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# ABORTION TRAVEL AND THE LIMITS OF CHOICE

Lisa M. Kelly\*

## INTRODUCTION

American women have long had to travel to access abortion. In the years prior to *Roe v. Wade*, at a time when a majority of states criminalized abortion, most laws targeted the providers of abortions or abortifacient drugs, rather than the women obtaining them.<sup>1</sup> The punitive cost for women was instead lack of choice or exile: many had to leave their home jurisdictions to access services they were unable to receive locally. Women with the resources to do so travelled to Mexico, and even as far away as Japan, Sweden, and the United Kingdom, to terminate pregnancies.<sup>2</sup> Feminist networks and organizations assisted women with travel, while also working to change the restrictive laws that made these journeys necessary.<sup>3</sup>

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<sup>1</sup> *Roe v. Wade*, 401 U.S. 113 (1973); see Reva B. Siegel, *Roe's Roots: The Women's Rights Claims that Engendered Roe*, 90 B.U.L. REV. 1875, 1879 (2010) (discussing prosecutions of doctors who performed abortions in the years prior to *Roe*); see also LESLIE J. REAGAN, DANGEROUS PREGNANCIES: MOTHERS, DISABILITIES, AND ABORTION IN MODERN AMERICA 139–79 (2010) (discussing the prosecution of doctors providing abortions in California during a 1960s outbreak of German Measles and the ensuing backlash). For a discussion of the more limited prosecution of women seeking abortions, see HEATHER D. BOONSTRA, RACHEL BENSON GOLD, CORY L. RICHARDS, & LAWRENCE B. FINER, *Abortion in Women's Lives*, GUTTMACHER INSTITUTE 11 (2006), <https://www.guttmacher.org/sites/default/files/pdfs/pubs/2006/05/04/AiWL.pdf>; see also Samuel W. Buell, *Note, Criminal Abortion Revisited*, 66 N.Y.U. L. REV. 1774, 1781 (1991).

<sup>2</sup> For a discussion of pre-*Roe* travel to Mexico and the role of feminist networks in travel and legal advocacy, see Leslie J. Reagan, *Crossing the Border for Abortions: California Activists, Mexican Clinics, and the Creation of a Feminist Health Agency in the 1960s*, 26 FEMINIST STUD. 331 (2000); see also "Rush" Procedure for Going to Japan, in BEFORE ROE V. WADE: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT'S RULING 8–11 (Reva B. Siegel & Linda Greenhouse eds., 2012) (describing "Rush" procedure for traveling to Japan to obtain an abortion).

<sup>3</sup> See, e.g., Statement of Ms. Pamela Lowry, Executive Committee Member of NARAL and Director of Constitutional Defense Project, Massachusetts to Senate Committee on the Judiciary (1975), in THE ABORTION CONTROVERSY: A DOCUMENTARY HISTORY 47 (Eva R. Rubin, ed., 1994) (describing how Planned Parenthood workers in the mid-1960s assisted women with traveling abroad for abortion).

Those without this help or sufficient means to travel often had no legal alternatives. Groups such as the Abortion Counseling Service of Women's Liberation, known as the Jane Collective, worked to fill these gaps by providing safe, but clandestine, terminations.<sup>4</sup>

More recently, efforts to single out abortion for onerous regulation have again made travel both necessary and widespread in the United States. Successive waves of state and federal regulation have limited women's ability to access abortion even as *Roe* remains on the books.<sup>5</sup> Referred to by reproductive rights advocates as TRAP laws ("Targeted Regulation of Abortion Providers"), these regulations frequently require abortion providers to obtain privileges at local hospitals, outfit their clinics as ambulatory surgical centers, or pay higher licensing fees than providers of comparable medical services.<sup>6</sup> Making the abortion right subject to death by a thousand cuts, burdensome regulations render abortion care more

services: So Planned Parenthood, much against its wishes, found itself involved in referring cases for abortion out of the country and around the world. In 1968 the British changed their laws. They passed a fairly sweeping reform act. It was a very, very liberal law. The cost of going to London for an abortion was half that of Japan. For \$800 you could get on the plane and go and get legal medical care. This opened up a tremendous—a flood gate of people who felt that they could somehow manage \$800 and who came to Planned Parenthood for help and information.”)

<sup>4</sup> See LAURA KAPLAN, *THE STORY OF JANE: THE LEGENDARY UNDERGROUND FEMINIST ABORTION SERVICE* (1995); Ron Grossman, *Before Roe v. Wade, the Jane Collective Served Chicago Women*, CHI. TRIBUNE (Jan. 20, 2017, 8:53 AM), <http://www.chicagotribune.com/news/opinion/commentarycommentary/ct-roe-wade-abortion-jane-collective-flashback-perspec-0122-jm-20170119-story.html>.

<sup>5</sup> For a discussion of the tactical shifts of the anti-abortion movement, see Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694, 1704 (2008); more generally, see Reva B. Siegel, *The Rights' Reasons: Constitutional Conflict and the Spread of Woman Protective Antiabortion Argument*, 57 DUKE L.J. 1641 (2008) (analyzing the turn among anti-abortion groups away from fetal-protection tactics toward a discourse of protecting women's health and decision-making).

<sup>6</sup> For discussion of TRAP laws and their role in the antiabortion strategy to both narrow *Roe*'s holding and reduce abortion access, see Linda Greenhouse & Reva B. Siegel, *Casey and the Clinic Closings: When "Protecting Health" Obstructs Choice*, 125 YALE L.J. 1428, 1444–49 (2016); see, e.g., *Whole Women's Health v. Lakey*, 46 F. Supp. 3d 673, 681 (2014) (“If allowed to go into effect, the act's ambulatory-surgical-center requirement will further reduce the number of licensed abortion-providing facilities [in Texas] to, at most, eight.”); *Jackson Women's Health Org. v. Currier*, 760 F. 3d 448, 457–58 (5th Cir. 2014) (“Under this formulation, [the clinic] has demonstrated a substantial likelihood of proving that H.B. 1390—effectively clos[es] the one abortion clinic in the state [of Mississippi].”), *cert. denied*, 136 S. Ct. 2536 (2016); see also Manny Fernandez, *Abortion Law Pushes Texas Clinics to Close Doors*, N.Y. TIMES (Mar. 6, 2014), <http://www.nytimes.com/2014/03/07/us/citing-new-texas-rules-abortion-provider-is-shutting-last-clinics-in-2-regions.html> (“Shortly before a candle light vigil on the sidewalk outside, employees of the last abortion clinic in the Rio Grande Valley in South Texas shut the doors early Thursday evening, making legal abortion unavailable in the poorest part of the state in the wake of tough new restrictions passed last year by the Texas Legislature. . . . There were 44 facilities that performed abortions in Texas in 2011, abortion providers said. After the two closings on Thursday, there are now 24, they said. When the law is fully implemented in September, that number is expected to drop to six.”).

costly and in many instances shutter clinics altogether. States have defended these regulations by claiming that they protect women's health.<sup>7</sup> Perhaps the most notorious recent example of such a law, Texas House Bill 2 ("H.B. 2") imposed strict admitting privileges and ambulatory surgical center requirements on abortion providers. At the time the law passed, forty-one abortion clinics operated in Texas; enforcing the new requirements would have led to the closure of approximately three-quarters of those clinics, forcing women to travel ever further to access services.<sup>8</sup> The Supreme Court struck down much of H.B. 2 in the landmark case of *Whole Woman's Health v. Hellerstedt*.<sup>9</sup>

Called upon to review such laws, appellate courts and advocates have offered competing visions of abortion travel—its causes, meaning, and legal and political significance—in deciding the constitutional fate of contemporary abortion regulations. In particular, they have divided over the question of how travel should figure into the "undue burden" analysis established in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>10</sup> *Casey* allows states to regulate abortion throughout pregnancy provided they do not impose an "undue burden" on a woman's ability to choose to terminate.<sup>11</sup> Under this framework, a law will not withstand constitutional scrutiny where its "purpose or effect is to place a substantial

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<sup>7</sup> The prominent anti-abortion law reform group Americans United for Life has led draft legislation efforts in this area as part of its "women-protection project." See Americans United for Life, "Women's Protection Project," <http://www.aul.org/womens-protection-project/>. However, state officials have also made public announcements in which they have celebrated these regulations as having expressly anti-abortion aims. See Karen McVeigh, *Rick Perry Signs Wide-ranging Texas Bill to Limit Access to Abortion*, *GUARDIAN* (July 18, 2013), <https://www.theguardian.com/world/2013/jul/18/rick-perry-texas-abortion-bill> (When signing Texas House Bill 2 into law, Governor Rick Perry said, "it is a very happy, celebratory day. This is an important day for those who support life and for those who support the health of Texas women. In signing House Bill 2, we celebrate and further cement the foundation on which the culture of life in Texas is built.").

