

2014

A Right in Theory But Not in Practice: Voter Discrimination and Trap Laws as Barriers to Exercising a Constitutional Right

Rachel Suppé

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/jgspl>

 Part of the [Law Commons](#)

Recommended Citation

Suppé, Rachel. "A Right in Theory But Not in Practice: Voter Discrimination and Trap Laws as Barriers to Exercising a Constitutional Right." *American University Journal of Gender Social Policy and Law* 23, no. 1 (2014): 107-137.

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in *Journal of Gender, Social Policy & the Law* by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact fbrown@wcl.american.edu.

A RIGHT IN THEORY BUT NOT IN PRACTICE: VOTER DISCRIMINATION AND TRAP LAWS AS BARRIERS TO EXERCISING A CONSTITUTIONAL RIGHT

RACHEL SUPPÉ

I. Background.....	109
a. The Right to Vote.....	109
b. The Right to an Abortion.....	114
II. Analysis.....	117
a. As State Voter Disenfranchisement Laws Were Struck Down as Arbitrary Violations of the Fifteenth Amendment Based on Animus, TRAP Laws Must be Struck Down as Arbitrary Violations of the Fourteenth Amendment Based on Animus.....	117
i. Under the Supreme Court Voter Disenfranchisement Jurisprudence, TRAP Laws are Invalid, as They are Arbitrary for Not Being Based on Reason and Arbitrary for Providing Unrestrained Discretion to an Authority.	118
ii. Under the Supreme Court Voter Disenfranchisement Jurisprudence, TRAP laws Are Invalid Because They Are Based on Animus.	123
b. As Voter Disenfranchisement Laws Were Unconstitutional Because They Made It Impossible to Exercise the Right to Vote, TRAP laws Are Unconstitutional Because They Make It Impossible to Exercise the Right to an Abortion.	126
III. Policy Recommendations.....	132
IV. Conclusion.....	136

· Rachel Suppé is the Law Students for Reproductive Justice Fellow at the Reproductive Health Technologies Project and a 2014 graduate of American University Washington College of Law. The author thanks Jessica L. Waters, J.D., Assistant Professor in American University's School of Public Affairs and Adjunct Professor at American University's Washington College of Law, for her invaluable instruction and guidance throughout the development of this Article.

Constitutional rights are of little value if they can be indirectly denied.¹ In the United States, a woman has a constitutional right to an abortion – a right that derives from the Fourteenth Amendment and guarantees that a state may not place an undue burden in the path of a woman seeking an abortion prior to viability.² In the past decade, states across the U.S. have launched an all-out war on abortion rights, chipping away at the standards set forth in *Roe v. Wade*³ and *Planned Parenthood of Southeastern Pennsylvania v. Casey*⁴ with creative and deliberate tactics. One such tactic is to make it nearly impossible, if not impossible, to physically obtain an abortion. With the goal of making states “abortion free,”⁵ states have implemented Targeted Regulation of Abortion Providers (TRAP) laws to effectively shut down abortion clinics.⁶ Despite the existence of the constitutional right to an abortion, TRAP laws make that right impossible to exercise and are based on arbitrary and malicious intentions.⁷

The notion that a right that is impossible to exercise is a meaningless one was proffered in the string of seminal Supreme Court cases dismantling voter discrimination laws used against African-Americans⁸ during the

1 *Smith v. Allwright*, 321 U.S. 649, 664 (1944) (citing *Lane v. Wilson*, 307 U.S. 268, 275 (1939)).

2 See *Planned Parenthood v. Casey*, 505 U.S. 833, 877 (1992) (defining an undue burden as a restriction that has the “purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”); *Roe v. Wade*, 410 U.S. 113, 154 (1973) (finding a fundamental right to an abortion).

3 410 U.S. 113 (1973).

4 505 U.S. 833 (1992).

5 See, e.g., Am. Compl. at 3-4, *Jackson Women’s Health Org. v. Currier*, 2012 WL 3234936 (S.D. Miss. 2012) (No. 3:12 Civ. 00436) (stating that Governor Tate Reeves declared that the state TRAP laws “should effectively close the only abortion clinic in Mississippi[,]” State Senator Merle Flowers stated “[t]here’s only one abortion clinic in Mississippi. I hope this measure shuts that down[,]” and that State Representative Bubba Carpenter stated “[w]e have literally stopped abortion in the state of Mississippi. . . .”); Laura Basset, *Mississippi Abortion Bill May Force State’s Only Clinic To Close*, HUFFINGTON POST, Apr. 4, 2013, http://www.huffingtonpost.com/2012/04/05/mississippi-abortion-bill_n_1404705.html (quoting Mississippi Governor Phil Bryant’s statement that “As governor, I will continue to work to make Mississippi abortion-free.”).

6 *Threats to Abortion Rights/TRAP Bills*, NAT’L ABORTION FED’N, http://www.prochoice.org/policy/states/trap_laws.html (last visited June 26, 2014) [hereinafter *TRAP Bills*].

7 See *infra* Part II.

8 It should be noted that the Fifteenth Amendment prohibits discrimination based on race, color, or previous condition of servitude. While the Fifteenth Amendment was largely passed to prohibit discrimination against freed slaves, the Amendment was also

Reconstruction and Jim Crow eras.⁹ Though African-American males were granted the right to vote in 1870, backdoor means of keeping black voters out were used to prevent them from exercising this right. Grandfather clauses, literacy tests, and white primaries were only some of the tactics used to diminish the strength of the black electorate.

This paper argues that had abortion been examined as a fundamental right under the voting rights lens prior to *Casey*, Supreme Court jurisprudence would have required that TRAP laws be invalidated. Part I of this paper discusses voter discrimination and TRAP law jurisprudence. Part II posits that had the Supreme Court examined abortion rights after *Roe* under the voter discrimination frame, TRAP laws would require invalidation because they are based on arbitrariness and animus. Part II also argues that under the analysis used by courts in voter discrimination cases, discriminatory restrictions that prevent women from exercising their right to an abortion are accordingly unconstitutional. Part III offers policy recommendations regarding future treatment of the federal right to abortion. Finally, Part IV concludes that the abortion-rights advocates should not limit themselves to defending abortion rights through the right to privacy precedent, but should seek out new lenses through which to legally challenge antiabortion restrictions.

I. BACKGROUND

a. The Right to Vote

The right to vote is not explicitly granted by the Constitution.¹⁰ Individuals have no federal constitutional right to vote for electors for the President unless and until the state legislature chooses a statewide system for doing so.¹¹ The Constitution requires that members of the U.S. House of Representatives and Senate are to be elected by the people¹² and that

aimed at protecting other racial minorities including Mexican-Americans and Native Americans, among others. For the purpose of this paper, the term African-Americans will be used as the majority of cases referenced in this paper refer to the disenfranchisement of African-Americans.

⁹ See, e.g., *Smith v. Allwright*, 321 U.S. 649, 664-65 (1944) (striking down Texas' white primary system).

¹⁰ See Christopher Watts, Note, *Road to the Poll: How the Wisconsin Voter ID Law of 2011 is*

Disenfranchising its Poor, Minority, and Elderly Citizens, 3 COLUM. J. RACE & L. 119, 122 (2013) ("The original text of the Constitution is essentially silent with regard to the voting rights of citizens and does not make any concrete suppositions about who might be allowed to vote and under what conditions.").

