of Atlanta Motel*: "[G]ender-based violence in the 1990s was shown to operate in a manner similar to racial discrimination in the 1960s in reducing the mobility of employees and their production and consumption of goods shipped in interstate commerce." *Id.* at 635–36.

[286] *See id.* at 637.

[287] *See* Gonzales v. Raich, 545 U.S. 1, 9 (2005).

[288] *See id.* at 17. Facing federal charges for cultivating and using marijuana in violation of the Controlled Substance Act (CSA), Respondents argued that such use was permissible under California state law and that enforcement of CSA exceeded congressional Commerce Clause authority. *Id.* at 7–8.

[289] *Id.* at 17 (quoting Wickard v. Filburn, 317 U.S. 111, 125 (1942)).

[290] *Id.* at 22.

[291] Goldberg, *supra* note 18, at 328.

physician to administer the procedure comes at a cost, whether this alone can suffice to qualify the procedure as one that is economic is yet to be determined.[292] Because the Court's previous understanding of the Commerce Clause extended to include all activity with an aggregated substantial effect on interstate commerce, VAWA would have conceivably passed muster under a different Supreme Court configuration for reasons noted in *Morrison*'s dissenting opinion: that the deaths of thousands of women "at the hands of domestic abusers" would affect the "[s]upply and demand for goods in interstate commerce," and that rape victims unable to work would generate a surge in unemployment.[293] For similar reasons, the aggregated consequence of ignoring the needs of impregnated victims of sexual violence and incest who are likely to forego opportunities to become financially solvent and contribute to a robust economy has the potential to overwhelmingly impact interstate commerce, a prospect that on its own would have warranted congressional action during the pre-*Lopez*/*Morrison* era of Commerce Clause jurisprudence.[294]

C. A Solution: Congress Should Use its Power Under the Commerce Clause to Address States' Failure to Reconcile Their Parens Patriae Duty with Stringent Abortion Regulations

Congressional action that would compel states to include sexual assault and incest exceptions in their abortion regulatory schemes is plausible under the theory that Congress is positioned to formulate legislation enforceable under the Commerce Clause. By emphasizing the aggregate effect on interstate economic activity inherent in the rearing of unwanted children,[295] as well as the adverse effects on foster care and family support,[296] Congress is able to impose regulatory measures that would further an interest in controlling activities that substantially impact the economy. At what point, then, does society decide that adolescent parenting becomes an economically burdensome activity?

Because minors are least likely to be emotionally and financially prepared to raise children, forcing them to endure motherhood when they are incapable of supporting themselves presents a particularly oppressive situation that will eventually develop into a financial impediment for society.[297] "Restricting access to abortion makes it more difficult for minors to complete their education and become economically self-sufficient . . . [which] constrains young women's ability to determine their life's course . . . ."[298] Eliminating a minor's ability to access abortion thus obstructs the state's goal of ensuring that minors—presumably including those that are pregnant—are given the opportunity to successfully acquire the skills necessary to join the workforce upon reaching adulthood.[299] This, in turn, hinders their ability to participate as productive members of society that are prepared to contribute to a

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292 *Id.* at 328.

293 United States v. Morrison, 529 U.S. 598, 636–37 (2000).

294 *See* Schmidt, *supra* note 17, at 600.

295 *See id.* at 624.

296 According to an annual report from the Adoption and Foster Care Analysis and Reporting System (AFCARS), there were approximately 424,000 children in foster care nationwide as of September 2019. ADMIN. FOR CHILDREN & FAMIILIES, ADMIN. ON CHILDREN, YOUTH AND FAMILIES, CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., THE AFCARS REPORT 1 (2020), https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport27.pdf [hereinafter THE AFCARS REPORT].

