ARTICLES

Inconvenient Federalism: The Pandemic, Abortion Rights, and the Commerce Clause

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ABSTRACT

When United States presidents perceive a crisis, they tend to hide their eyes from the limits of federal power in our constitutional system. Former President Donald Trump and President Joe Biden are no exception. As the COVID-19 pandemic ravaged the nation's health, its economy, and his own re-election prospects, President Trump claimed "total" control, suggesting that he could compel state governors to let businesses re-open in their states. And when a Texas abortion prohibition initially evaded challenge in federal court, President Biden renewed his commitment to codifying Roe v. Wade*, indicating that he would work with Congress to force every state to permit abortion on the Federal Government's terms.*

The Founders, though, did not establish a paternalistic relationship between the Federal Government and the states. "Article I contains no whatever-it-takes-to-solve-a-national-problem power," the dissenting Justices rightly explained in National Federal of Independent Business v. Sebelius. *The Federal Government's power is limited to what is delegated in the Constitution, and the states are sovereigns, too. When a federal statute conflicts with a state law, the federal statute emerges triumphant only when it is tethered to power that the Constitution delegates to the Congress. An unmoored federal law is no law at all.*

Thus, for the Federal Government to force states to re-open their economies in the midst of a pandemic or to allow abortion within their borders without restrictions deemed undesirable, Congress must act pursuant to one of its delegated powers. For re-opening legislation, Congress's power to regulate interstate commerce seems the most likely choice, and the Women's Health Protection Act ("WHPA"), legislation that has been introduced and reintroduced in Congress many times over the years to codify Roe *and eliminate certain state law restrictions on abortion, explicitly "invokes" the Commerce Clause as a source of congressional power.*

This Article considers whether the Commerce Clause supplies the power necessary for hypothetical re-opening legislation and WHPA. The United States Supreme Court's steady march to interpret the Clause more and more broadly

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suggests an easy answer. But decisions from long ago describe foundational limits that the Court has not disavowed: the states enjoy nearly exclusive power to authorize businesses to operate within state boundaries, Congress does not have the power to regulate the practice of medicine directly, and a state's power to define and punish violent crime is sacrosanct. Consequently, this Article concludes that sweeping re-opening legislation and WHPA stretch the Commerce Clause beyond its breaking point.

TABLE OF CONTENTS

INTRODUCTION

The Constitution can get in the way. When President Harry Truman tried to seize steel mills during the Korean War, he learned that the Constitution does not give the president emergency powers.[1] When Congress sought to protect individuals from state regulatory action that encroaches on their religious exercise, the United States Supreme Court explained that Section 5 of the Fourteenth Amendment does not supply the necessary

1. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587–89 (1952) (concluding that President Truman did not have power under the Constitution to seize property without an act of Congress).

authority.[2] And when Congress attempted to withhold existing Medicaid funding from states that refused to expand the program, the Court reminded Congress that it cannot not use its spending power to coerce states into doing what the Federal Government wants.[3] As the Court explained in *A.L.A. Schechter Poultry Corporation v. United States*: "Extraordinary conditions may call for extraordinary remedies. But . . . [e]xtraordinary conditions do not create or enlarge constitutional power. . . . Those who act under . . . grants [of constitutional power] are not at liberty to transcend the imposed limits because they believe that more or different power is necessary."[4]

The president and Congress, though, continue to "reach beyond the natural extent of [federal] authority, '[and] . . . [try to] draw[] all power into [the Federal Government's] impetuous vortex.'"[5] For example, with a pandemic wreaking havoc on the nation's health and economy, President Trump declared that he could force governors to lift restrictions on business activities within their states: "When somebody is president of the United States, the authority is total. . . . The governors know that."[6] The 45th president backed off,[7] perhaps after a reminder about separation of powers, but his claim raises an important question about the reach of federal power—whether the Constitution permits federal legislation that would force states to allow internal trade in the midst of a pandemic (referred to in this Article as "re-opening legislation").[8]

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2. *See* City of Boerne v. Flores, 521 U.S. 507, 511, 536 (1997) (holding that Congress did not have the power under Section 5 of the Fourteenth Amendment to make the Religious Freedom Restoration Act of 1993 apply to the States).

3. *See* Nat'l Fed'n of Indep. Bus. ("NFIB") v. Sebelius, 567 U.S. 519, 577–78 (2012) (opinion of Roberts, C.J.) ("Congress may use its spending power to create incentives for States to act in accordance with federal policies. But when 'pressure turns into compulsion,' the legislation runs contrary to our system of federalism."); *id.* at 679 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) ("[I]f States really have no choice other than to accept the package, the offer is coercive, and the conditions cannot be sustained under the spending power.").

4. A.L.A. Schechter Poultry Corp. v. U.S., 295 U.S. 495, 528–29 (1935).

5. *NFIB*, 567 U.S. at 554 (opinion of Roberts, C.J.) (quoting THE FEDERALIST NO. 48 (James Madison)).

6. Jill Colvin, Zeke Miller & Geoff Mulvihill, *Trump Claims 'Total' Authority, Over Govs, to Reopen Economy*, ASSOCIATED PRESS (Apr. 13, 2020), https://apnews.com/article/virus-outbreak-donald-trump-ap-top-news-politics-health-ba9578acf23bdb03fd51a2b81f640560 [https://perma.cc/9FLU-JE8J] (quoting President Donald Trump).

7. *See* Jeff Mason & Alexandra Alper, *Trump Says Close to Plan to Reopen Economy Possibly, in Part, Before May 1*, REUTERS (Apr. 14, 2020), https://www.reuters.com/article/us-health-coronavirus-trump/trump-says-close-to-plan-to-reopen-economy-possibly-in-part-before-may-1-idUSKCN21X060 [https://perma.cc/A6QW-7KQD] ("Trump said he would not press states to re-open.").

8. *See* Byron Tau, *Trump's Legal Authority to Overrule Governors on Coronavirus Is Limited*, WALL ST. J. (Apr. 14, 2020), https://www.wsj.com/articles/trumps-legal-authority-to-overrule-governors-on-coronavirus-is-limited-11586891577 [https://perma.cc/A3AQ-WA3U] (noting that Congress's power under the Commerce Clause is broad, but not unlimited); John Yoo, *No, Trump Can't Force States to Reopen*, NAT'L REV. (Apr. 13, 2020), https://www.nationalreview.com/2020/04/no-trump-cant-force-states-to-reopen/ [https://perma.cc/5CSW-HUYF] ("Congress enjoys the authority to 'regulate Commerce with foreign Nations, and among the several States.' . . . But our federal system reserves the leading role over public health to state governors. States possess the 'police power' to regulate virtually all activity within their borders. . . . Only the states can impose

Because Donald Trump no longer is president and state economies largely are open now, re-opening legislation has faded into the hypothetical realm. The Biden administration, however, has served up an issue with a similar flavor. On the campaign trail, then-candidate Joe Biden pledged to pursue codifying *Roe v. Wade*,[9] and after the Court left in place a Texas law authorizing vigilante justice for those who provide or facilitate abortions in that state,[10] President Biden renewed his commitment.[11] The United States House of Representatives followed suit, advancing the Women's Health Protection Act of 2021 (WHPA), which would establish a right under federal law to provide and obtain abortions, toward the president's desk.[12] WHPA would force states to open their doors—in this case, to abortion services—on Congress's terms, not on their own. WHPA thus introduces a question of federal power in relation to the states that is substantially similar to the one that re-opening legislation presents.

Congress, though, legislates validly only when it acts pursuant to a power that the Constitution specifically grants it.[13] WHPA attempts to ground itself in the Commerce Clause,[14] which gives Congress the ability to regulate interstate

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quarantines, close institutions and businesses, and limit intra-state travel."); Charlie Savage, *Trump's Claim of Total Authority in Crisis Is Rejected Across Ideological Lines*, N.Y. TIMES (Apr. 14, 2020), https://www.nytimes.com/2020/04/14/us/politics/trump-total-authority-claim.html [https://perma.cc/7ZQ2-6SZD] ("[E]ven if Congress were to now enact a law giving Mr. Trump th[e] power [to override state restrictions,] . . . there would still be legal obstacles."); Brian Naylor, *FACT CHECK: Trump Doesn't Have The Authority To Order States To 'Reopen'*, NPR (Apr. 14, 2020), https://www.npr.org/2020/04/14/834040912/fact-check-trump-doesnt-have-the-authority-to-order-states-to-reopen [https://perma.cc/R49R-DG3C] (noting that an Emory law professor indicated that Congress might be able to use its commerce power to "reopen the economy").

9. *See The Biden Agenda for Women*, BIDEN HARRIS, https://joebiden.com/womens-agenda/ [https://perma.cc/PZ5V-8BCZ] ("Biden will work to codify *Roe v. Wade*.").

10. *See* Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2495–96 (2021) (denying preliminary relief from Texas abortion law); TEX. HEALTH & SAFETY CODE §§ 171.204 and 171.208 (prohibiting abortion when a heartbeat is detecting and allowing civil actions to be brought by persons other than government officials against physicians performing abortions and those who "aid and abet" the performance of abortions in violation of the law).

11. *See* Katie Rogers, *Biden Vows to Protect Abortion Rights in Face of 'Extreme' Texas Law*, N.Y. TIMES (Sept. 7, 2021), https://www.nytimes.com/2021/09/02/us/politics/biden-abortion-texas-law.html [https://perma.cc/6ZZZ-HLSE] ("Jen Psaki, the White House press secretary, said . . . that the president would 'continue to call for the codification of Roe,' adding that the Texas law 'highlights even further the need to move forward on that effort.'").

12. *See* Women's Health Protection Act of 2021, H.R. 3755, 117th Cong. Senator Richard Blumenthal introduced a similar bill in the United States Senate. *See* Women's Health Protection Act of 2021, S. 1975, 117th Cong.

13. *See* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S.Ct. 1461, 1476 (2018) ("The Constitution confers on Congress not plenary legislative power but only certain enumerated powers."); NFIB v. Sebelius, 567 U.S. 519, 534 (2012) (opinion of Roberts, C.J.) ("[T]he Constitution lists, or enumerates, the Federal Government's powers. . . . The Constitution's express conferral of some powers makes clear that it does not grant others."); United States v. Morrison, 529 U.S. 598, 607 (2000) (quoting Marbury v. Madison, 5 U.S. 137, 176 (1803)) ("The powers of the legislature are defined and limited.").

14. *See* H.R. 3755, § 2(b) (reciting sources of congressional authority); S.1975.

commerce[15] and is the place one logically would turn for re-opening legislation.

That WHPA looks to the Commerce Clause comes as little surprise because the Court historically has interpreted Congress's power over interstate commerce as an embarrassment of riches, allowing Congress to regulate even purely intrastate activities under some circumstances.[16] But decisions in the last thirty years attest that Congress's assertion of its commerce power "does not necessarily make it so."[17] In *Lopez v. United States* and *Morrison v. United States*, the Court suggested that the Commerce Clause gives Congress the power to "regulat[e] . . . intrastate activity only where that activity is economic in nature."[18] And in *National Federation of Independent Business ("NFIB") v. Sebelius*, a majority of the Justices explained that Congress cannot use its commerce power to force individuals to engage in activity.[19] Importantly, all three decisions reflect a concern that interpreting the Commerce Clause too broadly would allow Congress to regulate every aspect of American life, thereby destroying the important federal/state balance the Founders intended.[20]

The balance apparently is not upset when Congress uses its commerce power to prohibit intrastate conduct that a state otherwise would permit[21] or when Congress makes unlawful conduct that a state also bars.[22] The Court, however,

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15. Naylor, *supra* note 8 ("Congress may have the authority to reopen the economy under the Constitution's Commerce Clause.").

16. *See, e.g.*, Gonzales v. Raich, 545 U.S. 1, 5, 32–33 (determining that the Commerce Clause permits Congress to regulate intrastate production and use of marijuana for medical purposes); Wickard v. Filburn, 317 U.S. 111, 128–29 (1942) (upholding a federal statute that restricted a farmer's production of wheat for the farmer's own use); United States v. Darby, 312 U.S. 100, 123 (1941) (concluding that the Commerce Clause gave Congress the power to regulate the wages and hours of employees engaged in manufacturing products for interstate commerce).

17. United States v. Morrison, 529 U.S. 598, 614 (2000) (quoting United States v. Lopez, 514 U.S. 549, 557 n.2 (1995)).

18. *Id.* at 613 (citing United States v. Lopez, 514 U.S. 549, 559–60 (1995)).

19. *See* NFIB v. Sebelius, 567 U.S. 519, 550 (2012) (opinion of Roberts, C.J.) ("The power to regulate commerce presupposes the existence of commercial activity to be regulated. If the power to 'regulate' something included the power to create it, many of the provisions in the Constitution would be superfluous."); *id.* at 658 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) ("[I]t must be *activity* affecting commerce that is regulated, and not merely the failure to engage in commerce.").

20. *See id.* at 552 (opinion of Roberts, C.J.) ("Applying the Government's logic to the familiar case of *Wickard v. Filburn* shows how far that logic would carry us from the notion of a government of limited powers."); *id.* at 647 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) ("Whatever may be the conceptual limits upon the Commerce Clause[,] . . . they cannot be such as will enable the Federal Government to regulate all private conduct. . . ."); *Morrison*, 529 U.S. at 615 ("Petitioners' reasoning . . . will not limit Congress to regulating violence but may . . . be applied equally as well to family law and other areas of traditional state regulation."); *Lopez*, 514 U.S. at 564 ("Under the theories that the Government presents[,] . . . it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign.").