¹¹ *Bush v. Gore*, 531 U.S. 98, 104 (2000).

¹² U.S. CONST. art. 1, § 2 ("The House of Representatives shall be composed of

states will be penalized for abridging the voting rights of male citizens who are at least twenty-one years of age.¹³ Aside from this, the Constitution merely prohibits the disenfranchisement of certain populations who have faced a history of political or social discrimination. For example, the Nineteenth Amendment prohibits voting discrimination based on sex, the Twenty-fourth Amendment prohibits voting discrimination based on wealth, and the Twenty-sixth Amendment prohibits voting discrimination against those eighteen years of age or older.¹⁴

States have broad discretion to regulate their local electoral process through legislation and executive action,¹⁵ so long as those regulations do not violate federal constitutional guarantees.¹⁶ This right is conferred by

members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.”); U.S. CONST. amend. XVII (“The Senate of the United States shall be composed of two Senators from each state, elected by the people thereof, for six years; and each Senator shall have one vote.”); *see also* *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 665 (1966) (stating that “[w]hile the right to vote in federal elections is guaranteed by Art. 1 § 2 of the U.S. Constitution, the right to vote in state elections is nowhere expressly mentioned.”).

13 *See* U.S. CONST. amend. XIV (“But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.”).

14 U.S. CONST. amend. XXVI, § 1 (“The right of citizens of the United States, who are eighteen years of age or older, to vote, shall not be denied or abridged by the United States or any state on account of age.”); U.S. CONST. amend. XXIV, § 1 (“The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any state by reason of failure to pay any poll tax or other tax.”); U.S. CONST. amend. XIX (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex.”).

15 *See* *Guinn v. United States*, 238 U.S. 347, 362 (1915) (“Beyond doubt the Amendment does not take away from the state governments in a general sense the power over suffrage which has belonged to those governments from the beginning”); Claire Foster Martin, Comment, *Block the Vote: How a New Wave of State Election Laws is Rolling Unevenly Over Voters & the Dilemma of How to Prevent It*, 43 CUMB. L. REV. 95, 98 (2012-2013) (stating that states have broad discretion to regulate their means of holding elections).

16 *Harper*, 383 U.S. at 665 (“[T]he right of suffrage ‘is subject to the imposition of state standards which are not discriminatory which do not contravene any restriction

the Elections Clause of the Constitution, which grants the states the explicit power to regulate the times, places, and manner of holding elections.¹⁷ Within limits, states are free to restrict who votes and how.¹⁸ States may prohibit felons from voting,¹⁹ pass voter identification laws,²⁰ create rules regarding the counting or recounting of ballots,²¹ and more.

Ratified in 1870, the Fifteenth Amendment to the U.S. Constitution prohibits discrimination based on race, color, or previous condition of servitude in all elections, at all levels, and for all offices.²² The ratification was met with immediate hostility from those opposing African-Americans enfranchisement, yet Congress did little to address the backlash.²³ Seizing upon this lack of federal enforcement, states enacted what became known as “Black Codes,” or state laws that restricted the freedoms of African-Americans, including restrictions on the new right to vote.²⁴ Restrictions including literary tests, poll taxes, property ownership requirements, and white primaries were effectively used to deter African-Americans and resulted in the disenfranchisement of millions of would-be voters.²⁵ States such as Alabama, Arkansas, Mississippi, Tennessee, Oklahoma, Louisiana, South Carolina, and Virginia were among the many Southern states that

that Congress, acting pursuant to its constitutional powers, has imposed.”).

17 U.S. CONST. art. 1, § 4 (“The Times, Places and Manner of Holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators.”).

18 *Clingman v. Beaver*, 544 U.S. 581, 593 (2005) (noting that “states may, and inevitably must, enact reasonable regulations of parties, elections, and ballots.”).

19 *See Richardson v. Ramirez*, 418 U.S. 24, 54 (1974).

20 *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 204 (2008).

21 *Bush v. Gore*, 531 U.S. 98, 116-17 (2000).

22 U.S. CONST. amend. XV, § 1 (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”); Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 GEO. L. J. 259, 281 (2004) (stating that the right is applied to all governmental elections).

23 Michael Ellement, Note, *The New Voter Suppression: Why the Voting Rights Act Still Matters*, 15 SCHOLAR 261, 265 (2013).

24 *Id.*

25 *See Oregon v. Mitchell*, 400 U.S. 112, 147 (1970) (Douglas, J., concurring and dissenting) (“[T]he [literacy] tests have been used . . . as a discriminatory weapon against some minorities, not only Negroes but Americans of Mexican ancestry, and American Indians.”); Michael James Burns, *Shelby Cnty. v. Holder and the Voting Rights Act: Getting the Right Answer with the Wrong Standard*, 62 CATH. U. L. REV. 227, 227 (2012) (writing that such tactics resulted in the disenfranchisement of millions of people of color).

undertook such methods.

When the federal government failed to intervene in order to address the suppression of minority voters in the South,²⁶ activists brought their claims to court. In a string of landmark cases, the Supreme Court, and eventually Congress, took steps to prohibit such modes of disenfranchisement. The first of such cases was the 1915 case of *Guinn v. United States*,²⁷ where the Supreme Court struck down the use of “grandfather clauses,” which placed voting restrictions on all citizens but exempted those who were allowed to vote prior to the Civil War or who were lineal descendants of those allowed to vote prior to the Civil War.²⁸ The Court invalidated Oklahoma’s grandfather clause, finding that because the provision prevented African-American males from exercising their Fifteenth Amendment right, it was unconstitutional.²⁹ The ruling required the dismantling of similar restrictions in other Southern states, such as Alabama, North Carolina, Louisiana, Virginia, and Georgia.³⁰

While the Court skirted the issue of literacy tests in *Guinn*, Congress itself prohibited their use through the enactment of the Voting Rights Act of 1965.³¹ Literacy tests were used to keep African-Americans from voting and were administered at the discretion of voting registrars.³² For instance, if the registrar wanted a person to pass, he could ask a simple question such as “Who is the president of the United States?”³³ That same registrar also had the discretion to ask a more difficult question or might also require a black person to answer every single question correctly or in an unrealistic amount of time in order to pass.³⁴ Hoping to “banish the blight of racial discrimination in voting, which ha[d] infected the electoral process in parts of [the] country for nearly a century,”³⁵ the Voting Rights Act, among other things, suspended “the use of tests or devices in determining eligibility to

26 Ellement, *supra* note 23, at 266.

27 238 U.S. 347 (1915).

28 BLACK’S LAW DICTIONARY 767 (9th ed. 2009).

29 *Guinn*, 238 U.S. at 365.

30 Alison Shay, *Remembering Guinn v. United States*, UNIV. OF N.C. AT CHAPEL HILL (June 21, 2012), <https://lcrmlib.lib.unc.edu/blog/index.php/2012/06/21/remembering-guinn-v-united-states/>.

31 The Voting Rights Act of 1965, 42 U.S.C. § 1973 (2013).

32 *See, e.g., Louisiana v. United States*, 380 U.S. 145, 150 (1965).

33 *The Rise and Fall of Jim Crow*, PUB. BROAD. SERV., http://www.pbs.org/wnet/jimcrow/voting_literacy.html (last visited June 30, 2014).