297 Schmidt, *supra* note 17, at 624.

298 *Id.*

299 *See id.*

growing and successful economy.[300]

Furthermore, prohibiting safe and easy access to abortions takes a toll on taxpayers in a significant way. There are approximately 424,000 children that are currently in foster care nationwide.[301] A study from 2014 revealed that "more than [nine billion] federal and state dollars are spent on caring for foster children through the Social Security Act each year," with additional costs allocated toward "medical care, food stamps, cash welfare, and child care payments."[302] Studies have also revealed that foster youth face a higher probability of financially burdening their communities throughout their adult lives.[303] At some point during their lifetime, a third of former foster care children will wind up incarcerated.[304] "By age 17, over half of foster care youth [will] have experienced an arrest, conviction, or overnight stay in a correctional facility."[305] Additionally, "[s]tudies have found that on average taxpayers spend more than $300,000 on public assistance and incarceration costs over the lifetime of each individual that ages out of the foster care system."[306]

Foster care youth also face an elevated risk of homelessness.[307] "Nationally, 50% of the homeless population have spent time in foster care," while "20% of foster children will become instantly homeless" after reaching the age of eighteen.[308] While only 1–3% of foster care youth will graduate from college, 25% of foster care youth "who age out of the system will not graduate from high school or be able to pass their GED."[309] Moreover, "[y]oung women in foster care are more than twice as likely to become pregnant as [an adolescent or] teen[ager] than their non-system involved peers," and "half of children born to mothers in foster care will also enter into the child welfare system by their second birthday," thus perpetuating the cycle of teenage pregnancy within the foster care system.[310]

These studies indicate that the short-term and long-term economic implications of barring minors from safe and easy access to abortion procedures are staggering. Still, there is room for Commerce Clause interpretation that would favor congressional authority to alleviate the ramifications of teenage pregnancies and adolescent parenting, depending on the lens through which that authority is assessed.[311] If a court applies the standard established in *Lopez* and *Morrison*, any attempt by Congress to govern the manner in which states regulate activity that is not purely economic, or activity that is too attenuated to squarely fit within the limits of the Court's pre-*Wickard* definition of commercial, would be challenged as congressional overreach of authority and ultimately struck down.[312]

If, however, a court applies the *Wickard* (or, more recently, *Raich*) standard,

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300 *See id.*

301 THE AFCARS REPORT, *supra* note 296, at 1.

302 Elizabeth Eowyn Steffel, *Foster Care Affects You, Your Money & Your Wallet*, FOSTER FOCUS, https://www.fosterfocusmag.com/articles/foster-care-affects-you-your-money-your-wallet (last visited Aug. 28, 2021).

303 *Id.*

304 *Id.* A third of this third will be involved in the criminal justice system, though not necessarily incarcerated. *Id.*

305 W. R. Cummings, *The Foster-Care-to-Prison Pipeline*, PSYCHCENTRAL (Apr. 27, 2019), https://www.psychcentral.com/blog/foster-care/2019/04/the-foster-care-to-prison-pipeline#1.

306 Steffel, *supra* note 302.

307 Cummings, *supra* note 305.

308 *Id.*

309 *Id.*

310 Sara Tiano, *Study: Half of Kids Born to Teen Moms in Foster Care Will Wind up in Foster Care Themselves*, IMPRINT (June 25, 2018, 5:00 AM), https://imprintnews.org/research-news/study-parenting-foster-youth/31352.

311 Goldberg, *supra* note 18, at 328.

312 *Id.* at 310, 315, 329.

congressional authority to take legislative action would hinge on whether Congress can rationally conclude that the regulated activity substantially affects interstate commerce and, to some degree, whether the activity itself is decidedly economic in nature.[313] Given the figures and statistics mentioned above, it is difficult to ignore the social and financial consequences of society's shouldered responsibility of caring for children born to minors, especially where those children are the product of sexual violence. Under cases like *Wickard* and *Heart of Atlanta Motel*, the direct and indelible economic repercussions of teenage pregnancies resulting from sexual violence present an opportunity for Congress to argue in favor of mandating states to include assault and incest exceptions as part of their abortion regulatory schemes.