21. *See, e.g.*, *Raich*, 545 U.S. at 6, 32 (concluding that Congress may bar the intrastate production and use of marijuana for medical purposes, conduct that California has elected to permit); *Darby*, 312 U.S. at 113–14 (indicating that Georgia had decided not to regulate wages and hours of workers with the State).

22. *Cf.* Gamble v. United States, 139 S. Ct. 1960, 1980 n.1 (2019) (Thomas, J., concurring) ("Congress is responsible for the proliferation of duplicative prosecutions for the same offenses by the States and the Federal Government. . . . [T]he Court has been complicit by blessing this questionable expansion of the Commerce Clause."); United States v. Bass, 404 U.S. 336, 349 (1971) ("Congress has

has not ruled that Congress has limitless authority under the Commerce Clause to grant in the first instance the right to operate a business—or to deliver particular products or services—that a state wishes to prohibit within its borders. As a result, attempting to use Congress's power over commerce to enact re-opening legislation or WHPA would be novel, and as Chief Justice Roberts warned in *NFIB*, "sometimes 'the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent' for Congress's action."[23]

This Article evaluates whether re-opening legislation and WHPA exceed the limits of Congress's power under the Commerce Clause. Part I briefly describes how the COVID-19 pandemic and abortion regulation have brought to the fore questions regarding Congress's power to regulate interstate commerce. In Part II, the Article highlights the Court's historically expansive interpretation of Congress's commerce power and gives detailed attention to recent cases that have recognized critical limitations. Then, Part III tests re-opening legislation and WHPA against the Court's Commerce Clause jurisprudence. Part III first studies essential 19th century decisions in which the Court emphasizes that, although Congress may license activities associated with the channels of interstate commerce, it otherwise is powerless to authorize business activities within a state. Part III continues by considering, with respect to WHPA alone, the extent to which the Commerce Clause empowers Congress to regulate the medical profession and criminal activity. There, the Article explains that Congress has neither the power to regulate medical practice directly nor the power to decriminalize conduct a state has defined as criminal. In addition, throughout Part III, the Article explores what finding re-opening legislation and WHPA within Congress's commerce power would mean for the delicate balance of federal and state power. The Article concludes that the Constitution prevents Congress from using its commerce power to treat states as recalcitrant children in need of federal discipline. When it comes to re-opening legislation and WHPA, the Constitution—by design—gets in the way.

I. THE PANDEMIC AND ABORTION REGULATION

As the deadly COVID-19 pandemic began to invade the United States at the beginning of 2020, states took emergency measures to protect their citizens.[24] Among the measures were stay-at-home orders[25] and forced business

traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States.").

23. *NFIB*, 567 U.S. at 549 (opinion of Roberts, C.J.).

24. *See* Rachel Treisman, *How Is Each State Responding to COVID-19?*, NPR (Dec. 4, 2020), https://www.npr.org/2020/03/12/815200313/what-governors-are-doing-to-tackle-spreading-coronavirus [https://perma.cc/6PZV-X486] ("When the coronavirus first struck the U.S. in March, every state implemented restrictions aimed at limiting its spread.").

25. *See* Sarah Mervosh, Denise Lu & Vanessa Swales, *See Which States and Cities Have Told Residents to Stay at Home*, N.Y. TIMES (Apr. 20, 2020), https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html [https://perma.cc/6PWN-268J] (detailing State stay-at-home orders).

closures[26] that took a serious toll on the American economy.[27] President Trump was then in a fight for reelection and particularly anxious to re-open the economy and restore the nation's economic health.[28] Fearing resistance, however, the president declared that he had "total" authority, implying that he could override state law limitations on business operations.[29]

The White House ultimately left its bluster behind and released *non-binding* re-opening *guidelines* with a phased approach to reopening.[30] By the end of May 2020, states had begun re-opening, but with varying capacity and other limitations on certain businesses.[31] For example, the Governor of California, presiding over the state with the largest economy,[32] announced on May 12, 2020, that only restaurants in certain counties could allow indoor dining.[33] A few days later in Texas, which is the second largest economy, the governor issued an executive

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26. *See* Erin Schumaker, *Here Are The States That Have Shut Down Nonessential Businesses*, ABC NEWS (Apr. 3, 2020, 7:58 PM), https://abcnews.go.com/Health/states-shut-essential-businesses-map/story?id=69770806 [https://perma.cc/8DEJ-5S44] (noting widespread government-ordered business closures).

27. *See* Lauren Bauer, Kristen Broady, Wendy Edelberg & Jimmy O'Donnell, *Ten Facts About COVID-19 and the U.S. Economy*, BROOKINGS INST. (Sept. 17, 2020), https://www.brookings.edu/research/ten-facts-about-covid-19-and-the-u-s-economy/ [https://perma.cc/AJ7G-M8DK] ("The coronavirus 2019 disease (COVID-19) pandemic has created . . . an economic crisis in the United States."); Jim Tankersley, Maggie Haberman & Roni Caryn Rabin, *Trump Considers Reopening Economy, Over Health Experts' Objections*, N.Y. TIMES (Mar. 23, 2020), https://www.nytimes.com/2020/03/23/business/trump-coronavirus-economy.html [https://perma.cc/NYX6-4JHB] ("Morgan Stanley researchers said on Monday that they now expected the economy to shrink by an annualized rate of 30 percent in the second quarter of this year, and the unemployment rate to jump to nearly 13 percent. Both would be records, in modern economic statistics.").

28. *See* Maeve Reston, *Trump Wants to Reopen Country Soon. But Power Really Lies with Governors*, CNN (Apr. 12, 2020, 11:21 AM), https://www.cnn.com/2020/04/12/politics/governors-trump-coronavirus-response/index.html [https://perma.cc/YRN9-56VM] (suggesting that Trump had a "fervent desire to reopen the nation's economy"); Brian Bennett, *Why Coronavirus May Be the Biggest Threat Yet to Donald Trump's Re-Election*, TIME (Mar. 10, 2020), https://time.com/5800093/coronavirus-donald-trump-2020-election/ [https://perma.cc/29UR-845K] (quoting a Republican donor as saying that COVID-19's economic impact could cause President Trump to lose the 2020 election).

29. *See* Colvin et al., *supra* note 6 (quoting President Donald Trump).

30. *See* Philip Ewing & Alana Wise, *White House Unveils Coronavirus Guidelines on Path to Reopening the Country*, NPR (Apr. 16, 2020), https://www.npr.org/2020/04/16/833451041/watch-white-house-to-share-coronavirus-guidelines-on-a-path-to-reopening-the-cou [https://perma.cc/U894-SKTF] (indicating that President Trump did not plan to pressure States to follow the reopening guidelines); The White House & U.S. Ctrs. for Disease Control and Prevention, *Opening Up America Again*, TRUMP WHITE HOUSE, https://trumpwhitehouse.archives.gov/openingamerica/ [https://perma.cc/KC9V-6NPJ] (recommending a phased approach to opening up State economies).

31. *See* Alaa Elassar, *This Is Where Each State Is During Its Phased Reopening*, CNN (May 27, 2020), https://www.cnn.com/interactive/2020/us/states-reopen-coronavirus-trnd/ [https://perma.cc/54A5-6NWL] (describing each State's economic restrictions).

32. *See GDP by State 2022*, WORLD POPULATION REV., https://worldpopulationreview.com/state-rankings/gdp-by-state [https://perma.cc/DVW4-6MG4] (ranking the top ten States by gross domestic product).

33. *See* Hannah Miller, *Restaurants in Some California Counties to Reopen Under Restrictions*, CNBC (May 12, 2020), https://www.cnbc.com/2020/05/12/restaurants-in-some-california-counties-to-reopen-under-restrictions.html [https://perma.cc/8DPL-48FG] (discussing restrictions on restaurants in California). *See also* CAL. DEP'T OF PUBLIC HEALTH, COVID-19 INDUSTRY GUIDANCE 3 (Nov. 24, 2020), https://perma.cc/R53J-QPVM (providing for capacity limitations on indoor dining).

order allowing indoor dining in most Texas counties, but with capacity limitations.[34]

During the height of the pandemic, states placed limits on nonessential healthcare,[35] and some states even attempted to restrict access to abortion by declaring the procedure nonessential.[36] But perhaps more concerning for those who want to preserve abortion access is the explosion of state law restrictions over the last decade,[37] with regulations ranging from pre-abortion ultrasound requirements[38] to bans on particular abortion methods[39] to requirements that abortion facilities meet standards applicable to ambulatory surgery centers.[40] Many states now have gone so far as to adopt pre-viability abortion bans,[41] measures that directly conflict with the Court's admonition in *Planned Parenthood of Southeastern Pennsylvania v. Casey* that "a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability."[42]

Pro-choice advocates have successfully challenged pre-viability abortion bans as violating a woman's putative constitutional right to choose.[43] Their success, though, could come to an end when the Court rules in *Jackson Women's Health Organization v. Dobbs* on the constitutionality of a Mississippi law that bars

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34. *See* Tex. Exec. Order No. GA-23, 4–5 (May 18, 2020), https://gov.texas.gov/uploads/files/press/EO-GA-23_phase_two_expanding_opening_COVID-19.pdf [https://perma.cc/4WLX-HZ8G] (allowing indoor dining with restrictions).

35. *See, e.g.*, Mich. Exec. Order No. 2020-17 (Mar. 20, 2020), https://perma.cc/Q3BF-6MAK (requiring postponement of "non-essential" procedures); Utah Dep't of Health, *State Public Health Order* (Mar. 23, 2020), https://drive.google.com/file/d/12gNfyF1fHbhI_kv3L6jq-KeU4dkGtK2d/view [https://perma.cc/W96T-6XHB] (ordering postponement of "elective surgeries and procedures"); N.J. Exec. Order No. 109, at 5 (Mar. 23, 2020), https://nj.gov/infobank/eo/056murphy/pdf/EO-109.pdf [https://perma.cc/Z45L-GTAD] (requiring cancellation or postponement of "elective surgeries or invasive procedures").

36. *See* Gabriela Weigel, Alina Salganicoff & Usha Ranji, *Potential Impacts of Delaying "Non-Essential" Reproductive Health Care*, KFF (Jun. 24, 2020), https://www.kff.org/womens-health-policy/issue-brief/potential-impacts-of-delaying-non-essential-reproductive-health-care/ [https://perma.cc/SK65-59PQ] (identifying twelve States that attempted to restrict abortion).

37. *See* Elizabeth Nash & Lauren Cross, *2021 Is on Track to Become the Most Devastating Antiabortion State Legislative Session in Decades*, GUTTMACHER INST. (June 14, 2021), https://www.guttmacher.org/article/2021/04/2021-track-become-most-devastating-antiabortion-state-legislative-session-decades [https://perma.cc/99SD-RLDL] (indicating that over 40% of abortion restrictions since *Roe* were enacted beginning in 2011).

38. *See Requirements for Ultrasound*, GUTTMACHER INST. (Jan 1, 2022), https://www.guttmacher.org/state-policy/explore/requirements-ultrasound [https://perma.cc/T2PG-L5NE] (describing State ultrasound requirements).

39. *See Bans on Specific Abortion Methods Used After the First Trimester*, GUTTMACHER INST. (Jan. 1, 2022), https://www.guttmacher.org/state-policy/explore/bans-specific-abortion-methods-used-after-first-trimester [https://perma.cc/69JV-D8R4] (describing state bans on particular abortion methods).

40. *See Targeted Regulation of Abortion Providers*, GUTTMACHER INST. (Jan. 1, 2022), https://www.guttmacher.org/state-policy/explore/targeted-regulation-abortion-providers [https://perma.cc/VF6J-ZA2N] (detailing abortion facility requirements).

41. *State Bans on Abortion Throughout Pregnancy*, GUTTMACHER INST., https://www.guttmacher.org/state-policy/explore/state-policies-later-abortions [https://perma.cc/7RQ9-93ZN] ("16 states (including four with two different bans) have attempted to ban abortion before viability but have been stopped by court order.").

42. Planned Parenthood of Se. Penn. v. Casey, 505 U.S. 833, 879 (1992).

43. *See* GUTTMACHER, *supra* note 41.

abortion after fifteen weeks gestation.[44] With six justices appointed by Republican presidents, fears of impending doom for *Roe* and *Casey* are real.[45] Indeed, the Court's refusal to grant emergency relief from a Texas heartbeat ban seems a bad omen for those who favor a right to choose.[46] The six-week ban undoubtedly is unconstitutional under *Casey*, yet the "exceedingly clever" Texas law makes challenge difficult because it places enforcement power solely in private citizens' hands.[47]

The threats that *Dobbs* and the Court's ruling on the Texas ban pose to abortion access renewed interest in WHPA, and the House of Representatives approved the proposed legislation on September 24, 2021.[48] WHPA, though, attempts to do more than just "codify *Roe*."[49] It purports to grant women the right to abortion free from various State restrictions, including limits on the use of telemedicine, requirements for multiple visits to abortion providers, and government-mandated tests and procedures.[50]

Given that the Democrats controlled the House of Representatives in the summer of 2020, re-opening legislation would have been dead on arrival if President Trump had suggested it.[51] In February 2022, WHPA came to a halt in an

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44. *See generally* Jackson Women's Health Organization v. Dobbs, 945 F.3d 265 (5th Cir. 2021), *cert. granted*, 141 S. Ct. 2619 (2021) (striking down a Mississippi abortion ban).

45. *See* Adam Liptak, *Supreme Court to Hear Abortion Case Challenging* Roe v. Wade, N.Y. TIMES (Dec. 1, 2021), https://www.nytimes.com/2021/05/17/us/politics/supreme-court-roe-wade.html [https://perma.cc/2JZD-7BJ7] ("Alarm bells are ringing loudly about the threat to reproductive rights."); Lawrence Hurley, *Analysis: U.S. Supreme Court's Rightward Lurch Put* Roe v. Wade *on the Brink*, REUTERS (Sept. 3, 2021 9:20 PM), https://www.reuters.com/world/us/us-supreme-courts-rightward-lurch-put-roe-v-wade-brink-2021-09-03/ [https://perma.cc/KY9K-QNHM] (suggesting that the Court may overturn *Roe*).