34 *Id.*

35 Ellement, *supra* note 23, at 267.

vote” and expressly banned the use of literacy tests.³⁶

Similarly, in 1965, the Supreme Court prohibited the use of “interpretation tests,” which required those wishing to register to vote to give a “reasonable interpretation” of any clause of the state or U.S. Constitution.³⁷ The Court held that such a vague test granted registrars “virtually uncontrolled discretion as to who should vote and who should not”³⁸ and found ample evidence that the test had effectively been used to deprive otherwise qualified African-American citizens of their right to vote.³⁹

A third tactic used to deter the black vote was the use of white primaries – primary elections of the Democratic Party in which blacks were explicitly barred from participation. Because the Democratic Party dominated the Southern states during the Jim Crow era, such bans effectively kept blacks from voting in elections that generally determined who would hold office in a Democratic-dominated state.⁴⁰ The Court prohibited these types of primaries in 1944 in the case of *Smith v. Allwright*,⁴¹ which had a drastic effect on the strength of the black vote. In the case’s aftermath, African-American voter registration vastly improved: the number of Southern blacks registered to vote rose to between 700,000 and 800,000 by 1948 and then to one million by 1952.⁴²

The Twenty-fourth Amendment, ratified in 1964, prohibited the use of poll taxes, which required voters to pay a fee to vote or to register to vote in

36 42 U.S.C. § 1973(b); *see also* *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2619-20 (2013) (stating that the Voting Rights Act targeted jurisdictions who had used tests which “included literacy and knowledge tests, good moral character requirements, the need for vouchers from registered voters, and the like[.]” and that in 1975 Congress amended the definition of “test or device” to include the practice of providing English-only voting materials in places where over five percent of voting-age citizens spoke a single language other than English).

37 *See Louisiana*, 380 U.S. at 150.

38 *See id.* (“Under the State’s statutes and constitutional provisions the registrars, without any objective standard to guide them, determine the manner in which the interrelation test is to be given, whether it is to be oral or written, the length and complexity of the sections of the State or Federal Constitution to be understood and interpreted, and what interpretation is to be considered correct.”).

39 *Id.* at 153.

40 Sanford N. Greenberg, *White Primary*, TEX. STATE HISTORICAL ASS’N, <http://www.tshaonline.org/handbook/online/articles/wdw01> (last visited June 30, 2014).

41 321 U.S. 649 (1944).

42 *Landmark: Smith v. Allwright*, NAACP LEGAL DEF. & EDUC. FUND, <http://www.naacpldf.org/case/smith-v-allwright> (last visited June 30, 2014).

42 *Id.*

federal elections.⁴³ However, it wasn't until the 1966 case of *Harper v. Virginia State Board of Elections*⁴⁴ that the Supreme Court extended such prohibitions to state elections.⁴⁵ The Court based its determination on the finding that wealth was a poor proxy for evaluating voter qualifications.⁴⁶

Lastly, another tactic used to disenfranchise black voters was deception – moving polling places, changing dates of voting, closing polls early, etc.⁴⁷ Challengers of this tactic brought suit under Section 5 of the Voting Rights Act.⁴⁸ Section 5 of the Voting Rights Act requires that whenever a state or political subdivision covered by the Act wishes to make a change to their voting process, that state or subdivision must first obtain approval from a federal court to do so.⁴⁹ The challengers alleged that the changing of polling locations from the polling locations used in their city during the previous election required such preclearance.⁵⁰ In 1966, the Supreme Court agreed and found Mississippi to be in violation of the Voting Rights Act for the changing of polling locations without permission to do so.⁵¹

b. The Right to an Abortion

Under the lens of strict scrutiny, the Supreme Court established a fundamental right to abortion in the 1973 case of *Roe v. Wade*, which examined a Texas statute criminalizing abortion except under very narrow circumstances.⁵² The Court held that the Fourteenth Amendment's conception of personal liberty included the right to privacy and was broad enough to encompass a woman's decision whether to terminate her pregnancy.⁵³ Simultaneously recognizing that a state may exercise a valid interest in protecting potential life, the Court established the trimester framework.⁵⁴ This framework provided that during the first trimester, the

43 U.S. CONST. amend. XXIV.

44 383 U.S. 663 (1966).

45 *See id.* at 670.

46 *Id.*

47 Richard Pierce, *The End of Reconstruction*, UNIV. OF NOTRE DAME (Sept. 05, 2006), <http://ocw.nd.edu/history/african-american-history-ii/lecture-notes/lecture-5-notes> [hereinafter *The End of Reconstruction*].

48 *See Perkins v. Matthews*, 400 U.S. 379, 382-83 (1971).

49 *Id.* at 380-82.

50 *Id.* at 382-83.

51 *Id.* at 387.

52 *See Roe v. Wade*, 410 U.S. 113, 117-18 (1973) (examining the statute that made abortion a crime except that “for the purpose of saving the life of the mother.”).

53 *Id.* at 153.

54 *See id.* at 163 (using the trimester framework to balance a pregnant woman's interest in self-determination with a state's interest in protecting future life).

decision whether to terminate a pregnancy should be left largely to a woman and her physician with only minimal restrictions from the state.⁵⁵ In the second trimester, a state may regulate abortion in ways that are reasonably related to maternal health, and in the third trimester, a state may regulate abortion in the interest of protecting future life, except where the life and health of the mother are at stake.⁵⁶

Nearly twenty years later, the Supreme Court replaced the trimester framework with the “undue burden” test in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.⁵⁷ Though the Court affirmed *Roe*’s main holding,⁵⁸ the Court additionally established the undue burden test, which states that a regulation is unduly burdensome, and therefore unconstitutional, if it has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion prior to viability.⁵⁹

Today, the *Casey* standard largely remains the law of the land and a state is free to implement abortion restrictions prior to viability so long as those restrictions do not present an undue burden. One type of restriction that has often been upheld is TRAP laws – laws that impose regulations on abortion providers that are not imposed on other medical providers. TRAP regulations often include restricting where abortions may be performed by limiting abortion care to hospitals or other specialized facilities, requiring doctors to obtain additional medical licenses, or essentially converting their practices into mini-hospitals through structural requirements.⁶⁰ Such structural requirements range from specifications for the janitors’ closets, to hallway width and height, to lawn care standards, or to excessive staffing

⁵⁵ *Id.* at 164.

⁵⁶ *Id.* at 164-65.

⁵⁷ See *Planned Parenthood v. Casey*, 505 U.S. 833, 874, 876 (1992) (finding the undue burden standard better reconcile the state’s interest with the women’s right).

⁵⁸ See *id.* at 845-46 (writing that the Court affirmed *Roe*’s main holdings that 1) a woman has the right to choose to have an abortion before her fetus is viable and to obtain an abortion without undue interference from a state; 2) a state has the power to restrict abortions after fetal viability, if the state law imposing such a restriction contains exceptions for pregnancies which endanger a woman’s life or health; and 3) a state has legitimate interests from the outset of a pregnancy in protecting the health of the pregnant woman and the life of the fetus that may become a child).

⁵⁹ See *id.* at 877-78 (finding such a purpose to be invalid because a regulation cannot have the purpose of hindering exercise of an informed choice and finding such an effect to be invalid because hindering such a choice is not a permissible means of serving the state’s interest in protecting future life).