<sup>8</sup> After Texas introduced its admitting-privileges requirement, the number of abortion facilities dropped by half and the number of reproductive age women living more than fifty miles from a clinic doubled. *Whole Woman's Health v. Lakey*, 46 F. Supp. 3d 673, 681–82 (W.D. Tex. 2014); see Caitlin Gerds et al., *Impact of Clinic Closures on Women Obtaining Abortion Services After Implementation of a Restrictive Law in Texas*, 106 AM. J. PUB. HEALTH 857, 860–61 (2016) (The Texas Evaluation Project found that twenty-five percent of women whose nearest clinic closed with the introduction of these requirements lived more than 139 miles from a facility and ten percent lived more than 256 miles away.).

<sup>9</sup> *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016); see Act of July 18, 2013, 2013 Tex. Sess. Law Serv. 4795–4802 (West) (codified at TEX. HEALTH & SAFETY CODE ANN. §§ 171.0031, 171.041–048, 171.061–064, 245.010–011 (West 2015)); TEX. OCC. CODE ANN. §§ 164.052, 164.055 (West 2015)).

<sup>10</sup> *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

<sup>11</sup> *Id.* at 878. After viability, the balance shifts markedly in favor of the state interest in protecting fetal life. *Casey* reaffirmed that post-viability the state can regulate to the point of prohibition so long as it provides for an exception to preserve the life or health of the woman.

obstacle in the path of a woman seeking an abortion” before fetal viability.<sup>12</sup>

Against this backdrop, how should reviewing courts assess regulations that reduce abortion services and thereby force women to travel ever longer distances to access care?<sup>13</sup> This question deeply divides American abortion jurisprudence today. The United States Court of Appeals for the Fifth Circuit, for example, has given inconsistent guidance, treating abortion travel as an incidental private burden of choice in one case, and as impermissible state outsourcing of constitutional obligations onto neighboring states in another.<sup>14</sup> Still other courts and parties have attempted to draw arbitrary geographic lines—for example, 150 miles from a woman’s home, as obliquely referenced by the Supreme Court in *Planned Parenthood v. Casey*—below which travel would not constitute an “undue burden” on the abortion right.<sup>15</sup>

Most recently, in *Whole Woman’s Health*, the Supreme Court found that travel burdens flowing from clinic closures contributed to an undue burden, but only when taken into account with other factors. Justice Breyer, writing for the majority, described women traveling long distances to access crammed facilities—a vision of industrial service, rather than individualized care.<sup>16</sup> Even here, however, the Court held that increased travel alone would not always constitute an “undue burden.”<sup>17</sup>

Why does travel remain such a vexing issue for the constitutional law of abortion? I argue in this paper that contests over abortion travel raise

<sup>12</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 925 (1992) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part). For leading accounts of the meaning of the *Casey* framework and its application to contemporary challenges to abortion laws, see Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 *YALE L. J.* 1694 (2008); Greenhouse & Siegel, *supra* note 6.

<sup>13</sup> For a discussion of the ways in which restrictive abortion policies exclude and stigmatize women, see Joanna Erdman, *The Law of Stigma, Travel and the Abortion-Free Island*, 33 *COLUM. J. GEN. & L.* 29 (2016). On the stigmatizing effects of criminal abortion restrictions, see Rebecca J. Cook, *Stigmatized Meanings of Criminal Abortion Law*, in *ABORTION LAW IN TRANSNATIONAL PERSPECTIVE: CASES AND CONTROVERSIES* 347 (Rebecca J. Cook, Joanna N. Erdman, & Bernard M. Dickens eds. 2014). For a discussion of the meaning and significance of “abortion secrecy,” see CAROL SANGER, *ABOUT ABORTION: TERMINATING PREGNANCY IN TWENTY-FIRST-CENTURY AMERICA* 46–69 (2017).

<sup>14</sup> *Jackson Women’s Health Org. v. Currier*, 760 F. 3d 448, 457–58 (5th Cir. 2014); *Lakey*, 46 F. Supp. 3d at 681–82; *see also* *Planned Parenthood of Wisconsin, Inc. v. Schimel*, 806 F.3d 908 (2015).

<sup>15</sup> *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Planned Parenthood of Greater Tex. Surg. Health Servs. v. Abbott*, 748 F.3d 583, 598 (5th Cir. 2014).

<sup>16</sup> *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2313 (2016) (“More fundamentally, in the face of no threat to women’s health, Texas seeks to force women to travel long distances to get abortions in crammed-to-capacity super facilities. Patients seeking these services are less likely to get the kind of individualized attention, serious conversation, and emotional support that doctors at less taxed facilities may have offered. Healthcare facilities and medical professionals are not fungible commodities.”).

<sup>17</sup> *Id.* (“We recognize that increased driving distances do not always constitute an ‘undue burden.’”).

profound distributive questions about class, race, age, citizenship, sex, and the terms of reproduction in America.<sup>18</sup> From the pre-*Roe* era through the present, travel remains a key means by which class and geography define abortion access in the United States. Women's ability to travel in circumstances where abortion services are limited—to "chas[e] abortion rights across . . . state line[s]," as Linda Greenhouse recently described it—functions as a safety valve.<sup>19</sup> It offers choice to those who can afford to travel, while preserving restrictions on those who cannot. At the same time, through the act of exile, women and families become "reproductive refugees," in the words of Melissa Murray, Glen Cohen, and Jessie Hill, for whom travel embodies a punitive logic of exclusion.<sup>20</sup> For those women and girls unable to undertake abortion journeys, travel functions not as an act of banishment, but as a hard barrier to access.

These questions of punishment and political economy are critical to understanding the contested legal status of abortion travel in the United States today. My aim is not to elaborate a unified vision of abortion travel. Neither its disparate judicial treatment, nor its myriad meanings and consequences in practice, would permit doing so. Instead, I seek to disaggregate travel as a factor in law and politics, and show how mobility performs distinct work with varied outcomes for different actors within the system.

Part I analyzes the burden and choice discourse that courts and parties have relied upon to both challenge and defend regulations that would require women to travel to access abortion services. I show how courts have struggled to decide political questions of resource distribution—financial, legal, and logistical—through competing ideas of public versus private responsibility. Part II analyzes abortion travel as a site of horizontal struggle between states over the meaning of mobility and federalism. In response to constitutional challenges, states such as Mississippi and Texas have argued that abortion regulations do not constitute an "undue burden" because women can simply travel to neighboring states. I show that beyond the question of individual burdens, interstate abortion travel tests the meaning of state obligations in a federal union. Together, Parts I and II

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<sup>18</sup> In theorizing the unique and enduring role of abortion in American political and cultural life, Carol Sanger has argued: "so many things are about abortion because abortion itself is about so many things." The subject of abortion is, in Sanger's words, "an opaque slate" upon which citizens inscribe concerns not just about fetal personhood but about adolescent rights, state power, women's equality, religious morality, and sexual norms. See Carol Sanger, *Talking About Abortion*, 25 SOC. & LEG. STUD. 651, 653 (2016).

<sup>19</sup> See Linda Greenhouse, *Chasing Abortion Rights Across the State Line*, N.Y. TIMES (Nov. 24, 2016), <https://www.nytimes.com/2016/11/24/opinion/chasing-abortion-rights-across-the-state-line.html>.