46. *See* Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2495 (2021) (denying preliminary injunction and motion to vacate lower court stay). *See* TEX. HEALTH & SAFETY CODE ANN. §§ 171.204(a) (barring a physician from knowingly performing an abortion after the physician detects a fetal heartbeat).

47. *See* Jacob Gershman, *Supreme Court Abortion Ruling Brings New Uncertainty to Decades-Old Fight*, WALL ST. J. (Sept. 2, 2021, 7:12 PM), https://www.wsj.com/articles/supreme-court-abortion-ruling-brings-new-uncertainty-to-decades-old-fight-11630621820 [https://perma.cc/UHS7-FEGW] (quoting Virginia law professor Douglas Laycock).

48. Carl Hulse, *House Approves Measure to Protect Abortion Rights Amid Threats From States and the Courts*., N.Y. TIMES (Sept. 24, 2021), https://www.nytimes.com/2021/09/24/us/politics/abortion-rights-bill-house.html [https://perma.cc/7FVU-KRAM] (stating that the House of Representatives had passed WHPA).

49. *See* Women's Health Protection Act §§ 4(a)(8)-(9) (2021) (freeing physicians and women from abortion prohibitions).

50. *See* Women's Health Protection Act §§ 4(a)(1), (5), (7) (2021) (granting women abortions rights free of certain types of State law restrictions).

51. *See* Grace Panetta, Ashley Collman & Lauren Frias, *Democrats Projected to Retain Their House Majority But Lose Key Seats to Republicans*, BUS. INSIDER (Nov 30, 2020, 9:02 PM), https://www.businessinsider.com/2020-house-elections-results [https://perma.cc/BR8D-L5YQ] (noting that the Democrats took control of the House of Representatives in 2018).

evenly divided Senate with an intact filibuster, and the vote wasn't even close.[52] But political winds can change, and both WHPA and re-opening legislation raise similar and important questions for our "indestructible Union, composed of indestructible States."[53]

II. THE COMMERCE CLAUSE

Federal law reigns supreme over inconsistent State laws by virtue of the Constitution's Supremacy Clause,[54] but "[f]ederal power is delegated, and its prescribed limits must not be transcended even though the end seems desirable."[55] Thus, a foundational question for WHPA and re-opening legislation is whether Congress even has the power to enact such laws.

Among the sources of power cited in WHPA is the Commerce Clause,[56] contained in Article I, Section 8 of the Constitution. Given that re-opening legislation's aim would be to allow commercial businesses to operate, the Commerce Clause also is a logical ground for re-opening legislation.

The Commerce Clause provides that Congress "shall have Power … To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[57] The Court has recognized that the Commerce Clause allows Congress to regulate the channels and instrumentalities of interstate commerce, persons or things in commerce, and more controversially, activities that have a substantial effect on interstate commerce.[58] Regarding the last of the three categories, the Court has granted Congress significant latitude, limiting a court's role to assessing whether a "rational basis" exists for Congress to have determined that an activity has such an effect.[59] Nevertheless, the Court has emphasized that it has the final say on the connection's sufficiency.[60]

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52. *See* Carl Hulse, *Republicans Block Abortion Rights Measure in Senate*, N.Y. TIMES (Feb. 28, 2022), https://www.nytimes.com/2022/02/28/us/politics/abortion-rights-measure-senate.html [https://perma.cc/6LZT-LTS5] ("Democrats fell 14 votes short of the 60 needed to bring the Women's Health Protection Act to the floor for consideration . . . .").

53. Texas v. White, 74 U.S. 700, 725 (1868).

54. *See* U.S. CONST. art. VI, § 2 (providing that Congress "shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

55. Linder v. United States, 268 U.S. 5, 22 (1925).

56. *See* Women's Health Protection Act §§ 2(a)(5)(A), 2(b)(3). The act also identifies Section 5 of the Fourteenth Amendment and the Necessary and Proper Clause as sources of congressional power. *See* Women's Health Protection Act §§ 2(a)(5)(B), 2(a)(5)(B), 2(b)(3).

57. U.S. CONST. art. I, § 8.

58. *See* NFIB v. Sebelius, 567 U.S. 519, 536 (2012) (opinion of Roberts, C.J.) (describing the scope of Congress's power under the Commerce Clause); Gonzales v. Raich, 545 U.S. 1, 16–17 (2005) (same as above); United States v. Lopez, 514 U.S. 549, 558–59 (1995) (same as above). *See also NFIB*, 567 U. S. at 708 (Thomas, J., dissenting) (quoting United States v. Morrison, 529 U.S. 598, 627 (2000) (Thomas, J., concurring)) ("I adhere to my view that 'the very notion of a "substantial effects" test under the Commerce Clause is inconsistent with the original understanding of Congress' powers and with this Court's early Commerce Clause cases.'").

59. *See, e.g.*, *Raich*, 545 U.S. at 22 (describing the nature of the Court's review); *Lopez*, 514 U.S. at 557 (same as above).

60. *See Morrison*, 529 U.S. at 614 (describing the Court's role in determining the breadth of the commerce power); Maryland v. Wirtz, 392 U.S. 183, 190 (1968) (quoting Katzenbach v. McClung, 379

As the constitutional text makes clear, Congress does not have the power to regulate *all* commerce. Early in the life of the Republic, the Court explained the Commerce Clause's limits:

> The enumeration [of Congress's power to regulate commerce] presupposes something not enumerated; and that something, if we regard the language or the subject of the [Commerce Clause], must be the exclusively internal commerce of a State. . . . The completely internal commerce of a State . . . may be considered as reserved for the State itself.[61]

Yet the Court has long held that the commerce power gives Congress substantial freedom to regulate commercial activities legally taking place within a State.[62]

Examples abound. In *United States v. Darby*, the Court upheld the provisions of the Fair Labor Standards Act that prescribed minimum wages and maximum weekly work hours for employees engaged in the production within a State of goods destined for interstate sale.[63] In *United States v. Wrightwood Dairy Co.*, the Court decided that Congress could use its commerce power to regulate the price of milk produced and sold solely within a single State.[64] The Court in *Wickard v. Filburn*—recognized by some as the Court's *ne plus ultra* interpretation of Commerce Clause authority[65]—concluded that, in controlling the volume of wheat "moving in interstate and foreign commerce,"[66] Congress could limit not only the amount of wheat produced for sale, but also the amount produced for a farmer's own consumption.[67] In *Heart of Atlanta Motel, Inc. v. United States* and *Katzenburg v. McClung*, the Court held that Congress validly exercised its power under the Commerce Clause when it barred racial and other discrimination in motels and restaurants under Title II of the Civil Rights Act of 1964.[68] The Court in *Perez v. United States* upheld a federal law criminalizing loansharking,

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U.S. 294, 303 (1964)) ("[T]he mere fact that Congress has said when particular activity shall be deemed to affect commerce does not preclude further examination by this Court.").

61. Gibbons v. Ogden, 22 U.S. 1, 195 (1824).

62. *See id.* at 204 ("Congress may control the State laws, so far as it may be necessary to control them, for the regulation of commerce.").

63. *See* United States v. Darby, 312 U.S. 100, 114 (1941) (upholding against a Commerce Clause challenge provisions of the Fair Labor Standards Act).

64. *See* United States v. Wrightwood Dairy Co., 315 U.S. 110, 121 (1942) (upholding federal regulation of prices of milk purchased and sold solely within a State).

65. *See* NFIB v. Sebelius, 567 U.S. 519, 554 (2012) (opinion of Roberts, C.J.) (quoting United States v. Lopez, 514 U.S. 549, 560 (1995)) ("*Wickard* has long been regarded as 'perhaps the most far reaching example of Commerce Clause authority over intrastate activity.'").

66. Wickard v. Filburn, 317 U.S. 111, 115 (1942).

67. *See id.* at 129 (upholding congressional authority to control wheat consumption as part of the regulation of the price of wheat).

68. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261 (1964) (upholding the authority of Congress to apply the public accommodations provisions to a motel); Katzenbach v. McClung, 379 U.S. 294, 295 (1964) (upholding the authority of Congress to apply the public accommodations provisions to a restaurant).

even as it applied to entirely intrastate conduct.[69] And in *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, the Court found that the Commerce Clause gave Congress the power to regulate surface mining.[70]

Decisions of more recent vintage, however, have identified critical limits to the Commerce Clause's scope. The Court's 1995 and 2000 opinions in *United States v. Lopez* and *United States v. Morrison*, for example, strongly suggest that Congress's commerce authority over intrastate activities extends only to economic activities,[71] and the 2012 *National Federation of Independent Business v. Sebelius* decision indicates that Congress's power under the Commerce Clause is the power to regulate existing activities, not to force private parties to engage in activities against their wishes.[72]

In *Lopez*, the Court considered whether the Commerce Clause permitted Congress to enact the Gun-Free School Zones Act of 1990, a law that made it illegal to knowingly possess a firearm in a school zone.[73] The *Lopez* Court concluded that, for several reasons, the Commerce Clause did not supply the power necessary. First, the act was not economic, but criminal in nature, and it was "not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."[74] Second, the law did not contain a jurisdictional limitation limiting its reach to interstate commercial activity.[75] Finally, Congress never made—in committee or otherwise—specific findings as to the connection of the possession of guns in school zones to interstate commerce.[76]

In striking down the Gun-Free School Zones Act, the *Lopez* Court pointed out that the Government's argument regarding the connection to interstate commerce required a long logical string: the possession of guns in school zones leads to

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69. *See* Perez v. United States, 402 U.S. 146, 154 (1971) ("Extortionate credit transactions, though purely intrastate, may in the judgment of Congress affect interstate commerce.").

70. *See* Hodel v. Virginia Surface Mining and Reclamation Assoc., Inc., 452 U.S. 264, 268 (1981) (upholding the Surface Mining Control and Reclamation Act of 1977 as a valid exercise of Congress's power over interstate commerce).

71. *See* United States v. Morrison, 529 U.S. 598, 613 (2000) ("[T]hus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."); United States v. Lopez, 514 U.S. 549, 560 (1995) ("[T]he pattern is clear. Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.").

72. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 550 (2012) (opinion of Roberts, C.J.) ("The power to *regulate* commerce presupposes the existence of commercial activity to be regulated. If the power to 'regulate' something included the power to create it, many of the provisions in the Constitution would be superfluous."); *id.* at 658 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) ("[I]t must be *activity* affecting commerce that is regulated, and not merely the failure to engage in commerce.").

73. *See Lopez*, 514 U.S. at 551 (describing the Gun-Free School Zones Act of 1990).

74. *Id.* at 561.

75. *See id.* (describing the reasons why the Gun-Free School Zones Act did not fall within Congress's commerce authority).

76. *See id.* at 562 (describing the reasons why the Gun-Free School Zones Act did not fall within Congress's commerce authority).

violent crime; violent crime affects the national economy by increasing insurance rates, discouraging interstate travel to places considered unsafe, and adversely affecting student learning; and the harmful effects on student learning decrease worker productivity, thereby yielding negative economic consequences.[77] According to the Court, accepting the Government's argument would radically extend the Commerce Clause's reach:

> The Government admits, under its 'costs of crime' reasoning, that Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce. Similarly, under the Government's "national productivity" reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the theories that the Government presents, it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign.[78]

Rejecting Justice Breyer's contention that "Congress . . . could rationally conclude that schools fall on the commercial side of the line," the *Lopez* Court stressed that, although Congress has broad authority to "regulate numerous commercial activities that substantially affect interstate commerce and also affect the educational process," Congress's power "does not include the authority to regulate each and every aspect of local schools."[79] According to the Court, if the effects on student learning and the related economic impacts were the appropriate measures for the Commerce Clause as it related to the Gun-Free School Zones Act, Congress could go so far as to make curricular decisions for local schools.[80] Finally, the Court explained, "[t]o uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."[81]

Following the *Lopez* Court's analytical framework, the *Morrison* Court decided that 42 U.S.C. § 13981, enacted as part of the Violence Against Women Act of 1994 ("VAWA") and offering a civil remedy for victims of violence based on gender, exceeded Congress's authority over interstate commerce.[82] In so doing, the Court explained that gender-based violent crimes are not economic

77. *See id.* at 563–64 (explaining the Government's proffered rationale).

78. *Id.* at 564 (citation omitted).

79. *Lopez*, 514 U.S. at 565–66.

80. *See id.* at 565 (discussing the potential for Congress to "mandate a federal curriculum for local elementary and secondary schools because what is taught in local schools has a significant 'effect on classroom learning'").

81. *Id.* at 567.