⁶⁰ *Targeted Regulation of Abortion Providers (TRAP)*, NARAL PRO-CHOICE AM., <http://www.prochoiceamerica.org/what-is-choice/fastfacts/issues-trap.html> (last visited June 30, 2014).

requirements.⁶¹ The National Abortion Federation reports that TRAP laws “often establish new licensing requirements for abortion clinics, subjecting clinics to heavy fees and regular inspections of facilities and records by the state, sometimes without adequate safeguards to protect patient privacy.”⁶² Forty-five states plus the District of Columbia have laws subjecting abortion providers to burdensome restrictions not imposed on other medical providers.⁶³ Noncompliance with TRAP laws can result in civil and/or criminal charges.⁶⁴ Such restrictions are usually unrelated to a patient’s health or safety, are costly and difficult, if not impossible, to implement, and often result in the forced shutdown of a clinic.⁶⁵

TRAP laws have proven extremely difficult to challenge in court for a number of reasons.⁶⁶ First, courts have been unwilling to strike down TRAP laws that target abortion providers rather than all medical providers by characterizing abortion as a “unique” medical procedure and therefore worthy of “unique” regulation.⁶⁷ Second, courts have rejected the argument that the costs of compliance with TRAP laws (costs which are often passed on to the patient via an increase in the cost of an abortion) are high enough of a price increase to be considered an undue burden under *Casey*.⁶⁸ Third, when courts have addressed Equal Protection claims regarding TRAP laws, they have usually used rational basis review – refusing to identify that the right to an abortion triggers any form of heightened scrutiny.⁶⁹

61 *Threats to Abortion Rights/TRAP Bills*, NAT’L ABORTION FED’N, http://www.prochoice.org/policy/states/trap_laws.html (last visited June 26, 2014).

62 *Id.*

63 NARAL PRO-CHOICE AM., *supra* note 60.

64 Gillian E. Metzger, *Abortion, Equality, and Administrative Regulation*, 56 EMORY L.J. 865, 871 (2007).

65 *See, e.g., Tucson Woman’s Clinic v. Eden*, 379 F.3d 531, 542 (9th Cir. 2004) (stating that Arizona’s TRAP law would cause individual abortion providers to incur tens of thousands of dollars in expenses to comply, that the law may force providers to stop practicing medicine altogether, that Planned Parenthood will see a drop in two-thirds of the number of its physicians, that the increased monetary cost delays will deter patients, and that the delay in abortion increases health risks).

66 CTR. FOR REPROD. RIGHTS, *Targeted Regulation of Abortion Providers: Avoiding the “TRAP”* 5 (2003), available at http://reproductiverights.org/sites/default/files/documents/pub_bp_avoidingthetrap.pdf [hereinafter *Avoiding the “TRAP”*].

67 Metzger, *supra* note 64, at 872.

68 *See, e.g., Greenville Women’s Clinic v. Bryant*, 222 F.3d 157, 171 (4th Cir. 2000) (finding that plaintiffs had failed to demonstrate that an increased cost of an abortion would place an undue burden on a woman’s ability to obtain an abortion).

69 Metzger, *supra* note 64, at 874.

While there have been relatively few decisions addressing constitutional challenges to TRAP measures post-*Casey*, particularly at the federal appellate level,⁷⁰ never before have TRAP laws been so burdensome that states' last abortion clinics are in dire threat of closing involuntarily.⁷¹ Such a scenario, for the first time, would mean that a woman with a constitutional right to an abortion would legally have no way of exercising that right within her state. An example of such a scenario is currently playing out in Mississippi, where the state's latest TRAP law is in the process of shutting down its last abortion provider. If the TRAP law survives its pending litigation, Mississippi will become the first state in which it is legally impossible to obtain an abortion.⁷²

II. ANALYSIS

Had the Supreme Court reexamined abortion post-*Roe* under the voting rights standard rather than the *Casey* undue burden standard, voting rights jurisprudence would have required the dismantling of TRAP laws. A close examination of the two rights and the legislative and judicial responses to their restrictions demonstrate that the two are well suited for comparison. For the same reasons that voter disenfranchisement laws have been struck down, TRAP laws must accordingly be struck down. First, disallowed voting restrictions, like TRAP laws, are arbitrary and based on animus, and are therefore unconstitutional. Second, both types of restrictions make it impossible, rather than just *difficult*, for a person to exercise his or her right to vote or to an abortion.

a. As State Voter Disenfranchisement Laws Were Struck Down as Arbitrary Violations of the Fifteenth Amendment Based on Animus, TRAP Laws Must be Struck Down as Arbitrary Violations of the Fourteenth Amendment Based on Animus.

Under the Elections Clause of the U.S. Constitution, states have the

⁷⁰ *Id.* at 873.

⁷¹ See, e.g., Jackson Women's Health Org. v. Currier, 940 F. Supp. 2d 416, 420 (S.D. Miss. 2013) (explaining that under the new TRAP law, Mississippi's last abortion clinic's success or failure in obtaining admitting privileges to local hospitals would be determinative in whether or not the clinic would be able to stay open and that though the court originally wanted to wait and see whether or not the admitting privileges would be granted, "[t]hat day has now arrived.").

⁷² It should be noted that women in Mississippi will still be able to obtain an abortion at a hospital, but only in the cases of rape, incest, fetal abnormality, or when the life of the mother is at stake. See *id.* at 421 (noting that if Mississippi's last abortion clinic closes, women may have to travel out of state to obtain the procedure); see also Jackson Women's Health Org. v. Amy, 330 F. Supp. 2d 820, 825-26 (S.D. Miss. 2004) (citing Miss. Code § 41-41-91 (2012)).

explicit power to regulate the times, places, and manner of holding elections,⁷³ so long as the regulations are not arbitrary or based on animus.⁷⁴ Because the issue of African-American suffrage was a new issue for the Supreme Court, the above mentioned disenfranchisement cases were decided on varying and inconsistent grounds. While some decisions were based on violations of the Fifteenth Amendment, others were based on Due Process arguments, while still others rested upon the guarantees of the Voting Rights Act.⁷⁵ Moreover, though these early discussions of voting rights did not firmly establish the right to vote as a fundamental one (which it now is),⁷⁶ the early Court danced around the issue, though the cases never referred to strict scrutiny or compelling state interests, as other fundamental rights cases do. While the cases may have been decided on different grounds, each decision relied upon the factors of arbitrariness and animus. Under the voter disenfranchisement analysis, TRAP laws that are arbitrary or based on animus are also invalid.

i. Under the Supreme Court Voter Disenfranchisement Jurisprudence, TRAP Laws are Invalid, as They are Arbitrary for Not Being Based on Reason and Arbitrary for Providing Unrestrained Discretion to an Authority.

Though states may tailor how they conduct elections, the Supreme Court has reprimanded states that, under the guise of allowable voter restrictions, have passed arbitrary restrictions as a means of deterring voting among African-Americans. The dictionary defines “arbitrary” as “based on random choice or personal whim, rather than any reason or system,” or “unrestrained and autocratic in the use of authority.”⁷⁷ Similarly, the

73 Claire Foster Martin, Comment, *Block the Vote: How a New Wave of State Election Laws is Rolling Unevenly Over Voters & the Dilemma of How to Prevent It*, 43 CUMB. L. REV. 95, 98 (2012).