<sup>20</sup> Brief for Law Professors Melissa Murray, I. Glenn Cohen, & B. Jessie Hill as Amici Curiae Supporting Petitioners, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (No. 15-274), at \*18.

demonstrate the distributive decisions at the center of abortion travel jurisprudence, both within and among states. In Part III, I argue that constitutional adjudication alone will not resolve these distributive questions. So long as courts continue to limit the abortion right in American law to preventing states from *interfering* with women's decisions, geography and social class will remain defining elements of access. To this end, reproductive justice initiatives aimed at addressing economic and geographic barriers to access are crucial. Harkening back to pre-*Roe* activism, I conclude by discussing the efforts of grassroots reproductive justice groups to once again engage abortion travel as a site of individual and collective struggle.<sup>21</sup>

### AN INDIVIDUAL BURDEN OR CHOICE?

In making the moral case for reproductive choice, abortion provider Dr. Willie Parker has emphasized the tenacity of the women who present before him. "A woman who wants to terminate her pregnancy," Dr. Parker writes, "has to make her decision in the context of a culture that shames her and, increasingly, within the constraints of laws that dramatically inconvenience her."<sup>22</sup> Mandatory waiting periods, compelled ultrasounds, and misleading informed consent scripts make the experience of obtaining an abortion distinct from comparable medical procedures.<sup>23</sup> All of this assumes, of course, that the woman can physically get herself to a provider. When Dr. Parker began providing abortion services in 2002, there were twelve clinics in his home state of Alabama. By 2017, only five remained. In neighboring Mississippi, as I discuss below, Dr. Parker works at the state's last remaining clinic. "To do abortion where the need is greatest is to be itinerant," Dr. Parker observes, "always on the road, because the

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<sup>21</sup> See, e.g., FUND TEXAS CHOICE, <http://fundtexaschoice.org/> (providing financial assistance for transportation to and from the nearest abortion clinic and assists with finding accommodation during the trip to an abortion clinic); see also PLANNED PARENTHOOD SOUTH TEXAS, <https://www.plannedparenthood.org/planned-parenthood-south-texas/patients/abortion-care-services/a-abortion-care-fund> ("New laws have also forced many doctors in cities across Texas to stop providing abortion care. This means women have to travel hundreds of miles several times to access safe, legal abortion. We also have limited special financial assistance to help with travel expenses for women who have to travel more than 100 miles to get to our health center in San Antonio. This assistance is also based on your income and family size."). For a list of state funds that provide financial assistance with abortion services, see NATIONAL NETWORK OF ABORTION FUNDS, <https://abortionfunds.org/need-abortion/>.

<sup>22</sup> WILLIE J. PARKER, *LIFE'S WORK: A MORAL ARGUMENT FOR CHOICE* 8 (2017).

<sup>23</sup> For an argument that state efforts to persuade women against terminating a pregnancy should be treated differently to laws that restrict access to the procedure, see Greenhouse & Siegel, *supra* note 6.

distances between the clinics are so great.”<sup>24</sup> For both providers and women in the South and Midwest, travel is a key part of the contemporary abortion landscape.

Reproductive rights advocates work to translate these stories of clinic closures and abortion travel into legal challenges to restrictive abortion regulations. In doing so, they face a central question. Are travel burdens merely private incidents of reproductive choice, and therefore beyond state responsibility? Or is travel the logical consequence of restrictive regulations such that it constitutes—or at the very least contributes to—an “undue burden” on women’s constitutionally protected right to decide to terminate a pregnancy? At stake in this analysis is more than the outcome of specific constitutional challenges. Narrow and formalist understandings of state action and responsibility contribute to a political economy that *privatizes* abortion burdens, leaving poor, young, rural and overwhelmingly black and brown women to the vagaries of geography and the market.<sup>25</sup> In contrast, drawing a direct line between travel and the regulations that produce abortion scarcity redistributes responsibility toward the state as part of the “undue burden” analysis. Travel cases test liberal distinctions between public and private, and state versus individual responsibility.<sup>26</sup>

Given these stakes, it is unsurprising that we see courts divided over the legal meaning and significance of abortion travel. Reproductive rights advocates and defendant states translate these distributive struggles into legal arguments that they then call upon judges to resolve. The reasoning often devolves into intensely fact-specific inquiries about mileage, gas, borders, and cost. What distance constitutes an “undue burden” under *Casey*? Should this distance analysis vary contextually according to women’s circumstances and resources? Does travel constitute a discrete factor in the “undue burden” analysis or should courts consider it only in combination with other burdens?

*Whole Woman’s Health* provides a recent, and particularly notable, example of these inquiries into whether and how courts should attribute travel burdens to state regulation or instead treat them as largely private costs. In this Part, I highlight the ways in which advocates and courts struggled with the place of individualized circumstances, as expressed

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<sup>24</sup> PARKER, *supra* note 22, at 5.

<sup>25</sup> For discussion of geography and judicial bias toward urban living, see Lisa R. Pruitt & Marta R. Vanegas, *Urbanormativity, Spatial Privilege, and Judicial Blind Spots in Abortion Law*, 30 BERKELEY J. GEN. L. & JUST. 76 (2015).

<sup>26</sup> For discussion and critiques of the public/private distinction and its ideological significance, see Frances Olsen, *Constitutional Law: Feminist Critiques of the Public/Private Distinction*, 10 CONST. COMM. 319 (1993); Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PENN. L. REV. 1349 (1982).



through travel, in the undue burden analysis. Advocates and lower courts explored various solutions to this challenge, from weighing them directly to disregarding them entirely. The decisions reveal that courts were most comfortable addressing the question obliquely, by commingling it into a more general undue burden analysis or into a facially objective standard, beginning with the question of distance.

The arguments advanced by the parties and *amicus* briefs in *Whole Woman's Health* reveal the material questions at the heart of debates over abortion travel. Basing its arguments on its experience assisting women seeking abortions since the passage of the Texas law at issue, the National Abortion Federation (“NAF”) urged the Supreme Court in its *amicus* brief to assess the burdens that clinic closures and resultant travel would impose on specific classes of women.<sup>27</sup> Since the passage of H.B. 2, the NAF Hotline was flooded with calls from Texas women desperately seeking timely abortion care. Many women had to rely on limited public transportation or friends and family to travel to their appointments; others had to pawn or sell personal items, such as furniture or wedding rings, to pay for the additional costs.<sup>28</sup> Their plight, NAF argued, should be at the center of the Court’s analysis of travel.

Still others urged the Court to consider the dignitary harms to women who are forced to leave their homes and travel long distances to access abortion care. Legal scholars Melissa Murray, Glenn Cohen, and Jessie Hill argued that Texas was actively excluding women from their own political communities by relying on travel arguments to defend its law.<sup>29</sup> When the state regulates abortion in a way that requires women to pack their bags and travel far from home, it punishes them through the process.<sup>30</sup> This is not a mere incident of private choice, according to Murray, Cohen, and Hill, but state action that actively stigmatizes women seeking abortion care. In contrast to situations where people may exercise their “own judgment and deliberation” to travel for complex or experimental treatment, abortion travel is “the product of state-imposed regulations that make routine medical care unavailable at home.”<sup>31</sup> The state creates the need for travel and, in doing so, makes the experience of accessing a very common

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<sup>27</sup> Brief for National Abortion Federation as Amicus Curiae Supporting Petitioners at 17–18, *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (No. 15-274).

<sup>28</sup> *Id.*

<sup>29</sup> Brief for Law Professors Melissa Murray, I. Glenn Cohen, & B. Jessie Hill as Amici Curiae Supporting Petitioners, *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (No. 15-274), at \*13.

<sup>30</sup> See CAROL SANGER, ABOUT ABORTION: TERMINATING PREGNANCY IN TWENTY-FIRST-CENTURY AMERICA (2017) (discussing the ways in which the onerous procedural hurdles to access abortion operate as a form of punishment).