82. *See* United States v. Morrison, 529 U.S. 598, 619 (2000) ("[W]e conclude that the Commerce Clause does not provide Congress with authority to enact § 13981.").

activities.[83] In addition, the Court noted that, like the Gun Free School Zones Act, the civil remedy provision did not have a jurisdictional element linked to interstate commerce.[84] Although the Court observed that Congress had made findings with respect to VAWA,[85] these findings fell short because they described a rationale similar to that which the *Lopez* Court had determined insufficient.[86]

As in *Lopez*, the *Morrison* Court feared that accepting the government's arguments would give Congress license to invade areas of traditional State concern "such as marriage, divorce, and childrearing."[87] The Court added:

> The Constitution requires a distinction between what is truly national and what is truly local. . . . The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States. Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.[88]

Gonzales v. Raich, however, took a small turn away from *Lopez* and *Morrison* and gave Congress some latitude under the Commerce Clause to regulate criminal activity. The *Raich* Court considered whether Congress could use its commerce authority to extend the federal Controlled Substances Act (the "CSA"), consisting of Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970, to prohibit marijuana produced and used entirely intrastate for medicinal purposes, as California law permitted.[89] The CSA was designed to combat the illegal drug trade in interstate and international commerce by controlling both legitimate and illegitimate trafficking.[90] To accomplish this, the CSA prohibits the "manufacture, distribut[ion], dispens[ation], or possess[ion]" of marijuana and other drugs except in accordance with the CSA.[91] And as to marijuana, the CSA criminalized its manufacture, distribution, and possession except in connection with a particular government research study.[92]

The *Raich* Court concluded that the CSA was a valid exercise of Congress's commerce power, even as it applied to the completely intrastate growing and

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83. *See id.* at 613.
84. *See id.*
85. *See id.* at 614.
86. *See id.* at 615.
87. *Id.* at 616.
88. United States v. Morrison, 529 U.S. 598, 617–18 (2000) (citation omitted).
89. *See* Gonzales v. Raich, 545 U.S. 1, 5 (2005) (describing the issue in the case). More precisely, the Court considered whether the Necessary and Proper Clause would allow extension of the CSA, which otherwise reflects a valid exercise of Congress's commerce authority, to intrastate activities. *See id.*
90. *See id.* at 12–13 (describing Congress's aim in enacting the CSA).
91. *Id.* at 13.
92. *See id.* at 14 (explaining how the CSA applied to marijuana).

possession of marijuana for medical purposes, as State law permitted.[93] The Court observed that it had consistently held that Congress has the authority to regulate an entire "economic 'class of activities'" that has a substantial effect on interstate commerce, an authority extending to purely intrastate activities that fit within the class, regardless of whether those activities themselves constitute commerce.[94] Looking to *Wickard*, the Court explained "that Congress can regulate purely intrastate activity that is not itself 'commercial,' in that it is not produced for sale, if [Congress] concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity."[95]

In upholding the CSA's application to intrastate, non-commercial activities, the *Raich* Court carefully distinguished *Lopez* and *Morrison*. First, the Court noted that, in *Lopez* and *Morrison*, it had considered whether an entire statute or provision was within Congress's commerce power, not how far an otherwise valid "comprehensive framework" like the CSA lawfully can extend.[96] Second, according to the Court, unlike the CSA, the Gun-Free School Zones Act and VAWA § 13981 regulated non-economic activity.[97] The Court stressed:

> [T]he activities regulated by the CSA are quintessentially economic. "Economics" refers to "the production, distribution, and consumption of commodities." The CSA is a statute that regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market. . . . Because the CSA is a statute that directly regulates economic, commercial activity, our opinion in *Morrison* casts no doubt on its constitutionality.[98]

In *National Federation of Independent Business (NFIB) v. Sebelius*, a majority of the Court returned to defining proscriptions on congressional authority, explaining that Congress does not have the power under the Commerce Clause to require individuals to engage in commerce.[99] The *NFIB* Court upheld the Patient Protection and Affordable Care Act of 2010's individual mandate, which required individuals to purchase health insurance or pay a penalty,[100] as a valid exercise of

93. *See id.* at 33 (reversing the decision of the United States Court of Appeals for the Ninth Circuit that application of the CSA to purely intrastate production and use exceeded Congress's power under the Commerce Clause).

94. *See id.* at 17 (describing precedent with respect to the scope of the Commerce Clause).

95. *Raich*, 545 U.S. at 18.

96. *See id.* at 23 (distinguishing *Lopez* and *Morrison*).

97. *See id.* at 23, 25 (distinguishing *Lopez* and *Morrison*).

98. *Id.* at 25–26 (citation omitted).

99. *See* NFIB v. Sebelius, 567 U.S. 519, 561 (2012) (opinion of Roberts, C.J.) ("The commerce power . . . does not authorize the mandate."); *id.*at 647–50 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) (discussing Congress's commerce power and concluding that it did not permit enactment of the individual mandate).

100. *See id.* at 530–31 (describing the individual mandate).

Congress's taxing authority.[101] But Chief Justice Roberts, author of the Court's principal opinion, parted ways with the other members of the majority and agreed with the Court's four dissenters that the mandate was not valid under the Commerce Clause.[102]

Even though the Chief Justice acknowledged that Congress's power to regulate commerce is expansive, he stated: "The power to *regulate* commerce presupposes the existence of commercial activity to be regulated. . . . The language of the Constitution reflects the natural understanding that the power to regulate assumes there is already something to be regulated."[103] Chief Justice Roberts rejected the Government's argument that Congress could use its commerce power to require individuals to purchase health insurance because the failure of the individual to do so has an effect on interstate commerce.[104] According to the Chief Justice:

> The Government's theory would . . . permit[] Congress to reach beyond the natural extent of its authority, "everywhere extending the sphere of its activity and drawing all power into its impetuous vortex." Congress already enjoys vast power to regulate much of what we do. Accepting the Government's theory would give Congress the same license to regulate what we do not do, fundamentally changing the relation between the citizen and the Federal Government.[105]

The Chief Justice likewise determined that the Necessary and Proper Clause would not save the individual mandate. Unlike the prohibition against intrastate marijuana production and use at issue in *Raich*, Chief Justice Roberts emphasized that the individual mandate's intrusion did not involve "individual *applications* of a concededly valid statutory scheme."[106] The mandate, the Chief Justice indicated, could not be considered "incidental to the exercise of the commerce power," but would involve an independent expansion of congressional power.[107]

For nearly the same reasons, the dissenting Justices in *NFIB* concluded that neither the Commerce Clause nor the Necessary and Proper Clause could buoy the individual mandate. According to the dissent, "*purchasing* insurance *is* 'Commerce'; but one does not regulate commerce that does not exist by compelling its existence."[108] For the commerce power to apply and for the Court to defer

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101. *See id.* at 575 ("The Federal Government [has] the power to impose a tax on those without health insurance. Section 5000A is therefore constitutional.").

102. *See id.* at 561 (opinion of Roberts, C.J.) ("The commerce power . . . does not authorize the mandate."); *id.* at 649–60 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) (explaining why Congress had no authority to enact the individual mandate under the Commerce Clause).

103. *Id.* at 550 (opinion of Roberts, C.J.)

104. *See id.* at 552 (opinion of Roberts, C.J.) (discussing the effect of the individual mandate).

105. *NFIB*, 567 U.S. at 554–55.

106. *Id.* at 561.

107. *Id.* at 560.

108. *Id.* at 648 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

to Congress's determination of what affects interstate commerce, the dissent stressed, "it must be *activity* affecting commerce that is regulated, and not merely the failure to engage in commerce."[109] Referring to *Wickard* and *Perez*, the dissent pointed out that extending the Commerce Clause to permit the individual mandate would mean "growing and lending can be federally compelled."[110] And like the Chief Justice, the dissenting Justices distinguished *Raich*, observing that *Raich* did not involve a limitless expansion of power, and because marijuana coming from out of state is virtually indistinguishable from marijuana produced in the same state in which it is possessed and used, the CSA's application to intrastate activity was "necessary and proper."[111]

The Commerce Clause thus is not unbounded.[112] *Lopez*, *Morrison*, *NFIB,* and even *Raich* speak to its limits. *Lopez*, *Morrison*, and *Raich* all suggest that Congress's power under the Commerce Clause to regulate intrastate activities extends only to instances in which Congress is regulating conduct that is economic in nature.[113] And the Commerce Clause majority[114] in *NFIB* stressed that

109. *Id*. at 658.

110. *Id*. at 657.

111. *Id*. at 653–54.

112. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat. 1) 1, 64–65 (1824) ("This power . . . does not extend to the regulation of the internal commerce of any State. This results from the terms used in the grant of power, 'among the several States.' It results also from the effects of a contrary doctrine, on the whole mass of State power."); United States v. Lopez, 514 U.S. 549, 556–57 (1995) ("[E]ven . . . modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits."); United States v. Morrison, 529 U.S. 598, 608 (2000) (quoting *Lopez*, 514 U.S. at 556–57). *See also NFIB*, 567 U.S. at 554 (opinion of Roberts, C.J.) (quoting Maryland v. Wirtz, 392 U.S. 183, 196 (1968)) ("While Congress's authority under the Commerce Clause has of course expanded with the growth of the national economy, our cases have 'always recognized that the power to regulate commerce, though broad indeed, has limits.'"); *id*. at 647 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) ("Whatever may be the conceptual limits upon the Commerce Clause . . . [it] cannot be such as will enable the Federal Government to regulate all private conduct and to compel the States to function as administrators of federal programs.").

113. *See* Gonzales v. Raich, 545 U.S. 1, 25 (2005) (observing that the laws that the *Lopez* and *Morrison* Courts struck down "did not regulate economic activity."); *Morrison*, 529 U.S. at 613 ("[T]hus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."); *Lopez*, 514 U.S. at 560 ("Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.").

114. This Article refers to Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Alito, collectively, as the "Commerce Clause majority" in *NFIB* because, although they all agreed that neither the Commerce Clause nor the Necessary and Proper Clause could sustain the individual mandate, they did not join in a single opinion with respect to that matter. Whether the Chief Justice's opinion is controlling as to interpretation of the Commerce Clause is subject to some question because the Court sustained the individual mandate under Congress's taxing authority. *See* United States v. White, 782 F.3d 1118, 1124 (10th Cir. 2015) (indicating that *NFIB* does not have a controlling opinion related to the Commerce Clause); United States v. Anderson, 771 F.3d 1064, 1068 n.2 (8th Cir. 2014) ("The issues in [*NFIB*] resulted in a split decision, and there is no controlling opinion on the issue of whether provisions of the Affordable Care Act violated the Commerce Clause. . . . We cannot read the conglomeration of the dissenting opinion of four Justices combined with the concurring opinion of the Chief Justice to constitute binding precedent interpreting the Commerce Clause."); United States v. Robbins, 729 F.3d 131, 135 (2d Cir. 2013) ("It is not clear whether anything said about the Commerce Clause in *NFIB*'s primary opinion—that of Chief Justice Roberts—is more than dicta."); United States v. Henry, 688 F.3d 637, 641 n.5 (9th Cir. 2012) ("Five justices [in *NFIB*] . . . agreed that the Commerce Clause did not

Congress's commerce power is the power to *regulate* economic activity, not the power to *force citizens to engage in* economic activity.[115]

III. RE-OPENING LEGISLATION AND THE WOMEN'S HEALTH PROTECTION ACT

Like the legislation at issue in *Lopez*, *Morrison*, and *NFIB*, WHPA does not police the "use of the channels of interstate commerce," bar transporting a commodity through those channels, or attempt "to protect an instrumentality of interstate commerce or a thing in interstate commerce."[116] And although some legislation seeking to ignite economic activity in the midst of a pandemic might fit within one or more of those categories, re-opening legislation of the type this Article considers—legislation to force states to permit internal trade—does not. Thus, as it was in *Lopez*, *Morrison*, *NFIB*, and *Raich*, it is the breadth of Congress's authority to regulate activities substantially affecting interstate commerce that determines whether Congress has the power under the Commerce Clause to enact WHPA or re-opening legislation.

To be sure, both re-opening legislation and WHPA involve economic activities more directly than the laws at issue in *Lopez* and *Morrison*. Indeed, re-opening legislation's aim is to force states to allow commerce.

WHPA's relationship to commercial activity is a little less obvious, but the proposed legislation describes several ways in which abortion services implicate not only commerce but interstate commerce.[117] First, the bill indicates that women travel across state lines to obtain abortions, and physicians and others travel across state lines to provide or facilitate abortion services.[118] Second, the bill observes that abortion providers obtain supplies, equipment, pharmaceuticals, and services transported through interstate commerce and that providers offer and procure training through interstate commerce.[119] Finally, and more obliquely, the bill maintains that the availability of abortion allows women to participate in the economic life of the country.[120]

The last potential connection to interstate commerce plainly is insufficient for Commerce Clause purposes and deserves only brief attention because a similar

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authorize th[e] statute. There has been considerable debate about whether the statements about the Commerce Clause are dicta or binding precedent."). At a minimum, however, the agreement among a majority of the Justices regarding the scope of Congress's commerce power is persuasive.

115. *See NFIB*, 567 U.S. at 550 (opinion of Roberts, C.J.) ("The power to regulate commerce presupposes the existence of commercial activity to be regulated. If the power to 'regulate' something included the power to create it, many of the provisions in the Constitution would be superfluous."); *id.* at 657 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) ("[I]t must be *activity* affecting commerce that is regulated, and not merely the failure to engage in commerce.").

116. *Lopez*, 514 U.S. at 559.

117. *See* WHPA § 2(a)(20) ("Health care providers engage in a form of economic and commercial activity when they provide abortion services, and there is an interstate market for abortion services.").

118. *See id.* §§ 2(a)(19), (21).

119. *See id.* § 2(a)(21).

120. *See id.* § 2(a)(7) ("Abortion-specific restrictions . . . harm the . . . ability [of women] to participate in the social and economic life of the Nation."); *id.* § 2(b)(2) (stating that one purpose is "to promote . . . women's ability to participate equally in the economic and social life of the United States").

"economic participation" rationale failed in *Morrison* for the reasons that the *Lopez* Court cited when it rejected the government's "costs of crime" justification for the Gun Free School Zones Act.[121] If adverse effects on the ability of women (or any other group, for that matter) to participate in economic life were sufficient to empower Congress to draw on its commerce power, "it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign."[122] Congress could regulate marriage, divorce, child custody, wills, trusts, curricular decisions in public and private schools, and even restaurant health standards[123]—indeed, "any activity that Congress found was related to the [ability] of individual citizens" to participate in economic life.[124] Consequently, an "economic participation" rationale for WHPA falls short.