74 See *infra* Parts II(a)(i)-(ii).

75 See *Bush v. Gore*, 531 U.S. 98, 108-09 (2000) (deciding the case on Equal Protection of fundamental rights grounds); *Perkins v. Matthews*, 400 U.S. 379, 390 (1971) (deciding the case under the Voting Rights Act); *Louisiana v. United States*, 380 U.S. 145, 153 (1965) (deciding the case on Fifteenth Amendment grounds); *Smith v. Allwright*, 321 U.S. 649, 664 (1944) (deciding the case on Fifteenth Amendment grounds); *Guinn v. United States*, 238 U.S. 347, 362 (1915) (deciding the case on Fifteenth Amendment grounds).

76 *Bush*, 531 U.S. at 109.

77 BLACK’S LAW DICTIONARY 340 (9th ed. 2009) (defining “arbitrary” as “depending on individual discretion; specif., determined by a judge rather than by fixed rules, procedure, or law” and as “(of a judicial decision) founded on prejudice or preference rather than on reason or fact.”); OXFORD DICTIONARIES, available at

Supreme Court struck down voting restrictions that were arbitrary because they were based on random choice rather than reason, or were based on the unrestrained discretion of an authority.

The first category of arbitrariness is arbitrariness that is random rather than based on reason and was used to strike down voting restrictions that were not based on legitimate qualifications to vote. For example, in *Harper v. Virginia State Board of Elections*, the Supreme Court declared that in regards to poll taxes, “wealth or fee paying has, in our view, no relation to voting qualifications.”⁷⁸ The poll tax was “arbitrary”⁷⁹ because “wealth, like race, creed, or color, is not germane to one’s ability to participate intelligently in the electoral process” and that “[t]o introduce wealth or payment of a fee as a measure of a voter’s qualification is to introduce a capricious or irrelevant factor.”⁸⁰ Since the tax had “no relation to voting qualifications,” the Court concluded that wealth is a poor proxy for evaluating voter qualifications.⁸¹

The second category of arbitrariness, one that grants excessive authority to a decision maker, was addressed in *Louisiana v. United States*. The Court found Louisiana’s interpretation test, which required a person to give a “reasonable interpretation” of any clause of the Louisiana or U.S. Constitution, to be arbitrary and therefore invalid.⁸² Finding that the interpretation test gives an arbitrary power to its registrars,⁸³ the Court stated:

The applicant facing a registrar in Louisiana thus has been compelled to leave his voting fate to that official’s unconstitutional power to determine whether the applicants understanding of the Federal or State Constitution is satisfactory. As the evidence showed, colored people, even some with the most advances education and scholarship, were declared by voting registrars with less education to have unsatisfactory understanding of the Constitution of Louisiana or of the United States. This is not a test but a trap, sufficient to stop even the most brilliant man on his way to the voting booth.⁸⁴

<http://oxforddictionaries.com/definition/english/arbitrary?q=arbitrary> (last visited June 26, 2014).

78 *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966).

79 *Id.* at 673 (Black, J., dissenting).

80 *Id.* at 668.

81 *Id.* at 670.

82 *Louisiana v. United States*, 380 U.S. 145, 153 (1965).

83 *Id.* at 153.

84 *Id.* at 152-53.

The interpretation test was “arbitrary” because it gave deference to the registrars’ discretion without imposing “definite and objective standards upon registrars of voters for the administration of the interpretation test.”⁸⁵ Likewise, literacy tests were similarly prohibited for the unrestrained discretion they gave to registrars.⁸⁶

The types of arbitrariness described in the aforementioned voter disenfranchisement cases require the invalidation of TRAP laws. Like voter disenfranchisement laws, TRAP laws are arbitrary because they are based on 1) random choice rather than reason and/or 2) the unrestrained discretion of an authority. First, TRAP laws are based random choice rather than reason. Proponents of poll taxes urged that such restrictions were necessary because they were germane to a voter’s qualifications. Similarly, proponents of TRAP laws urge that such restrictions are necessary because they are germane to women’s health. The Supreme Court held that poll taxes were *not* germane to voter qualifications, just as TRAP laws are *not* germane to women’s health.⁸⁷ TRAP laws go as far as to regulate the height of the grass outside abortion clinics,⁸⁸ the number of parking spots,⁸⁹ the allowable dimensions of the janitors’ closets,⁹⁰ the type of fabric to be used on window coverings,⁹¹ and the air temperature in “patient areas.”⁹²

Other regulations may seem less arbitrary, but are still unrelated to the protection of women’s health. Examples of such less egregious sounding TRAP laws include requiring abortion providers to have hospital admitting privileges, allowing only physicians (rather than other health care providers) to perform abortions, requiring clinics to undergo certain

85 *Id.* at 152.

86 *See supra* notes 31-36 and accompanying text.

87 *See Avoiding the “TRAP”*, *supra* note 66, at 1.

88 *Targeted Regulation of Abortion Providers (TRAP)*, NARAL PRO-CHOICE AM., <http://www.prochoiceamerica.org/what-is-choice/abortion/trap-laws.html> (last visited June 30, 2014) [hereinafter NARAL TRAP].

89 *Utah: Targeted Regulation of Abortion Providers (TRAP)*, NARAL PRO-CHOICE AM., <http://www.prochoiceamerica.org/government-and-you/state-governments/state-profiles/utah.html?templateName=template-161602701&issueID=8&ssumID=2854> (last visited June 30, 2014) [hereinafter *Utah: Targeted Regulation*].

90 NARAL TRAP, *supra* note 88.

91 *Utah: Targeted Regulation*, *supra* note 89.

92 *South Carolina: Targeted Regulation of Abortion Providers (TRAP)*, NARAL PRO-CHOICE AM., <http://www.prochoiceamerica.org/government-and-you/state-governments/state-profiles/south-carolina.html?templateName=template-161602701&issueID=8&ssumID=2822> (last visited June 30, 2014).

licensing procedures, and more.⁹³ Even these laws, however, are medically unnecessary and are often contrary to accepted medical practice.⁹⁴

TRAP laws are not only unrelated to women's health, they are dangerous to women's health. Primarily, TRAP laws threaten to shut down abortion clinics, which is especially dangerous in states with only one remaining clinic such as Mississippi or North Dakota. Abortion services play a vital role in women's health and well-being and the shutting down of such clinics will only force women to take illegal or dangerous means of self-induced or back-alley abortions.⁹⁵ Moreover, many clinics that provide abortion care also provide both men and women with a wide range of medical services including cancer screenings and prevention, STD/STI testing, treatment and education, contraception services, pregnancy tests, prenatal care, adoption referrals, and more.⁹⁶ They provide counseling for men, women, boys, and girls who have been abused, raped, or are being bullied or pressured into sex.⁹⁷ Such clinics are often able to provide services at lower costs⁹⁸ and in a more easily accessible manner by their walk-in nature and sliding scale fees. When TRAP laws result in the loss of these clinics, entire communities consequently lose more than just abortion-related care.