<sup>31</sup> Brief for Law Professors Melissa Murray, I. Glenn Cohen, & B. Jessie Hill as Amici Curiae Supporting Petitioners, *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (No. 15-274), at \*13.

medical procedure both difficult and exceptional. Laws that single out abortion for onerous regulation, Murray, Cohen, and Hill argued to the Court, “announce that women seeking abortion are unworthy and unequal in the eyes of the law.”<sup>32</sup>

While these briefs provided a thick account of state responsibility for *limiting* abortion care, the anti-abortion organization Live Action presented arguments at the other end of the spectrum. It presented a classical, negative rights framework focused on individual choice and the absence of a public responsibility for individual circumstances. Equating abortion with any other elective procedure, and abortion providers with any other industry, Live Action argued in its amicus brief:

The state has no constitutional responsibility to ensure that every patient has low-cost transportation, an elimination of wait time, or short travel to every elective medical procedure. Meeting the business interests of the abortion industry is hardly the duty of the state.<sup>33</sup>

On this view, the fact that women may have to travel long distances is a *private* burden they must bear, not a *public* responsibility of the state. The brief did not acknowledge the fact that the petitioners were challenging state regulation that was producing market scarcity in the first place.

These competing visions of public responsibility and private choice animated the judicial response to travel in *Whole Woman’s Health* from the Fifth Circuit to the Supreme Court. In upholding H.B. 2, the Fifth Circuit used formalist reasoning to exclude questions of poverty and hardship from its constitutional review. “It found conditions of class or precarious employment to be irrelevant to the “undue burden” analysis because the impugned law did not itself create those conditions.”<sup>34</sup> In overturning the district court on this point, the Fifth Circuit wrote:

In reaching its conclusion that H.B. 2’s requirements imposed an undue burden on a significant number of women, the district court also found that travel distances combined with the following practical concerns to create a de facto barrier to abortion for some women: “lack of availability of child care, unreliability of transportation, unavailability of appointments at abortion facilities, unavailability of time off from work, immigration status and inability to pass border checkpoints, poverty level, the

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<sup>32</sup> *Id.* at \*15.

<sup>33</sup> Brief of Live Action as Amicus Curiae Supporting Respondents at 34, *Whole Woman’s Health v. Cole*, 790 F.3d 563 (5th Cir. 2015), (No. 15-274) 2016 WL 537541.

<sup>34</sup> *Whole Woman’s Health v. Cole*, 790 F.3d 563 (5th Cir. 2015).

time and expense involved in traveling long distances, and other, inarticulable psychological obstacles.” On this point, we agree with the motions panel majority: “We do not doubt that women in poverty face greater difficulties. However, to sustain a facial challenge, the Supreme Court and this circuit require Plaintiffs to establish that the law itself imposes an undue burden on at least a large fraction of women. Plaintiffs have not done so here.”<sup>35</sup>

The Fifth Circuit held that the material hardships of travel for poor, young, migrant, and rural women should not figure into the “undue burden” analysis because H.B. 2 had not itself created those conditions. It merely mapped onto them. The Fifth Circuit deemed the distributive effects of H.B. 2 to be “private”—not of the law’s making—and therefore outside constitutional review.

However, in advancing this formalist position, the Fifth Circuit did not hold questions of travel to be completely outside constitutional review. Instead, it endorsed a bright-line rule that would apply to *all* women, thereby making distance and not individual or group circumstances the primary criterion for constitutionality. It based this rule on an oblique reference in *Casey* to nearby providers. The Fifth Circuit held that so long as even a single provider remained within a 150-mile radius of a woman’s residence, no substantial obstacle existed, regardless of the number of women who might be dependent on that single provider.<sup>36</sup>

On appeal to the Supreme Court, the petitioners attacked the Fifth Circuit’s distance-based rule and the formalist reasoning underpinning it. The petitioners argued that the Fifth Circuit ignored *Casey* as a precedent by paying insufficient attention to individual circumstances, particularly among those who would be most adversely impacted by abortion scarcity:

This “150-mile” bright-line rule cannot be reconciled with this Court’s precedents. In *Casey*, for example, the Court held that the spousal notification requirement created a substantial obstacle to abortion access in part because married women who experienced domestic violence were “likely to be deterred from procuring an abortion” by fear that the required notification would trigger violence against themselves or their children. The Court explained that “[w]e must not blind ourselves” to the practical impact of the law on women in abusive marriages. But the Fifth Circuit’s logic would compel courts to do exactly that

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<sup>35</sup> *Id.* at 589.

<sup>36</sup> *Id.*

because the law itself did not create those abusive relationships.<sup>37</sup>

While the Court in *Casey* concerned itself with the subset of women who might experience violence if forced to notify their spouses, the Fifth Circuit refused to take personal circumstances into account in setting a bright-line rule. As the United States argued in its *amicus* brief supporting the petitioners, *Casey* seemed to call upon courts to consider precisely the kinds of individual circumstances the Fifth Circuit ignored, with a particular emphasis on vulnerable groups directly affected by the government action at issue.<sup>38</sup> The United States argued that the Fifth Circuit had erred in considering all women of reproductive age in Texas instead of just those who would have to travel long distances.<sup>39</sup>

The challenge for the petitioners was to convince the Court the analogy to *Casey* was apposite. This was a steep, uphill battle. It is certainly true that *Casey* took into account the specific impact that spousal notification laws would have on married women whose husbands might abuse them. However, it was arguably easier for the Court to consider individual circumstances of spousal violence in *Casey* than it would be to confront questions of class, geography, and migrant status in *Whole Woman's Health*. What makes travel cases hard is that they raise foundational questions about the meaning of public responsibility versus private choice in abortion law.

The Supreme Court in *Whole Woman's Health* largely deflected these questions. Despite being central to the case, Justice Breyer devoted only two full sentences to travel in his forty-page opinion for the Court. He wrote:

We recognize that increased driving distances do not always constitute an “undue burden.” See *Casey*, 505 U. S., at 885–887 (joint opinion of O’Connor, Kennedy, and Souter, JJ.). But here, those increases are *but one additional burden*, which, when taken together with others that the closings brought about, and when viewed in light of the virtual absence of any health benefit, lead us to conclude that the record adequately supports the District Court’s “undue burden” conclusion.<sup>40</sup>

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<sup>37</sup> Brief of Petitioner at 50–51, *Whole Woman's Health v. Cole*, No. 15-274 (5th Cir. Oct. 5, 2015) (citations omitted).

<sup>38</sup> Brief of the United States as *Amicus Curiae* Supporting Petitioners at 30–31, *Whole Woman's Health v. Cole*, 790 F. 3d 563 (5th Cir. 2015), (No. 15-274), <http://www.scotusblog.com/wp-content/uploads/2016/01/United-States.pdf>.

<sup>39</sup> *Id.*

<sup>40</sup> *Whole Woman's Health*, *supra* note 9, at 2298 (emphasis added).

The majority treated travel here as simply one of several burdens to be considered together. This rendered travel a relevant but indeterminate factor in constitutional review. Justice Breyer confirmed that increased travel alone would not necessarily give rise to an “undue burden” finding. Instead, the majority incorporated travel into its benefit-burden analysis, having already found that the costs of H.B. 2 clearly outweighed any putative benefits.

Commentators and advocates have rightly celebrated the evidence-based thrust of *Whole Woman’s Health*. Linda Greenhouse and Reva Siegel have commended “Justice Breyer’s unusually close examination of the facts” as modeling “a kind of scrutiny that few TRAP laws could withstand.”<sup>41</sup> By holding states accountable for the actual effects of their laws rather than their colorable purposes, the Court helped to clarify “what counts as a benefit and a burden to be balanced within the *Casey* framework.”<sup>42</sup> Moreover, the dispassionate style with which Justice Breyer weighed these costs and benefits arguably worked to normalize abortion as a matter of constitutional review.<sup>43</sup> In stark contrast to the graphic account of surgical abortion provided by Justice Kennedy in *Gonzales v. Carhart*, Justice Breyer presented a “matter-of-fact description of abortion as a medical procedure.”<sup>44</sup> As Carol Sanger writes, the Court took seriously “the quality of medical care for pregnant women” in weighing the costs of clinic closures against the absence of any health benefits of hospital privileges and ambulatory surgical center requirements.<sup>45</sup> *Whole Woman’s Health* is powerful in part because it’s ultimately banal.