The more specific connections WHPA cites, however, warrant further evaluation not only with respect to WHPA itself but also with respect to re-opening legislation, because the types of connections WHPA lists easily apply to the vast majority of businesses that re-opening legislation would affect. Consider, for example, hair care services. Barbershops and hair salons operate throughout the United States, and their aggregate annual revenue is in the billions.[125] Industry participants range from small, local businesses to nationwide franchises like Sport Clips, Great Clips, and Supercuts.[126] It seems unexceptionable that, in places like Kansas City, Kansas and Kansas City, Missouri or Bristol, Virginia and Bristol, Tennessee, people travel across state lines to obtain haircuts and hair styling services, and barbers, stylists and others travel across state lines to provide or facilitate haircuts and hair styling services. Likewise, barbershops and hair salons undoubtedly obtain supplies, equipment, products for resale,[127] and services transported through interstate commerce, and barbers, stylists, and others offer and procure training through interstate commerce.

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121. *See Morrison*, 529 U.S. at 615 (indicating that the congressional findings related to the willingness of potential victims of gender-motivated to "engag[e] in employment" and "transact[] with business" were insufficient because of the concerns the *Lopez* Court identified); *Lopez*, 514 U.S. at 564–65 (discussing the implications if the Court were to agree with the Government's "costs of crime" argument).

122. *Lopez*, 514 U.S. at 564.

123. *See id*. at 564–65 (describing the potential reach of federal power).

124. *Id*. at 564.

125. *See Beauty Salon Business*, SBDCNET (May 21, 2020), https://www.sbdcnet.org/small-business-research-reports/beauty-salon/ [https://perma.cc/RPX4-4FFT] [hereinafter *Salon Businesses*] ("The US hair care services industry includes more than 80,000 establishments (77,000 beauty salons; 4, 500 barber shops) with combined annual revenue of about $20 billion.").

126. *See id*. (indicating that both small and large companies are segments of the industry); *Hair Care Franchises*, ENTREPRENEUR, https://www.entrepreneur.com/franchises/category/hair-care [https://perma.cc/84FE-Y6P4] (listing franchises).

127. *See Beauty Salon Business*, *supra* note 125 ("Sales of hair care products are an important revenue source for many salons, typically providing from 5% to 25% of revenue.").

During the COVID pandemic, states have ordered closure and capacity restrictions on barbershops and hair salons,[128] making them a potential target for re-opening legislation. But the connections described above—whether applied to abortion providers, barbershops, hair salons, or other businesses—do not confer power on Congress through the Commerce Clause to enact measures like re-opening legislation or WHPA, as the remainder of this Part explains.

A. The Commerce Clause Does Not Grant Congress the Power to Legalize Internal Trade that States Wish to Prohibit

The Court has long recognized that the Commerce Clause's scope must be evaluated in light of our federal system and may not be interpreted so broadly that it fundamentally alters the Constitution's delicate balance of federal and State power.[129] Treating re-opening legislation and WHPA as a valid exercise of Congress's commerce power would do just that.

When incident to an otherwise valid regulatory scheme governing commercial activity, Congress has the power under the Commerce Clause to restrict business activities that State law permits.[130] The converse, however, is not true. Congress does not have the power to authorize internal trade that a State wishes to prohibit. The Court in its 1866 *License Tax Cases* opinion and 1888 *Kidd v. Pearson* decision made that point manifest.

Presaging *NFIB*, the Court in the *License Tax Cases* upheld as proper exercises of Congress's taxing power federal laws that required those selling lottery tickets

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128. *See, e.g.*, Governor of the Commonwealth of Virginia, Executive Order No. 53 at ¶ 4, Mar. 23, 2020, https://cdn.ymaws.com/www.lcamddcva.org/resource/resmgr/docs/legislative_alerts/eo-53-temporary-restrictions.pdf [https://perma.cc/GQE7-X335] (closing beauty salons and barbershops); Governor of the Commonwealth of Virginia, Executive Order No. 61 at ¶ A(6), May 8, 2020, https://vafma.org/wp-content/uploads/2020/05/EO-61-and-Order-of-Public-Health-Emergency-Three-Phase-One-Easing-Of-Certain-Temporary-Restrictions-Due-To-Novel-Coronavirus-COVID-19.pdf [https://perma.cc/9QQJ-9BRV] (imposing maximum occupancy and other restrictions on beauty salons and barber shops); Governor of the State of Michigan, Executive Order No. 2020-21 at ¶ 1, effective Mar. 24, 2020, https://www.michigan.gov/whitmer/news/state-orders-and-directives/2020/03/23/executive-order-2020-21 [https://perma.cc/HVV2-JELL] (barring "in-person work that is not necessary to sustain or protect life"); Governor of the State of Michigan, Executive Order No. 2020-145 at ¶ 11, July 9, 2020, https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-534168–,00.html [https://perma.cc/B9UD-DF44] (imposing waiting area occupancy limitations, physical distancing requirements, and other restrictions on barbershops and similar services); Governor of the State of Arizona, Executive Order 2020-18 at ¶ 12, Apr. 30, 2020, https://azgovernor.gov/sites/default/files/eo_2020-18_stay_home_stay_healthy_stay_connected_1.0.pdf [https://perma.cc/M5DP-9VV8] (permitting operation of non-essential business to the extent "in-person, on-site transactions" are not required); Governor of the State of Arizona, Executive Order 2020-34 at ¶ 1, May 4, 2020, https://azgovernor.gov/sites/default/files/eo_2020-34_salons_dine_in.pdf [https://perma.cc/7H78-SC7F] (allowing barbers and cosmetologists to operate on an appointment-only basis and following Centers for Disease Control and Prevention protocols).

129. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937) (indicating that Congress's commerce power "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them . . . would effectually obliterate the distinction between what is national and what is local").

130. *Cf.* Gonzales v. Raich, 545 U.S. 1, 27 (2005) (upholding federal bar against production and use of marijuana permitted by California law as part of "a comprehensive regulatory regime").

or liquor to pay for a license from the Federal Government or to pay a penalty for doing so without a license.[131] Although the Court recognized that Congress had the power to license certain activities involving the channels of interstate commerce (such as those related to navigable waterways) pursuant to its commerce power, it stressed that internal trade is quite a different matter.[132] According to the Court:

> The power to authorize a business within a State is plainly repugnant to the exclusive power of the State over the same subject. . . . [I]f the licenses were regarded as giving authority, . . . there would be a direct conflict between National and State legislation on a subject which the Constitution places under the exclusive control of the States.[133]

The upshot is that Congress may *discourage* an activity occurring illegally under State law, but it does not have the power to legalize internal trade that a State wishes to prohibit.[134]

The Court drew on the *License Tax Cases* about 20 years later in *Kidd*, a Commerce Clause case.[135] Unlike in the *License Tax Cases*, the question in *Kidd* was not whether federal legislation represented a valid exercise of congressional power, but whether a State law encroached on Congress's authority to regulate interstate commerce.[136] The law at issue was an Iowa statute that barred the manufacture of alcohol within the State except when manufactured for sale within the State and exclusively for "mechanical, medicinal, culinary, or sacramental" purposes.[137] The Court upheld the statute, emphasizing a State's power over authorizing a particular business within its borders: "The proposition that, supposing the goods were once lawfully called into existence, it would then be beyond the power of the state either to forbid or impede their exportation, may be conceded. Here, however, the very question underlying the case is whether the goods ever came lawfully into existence."[138]

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131. *See* License Tax Cases, 72 U.S. 462, 471 (1866) (explaining that the licensing laws at issue represented revenue measures). *See also* NFIB v. Sebelius, 567 U.S. 519, 574 (2012) ("The Affordable Care Act's requirement that certain individuals pay a financial penalty for not obtaining health insurance may reasonably be characterized as a tax."). The *NFIB* Court cited the *License Tax Cases* in support of its conclusion that the "individual mandate" was a proper exercise of Congress's taxing power. *See id*. at 564–65 (citing *License Tax Cases*, 72 U.S. at 471).

132. *See License Tax Cases*, 72 U.S. at 470 (discussing the congressional power to authorize activities).

133. *Id*. at 471–72.

134. *See License Tax Cases*, 72 U.S. at 473 ("There is nothing hostile or contradictory . . . in the acts of Congress to the legislation of the States. What the latter prohibits, the former, if the business is found existing notwithstanding the prohibition, discourages by taxation.").

135. *See* Kidd v. Pearson, 128 U.S. 1, 23–24 (1888) (discussing the *License Tax Cases*).

136. *Id*. at 15 (reciting the issues in the case).

137. *See id*. at 19 (explaining the Iowa statute).

138. *Id*. at 18.

The *Kidd* Court acknowledged that the Iowa law's "effects may reach beyond the state, by lessening the amount of intoxicating liquors exported,"[139] but it also feared that striking down the law on Commerce Clause grounds would expand congressional power too far: "[I]s there [any branch of human industry] that does not contemplate, more or less clearly, an interstate or foreign market?"[140] If this were enough for Commerce Clause purposes, the Court worried, Congress would have the ability and responsibility to regulate business in every minute detail.[141]

Following ratification of the Twenty-first Amendment, which gives the States the power to regulate importation, transportation, and use of alcohol within their borders,[142] the Court in *Ziffrin, Inc. v. Reeves* looked to *Kidd* and held that, because a State lawfully could prohibit the manufacture and sale of alcohol entirely, it could condition the manner in which it was shipped without violating the Commerce Clause: "Having power absolutely to prohibit manufacture, sale, transportation, or possession of intoxicants, . . . it [was] permissible for Kentucky to permit these things only under definitely prescribed conditions. . . . The greater power includes the less."[143] In *Granholm v. Heald*, however, the Court retreated from *Ziffrin*'s broad reading of the Twenty-first Amendment as displacing the Commerce Clause entirely and held that a State is not entirely free to enact, consistent with the Commerce Clause, importation laws that discriminate against alcohol produced out of State or distribution regulations adopted as a means of protectionism.[144] Moreover, since *Ziffrin*, the Court has held that State regulations preventing the exportation of alcohol, natural resources, or wildlife could not

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139. *Id.* at 22.

140. *Id.* at 21.

141. *See id.* ("The power being vested in congress and denied to the states, it would follow . . . that the duty would devolve on congress to regulate all of these . . . interests which in their nature are . . . local in all the details of their successful management.").

142. Although the *Kidd* Court likened a State's ability to prohibit the manufacture of alcohol for export to an earlier conclusion that a State has the power to bar the retail sale of imported alcohol, *see Kidd*, 128 U.S. at 23, prior to prohibition and its repeal, States could not prevent effectively the sale of alcohol imported from out of State to the extent it was in its "original package," *see* Leisy v. Hardin, 135 U.S. 100, 124 (1890) ("The plaintiffs . . . import into Iowa beer which they sell in original packages. . . . [T]hey had the right to import this beer into that state, and . . . had the right to sell it . . . ."); Granholm v. Heald, 544 U.S. 460, 478 (2005) ("[States] could ban the production of domestic liquor, but these laws were ineffective because out-of-state liquor was immune from any state regulation as long as it remained in its original package."); Tennessee Wine & Spirits Retailers Ass'n v. Thomas, 139 S.Ct. 2449, 2464–65 (2019) ("Under th[e] [original-package] doctrine, 'goods shipped in interstate commerce were immune from state regulation while in their original package,' because at that point they had not yet been comingled with the mass of domestic property subject to state jurisdiction."). According to the Court in *Leisy v. Hardin*, a State's restrictions become applicable "only after the importation is completed, and the property imported is mingled with and becomes part of the general property of the state." *Leisy*, 135 U.S. at 119.

143. Ziffrin, Inc. v. Reeves, 308 U.S. 132, 138 (1939).

144. *See Granholm*, 544 U.S. at 493 ("Without demonstrating the need for discrimination, New York and Michigan have enacted regulations that disadvantage out-of-state wine producers. Under our Commerce Clause jurisprudence, these regulations cannot stand.").

withstand Commerce Clause scrutiny.[145]

Although cases subsequent to *Kidd* suggest that a State may not impose conditions on business activities that discriminate against interstate commerce, the Court has not overruled the *License Tax Cases* or *Kidd*. In fact, in *NFIB*, the Court reinforced the vitality of the *License Tax Cases* as it upheld the individual mandate under Congress's taxing authority.[146] Consequently, the fundamental principles set forth in the *License Tax Cases* and *Kidd*—that a State has the "exclusive power" to determine what may be bought and sold within its borders and, in general, under what conditions[147]—remain.

Cases like *Darby*, *Wickard*, *Heart of Atlanta*, *McClung*, and *Raich* do not undermine the continued validity of these principles. The measures at issue in those cases related to matters *ancillary* to *legal* profit-making activities and conduct State law permitted. Congress sought to secure minimum wages and limits on working hours for employees, not to legalize lumber manufacturing in Georgia, free manufacturers from higher State minimum wages, or lower working hour maximums.[148] Congress limited the volume of wheat produced across the country[149]; it did not attempt to legalize wheat production in Ohio or liberate Ohio farmers from State volume limitations. Congress proscribed discrimination in certain legally operating motels and restaurants[150]; it did not try to legalize the operation of motels in Georgia or barbeque restaurants in Alabama, or to allow discrimination notwithstanding a State law prohibition. And Congress prohibited the legal production and use of marijuana[151]; it did not legalize the production and use of marijuana in California for medicinal purposes or for purposes contrary to California law.