In addition, TRAP laws are not based on current medical research.⁹⁹ Often, TRAP laws are drafted based on the political agendas of state legislators and administrators, who are largely unfamiliar with the abortion procedure and who disregard the recommendations of the medical

93 AVOIDING THE "TRAP", *supra* note 66, at 2-4.

94 See Matthias Decl. for Petitioner at 8, Jackson Women's Health Org. v. Currier, 940 F. Supp. 2d 416 (S.D. Miss. 2013) (No. 3:12-CV-00436-DPJ-KFB) [hereinafter Matthias] ("In my expert medical opinion, if a woman who experienced a complication after the abortion procedure were forced to travel several hours in order to be admitted to a hospital where her physician had admitting privileges, this travel time could jeopardize her safety and health.").

95 See Grossman Decl. for Petitioner at 5, 6, Jackson Women's Health Org. v. Currier, 940 F. Supp. 2d 416 (S.D. Miss. 2013) (No. 3:12-CV-00436-DPJ-KFB) [hereinafter Grossman] ("It is extraordinarily important for women to have meaningful access to legal abortion. Women of childbearing age who do not have access to the procedure face significantly increased risks of death and poor health outcomes." and "[w]hen legal abortion is unavailable or difficult to access, some women turn to illegal, and unsafe, methods to terminate unwanted pregnancies.").

96 See *Health Info & Services*, PLANNED PARENTHOOD FED'N OF AM., <http://www.plannedparenthood.org/health-info/> (last visited June 30, 2014).

97 Jennifer Hamady, *The Importance of Planned Parenthood*, PSYCHOLOGY TODAY (Feb. 2, 2012), <http://www.psychologytoday.com/blog/finding-your-voice/201202/the-importance-planned-parenthood>.

98 *Id.*

99 See, e.g., Matthias, Decl. 4.

community in drafting such rules.¹⁰⁰ In fact, TRAP laws often require health care providers to adopt abortion regulations that depart from accepted medical practice.¹⁰¹ Doctors and the medical community at large have spoken out against the burdens that such regulations require and the effect those burdens have on patients.¹⁰² Not only does compliance mean added costs for both the patient and provider, the administrative and legal roadblocks interrupt patients' continuity of care.¹⁰³ Patient care suffers when clinic staff is required to spend additional time on unnecessary administrative tasks.¹⁰⁴

TRAP laws have no relation to women's health, just as poll taxes have no relation to voter qualifications, and therefore require invalidation under *Harper*. Introducing grass height, window treatments, or unnecessary licensing schemes as a measure of women's health is as arbitrary as introducing "wealth or payment of a fee as a measure of a voter's qualification."¹⁰⁵ Like wealth, such factors are "capricious [and] irrelevant."¹⁰⁶ Poll taxes are a poor proxy for voter qualifications and TRAP laws are a poor proxy for women's health.¹⁰⁷

100 *Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 184 (4th Cir. 2000) (Hamilton, J., dissenting) (discussing law makers' admissions that they knew very little about the abortion procedure or the differences between the first and second trimesters, that they had no formal medical training or education, that they took no meaningful steps to educate themselves on abortion or appropriate abortion clinic regulations, and that they read but disregarded recommendations made by Planned Parenthood, the National Abortion Federation, and the American College of Obstetricians and Gynecologists).

101 *Simopoulos v. Virginia*, 462 U.S. 506, 516 (1983) (stating that abortion regulations that depart from accepted medical practice are prohibited); Matthias, Decl. 4 ("It could also violate good medical practice and the generally accepted 'standard of medical care,' which requires that urgent/emergent medical conditions be treated at an appropriate facility.").

102 See Grossman, Decl. 4 (testifying that the American College of Obstetricians and Gynecologists, the American Medical Association, the American Public Health Association, and the World Health Organization have all condemned the use of TRAP laws, finding them to be inappropriate, ill advised, and dangerous).

103 See *Planned Parenthood of Kansas & Mid-Missouri, Inc. v. Drummond*, No. 07-4164-CV-C-ODS, 2007 U.S. Dist. LEXIS 70808, at *1, *7 (W.D. Mo. Sept. 24, 2007) (finding that the economic harm coupled with the harm suffered by patients who are either delayed or prohibited from receiving an abortion outweighs the harm done to the state).

104 *Women's Med. Ctr. of Nw. Hous. v. Bell*, 248 F.3d 411, 415 (5th Cir. 2001) (quoting obstetrician/gynecologist and abortion provider Dr. Fred Hansen).

105 *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 668 (1966).

106 *Id.*

107 See NARAL TRAP, *supra* note 88 (stating that TRAP regulations are not medically related to abortion care or women's health).

In addition to identifying arbitrariness based on random choice rather than reason, the Supreme Court identified a second category of arbitrariness in the voting rights cases. The second category relates to restrictions that grant unchecked discretion to authorities without objective standards or guidance. The Court identified this type of arbitrariness when analyzing the interpretation and literacy tests because they were arbitrarily applied to determine who could exercise their right to vote and who could not.¹⁰⁸ Similarly, TRAP laws grant unchecked discretion to authorities without objective standards or guidance, allowing for discrimination against the right to an abortion. For example, Mississippi's latest TRAP law requires an abortion facility to be "located in an attractive setting."¹⁰⁹ One of Arizona's TRAP laws requires doctors to provide care in a manner "designed to enhance the patient's self-esteem and self-worth."¹¹⁰ Such subjective "standards," like the ones struck down by the Supreme Court for giving unguided discretion to voting registrars, leave the power to determine who can exercise their right to an abortion and who cannot to an often biased and nonmedical authority.¹¹¹

States are free to fashion both voting rights and abortion rights to a certain degree, but those restrictions may not be arbitrary and must be related to their stated goals. TRAP laws, like voter disenfranchisement laws, are arbitrary in that they are based on random standards rather than reason, and because they are a subjective decision of a ruling body, unrestrained and autocratic in its use of authority.

ii. Under the Supreme Court Voter Disenfranchisement Jurisprudence, TRAP laws Are Invalid Because They Are Based on Animus.

As the Supreme Court held that voter disenfranchisement laws based on animus towards African-Americans were invalid, so too are TRAP laws that are based on animus towards abortion. A state may not restrict a

108 *Louisiana v. United States*, 380 U.S. 145, 152 (1965).

109 *Interview with Bonnie Scott Jones*, PUB. BROAD. SERV. (Nov. 8, 2005), <http://www.pbs.org/wgbh/pages/frontline/clinic/interviews/scottjones.html>.