Despite this indisputable victory for reproductive rights advocates, *Whole Woman’s Health* did not provide clear answers about access. In rejecting a 150-mile distance rule, the Court ultimately treated travel as an indeterminate factor to be weighed among others as part of the “undue burden” analysis. In future cases, if advocates cannot reliably point to state laws and policies as the *public* cause of clinic closures, travel barriers may simply be treated as *private* burdens. In other words, the Court left intact the distinction between public and private responsibility in American abortion law.

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<sup>41</sup> Linda Greenhouse & Reva B. Siegel, *The Difference a Whole Woman Makes: Protection for the Abortion Right After Whole Woman’s Health*, 126 YALE L. J. F. 149 (2016).

<sup>42</sup> *Id.*

<sup>43</sup> Some commentators have drawn parallels between Justice Breyer’s use of cost-benefit analysis in administrative law and *Whole Woman’s Health*. See Noah Feldman, *Justices Haven’t Ended Abortion Restrictions Yet*, BLOOMBERG VIEW (July 5, 2016, 12:30 PM), <https://www.bloomberg.com/view/articles/2016-07-05/supreme-court-hasn-t-ended-abortion-restrictions-yet>.

<sup>44</sup> SANGER, ABOUT ABORTION, *supra* note 13 at 236.

<sup>45</sup> *Id.*

As I discuss in the following Part, these questions of state responsibility inform not only vertical struggles between individual women and their states but also horizontal struggles between states in the federal union.

#### ABORTION TRAVEL IN A FEDERAL UNION

Shortly after his election victory, President-elect Donald Trump affirmed his commitment to a “pro-life” politics and judiciary.<sup>46</sup> Asked whether he wished the Supreme Court to overturn *Roe v. Wade*, he simply responded that if the decision were overruled, the question of abortion “would go back to the states.”<sup>47</sup> For women living in states that chose to restrict or prohibit abortion, travel would be their recourse. “Yeah, well,” Trump speculated, “they’ll perhaps have to go, they’ll have to go to another state.”<sup>48</sup>

In treating abortion as properly the subject of state authority, President-elect Trump tacitly endorsed the distributive compromise that existed prior to *Roe*. Women living in permissive states, as well as those with the means to travel to permissive states, would remain able to access abortion.<sup>49</sup> Those without these financial or geographic advantages would either have to either carry unwanted pregnancies to term or attempt clandestine or self-induced terminations.

One need not imagine a return to the pre-*Roe* days of outright prohibition to see how geography, class, and race remain organizing features of abortion access across the United States today. As the so-called “abortion desert” expands across the South and the Midwest, many women must travel to neighboring states to access abortion care.<sup>50</sup> Since 2014, five

<sup>46</sup> See Emily Schultheis, *Trump talks to “60 Minutes” about same-sex marriage, abortion and the Supreme Court*, CBS NEWS (Nov. 3, 2016), <http://www.cbsnews.com/news/trump-promises-pro-life-justices-supreme-court-same-sex-marriage/>.

<sup>47</sup> *Id.*

<sup>48</sup> Brief of the United States as Amicus Curiae Supporting Petitioners at 13, *Whole Woman’s Health v. Cole*, 790 F.3d 563 (5th Cir. 2015), (No. 15-274), <http://www.scotusblog.com/wp-content/uploads/2016/01/United-States.pdf>.

<sup>49</sup> New York State legalized abortion in 1970, three years prior to *Roe*, and became a primary destination for women from other states seeking legal abortions. See Ted Joyce, Ruoding Tan & Yuxiu Zhang, *Abortion Before & After Roe*, 32 J. HEALTH & ECON. 804 (2013).

<sup>50</sup> See Molly Hennessy-Fiske, *Crossing the ‘Abortion Desert’: Women Increasingly Travel out of Their States for the Procedure*, L.A. TIMES (June 2, 2016, 3:30 AM), <http://www.latimes.com/nation/la-na-adv-abortion-traveler-20160530-snap-story.html>; see also Rachel K. Jones & Jenna Jerman, *Abortion Incidence and Service Availability In the United States, 2011*, 46 PERSPECTIVES ON SEX. & REPRO. HEALTH 3 (2014), [https://www.guttmacher.org/sites/default/files/article\\_files/abortion\\_incidence\\_in\\_the\\_united\\_states\\_2011.pdf](https://www.guttmacher.org/sites/default/files/article_files/abortion_incidence_in_the_united_states_2011.pdf) (As of 2011, 89% of U.S. counties lacked an abortion clinic and 38% of reproductive age women lived in those counties); Caitlin Gerds et al.,

states—Mississippi, Missouri, North Dakota, South Dakota, and Wyoming—have been left with only a single abortion clinic.<sup>51</sup> Mississippi, in particular, has become a fierce battleground. The Jackson Women’s Health Organization (“JWHO”), known colloquially as “the Pink House” because of its painted exterior, is the last remaining abortion clinic in the state.<sup>52</sup>

In 2012, Mississippi passed a hospital privileges law that threatened to close JWHO.<sup>53</sup> Mississippi House Bill 1390 required all physicians associated with an abortion facility to have admitting privileges at a local hospital.<sup>54</sup> Several physicians at the JWHO sought admitting privileges at local hospitals, but the hospitals denied them, citing reasons related to the provision of abortion services. Mississippi subsequently denied a waiver of the privileges requirement for these physicians and issued JWHO an official notice of a hearing to revoke its license. The JWHO filed suit in *JWHO v. Currier*.<sup>55</sup>

In response to this challenge, Mississippi argued that the privileges law was validly enacted based on the state’s police power to regulate health and safety. It did not constitute an “undue burden” under *Casey* because women could travel to other states.<sup>56</sup> Mississippi insisted that its citizens would still be able to access abortion services in Tennessee, Louisiana, or Alabama without facing an “undue burden” in the exercise of their constitutional right to choose abortion.<sup>57</sup> In oral argument before the Fifth Circuit, Mississippi’s Attorney General contended that if the Court limited the undue burden analysis to the state’s own territory, it would restrict the police powers of smaller states. “Going that direction would create a difference in the police power between a state like Texas,” the Attorney General argued, “which is a large state with many abortion providers and a state like Mississippi’s which is small and might have only a limited number of providers.”<sup>58</sup> In other words, adopting a state-centric approach

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*Impact of Clinic Closures on Women Obtaining Abortion Services After Implementation of a Restrictive Law in Texas*, 106 AM. J. PUB. HEALTH 857, 860–61 (2016).

<sup>51</sup> See generally Jones & Jerman, *supra* note 45.

<sup>52</sup> For a discussion of a documentary film portrayal of the reproductive landscape in Mississippi, see Catie L’Heureux, *Mississippi’s Last Abortion Clinic, Captured*, N.Y. MAG. (June 6, 2016), <http://nymag.com/thecut/2016/06/jackson-documentary-last-abortion-clinic-mississippi.html>.

<sup>53</sup> MISS. CODE ANN. § 41-75-1(f) (2012).

<sup>54</sup> *Id.*

<sup>55</sup> *Jackson Women’s Health v. Currier*, U.S. District Court for Southern District of Mississippi (filed June 27, 2012).

<sup>56</sup> *Jackson Women’s Health Org. v. Currier*, 940 F. Supp. 2d 146 (S.D. Miss. 2014).

<sup>57</sup> See Brief of Petitioner at 7, *Jackson Women’s Health Org. v. Currier*, No. 14-997 (5th Cir. 2014).

<sup>58</sup> Oral Argument at 8:02, *Jackson Women’s Health Org. v. Currier*, 760 F.3d 448 (5th Cir. 2014).

would leave some states with greater regulatory discretion than others because the market for abortion services within larger states would be better able to withstand regulation under such a model. This would lead to inequality in the ability of states to regulate health and safety within their territories.