Yet ends such as this are exactly what re-opening legislation and WHPA would attempt to achieve. Re-opening legislation, for example, might try to legalize normal restaurant operation, notwithstanding pandemic-related regulations that

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145. *See* Hughes v. Oklahoma, 441 U.S. 322, 338 (1979) (striking down on Commerce Clause grounds, an Oklahoma law prohibiting delivering a "commercially significant number of natural minnows" for sale outside the State); Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 333–34 (1964) (determining that a New York regulation that barred transportation of alcohol through the State for foreign delivery contravened the Commerce Clause); West v. Kan. Nat. Gas Co., 221 U.S. 229, 249–50, 262 (1911) (finding repugnant to the Commerce Clause an Oklahoma statute that preventing exportation of natural gas in interstate commerce).

146. *See* NFIB v. Sebelius, 567 U.S. 519, 564–65 (2012) (citing License Tax Cases, 72 U.S. 462, 471 (1866)).

147. *License Tax Cases*, 72 U.S. at 471.

148. *See* United States v. Darby, 312 U.S. 100, 114 (1941) (considering federal restrictions on wages and hours "contrary to the policy of the state which has elected to leave them unregulated").

149. *See* Wickard v. Filburn, 317 U.S. 111, 114–15 (1942) (addressing the validity of acreage allotments made under the Agricultural Adjustment Act of 1938).

150. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 246 (1964) (assessing Congress's commerce authority in relation to the public accommodations provisions under the Civil Rights Act of 1964); Katzenbach v. McClung, 379 U.S. 294, 298–99 (1964) (same).

151. *See* Gonzales v. Raich, 545 U.S. 1, 7–8 (2005) (considering Congress's power under the Commerce Clause to prohibit the purely intrastate production and use of marijuana for medical purposes).

temporarily bar operation entirely, limit capacity, or impose masking requirements. Similarly, WHPA seeks to legalize abortion in States that wish to prohibit it entirely or at certain times[152] and to liberate women from conditions like waiting periods and ultrasound requirements that States wish to impose.[153] Thus, reopening legislation and WHPA are "plainly repugnant to the exclusive power of the State" to authorize in the first instance what profit-making activities it will permit within its territory and under what conditions.[154] The Court in the *License Tax Cases* explained that "Congress cannot authorize a trade or business within a State in order to tax it."[155] Likewise, Congress cannot authorize a trade or business within a state in order to *regulate* it.

The *Lopez* and *Morrison* Courts and the *NFIB* Commerce Clause majority were concerned that, if they were to concur with the proffered rationales for congressional power under the Commerce Clause, they would open the floodgates of federal regulation.[156] And if obtaining supplies, equipment, pharmaceuticals, and services transported through interstate commerce and providing and receiving training through interstate commerce[157]—justifications that WHPA cites—were enough for the Commerce Clause, Congress's authority would be broader than what the *Lopez* Court would allow.

In *Maryland v. Wirtz*, the Court concluded that Congress had the power under the Commerce Clause to regulate the wages of public school employees, observing that "[s]uch institutions, as a whole, obviously purchase a vast range of out-of-state commodities[,] . . . put to a wide variety of uses, presumably ranging from physical incorporation of building materials into hospital and school structures, to over-the-counter sale for cash to patients, visitors, students, and teachers."[158] But the Court overruled *Wirtz* in *National League of Cities v. Usery*, and although *Garcia v. San Antonio Metropolitan Transit Authority* later overruled *National League of Cities*,[159] the *Lopez* Court's treatment of the Gun-Free School

152. *See* WHPA §§ 4(a)(8), (9) (overriding State law prohibitions).

153. *See* WHPA §§ 4(a)(1), (7) (freeing abortion providers from performing particular tests and women from making "medically unnecessary in-person visits" to abortion providers).

154. License Tax Cases, 72 U.S. 462, 470 (1866).

155. *Id.* at 471.

156. *See* NFIB v. Sebelius, 567 U.S. 519, 554 (2012) (opinion of Roberts, C.J.) ("The Government's theory would . . . permit[] Congress to reach beyond the natural extent of its authority, 'everywhere extending the sphere of its activity and drawing all power into its impetuous vortex.'"); *id.* at 654 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) ("The mandating of economic activity . . . is a field so limitless that it converts the Commerce Clause into a general authority to direct the economy, that mandating is not 'consist[ent] with the letter and spirit of the constitution.'"); United States v. Morrison, 529 U.S. 598, 616 (2000) ("Petitioners' reasoning . . . may . . . be applied equally as well to family law and other areas of traditional state regulation."); United States v. Lopez, 514 U.S. 549, 565 (1995) ("Although Justice Breyer argues that acceptance of the Government's rationales would not authorize a general federal police power, he is unable to identify any activity that the States may regulate but Congress may not.").

157. *Cf.* WHPA § 2(a)(21) (asserting bases for commerce authority).

158. Maryland v. Wirtz, 392 U.S. 183, 201 (1968).

159. *See* Nat'l League of Cities v. Usery, 426 U.S. 833, 855 (1976) (overruling *Wirtz*); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 531 (1985) (overruling *National League of Cities*).

Zones Act belies any claim that *Garcia* resurrected *Wirtz*'s interpretation of the Commerce Clause. The *Lopez* Court rejected the Government's "costs of crime" argument with respect to the Gun-Free School Zones Act because the argument would justify a federally "mandate[d] . . . curriculum for local elementary and secondary schools."[160] If the purchase of a substantial amount of interstate goods were enough for Congress to invoke its commerce power in regulating schools, Congress's power over local and secondary school curricula already would have been beyond question, and therefore, the *Lopez* Court's worry would have been in vain.[161]

That people cross State lines to obtain a particular good or service (another interstate commerce connection WHPA describes[162]) likewise is inadequate to confer on Congress the power to legalize the sale of a good or provision of a service in States that wish to prohibit it. In *NFIB*, Chief Justice Roberts maintained that, if Congress could use the Commerce Clause to force individuals to purchase health insurance, it likewise could use its commerce power to compel people to purchase broccoli or cars.[163] One can see similarly absurd consequences if the fact people cross state lines for abortions or haircuts were to give Congress power under the Commerce Clause to force all States to allow abortion or normal operation of barbershops in the midst of a pandemic. For example, by that logic, Congress could require a State or local government to permit the sale of bacon from producers who treat their pigs inhumanely or the sale of soft drinks in cups over a certain size just because people cross state lines to buy bacon or soft drinks.[164]

Moreover, re-opening legislation and WHPA are simply not of the same character as the laws at issue in *Wickard* and *Raich*, which were comprehensive

160. *Lopez*, 514 U.S. at 566.

161. This conclusion does not undermine the *McClung* Court's conclusion regarding application of the public accommodations provisions in Title II of the Civil Rights Act of 1964, because *McClung* involved the *sale* of a particular volume of food obtained through interstate commerce. *See* Katzenbach v. McClung, 379 U.S. 294, 299–301 (1964) (discussing the effect of discrimination on the service of food that traveled in interstate commerce). *See also* Gonzales v. Raich, 545 U.S. 1, 25 (2005) (concluding that Congress had the power under the Commerce Clause to regulate intrastate production and use of marijuana under the CSA because the conduct the CSA regulates is "quintessentially economic," a term which the Court defined as "the production, distribution, and consumption of commodities").

162. *Cf.* WHPA § 2(a)(19) (asserting a basis for commerce authority).

163. *See* NFIB v. Sebelius, 567 U.S. 519, 558 (2012) (opinion of Roberts, C.J.) (finding comparable a requirement to purchase health insurance and a requirement to purchase broccoli or cars).

164. *See California's New Animal Welfare Law Could Mean the End of Bacon*, NPR (Aug. 2, 2021), https://www.npr.org/2021/08/02/1023708278/bacon-california-animal-law [https://perma.cc/6JB7-35R2] (discussing how California animal welfare requirements may affect the ability to sell pork in the State); N.Y. Statewide Coal. of Hispanic Chambers of Com. v. N.Y.C. Dept. of Health & Mental Hygiene, 16 N.E.3d 538, 541 (N.Y. 2014) (striking down on State constitutional grounds the New York City Board of Health's "Sugary Drinks Portion Cap Rule," which attempted to "restrict the size of cups and containers used by food service establishments for the provision of sugary beverages").

regulatory schemes that had an incidental effect on purely intrastate conduct.[165] Both would do more than "put a thumb on the scales and influence a state's decision as to how to shape its own . . . laws."[166] Rather, re-opening legislation and WHPA would operate as direct congressional "vetoes" of laws that fall plainly within the States' police powers.[167]

In WHPA, in particular, one sees a "veto" hiding under the façade of legislation granting rights to women and healthcare providers. The Court in *Murphy v. National Collegiate Athletic Ass'n* explained that the Constitution permits Congress to regulate directly what private actors may do or not do, but Congress may not regulate what the States may do and not do.[168] Probably in response to *Murphy*, the current iteration of WHPA purports to grant healthcare providers and patients statutory rights to perform and receive abortions free of particular limitations.[169] This was not always so. The 2017 edition listed similar limitations but declared them "unlawful" and stated that they "shall not be imposed or applied by any government."[170] Despite the shift from prohibitions to rights, WHPA's current version—like its 2017 predecessor—contains enforcement provisions that apply exclusively to government officials and not to any private actor.[171] Consequently, although WHPA in form may regulate private actors, its substance is an unconstitutional attempt to regulate the states. If the Court were to permit WHPA as a valid exercise of Congress's authority over interstate commerce, it would alter fundamentally the balance of federal and state power.

B. Additional Reasons Why Congress Does Not Have Power Under the Commerce Clause to Enact to WHPA

Even if Congress could use its commerce power to enact re-opening legislation, Congress cannot use that power to adopt WHPA for at least two reasons. First, WHPA attempts to regulate medical practice directly, which Congress is powerless to do. Second, WHPA impermissibly encroaches on the states' prerogatives in defining what is criminal within their borders.

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165. *See Raich*, 545 U.S. at 22 ("[A]s in *Wickard*, when it enacted comprehensive legislation to regulate the interstate market in a fungible commodity, Congress was acting well within its authority . . . to 'regulate Commerce . . . among the several States' [when it enacted the CSA].").

166. United States v. Windsor, 570 U.S. 744, 771 (2013).

167. *Cf.* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1478 (2018) (explaining that Congress may neither require States to act nor prohibit them from acting).

168. *See Murphy*, 138 S. Ct. at 1476 (citing New York v. United States, 505 U.S. 144, 166 (1992)) ("The Constitution . . . 'confers upon Congress the power to regulate individuals, not States.'").

169. *See* WHPA § 4.

170. Women's Health Protection Act of 2017, H.R. 1322, 115th Cong.; Women's Health Protection Act of 2017, S. 510, 115th Cong.

171. *Compare* Women's Health Protection Act of 2021, S. 1975, 117th Cong. § 8, *and* Women's Health Protection Act of 2021, H.R. 3755, 117th Cong. § 8, *with* Women's Health Protection Act of 2017, S. 510, 115th Cong. § 8, *and* Women's Health Protection Act of 2017, H.R. 1322, 115th Cong. § 8.

1. The Commerce Clause Does Not Grant Congress the Power to Regulate the Practice of Medicine Directly

Although the practice of medicine involves commerce in the sense that health-care professionals provide services in exchange for payment,[172] the extraordinary training and skill required to deliver competent care sets medical practice apart from the typical business.[173] According to the Court in *Dent v. West Virginia*, "[f]ew professions require more careful preparation by one who seeks to enter it than that of medicine."[174] Thus, licensing physicians to practice medicine within a State's borders is a "quintessential police power."[175] The Court in *Linder v. United States* was emphatic: "[D]irect control of medical practice in the states is beyond the power of the federal government."[176]

In *Linder*, the Court reversed a physician's criminal conviction for selling morphine and cocaine without a written order therefor as required under the Harrison Act, a federal law that regulated controlled substances before the CSA.[177] According to the *Linder* Court, the Harrison Act principally was a revenue act and the physician had not engaged in conduct that impaired the collection of taxes.[178] The Court stressed:

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172. *See* United States v. Gregg, 226 F.3d 253, 262 (3d Cir. 2000) ("Reproductive health clinics are income-generating businesses that employ physicians and other staff to provide services and goods to their patients.").

173. *See* Graves v. Minnesota, 272 U.S. 425, 429 (1926) (stressing that regulation of "locomotive engineers and barbers . . . manifestly involve[s] very different considerations from those relating to such professions as dentistry requiring a high degree of scientific learning"); Semler v. Or. State Bd. of Dental Examiners, 294 U.S. 608, 612 (1935) (observing that, in regulating dental practice, "[t]he legislature was not dealing with traders in commodities, but with the vital interest of public health, and with a profession treating bodily ills and demanding different standards of conduct from those which are traditional in the competition of the market place"); Collins v. Texas, 223 U.S. 288, 297 (1912) ("An osteopath undertakes to be something more than a nurse or a masseur, and the difference rests precisely in a claim to greater science."). *See also* Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2382 (2018) (Breyer, J., dissenting) ("Even during the *Lochner* era, when this Court struck down numerous economic regulations concerning industry, this Court was careful to defer to state legislative judgments concerning the medical profession.").

174. Dent v. West Virginia, 129 U.S. 114, 122 (1889).

175. N.C. State Bd. of Dental Examiners v. F.T.C., 574 U.S. 494, 520 (2015) (Alito, J., dissenting). *See* Barsky v. Bd. of Regents of Univ. of State of N.Y., 347 U.S. 442, 449 (1954) ("[A] state has broad power to establish and enforce standards of conduct within its borders relative to the health of everyone there. It is a vital part of a state's police power. The state's discretion in that field extends naturally to the regulation of all professions concerned with health."). *Cf.* Goldfarb v. Va. State Bar, 421 U.S. 773, 792 (1975) (acknowledging that States "have broad power to establish standards for licensing practitioners and regulating the practice of professions").