110 *Id.*

111 *Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 184 (4th Cir. 2000) (Hamilton, J., dissenting) (explaining that those tasked with drafting and promulgating the abortion clinic regulation had no medical background); Metzger, *supra* note 64, at 900 ("The lack of fit between abortion regulations and the governments health interests is the type of discrepancy that potentially may provoke greater judicial review. In administrative law terms, this lack of fit suggests a lack of reasoned decision-making. . . . Such inconsistency not only raises the impression of arbitrary administrative action, but it also suggests that the agency's stated rationale is not what is actually motivating its actions.").

constitutionally protected right out of animus,¹¹² defined as “a usually prejudiced and often spiteful or malevolent ill”¹¹³ or “moral disapproval.”¹¹⁴ In regards to voting rights, the Court stated that once the right to vote has been granted, the state may not, by disparate treatment, value one person’s vote over that of another.¹¹⁵ In describing backdoor methods of disenfranchising black voters, the Court found that “a whole arsenal of racist weapons has been perfected”¹¹⁶ and that disenfranchisement laws need not be facially invalid to be struck down, so long as they were motivated by a discriminatory purpose.¹¹⁷ Such a discriminatory purpose, like the one behind grandfather clauses, sought to turn back the hands of time and recreate restrictions imposed prior to the passage of the Fifteenth Amendment. A grandfather clause, the Court found, was “a mere denial of the restrictions imposed by the prohibitions of the Fifteenth Amendment and by necessary result re-creates and perpetuates the very conditions which the Amendment was intended to destroy.”¹¹⁸

Like voter disenfranchisement restrictions, TRAP laws are based on “prejudiced and often spiteful or malevolent ill” or “moral disapproval.” It is no secret that abortion clinics have been targeted based on this disfavor: “especially in the context of abortion, a constitutionally protected right that has been a traditional target of hostility, standardless laws and regulations such as these open the door to potentially arbitrary and discriminatory enforcement.”¹¹⁹ In addressing the validity of TRAP laws, courts have recognized that “abortion providers can be a politically unpopular group”¹²⁰ and that “singling out abortion in ways unrelated to the facts distinguishes abortion from other medical procedures is an unconstitutional form of discrimination on the basis of gender.”¹²¹ In recognizing such truths, courts have held that a state does not have the power to prohibit any providers from performing abortions merely because the state disapproves of

112 *Romer v. Evans*, 517 U.S. 620, 632 (1966) (finding that a state restriction which is based on animus can never be rational and will always be invalid).

113 *Animus Definition*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriamwebster.com/dictionary/animus>.

114 *Romer*, 517 U.S. at 644.

115 *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 665 (1966).

116 *Perkins v. Matthews*, 400 U.S. 379, 389 n.8 (1971).

117 Frank R. Parker, *The Constitutionality of Racial Redistricting: A Critique of Shaw v. Reno*, 3 D.C. L. REV. 1, 22 (1995).

118 *Guinn v. United States*, 238 U.S. 347, 360 (1915).

119 *Women’s Med. Ctr. of Nw. Hous. v. Bell*, 248 F.3d 411, 422 (5th Cir. 2001).

120 *Tucson Woman’s Clinic v. Eden*, 379 F.3d 531, 545 (9th Cir. 2004).

121 *Id.* at 548.

abortion.¹²²

At the same time, other courts have upheld TRAP laws under the guise of protecting health, when they are in fact based on animus towards abortion. In *Greeneville Women's Clinic v. Bryant*, for example, the Fourth Circuit upheld South Carolina's regulations establishing discriminatory standards for the licensing of abortion clinics.¹²³ The court's decision was purportedly grounded on the opinion that the regulation served the valid state interest of protecting women's health.¹²⁴ Disapproval or animus towards abortion was never expressed as a concern during the opinion. Yet the opinion's concluding paragraph read:

But the importance of the deeply divided societal debate over the morality of abortion and the weight of the interests implicated by the decision to have an abortion can hardly be overstated. As humankind is the most gifted of living creatures and the mystery of human procreation remains one of life's most awesome events, so it follows that the deliberate interference with the process of human birth provokes unanswerable questions, unpredictable emotions, and unintended social and, often, personal consequences beyond simply the medical ones.¹²⁵

This closing statement casts doubt on the court's assertion that its decision was based solely on concern for women's health.

Moreover, in regards to voting rights, the Supreme Court stated that once the right to vote has been granted, the state may not, by disparate treatment, value one person's vote over that of another.¹²⁶ Accordingly, once the right to a medical procedure has been granted, the state may not, by disparate treatment, value certain medical procedures over others. The Supreme Court has made clear time and time again that "action by a State that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose."¹²⁷ Like voter disenfranchisement laws, TRAP laws may be facially neutral, but single out abortion providers over other medical providers. As demonstrated above, action by states via TRAP laws are often motivated by a discriminatory purpose and are therefore equally as invalid as state disenfranchisement laws. Like the "arsenal of racist weapons" which "ha[d] been perfected," so too have such backdoor means of preventing abortion. Voting restrictions are never

¹²² *Id.* at 556.

¹²³ *Greeneville Women's Clinic v. Bryant*, 222 F.3d 157, 175 (4th Cir. 2000).

¹²⁴ *Id.* at 168.

¹²⁵ *Id.* at 175.

¹²⁶ *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666 (1966).

¹²⁷ *Parker*, *supra* note 117, at 31.

rational if they are based on animus.¹²⁸ Accordingly, abortion restrictions based merely on animus cannot stand.

Lastly, the Court found that voting restrictions “by necessary result re-creates and perpetuates the very conditions which the Amendment was intended to destroy.”¹²⁹ When a voter restriction prevented a black voter from exercising his right to vote, the restriction was prohibited because it had the practical effect of reincarnating “a period of time before the enactment of the Fifteenth Amendment and makes that period the controlling and dominant test of the right of suffrage.”¹³⁰ TRAP laws by necessary result re-create and perpetuate the very conditions which *Roe* was intended to destroy and make that period the controlling and dominant test of the right of abortion. TRAP laws are based on animus and may not be used to turn back the clock on women’s health.

b. As Voter Disenfranchisement Laws Were Unconstitutional Because They Made It Impossible to Exercise the Right to Vote, TRAP laws Are Unconstitutional Because They Make It Impossible to Exercise the Right to an Abortion.

When a right is protected by the U.S. Constitution, a state may not prohibit its members from exercising that right.¹³¹ It is for this reason that the Supreme Court and Congress took action to dismantle state initiatives that prevented African-Americans from exercising their right to vote. While some voter restrictions make it more *difficult* for people to vote or register to vote (voter ID laws, proof of citizenship laws, restrictions on same day registration, limited early voting periods, etc.), poll taxes, grandfather clauses, white primaries, literacy tests, interpretation tests, and deception made it *impossible* or *nearly impossible* for African-Americans to vote.

What the line of voter disenfranchisement opinions made clear is that the right and the means of providing that right are inseparable – one cannot exist without the other, or one would be meaningless without the other. The Court called the right to vote in a primary election “an integral part of

128 *Romer v. Evans*, 517 U.S. 620, 632 (1966).

129 *Guinn v. United States*, 238 U.S. 347, 360 (1915).

130 *Id.* at 365.

131 *See* *Bush v. Gore*, 531 U.S. 98, 104 (2000) (holding that the means of exercising a right are just as protected as the right itself); *Perkins v. Matthews*, 400 U.S. 379, 387-88 (1971) (holding that the means of exercising a right must exist if that right is guaranteed by the Constitution); *Smith v. Allwright*, 321 U.S. 649, 664 (1944) (finding that if a state makes a right impossible to exercise, it has stripped the right of its value).

the election machinery”¹³² and stated that constitutional rights would be of little value if they could be so indirectly denied.¹³³ The means through which the right is provided is as equally protected by the Constitution as the right itself:

The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another . . . It must be remembered that “the right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.”¹³⁴

Indeed, in the case of *Smith v. Allwright*, which examined Texas’ white primary system, the Supreme Court stated that in regards to a constitutional right, every privilege essential or necessary to the exercise of that right must also be guaranteed, or else the right would be a frivolous one.¹³⁵

In addition, the Supreme Court has held that the right to vote means little if that right cannot come into fruition on election day.¹³⁶ This statement was made in reference to the use of deception to deter black voters – moving polling place, changing dates of voting, closing polls early, etc.¹³⁷ The *Perkins* Court specifically urged that the accessibility, prominence, facilities, and prior notice of the polling place’s location all have an effect on a person’s ability to exercise his right to vote.¹³⁸ Acknowledging the necessity of a physical polling location to be able to exercise the right, the Court noted:

[T]here inheres in the determination of the location of polling places an obvious potential for “denying or abridging the right to vote on account of race or color” . . . Locations at distances remote from black communities or at places calculated to intimidate black from entering, or failure to publicize changes adequately might have that effect.¹³⁹

132 *Smith*, 321 U.S. at 659-60.