The underlying premise of Mississippi's interstate travel argument was that abortion is properly subject to *state* authority, with the practical realization of the abortion right left to the rest of the union. Where these concepts conflict, the former must prevail, with travel acting as a constitutionally mitigating factor. The "safety valve" of interstate travel thus emerges as the enduring mode of compromise, whether in the prohibitive criminal environment of *Roe* or the restrictive regulatory environment of today. If the democratic majority in a state like Mississippi wishes to limit abortion through regulation, women can resist or dissent from this majority by moving or at least traveling to a more permissive state.<sup>59</sup>

In addition to the direct consequences for women discussed in Part I, these arguments can be examined from two different but related standpoints: the practical consequence of regulatory externalities and the legal consequence on our understanding of state obligations. Turning first to regulatory externalities, relying on an "exit" option imposes significant transaction costs on individual travelers and externalizes medical coverage costs to destination providers who may already face in-state backlogs. In the latter case, interstate travel entails horizontal spillovers that have largely gone unnoticed in an abortion jurisprudence concerned with vertical relations between the state and individuals.<sup>60</sup> For this reason, states such as

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<sup>59</sup> This is a variation of the "exit" argument in federalism. According to proponents of this view, "exit" can operate as an optimal check on the controlling power of majoritarian governments and allows people to realize their individual preferences. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 893 (8th ed. 2001) ("[P]eople can sort themselves between states in accordance with their preference. The right to move to a different state supplements voting power in controlling the action of government officials."); see also Richard A. Epstein, *Exit Rights Under Federalism*, 55 L. & CONTEMP. PROBS. 147, 150 (1992) ("The great virtue of federalism is that it introduces an important measure of competition between governments. Federalism works best where it is possible to vote with your feet. The state that exploits its productive individuals runs the risk that they will take their business elsewhere.").

<sup>60</sup> For important exceptions in the literature that focus on the federalism questions that abortion regulations raise, see Katherine Shaw & Alex Stein, *Abortion, Informed Consent, and Regulatory Spillover*, 92 IND. L. REV. 1, 53 (2016) ("Since *Roe v. Wade*, the struggle between women's constitutional entitlement to abortion and state power to regulate that entitlement has been conventionally understood to proceed along vertical lines. The states' boundaries have demarcated the terrain on which abortion restrictions imposed by states have clashed with the reproductive freedom secured by the U.S. Constitution."); Seth F. Kreimer, *The Law of Choice and Choice of Law: Abortion, the Right to Travel, and Extraterritorial Regulation in American Federalism*, 67 N.Y.U. L. REV. 451 (1992) (arguing that states cannot constitutionally restrict citizens from traveling to other states to access services that are legal in the receiving state).



New York have argued against permitting states to rely on interstate travel to defend onerous regulations. In its *amicus* brief in *Whole Woman's Health*, New York State warned that if the Court gave its imprimatur to a patchwork analysis, "states would be able to shift to neighboring states the responsibility for protecting access to abortion services, and thereby strain the healthcare systems of those States."<sup>61</sup> The City of New York similarly urged the Supreme Court to reject Texas' reliance on interstate travel in that case, recalling its history as a safe haven for women seeking abortions from across the country in the years preceding *Roe*. New York hospitals and clinics were overwhelmed at the time and many women had to wait over six weeks to get an appointment.<sup>62</sup> In other regulatory contexts, including environmental pollution, downwind states may call for federal intervention to combat *under-regulation* by upwind states. Abortion travel presents a unique case in which receiving states appeal for federal judicial intervention to mitigate the effects of *over-regulation* by sending states, a phenomenon that remains largely unexamined and unresolved.<sup>63</sup>

Beyond this question of interstate externalities, the "exit" argument assumes that abortion is the type of good or service properly subject to state authority in a federal union. To put it in economic terms, this view suggests that women should "sort" themselves by traveling from restrictive jurisdictions to permissive ones.<sup>64</sup> Restrictive states can regulate abortion clinics to the point of closure so long as they allow demand to flow to other states. In other words, states such as Mississippi and Texas aim to translate the *de facto* "safety valve" that existed before *Roe* into a *de jure* defense of restrictive abortion regimes today under the "undue burden" standard of *Casey*.

In *JWHO v. Currier*, the Fifth Circuit firmly rejected this line of reasoning. In doing so, it breathed life into a federal understanding of state

<sup>61</sup> Brief for New York State as Amici Curiae Supporting Petitioners, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (No. 15-274), at \*33.

<sup>62</sup> Brief for City of New York as Amici Curiae Supporting Petitioners, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (No. 15-274), at \*6-12.

<sup>63</sup> See Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1222 (1992) ("The presence of interstate externalities is a powerful reason for intervention at the federal level: because some of the benefits of a state's pollution control policies accrue to downwind states, states have an incentive to underregulate."); Bruce L. Hay, *Conflicts of Law and State Competition in the Product Liability System*, 80 GEO. L. J. 617, 617 (1992) ("When states can pass laws whose costs are borne by outsiders, self-interested behavior by each makes all worse off.").

<sup>64</sup> Tiebout sorting refers to the sorting of households in and across neighborhoods according to residents' ability and willingness to pay for local public goods. The hypothesis suggests that people will publicly express and maximize their preferences by "voting with their feet." See C.M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956). Abortion travel is of course a more temporary form of "sorting," although the idea of household choice could in theory track abortion regulation.

obligations in the abortion context that other courts have since followed. The Fifth Circuit held that the constitutional protections that attach to the abortion decision make a meaningful difference in the outsourcing analysis. Writing for a two-member majority, Judge Grady Jolly held that Mississippi may not “shift its obligations to respect the established constitutional rights of its citizens to another state.”<sup>65</sup> The Fifth Circuit held that not only did Mississippi’s privileges law unduly burden its own citizens, its reliance on interstate travel would violate its constitutional compact with other states in the union. The Court wrote:

Such a proposal would not only place an undue burden on the exercise of the constitutional right, but would also disregard a state’s obligation under the principle of federalism—applicable to all fifty states—to accept the burden of the non-delegable duty of protecting the established federal constitutional rights of its own citizens.<sup>66</sup>

The Fifth Circuit framed abortion travel as an issue of both vertical (state-individual) and horizontal (state-state) constitutional review.

In reaching this conclusion, the Court invoked an earlier chapter in American federalism in which states similarly relied upon—indeed, compelled—interstate travel by their citizens. Judge Grady drew a parallel between state reliance on travel as part of Jim Crow segregation and contemporary reliance on interstate travel to insulate stringent abortion regimes.

In *Missouri ex rel. Gaines v. Canada* (1938), the NAACP Legal Defense Fund challenged a Missouri scheme that denied African Americans access to in-state graduate or professional training and instead offered them out-of-state tuition grants.<sup>67</sup> Southern and border states began enacting these plans during the interwar years as more African Americans secured high school and undergraduate diplomas.<sup>68</sup> As legal historian Michael Klarman has noted, out-of-state tuition programs were woefully inadequate, covering tuition but not travel or living expenses. “The *legal question*,” Klarman wrote, “was when those differences rose to the level of unconstitutional inequality.”<sup>69</sup> In *Gaines*, the Supreme Court held that they

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<sup>65</sup> Jackson Women’s Health Org. v. Currier, 760 F. 3d 448, 448 (5th Cir. 2014).

<sup>66</sup> *Id.*

<sup>67</sup> *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938). On the history of the *Gaines* case, see Kevin M. Kruse, *Personal Rights, Public Wrongs: The Gaines Case and the Beginning of the End of Segregation*, 22 J. SUP. CT. HIST. 113 (1997).

<sup>68</sup> See MICHAEL KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY, 148 (2004).