176. Linder v. United States, 268 U.S. 5, 18 (1925). *See* United States v. Singh, 390 F.3d 168, 190 (2d Cir. 2004) (citing United States v. Dicter, 198 F.3d 1284, 1291–92 (11th Cir. 1999)) (noting that the CSA's requiring forfeiture of a medical license is not inconsistent with *Linder* because a State remains free to issue another license).

177. *See Linder*, 268 U.S. at 15–16 (describing the accusation against the physician); Gonzales v. Raich, 545 U.S. 1, 10 (2005) (noting that the Harrison Act was the "primary drug control law" until the CSA repealed it).

178. *See Linder*, 268 U.S. at 22 ("We find no facts alleged in the indictment sufficient to show that petitioner had done anything falling within definite inhibitions or sufficient materially to imperil orderly collection of revenue.").

> Congress cannot, under the pretext of executing delegated power, pass laws for the accomplishment of objects not intrusted to the federal government. . . . [A]ny provision of an act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power, but solely to the achievement of something plainly within power reserved to the states, is invalid and cannot be enforced.[179]

The Harrison Act could be enforced as a regulation of medical practice, the Court emphasized, only to the extent incidental to the collection of revenue.[180]

The Court's decision in *Raich* fits neatly within *Linder*'s bounds. To be sure, the CSA infringes on the states' ability to regulate the practice of medicine within their borders because the federal law prevents the use of marijuana for medical purposes even when a state has exercised its regulatory authority to allow it. The CSA, though, is not a direct regulation of medical practice, which *Linder* explains is "beyond the power of the federal government."[181] Instead, the CSA regulates the practice of medicine indirectly as "an essential part of a larger regulation" aimed at curbing illicit drug trafficking.[182] As the *Raich* Court explained, "[t]he CSA designates marijuana as contraband for *any* purpose,"[183] and Congress had reason to believe that carving out the use of marijuana for medical purposes from the CSA's restrictions could undermine regulation of the wider market.[184] The year after *Raich*, the Court in *Gonzales v. Oregon* stressed that the CSA did not reflect congressional intent to regulate medical practice broadly, and the statute's "silence is understandable given the structure and limitations of federalism."[185]

Unlike the CSA, WHPA represents a direct regulation of medical practice alone, dictating to States what they must permit healthcare providers to do within State territory. The *Gibbons* Court stressed that when a state enacts health laws, it is not regulating commerce at all. Instead, according to the Court, health laws spring from the State's power to protect the health of those residing within its borders.[186] Through the Commerce Clause, Congress "may control the State laws, so far as it may be necessary to control them, for the regulation of commerce,"[187]

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179. *Id.* at 17.

180. *See id.* at 18 (discussing the breadth of congressional power).

181. *Id.* at 18.

182. *Raich*, 545 U.S. at 24; *see also id.* at 12 (indicating the CSA's purposes).

183. *Id.* at 27.

184. *See id.* at 30–31 (noting the risk that physicians would overprescribe marijuana); *see also* Gonzales v. Oregon, 546 U.S. 243, 250 (2006) ("To prevent diversion of controlled substances with medical uses, the CSA regulates the activity of physicians.").

185. *Oregon*, 546 U.S. at 270. Citing *Raich*, the *Oregon* Court maintained that Congress has the power to adopt "uniform national standards" for health and safety, but the Court did not suggest that Congress's power is plenary, allowing it to displace entirely the States' police powers in relation to medical practice. *Id.* at 271. The Court in *Oregon* recognized that the CSA regulates only one aspect of medical practice and that it does so only as part of a broader regulatory scheme aimed at controlling illicit drug use. *See id.* at 250, 271 (discussing the CSA's reach).

186. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 205–06 (1824) (discussing quarantine and health laws).

187. *Id.* at 206.

but the Constitution does not give Congress an explicit power to regulate health.[188] The name Women's *Health* Protection Act makes plain that it is a health regulation, and the very first congressional finding confirms WHPA's aim: "Abortion services are essential to *health care*."[189] The act includes many other findings to a similar effect.[190] Moreover, the absence in WHPA of a jurisdictional limitation tied to interstate commerce underscores that the act is about regulating medical practice, not commerce.[191]

If WHPA were a valid exercise of Congress's power over interstate commerce, numerous State health regulations would be at risk. Conversion therapy—sexual orientation change efforts (SOCE)—bans are but one example. According to the Human Rights Campaign, twenty States restrict SOCE. [192] But findings similar to those WHPA cites could plausibly be made with respect to conversion therapy. For example, Congress might assert: [193]

- Parents and children cross state lines to obtain SOCE.
- Mental health professionals and others cross state lines to provide or facilitate SOCE.

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188. *See id.* at 203 (observing that Congress does not have any "direct general power" to adopt health laws).

189. Women's Health Protection Act of 2021, H.R. 3755, 117th Cong. § 2(a)(1) (West 2021) (emphasis added).

190. *See, e.g.*, H.R. 3755 § 2(a)(2) (referring to a physician's "good-faith medical judgment"); H.R. 3755 § 2(a)(3) (asserting that States have adopted "medically unnecessary regulations that [do not] confer any health benefit"); H.R. 3755 § 2(a)(5) ("Reproductive justice seeks to address restrictions on reproductive health."); H.R. 3755 § 2(a)(6) ("Removing medically unjustified restrictions on abortion services would constitute one important step on the path toward realizing Reproductive Justice by ensuring that the full range of reproductive health care is accessible to all who need it."); H.R. 3755 § 2(a)(10) ("Many State and local governments have imposed restrictions on the provision of abortion services that are neither evidence-based nor generally applicable to the medical profession or to other medically comparable outpatient gynecological procedures."); H.R. 3755 § 2(a)(11) ("Abortion is essential health care and one of the safest medical procedures in the United States."); H.R. 3755 § 2(a)(11) ("These abortion-specific restrictions conflict with medical standards."); H.R. 3755 § 2(a)(12) ("Many abortion-specific restrictions . . . have the purpose and effect of unduly burdening people's personal and private medical decisions."); H.R. 3755 § 2(a)(16) ("UN human rights treaty bodies have likewise condemned medically unnecessary barriers to abortion services."); H.R. 3755 § 2(a)(19) (describing abortion as "essential medical care"); H.R. 3755 § 2(a)(23) (referring to "medically unnecessary regulations").

191. *See* United States v. Morrison, 529 U.S. 598, 613 (2000) ("Although *Lopez* makes clear that such a jurisdictional element would lend support to the argument that § 13981 is sufficiently tied to interstate commerce, Congress elected to cast § 13981's remedy over a wider, and more purely intrastate, body of violent crime."); United States v. Lopez, 514 U.S. 549, 562 (1995) ("[S]ection 992(q) [of the Gun-Free School Zones Act] ha[d] no express jurisdictional element which might [have] limit[ed] its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce.").

192. *See The Lies and Dangers of Efforts to Change Sexual Orientation or Gender Identity*, HUM. RTS. CAMPAIGN, https://www.hrc.org/resources/the-lies-and-dangers-of-reparative-therapy [https://perma.cc/Y3NW-FQJQ] (discussing conversion therapy bans).

193. The findings suggested are purely *hypothetical*. No attempt was made to determine whether there is an evidentiary basis to support them.

- SOCE providers obtain supplies, equipment, and services through interstate commerce, and providers offer and procure training through interstate commerce.

Thus, if the types of connections to interstate commerce cited in WHPA are sufficient to allow Congress to use its commerce power for that act, Congress could grant statutory rights to engage in and receive SOCE free of any and all limitations and requirements under state law. With the stroke of a pen, state conversion therapy bans could be gone.

A state's police powers allow it to regulate intrastate commerce,[194] but as *Gibbons* indicates, a state is regulating health—not commerce—when it adopts health laws. Likewise, when Congress attempts to adopt health laws, it is not regulating commerce and must look to a delegated power other than the Commerce Clause for authority. Unlike the CSA, WHPA is not a regulation of commerce that has an incidental impact on a state's regulation of medical practice, but a ruse to regulate the practice of medicine under the guise of regulating interstate commerce. The act "*invoke[s]* . . . the powers of Congress under the commerce clause,"[195] but it does so as a "pretext . . . for the accomplishment of objects not intrusted to the federal government."[196] This, the Constitution does not permit.

2. The Commerce Clause Does Not Grant Congress the Power to Decriminalize Conduct a State Has Defined as Criminal

Similar to what the *Linder* Court stated with respect to regulating medical practice, the Court in *Bond v. United States* explained that "our constitutional structure leaves local criminal activity primarily to the States. . . ."[197] And although *Raich* attests that Congress has some power under the Commerce Clause to bar as criminal wholly intrastate activity,[198] *Bond* stresses that, "[f]or nearly two centuries it has been 'clear' that, lacking a police power, 'Congress cannot punish felonies generally.'"[199] *Lopez* and *Morrison* reinforce that point.[200]

WHPA is quite different from the law at issue in *Raich*, because WHPA attempts to use the Commerce Clause—together with the Supremacy Clause—not to criminalize conduct a state permits, but to override a state's determination

194. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 203 (1824) ("[Among] that immense mass of legislation, which embraces every thing within the territory of a State, not surrendered to the general government [are] laws for regulating the internal commerce of a State.").

195. H.R. 3755 § 2(b)(3) (emphasis added).

196. Linder v. United States, 268 U.S. 5, 17 (1925).

197. United States v. Bond, 572 U.S. 844, 848 (2014).

198. *See* Gonzales v. Raich, 545 U.S. 1, 9 (2005) (concluding that Congress's power to regulate interstate commerce allowed it to prohibit the local production and use of marijuana).

199. *Bond*, 572 U.S. at 854.

200. *See* United States. v. Morrison, 529 U.S. 598, 617 (2000) ("We . . . reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."); United States v. Lopez, 514 U.S. 549, 551 (1995) (holding that Congress exceeded its power to regulate interstate commerce in the Gun-Free School Zones Act).

that certain conduct occurring within its borders should be criminal.[201] The question regarding Congress's commerce power with respect to WHPA is thus akin to the questions that would arise if Congress tried to use its commerce power to *legalize* the sale and use of marijuana across the country, the possession of a gun in a school zone, or violence against women.

Indeed, WHPA makes one query, as Justice Breyer did in his *Morrison* dissent when he disputed the economic/non-economic distinction the Court had made: "Does the local street corner mugger engage in 'economic' activity or 'noneconomic' activity when he mugs for money?"[202] If economic activity, can Congress use its power under the Commerce Clause to decriminalize mugging in every state in the Union? Regardless of the answer to Justice Breyer's question, the plurality opinion in the Court's 1945 *Screws v. United States* decision, which the *Lopez* Court cited in a footnote, indicates that the answer to the follow-on question is no.[203]

In *Bond*, the Court stressed that, if it were to interpret a federal chemical weapons ban broadly enough to reach a woman's use of toxic chemicals to cause her unfaithful husband's paramour *discomfort*, "it would mark a dramatic departure from [our] constitutional structure and a serious reallocation of criminal law enforcement authority between the Federal Government and the States."[204] All the more serious would be interpreting the Commerce Clause as giving Congress the power to decriminalize conduct that citizens of a state have decided should be criminal. Thus, the *Screws* plurality emphasized, "[u]nder our federal system the administration of criminal justice rests with the States except as Congress, acting within the scope of [its] delegated powers, has created offenses against the United States."[205] That is to say, Congress's power to venture into criminal law extends to *defining* federal *crimes*, *not* to *legalizing conduct* that the people of a state have decided is criminal. Regulation and decriminalization are distinct concepts,[206] and the Commerce Clause gives Congress the power to do the former, not the latter, with respect to conduct that has a substantial effect on interstate commerce.[207]

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201. *See, e.g.*, *Morrison*, 529 U.S. at 662 (Breyer, J., dissenting) ("[T]he law before us seems to represent an instance, not of state/federal conflict, but of state/federal efforts to cooperate in order to help solve a mutually acknowledged national problem.").

202. *Id.* at 656 (Breyer, J., dissenting).

203. *See Lopez*, 514 U.S. at 561 n.3 (citing Screws v. United States, 325 U.S. 91, 109 (1945)).

204. *Bond*, 572 U.S. at 866.

205. Screws v. United States, 325 U.S. 91, 109 (1945).

206. *See Regulation*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("[C]ontrol over something by rule or restriction."); *Decriminalization*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The legislative act or process of legalizing an illegal act."); Benjamin Wallace-Wells, *Is There a Case for Legalizing Heroin?*, NEW YORKER (Apr. 29, 2021), https://www.newyorker.com/news/annals-of-populism/is-there-a-case-for-legalizing-heroin [https://perma.cc/NA6G-WVY5] (indicating that a scientist at Columbia favored decriminalization *and* regulation).