D. Potential Pitfalls and Implications

If Congress were to enact federal legislation mandating the inclusion of sexual assault and incest exceptions for minors in state abortion regulations, doing so would naturally raise questions as to whether such legislation would pass as a valid exercise of federal Commerce Clause authority or be struck down as an encroachment on state sovereignty.[314] State legislatures largely comprised of pro-life advocates have already demonstrated an unbending tenacity in their efforts to overturn *Roe*.[315] An unwillingness to yield to what could potentially be deemed as congressional overreach under recent Commerce Clause jurisprudence will likely play out in the courts.[316] Because statutes regulating abortion procedures intersect areas of the law that have traditionally been regulated by the states,[317] pro-life lawmakers would challenge the proposed federal legislation by claiming that abortions fall within the realm of activities that are beyond the reach of the Commerce Clause.[318]

However, an alternative argument has its own merits, most of which rest on the weight afforded to Congress to regulate areas of the law traditionally understood to be within the states' control.[319] Although *Morrison* and *Lopez* ostensibly maintained the importance of precluding congressional encroachment on state sovereignty, whether a federal statute may intrude into an area of law traditionally governed by the state is not as clearly addressed or as critical under *Raich*.[320] Therefore, the question of how far "Congress may go in regulating these types of traditionally state-governed areas" of law, such as family law or health care, has yet to be answered.[321]

Beyond the potential legal pitfalls of a federal statute enforcing the inclusion of sexual violence exceptions for minors, Justice Blackmun's opinion in *Roe* outlining the ramifications of forced motherhood provides insight as to what relief might look like for the impregnated teenage victims of sexual assault and incest, as well as society at large.[322] The imminent mental and physical harms, and "the problem of bringing a

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313 *Id.* at 327–28.
314 Goldberg, *supra* note 18, at 331.
315 *See supra* text accompanying notes 190–212.
316 *See supra* text accompanying notes 291–94.
317 Goldberg, *supra* note 18, at 347. Abortion law has traditionally fallen under family law and health-care law. *Id.* at 348.
318 *Id.*
319 *See id.* at 322.
320 *Id.*
321 *See id.*
322 *See* Roe v. Wade, 410 U.S. 113, 153 (1973).

child into a family already unable, psychologically and otherwise, to care for it," are afflictions that can be directly alleviated through recourse in the form of federally-imposed inclusion of these exceptions.[323]

Moreover, while adolescent parenting lends itself to undesirable outcomes for teenage mothers, "most policy analysts and social scientists agree that adolescent parenting" bears negative consequences for the children born to minors, as they face an increased risk of confronting health, educational, and developmental problems throughout their lifetimes.[324] These, too, are consequences that could be avoided by requiring statutory exceptions in cases of sexual violence against minors. Finally, as discussed in Part III(C), the financial repercussions resulting from a failure to address the onerous challenges faced by minors forced to carry unwanted children to full term—such as "additional tax burdens and lost productivity"—are costs that society can avert under the proposed federally-enacted mandate.[325]

CONCLUSION

For adolescent parents, the negative consequences of forced child-rearing are unquestionably injurious, and this is especially true where the minor is a victim of sexual violence. Where a minor's choice to terminate her pregnancy has been forfeited in the name of protecting a product of sexual assault or incest, states offer no relief to the victimized adolescent or to those strained by the consequences of caring for a child when physically, psychologically, and financially unprepared to do so. Now that the Supreme Court's configuration seemingly favors a conservative agenda, the possibility that anti-abortion advocates will succeed in their attempts to challenge precedent established in *Roe* represents a concrete threat to women and pro-choice proponents nationwide.

Still, recourse is available. Exercising its Commerce Clause authority, Congress can push states to include sexual assault and incest exceptions in their abortion regulatory schemes by asserting that teenage pregnancies amount to considerable costs to taxpayers and to the nation's overall economic productivity. Thus, having an opportunity to predicate federal legislation on the deleterious economic repercussions of raising a child that neither the adolescent parent nor society is ready or willing to care for, Congress should act to preclude states from excluding exceptions from their abortion laws that, if absent, would have indelible consequences for impregnated victims of sexual violence.

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323 *Id.*

324 Buss, *supra* note 19, at 789.

325 *Id.* at 789–90.