<sup>69</sup> *Id.* at 149 (emphasis added).

had in the case of Missouri. Writing for the Court, Chief Justice Charles Evans Hughes insisted that the constitutional inquiry should focus not on what sorts of educational opportunities other states might offer, but on what opportunities Missouri denied black students on account of their race. The Court held that states could not shirk their constitutional obligations in reliance on their neighbors. Each state, Chief Justice Hughes wrote, is “responsible for its own laws establishing the rights and duties of persons within its borders,” and “it is an obligation the burden of which cannot be cast by one state upon another, and no state can be excused from performance by what another state may do or fail to do.”<sup>70</sup>

The Fifth Circuit in *Jackson v. Currier* revived *Gaines*. In forceful language that placed responsibility at Mississippi’s own doorstep, the Court insisted that *Gaines* “locks the gate for Mississippi to escape to another state’s protective umbrella and thus requires us to conduct the undue burden inquiry by looking only at the ability of Mississippi women to exercise their right within Mississippi’s borders.”<sup>71</sup> This was a stinging rebuke to the “exit” argument, at least in the case of a state with only one remaining clinic.

Other courts have since followed *Jackson v. Currier*, relying in part on *Gaines* for the proposition that states cannot rely on out-of-state access to cure in-state constitutional infirmities. In *Planned Parenthood v. Strange*, an Alabama district court enjoined a hospital privileges law and rejected state claims that interstate travel should figure into the constitutional “undue burden” analysis.<sup>72</sup> Judge Myron Thompson noted that interstate reliance claims had failed across a spectrum of constitutional rights.

The court must acknowledge that state boundaries are not always significant in women’s real-world decision-making. On the other hand, the State could identify no precedent for a court to consider conduct outside the political boundaries of a jurisdiction in order to justify the constitutionality of actions by that jurisdiction. On the contrary, in areas ranging from First Amendment free speech to Fourteenth Amendment equal protection to Second Amendment firearm rights, courts have refused to allow out-of-jurisdiction access to cure within-jurisdiction restrictions.<sup>73</sup>

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<sup>70</sup> *Gaines*, 305 U.S. at 350.

<sup>71</sup> *Id.*

<sup>72</sup> *Planned Parenthood S.E., Inc. v. Strange*, 33 F. Supp. 3d 1330 (M.D. Ala. 2014) (enjoining a hospital privileges law for abortion providers).

<sup>73</sup> *Id.* (citing *Schad v. Mt. Ephraim*, 452 U.S. 61 (1981) (free speech); *Gaines*, 305 U.S. at 337 (equal protection); *Ezell v. Chicago*, 651 F. 3d 684, 689–90, 697 (7th Cir. 2011) (firearm rights); *Islamic Ctr. of Miss., Inc. v. Starkville*, 840 F. 2d 293, 298–99 (5th Cir. 1988) (free exercise)).

Judge Thompson acknowledged that from the perspective of the woman herself, crossing state lines may or may not figure into real world decision-making. Women living in border towns may be able to access out-of-state clinics more easily than in-state clinics. However, from the perspective of the state, asking courts to ignore territoriality in constitutional review is legerdemain: territorial lines are constitutive of its very claim to authority and, reciprocally, demarcate its sphere of constitutional responsibility.

While this line of abortion travel jurisprudence should be encouraging to progressives, federalism arguments also offer an only potential answer to material problems of access. One reason is that federalism claims may depend on a state's expressed arguments and intent in describing challenged legislation. Where states have not expressed a wish to rely on other states to discharge their constitutional obligations, facially neutral regulations may survive scrutiny. However, an even more central reason for this deficiency is that requiring states to discharge their own constitutional duties can only advance the limited abortion right as defined in the case law. I discuss these limitations in the following Part.

### III. ABORTION TRAVEL AND REPRODUCTIVE JUSTICE

Travel poses a unique challenge for reproductive rights advocates in the United States because the constitutional jurisprudence from *Roe* through *Casey* has never held that states have positive duties to facilitate women's access to abortion, locally or otherwise.<sup>74</sup> As Robin West has emphasized, *Roe v. Wade* did not recognize a positive right to abortion; it enshrined a negative right against some forms of prohibition in some circumstances.<sup>75</sup> Consistent with this logic, the Supreme Court confirmed in *Harris v. McRae* that the abortion right does not impose positive funding obligations on the state.<sup>76</sup> Likewise, the Court concerned itself in *Planned Parenthood v. Casey* with impermissible burdens that states may not place in a woman's decision-making path, rather than with positive measures that the state must undertake to facilitate abortion access.<sup>77</sup> Even as academic commentators

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<sup>74</sup> For an early and trenchant critique of the negative abortion right, in particular the extent to which it leaves women subject to the "privacy" of the market and home, see CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 184 (1989); see also Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 *YALE L.J.* 1394, 1403 (2009) (arguing that the negative and individualist abortion right from *Roe* onwards is at odds with a more capacious reproductive justice agenda).

<sup>75</sup> *Id.*

<sup>76</sup> *Harris v. McRae*, 448 U.S. 297 (1980).

<sup>77</sup> *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

and courts have articulated varying grounds for the right—from privacy to liberty to women’s equality—its largely negative scope has endured.

Feminist theorists have long emphasized the tensions inherent in the Court’s choice in *Roe* to ground the abortion right in privacy. Catharine MacKinnon famously argued that liberal privacy discourse has the dual effect of limiting state intrusion into the so-called private sphere while also constituting that very sphere as one “that is considered free by definition.” The consequence of this duality—two sides of the same coin, in MacKinnon’s words—is that conservatives can flip progressive claims that the state has a duty *not* to intervene to argue that the state has no duty *to* intervene.<sup>78</sup>

The same liberal logic of privacy that limits states from *interfering* in women’s reproductive choices routinely deprives women of the ability to claim public *support* in exercising those choices. Travel highlights this tension because its legal significance depends on the perspective from which one views it. Outside of their material and legal circumstances, nothing directly stops women from traveling to other states to access abortion services; yet those very circumstances do, in concert with state regulations, effectively bar many women from travel.

In retrospect, one may conclude that *Roe* achieved only a fragile balance that is now eroding as detractors exploit its vulnerabilities. In view of the largely negative and individualist scope of the abortion right in American law, abortion travel remains an obstacle that constitutional adjudication alone is unlikely to resolve.<sup>79</sup> In the absence of a judicial reconceptualization of the abortion right and as antiabortion advocates and politicians work to reinstate a fragmented pre-*Roe* landscape of abortion deserts, reproductive rights advocates must also revive pre-*Roe* strategies and tactics. The problem requires a renewed emphasis on reproductive justice to address the social inequalities and collective issues that continue to exist within the prevailing reproductive rights framework.

In recent years, reproductive justice groups have worked to address these gaps by assisting women with organizing and funding abortion journeys. Fund Texas Choice, founded in response to Texas HB-2, assists women living in rural and low-income areas to travel for abortion care.<sup>80</sup> Even following the victory by reproductive rights groups in *Whole Woman’s Health*, many clinics that closed in Texas have not reopened and others face significant logistical and financial burdens in attempting to do

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<sup>78</sup> *Id.*

<sup>79</sup> See West, *supra* note 79.

<sup>80</sup> *About Us*, FUND TEXAS CHOICE, <http://fundtexaschoice.org/about-us/>.

so.<sup>81</sup> Fund Texas Choice reports that the average number of trips it has assisted with has tripled from 2014 to 2016.<sup>82</sup> In 2013, the National Abortion Federation hotline referred 21 Texans to New Mexico; two years later, that number had grown to 209.<sup>83</sup>

These efforts to facilitate abortion access reconceive the act of abortion travel. Through these initiatives, travel becomes an expression of collective will to secure reproductive justice for all women, and no longer merely an individual undertaking of stigmatized exile from one's home jurisdiction. In doing so, activists work to resolve MacKinnon's critique of the abortion right, bringing private struggles into the public sphere.<sup>84</sup>

Indeed, prior to *Roe*, abortion referral and travel networks formed a key part of broader feminist advocacy for the liberalization of abortion laws in the United States. In 1966, Patricia Maginnis helped to found the Society for Humane Abortion, later known as the Association to Repeal Abortion Laws, one of the first open abortion referral services in the country.<sup>85</sup> Maginnis viewed abortion referrals and travel as necessary and direct confrontation with restrictive abortion laws. Maginnis traveled to Tijuana, Mexico, where she visited local doctors providing abortions. She developed a list of the safest providers and returned to busy street corners in San Francisco where she distributed the lists to women.<sup>86</sup> Like their contemporary counterparts, these grassroots travel projects aimed to politicize and democratize abortion access.