207. *Cf.* NFIB v. Sebelius, 567 U.S. 519, 555 (2012) (opinion of Roberts, C.J.) ("The Framers gave Congress the power to *regulate* commerce, not to *compel* it."). Of course, Congress has the power to

Moreover, the Court in *Morrison* stated that it "[could] think of no better example of the police power, which the Founders denied to the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims."[208] The *Casey* Court admitted that abortion fits the bill when the Court observed that some consider abortion "nothing short of an act of violence against innocent human life."[209] Not only that, fetal homicide laws enacted in at least thirty-eight states testify that the deliberate killing of an unborn human is (or, at least, can be) a violent act.[210] It is no less so when the killing is at the hands of a physician, as Justice Kennedy's vivid description of second-trimester abortion methods in *Gonzales* makes plain.[211]

Furthermore, abortion has a long history in criminal law. Joseph Dellapenna explains that "[a]bortion ... was a crime before the American Revolution."[212] Dellapenna adds: "[T]he evidence is overwhelming that the protection of the life of the unborn child (as they termed it) was the primary purpose underlying [early to mid-nineteenth century abortion] statutes."[213] The Texas abortion ban that the Court struck down in *Roe* provided for a prison term of between two and five years,[214] and the *Roe* Court explained that the Texas statute "[was] typical of those that have been in effect in many States for approximately a century."[215] In addition, the federal partial-birth abortion ban the Court upheld in *Gonzales* provides that physicians who violate the ban are subject to imprisonment for up to two years.[216] Even the failure to follow "lesser" regulations may represent criminal conduct. For example, Pennsylvania's informed consent provision that the

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repeal its own valid laws and, through repeal of federal criminal laws, decriminalize for federal purposes conduct previously regulated as criminal under federal law.

In addition, Congress certainly has the power under the Commerce and Supremacy Clauses to displace State regulation of the channels of interstate commerce, as it did when it enacted the Airline Deregulation Act in 1978. *See* Northwest, Inc. v. Ginsberg, 572 U.S. 273, 280 (2014) (indicating that the Airline Deregulation Act contained a provision pre-empting State laws that might "undo federal deregulation"); *see also* City of Burbank v. Lockheed Air Terminal Inc., 411 U.S. 624, 627 (1973) (concluding that the Noise Regulation Act of 1972 pre-empted a city ordinance restricting when jets could take off).

208. United States v. Morrison, 529 U.S. 598, 618 (2000) (emphasis added).

209. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 852 (1992).

210. *See State Laws on Fetal Homicide and Penalty-enhancement for Crimes Against Pregnant Women*, NAT'L CONF. OF STATE LEGISLATURES (May 1, 2018), https://www.ncsl.org/research/health/fetal-homicide-state-laws.aspx [https://perma.cc/Z77GKDC3] (describing laws that punish fetal homicide).

211. *See* Gonzales v. Carhart, 550 U.S. 124, 135 (2007) ("The friction causes the fetus to tear apart. For example, a leg might be ripped off the fetus as it is pulled through the cervix and out of the woman."); *id.* at 139 (quoting a nurse's testimony as saying: "[T]he doctor stuck the scissors in the back of his head, and the baby's arms jerked out. . . . The doctor opened up the scissors, stuck a high-powered suction tube into the opening, and sucked the baby's brains out.").

212. JOSEPH W. DELLAPENNA, DISPELLING THE MYTHS OF ABORTION HISTORY 263 (2006).

213. *Id.* at 313.

214. *See* Roe v. Wade, 410 U.S. 113, 117 n.1 (1973) (reproducing the Texas law).

215. *Id.* at 116.

216. *See Gonzales*, 550 U.S. at 141 (reciting certain parts of the federal law).

Casey Court upheld specifies that any violation after the first is a third-degree misdemeanor.[217]

WHPA seeks to override state laws that treat abortion (or conduct surrounding abortion) as criminal. If upheld as a proper exercise of the Commerce Clause, the act would facilitate violence against "a class of [human beings] that the laws of . . . [numerous] States have sought to protect."[218] Our constitutional system does not tolerate laws such as this.[219]

The consequences of concluding that WHPA is a valid exercise of Congress's power over interstate commerce would be far-reaching, allowing Congress to nullify a host of state criminal laws. Take, for example, gun control. In 2008, the Court in *District of Columbia v. Heller* determined that the Second Amendment protects an individual's right to own a gun.[220] Yet, states have imposed various restrictions and requirements with respect to firearms, including assault weapons bans that federal appellate courts have upheld post-*Heller*.[221] Buying and selling firearms, however, is a big business,[222] and it is not hard to imagine the gun lobby's insistence on federal legislation giving retailers a statutory right to sell firearms, and individuals a statutory right to purchase and own them, free of specified limitations and requirements under state law.[223]

In such legislation, perhaps titled the "Gun Rights Protection Act" ("GRPA"), Congress might declare that gun ownership is "essential" to the safety of Americans, and one easily could craft WHPA-style findings supporting that type of law:[224]

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217. *See* Planned Parenthood of Se. Pa. v. Casey, 550 U.S. 833, 904 (1992) (reciting the penalties for violating the Pennsylvania informed consent law).

218. United States v. Windsor, 570 U.S. 744, 765 (2013). *See* AM. COLL. OF PEDIATRICIANS, WHEN HUMAN LIFE BEGINS 1 (2017), https://acpeds.org/assets/imported/3.21.17-When-Human-Life-Begins.pdf [https://perma.cc/QY2L-C9WH] ("At fertilization, [a] human being emerges as a whole, genetically distinct, individuated zygotic living human organism, . . . needing only the proper environment in order to grow and develop. The difference between the individual in its adult stage and in its zygotic stage is one of form, not nature.").

219. *Cf.* Romer v. Evans, 517 U.S. 620, 633 (1996) ("It is not within our constitutional tradition to enact laws of this sort.").

220. *See* District of Columbia v. Heller, 554 U.S. 570, 595 (2008) ("There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms.").

221. *See* Kolbe v. Hogan, 849 F.3d 114, 121 (4th Cir. 2017) (upholding a Maryland ban on assault weapons); N.Y. State Rifle & Pistol Ass'n v. Cuomo, 804 F.3d 242, 247 (2d Cir. 2015) (upholding Connecticut and New York assault weapons bans).

222. *See* Ben Popken, *America's Gun Business, By the Numbers*, NBC NEWS (Oct. 2, 2015), https://www.cnbc.com/2015/10/02/americas-gun-business-by-the-numbers.html [https://perma.cc/KDZ9-YG3X] (indicating gun sales is a multi-billion-dollar industry) .

223. *Cf.* H.R. 3755, 117th Cong. § 4(a) (2021) ("A health care provider has a statutory right under this Act to provide abortion services, . . . and that provider's patient has a corresponding right to receive such services, without any of the . . . limitations or requirements [specified in the Act].").

224. As above with respect to possible legislation associated with SOCE, the findings suggested are purely *hypothetical*. No attempt was made to determine whether there is an evidentiary basis to support them. *See supra* note 190 (identifying WHPA provisions that correspond to hypothetical findings with respect to legislation designed to override State limitations on SOCE).

- People travel across state lines and otherwise engage in interstate commerce when they purchase firearms.
- Retailers that sell firearms engage in interstate commerce when they purchase supplies, equipment, inventory, and other necessary goods and services to operate their businesses.
- Gun owners and retailers engage in interstate commerce to obtain and provide training with respect to the safe use of weapons.
- To operate their businesses, gun retailers employ and obtain commercial services from personnel who engage in interstate commerce and travel across state lines.

If these types of connections are enough for Congress to have power under the Commerce Clause to enact WHPA, they also would be enough for GRPA to "veto" assault weapons bans, waiting periods, and background checks. [225]

For a more extreme—but perhaps not that far-fetched[226]—example, take methamphetamine or "meth," for short. At the end of 2019, trafficking in meth was a criminal offense in every state.[227] Still, the nationwide market may be in excess of $50 billion annually,[228] indicating that the states have not been terribly effective in enforcing their laws. But what if all States were 100% effective in eliminating meth? Could Congress legalize meth across the country? If one credits the Commerce Clause majority's reasoning in *NFIB*, the answer arguably is no. Congress's power under the Commerce Clause is to regulate. If there is no

225. *Assault Weapons and High-Capacity Magazines Must Be Banned*, CTR. FOR AM. PROGRESS (Aug. 12, 2019), https://www.americanprogress.org/issues/guns-crime/reports/2019/08/12/473528/assault-weapons-high-capacity-magazines-must-banned/ [https://perma.cc/LMQ4-LMBT] ("Currently, seven states and Washington, D.C. have laws banning assault weapons . . . ."); Lindsay Whitehurst, *Gun Waiting Periods Rare in US States But More May Be Coming*, ABC NEWS (Mar. 21, 2021), https://abcnews.go.com/Politics/wireStory/states-seek-gun-waiting-periods-shootings-76590599 [https://perma.cc/U79D-QSD9] ("Waiting periods are required in just 10 states and the District of Columbia, although several states are considering legislation this year to impose them."); *Universal Background Checks*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, https://giffords.org/lawcenter/gun-laws/policy-areas/background-checks/universal-background-checks/ [https://perma.cc/5F7S-ZCET] (describing the federal background check requirement and stating that "[t]wenty-one states and Washington DC [sic] have extended the background check requirement beyond federal law").

226. Oregon decriminalized possession of small amounts of meth in 2020, so the example is not necessarily out of the realm of possibility. *See* Eric Westervelt, *Oregon's Pioneering Drug Decriminalization Experiment Is Now Facing the Hard Test*, NPR (June 18, 2021), https://www.npr.org/2021/06/18/1007022652/oregons-pioneering-drug-decriminalization-experiment-is-now-facing-the-hard-test [https://perma.cc/SZ7Y-RV7D] (discussing Oregon's decision to decriminalize possession of certain drugs, including meth).

227. *See Methamphetamine and Precursors: Summary of State Laws*, LEGIS. ANALYSIS & PUB. POL'Y ASS'N (Jan. 2020), http://legislativeanalysis.org/wp-content/uploads/2020/01/Summary-of-State-Methamphetamine-Laws.pdf [https://perma.cc/XS2Z-3QWD] (summarizing State laws with respect to methamphetamine possession, manufacturing, and trafficking).

228. *See* Steven Dudley & Parker Asmann, *The United States is Now Meth Country*, INSIGHT CRIME (Apr. 27, 2021), https://insightcrime.org/news/united-states-meth-country/ [https://perma.cc/LS7S-G4DV] ("The US market for [meth], which was worth $13 billion in 2010, may now be worth at least four times that much.").

activity, Congress has nothing to regulate. [229] Does that answer change, though, if every State except for Oregon has eliminated meth, and people travel to Oregon to obtain meth *illegally*? Does it matter if every State except for Oregon effectively has eliminated meth, Oregon has legalized it, and people travel to Oregon to purchase meth *legally*? What if all of the southeastern States effectively have eliminated meth, the other States have legalized it, and people from the southeastern States travel to States in other regions to purchase meth *legally*? Where does one draw the line?

No doubt, Congress may use its regulatory authority to restrict or encourage commerce,[230] and the *Lopez* Court emphasized that "congressional legislation under the Commerce Clause always will engender 'legal uncertainty.'"[231] Allowing lax State criminal law enforcement or legalization of certain conduct in one or more States to confer on Congress power under the Commerce Clause to *legalize* the conduct in *all 50*, however, would undermine our federal system. If Congress can force States to allow *intrastate* conduct that states have deemed criminal—as a way to stimulate interstate commerce in the goods and services useful for that conduct and as a means of easing the burdens on interstate commerce that arise when people travel to other States to engage in conduct that is criminal in their own—it would mark a monumental step toward "'obliterat[ing] the distinction between what is national and what is local and create a completely centralized government.'"[232] This is what upholding WHPA as a valid exercise of Congress's commerce power would mean. Thus, the proposed law stretches beyond the Commerce Clause's "outer limits."[233]

CONCLUSION

In 2011, the Court said with one voice that "the federal system rests on what might at first seem a counterintuitive insight, that 'freedom is enhanced by the creation of two governments, not one.'"[234] This freedom is not just a matter of

229. *See* NFIB v. Sebelius, 567 U.S. 519, 550 (2012) (opinion of Roberts, C.J.) ("The power to *regulate* commerce presupposes the existence of commercial activity to be regulated. If the power to 'regulate' something included the power to create it, many of the provisions in the Constitution would be superfluous.") (emphasis in original); *id.* at 658 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) ("[I]t must be *activity* affecting commerce that is regulated, and not merely the failure to engage in commerce.").

230. *See* Wickard v. Filburn, 317 U.S. 111, 128 (1942) ("The stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon."); United States. v. Darby, 312 U.S. 100, 113 (1941) ("The power to regulate commerce is the power 'to prescribe the rule by which commerce is to be governed.' It extends not only to those regulations which aid, foster and protect the commerce, but embraces those which prohibit it."); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 36–37 (1937) ("The fundamental principle is that the power to regulate commerce is the power to enact 'all appropriate legislation' for its 'protection or advancement'; to adopt measures 'to promote its growth and insure its safety'; 'to foster, protect, control, and restrain.'").

231. United States v. Lopez, 514 U.S. 549, 566 (1995).

232. *Id.* at 557 (quoting 301 U.S. at 37).

233. *Id.* at 557.

234. Bond v. United States, 564 U.S. 211, 220–21 (2011) (quoting Alden v. Maine, 527 U.S. 706, 758).

individual liberty.[235] It is a freedom that allows citizens of a State to act collectively to address local issues and to advance their values, subject to constitutional limitations.[236]

While the effects of a pandemic and access to abortion are matters of national concern, "Article I contains no whatever-it-takes-to-solve-a-national-problem power."[237] As the *Linder* Court explained, "[f]ederal power is delegated, and its prescribed limits must not be transcended even though the end seems desirable."[238]

President Trump may have wanted to force States to re-open and President Biden may want to codify *Roe*, but the Commerce Clause is not a door to measures such as these. Presidents and Congress may find federalism inconvenient at times. That is just what the Founders hoped.

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235. *See* Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rts. & Fight for Equality by Any Means Necessary, 572 U.S. 291, 312 (2014) ("[F]reedom does not stop with individual rights.").

236. *See id.* at 312 ("Our constitutional system embraces . . . the right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times.").

237. NFIB v. Sebelius, 567 U.S. 519, 660 (2012) (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

238. Linder v. United States, 268 U.S. 5, 22 (1925).