<sup>81</sup> *Id.*; see Paul J. Weber, *Texas May Not Restore Lost Abortion Clinics Despite Ruling*, U.S. NEWS (June 28, 2016) (citing obstacles to reopening clinics including leasing, staffing, and equipment funding; Amy Hagstrom Miller, founder of Whole Woman's Health, which operates a number of abortion clinics in Texas, stated after the Supreme Court victory, "we really have a daunting task to determine whether and how we can reopen our health centers"); see Kelli Garcia, *Chipping Away at Roe in Texas and Beyond*, NAT'L WOMEN'S L. CTR. (Jan. 19, 2016); Brief for Petitioners at 23–24, *Whole Woman's Health v. Cole*, 136 S. Ct. 499 (2015) (No. 15-274); see also Madeline Gomez, *More Than Mileage: The Preconditions of Travel and the Real Burdens of H.B. 2*, 33 COLUM. J. GENDER & L. 49, 50 (2016).

<sup>82</sup> See Miranda Bryant, "Abortion Travel Agent" from Texas Tells How She Helps Pregnant Women Get to One of the Few Clinics in the State That Still Offer the Procedure, as She Admits Demand for Her Services is Soaring, DAILY MAIL (Feb. 1, 2017, 7:25 PM), <http://www.dailymail.co.uk/femail/article-4182080/Abortion-travel-agent-helps-women-access-Texas-clinics.html>.

<sup>83</sup> See Molley Henessy-Fiske, *Crossing the "Abortion Desert": Women Increasingly Travel Out of Their States for the Procedure*, L.A. TIMES (June 2, 2016).

<sup>84</sup> See Joanna N. Erdman, *The Law of Stigma, Travel and the Abortion-Free Island*, 33 COLUM. J. GEN. & L. 29, 34 (2016); Yasmine Ergas, *The Law of Others: Mandating "Rights Through Travel" Between Discrimination, Moral Hazard, and Irrationality*, 33 COLUM. J. GENDER & L. 38, 38 (2016).

<sup>85</sup> Interview by Jeannette Cheek with Patricia Maginnis, *Reminiscences of Patricia Maginnis, Oral History* (1975); see Leslie J. Reagan, *Crossing the Borders for Abortions: California Activists, Mexican Clinics, and the Creation of a Feminist Health Agency in the 1960s*, 26 FEMINIST STUD. 323 (2000).

<sup>86</sup> See LAWRENCE LADER, *ABORTION II: MAKING THE REVOLUTION* (1973) (describing his meeting with Patricia Maginnis in 1966 and her efforts to publicize and politicize safe abortion access).

Contemporary reproductive justice groups have also mobilized travel narratives in an effort to develop more contextual constitutional rights jurisprudence and to produce generative politics at the local and state level.<sup>87</sup> In its amicus brief in *Whole Woman's Health*, the National Latina Institute for Reproductive Justice provided the Court with a number of interview accounts of the specific burdens facing Texan Latinas—including long-distance travel—as a result of H.B. 2.<sup>88</sup> The Institute noted that many interviewees reported having to find childcare, take out high-interest payday loans, work overtime, risk losing their jobs, and withstand scrutiny about their lengthy absence.<sup>89</sup> For undocumented women and families, the risk of detention at a permanent or tactical immigration checkpoint along the 100-mile border zone can make travel impossible.<sup>90</sup>

Rather than framing abortion as a matter of individual right, travel networks mobilize collective resources in order to secure real access for poor, rural, migrant, and young women, in the process revealing the material supports that women need to access abortion in the United States. The mission statement of the Mississippi Reproductive Freedom Fund “recognize[s] and affirm[s] the right to parent, not to parent, have access to full reproductive health care and education and to raise children in safe environments with full support.”<sup>91</sup> Travel networks exemplify many of the political goals and grassroots tactics that reproductive justice activists have advocated since the movement came to prominence in the 1990s.<sup>92</sup> Choice discourse has proven limited, as Dorothy Roberts notes, for “claiming public resources that most women need in order to maintain control over their bodies and their lives.”<sup>93</sup> Travel networks work to bring women and

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<sup>87</sup> For a discussion of the importance of reproductive stories in reproductive justice work, see Pamela D. Bridgewater, *Legal Stories and the Promise of Problematizing Reproductive Rights*, 21 L. & LITERATURE 402 (2009).

<sup>88</sup> Brief of National Latina Institute for Reproductive Health et al. as Amici Curiae Supporting Petitioners, *Whole Woman's Health*, 136 S. Ct. 499 (2015) (No. 15-274).

<sup>89</sup> *Id.*

<sup>90</sup> *Customs and Border Protection's (CBP's) 100-Mile Rule*, ACLU; see also Madeline M. Gomez, *Intersections at the Border: Immigration Enforcement, Reproductive Oppression and the Policing of Latina Bodies in the Rio Grande Valley*, 30 COLUM. J. GENDER & L. 84 (2015).

<sup>91</sup> *About Us*, MISSISSIPPI REPRODUCTIVE FREEDOM FUND: REMOVING BARRIERS TO FULL REPRODUCTIVE HEALTHCARE—INCLUDING ABORTION, <https://msreprofreedomfund.org/>.

<sup>92</sup> The term “reproductive justice” was coined in 1994 by feminists of color who viewed reproductive struggles as part of broader contests over race, class, and gender. Rather than focusing primarily or exclusively on abortion, reproductive justice advocates and commentators have advanced a more holistic vision of justice that includes parenting with dignity. See Loretta J. Ross, *Understanding Reproductive Justice*, SISTERSONG WOMEN OF COLOR REPRODUCTIVE HEALTH COLLECTIVE (2006), [https://d3n8a8pro7vbm.cloudfront.net/rrfp/pages/33/attachments/original/1456425809/Understanding\\_RJ\\_Sistersong.pdf?1456425809](https://d3n8a8pro7vbm.cloudfront.net/rrfp/pages/33/attachments/original/1456425809/Understanding_RJ_Sistersong.pdf?1456425809); Zakiya Luna & Kristin Lukin, *Reproductive Justice*, 9 ANN. REV. L. & SOC. SCI. 327 (2013).

<sup>93</sup> Dorothy Roberts, *Reproductive Justice, Not Just Rights*, DISSENT (Fall 2015),

men closer to achieving an as-yet unrealized reproductive justice.<sup>94</sup>

## CONCLUSION

Despite the pleas of reproductive rights advocates, it remains uncertain the extent to which marginalized groups can rely on the “undue burden” analysis to safeguard abortion access in the face of prohibitive travel challenges. Indeed, in the coming years, if social stigma, economic forces, and a dearth of abortion providers continue to force women living in the South and Midwest to travel vast distances to access abortion, it is far from clear that American constitutional law will vindicate their plight. Yet, what is apparent is that this scenario is as realistic as it would be harmful, bringing the need for a renewed reproductive justice movement into focus.

At this stage in American constitutional history, it would be naïve to think that distributive struggles over class, gender, immigration status and race at the root of the abortion travel debate will be resolved through adjudication alone. This is particularly the case where other moral and philosophical questions loom large, as in the abortion debate. If there is one conclusion to draw from the divergent and tentative treatment in the case law to date, it may be that the current reproductive rights framework is insufficient to resolve the issues surrounding abortion travel. Needing a traditional concept of reproductive rights to provide a legal baseline, but requiring a reproductive justice approach to make those rights meaningful, a holistic approach to abortion travel currently sits at a crossroads between the two frameworks.

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<https://www.dissentmagazine.org/article/reproductive-justice-not-just-rights>.

<sup>94</sup> See West, *supra* note 69, at 1431–32 (discussing the benefits of local, democratic and pragmatic advocacy for reproductive justice as compared to constitutional rights adjudication).