133 *Id.* at 664 (citing *Lane v. Wilson*, 307 U.S. 268, 275 (1939)).

134 *Bush*, 531 U.S. at 104-05.

135 *Smith*, 321 U.S. at 655-56 (quoting *Waples v. Marrast*, 184 S.W. 180, 184 (Tex. 1916)).

136 *Perkins v. Matthews*, 400 U.S. 379, 387 (1971).

137 *Pierce*, *supra* note 47.

138 *Perkins*, 400 U.S. at 387.

139 *Id.* at 388-89.

Smith and *Perkins* thus stand for the notion that a Constitutional right is a hollow one if it becomes impossible to exercise – whether by requiring an unattainable prerequisite for the exercising of the right or by withholding a physical location needed to exercise the right. The cases demonstrate that the Constitution does not just guarantee a right, but also guarantees the ability to exercise that right.

Like voting restrictions, some abortion restrictions make it more *difficult* to exercise the right to an abortion (mandatory waiting periods, parental consent requirement, ultrasound laws, increased financial costs of the abortion, etc.), while TRAP laws make it *impossible* or *nearly impossible* to exercise the right. The governor of Louisiana stated in 1898 that the grandfather clause solved the problem of “keeping Negroes from voting.”¹⁴⁰ Similarly, legislators have been quite candid about their strategy of using TRAP laws to make states “abortion free.”¹⁴¹

The voter disenfranchisement cases held that a right and the means of providing that right are often times inseparable – one cannot exist without the other. Such is true in the case of abortion. Generally speaking, women cannot legally perform abortions on themselves: they must rely on others to do so.¹⁴² Women thus depend on abortion providers as a means of exercising their right. In regards to a constitutional right, every privilege essential or necessary to the exercise of that right must also be guaranteed for the right not to be an empty one.¹⁴³ Therefore, in regards to the constitutional right to abortion, the privilege of being able to exercise that right by visiting an abortion clinic must also be guaranteed. Though a state may not have a legal obligation to erect, finance, staff, or maintain abortion

140 *Louisiana v. United States*, 380 U.S. 145, 152 (1965).

141 See e.g., Bassett, *supra* note 5 (quoting Mississippi Governor Phil Bryant’s statement that “[a]s governor, I will continue to work to make Mississippi abortion-free.”).

142 See Susan Yanow & Steph Herold, *Abortion is Legal: So Why is Self-Abortion Care a Crime?*, RH REALITY CHECK, (Dec. 6, 2011, 9:53 PM), <http://rhrealitycheck.org/article/2011/12/06/abortion-is-legal-so-why-is-self-abortion-care-crime/> (stating that self-induced abortion is illegal). *But see* Walter M. Weber, *The Right to Self-Abort? The Ninth Circuit Gets Cagey*, THE AM. CTR. FOR LAW AND JUSTICE (Sep. 12, 2012, 2:38 PM), <http://aclj.org/abortion/right-to-self-abort-ninth-circuit-gets-cagey> (discussing a recent Ninth Circuit decision that seems to indicate that self-induced abortion may be legal under certain circumstances by saying “at the heart of the *McCormack* decision is the question whether women have a constitutional right to self-abort. On that question, the Ninth Circuit opinion lays the groundwork for a ‘yes’ answer, but does not quite get there.”).

143 *Smith v. Allwright*, 321 U.S. 649, 655-56 (quoting *Waples v. Marrast*, 184 S.W. 180, 184 (Tex. 1916)).

clinics, under the voter disenfranchisement line of decisions, a state does not have the right to ban such clinics by forcing them out of business.¹⁴⁴ The Supreme Court has struck down abortion restrictions that “interfere with the woman’s status as the ultimate decision maker or try to give the decision to someone other than the woman.”¹⁴⁵ TRAP laws do exactly that by shutting down clinics and preventing women from exercising their right to an abortion. As stated in *Smith v. Allwright*, constitutional rights would be of little value if they could be thus indirectly denied.¹⁴⁶

Likewise, the voter disenfranchisement cases stressed the importance of a physical location in carrying out the right to vote. The *Perkins* Court wrote that the accessibility, prominence, facilities, and prior notice of the polling place’s location all have an effect on a person’s ability to exercise his right and that the location of a polling place has been used to deter black voters.¹⁴⁷ The Court found the right to vote to be meaningless if on

144 See *Perkins v. Matthews*, 400 U.S. 379, 387-88 (1971) (explaining the necessary connection between the right to vote and the polling place); *Planned Parenthood of Kan. & Mid-Mo., Inc. v. Drummond*, No. 07-4164-CV-C-ODS, 2007 U.S. Dist. LEXIS 70808 at *1, *9 (W.D. Mo. Sept. 24, 2007) (citing *Planned Parenthood of Minn., Inc. v. Citizens for Cmty. Action*, 558 F.2d 861, 865 n. 3 (8th Cir. 1977)) (explaining the “intimate” and crucial connection between the abortion clinic and the pregnant woman seeking to secure an abortion and explaining that her ability to do so is “inextricably bound up” with the ability of the clinic to provide one). See also *Ind. Hosp. Licensing Council v. Women’s Pavilion of South Bend, Inc.*, 420 N.E.2d 1301, 1312 (Ind. Ct. App. 1981) (“Although a state may not impose unwarranted regulations directly interfering with access to abortions, it is not obliged to utilize its legislative power to remove pre-existing non-governmental restrictions on a woman’s access to abortions.”).

145 *Greenville Women’s Clinic v. Bryant*, 222 F.3d 157, 166 (4th Cir. 2000) (“Accordingly, to the extent that state regulations interfere with the woman’s status as the ultimate decision maker or try to give the decision to someone other than the woman, the Court has invalidated them.”). See *Planned Parenthood v. Casey*, 505 U.S. 833, 887-98 (1992) (striking down a provision that required a physician performing an abortion on a married woman to obtain a statement from her indicating that she had notified her husband); *Thornburgh v. Am. Coll. of Obstetricians and Gynecologists*, 476 U.S. 747, 767 (1986) (invalidating reporting requirements that “raise the specter of public exposure and harassment of women who choose to exercise their personal, intensely private, right, with their physician, to end their pregnancy”); *Bellotti v. Baird*, 443 U.S. 622, 643 (1979) (plurality opinion) (ruling that “if the State decides to require a pregnant minor to obtain one or both parents’ consent to an abortion, it must also provide an alternative procedure whereby authorization for the abortion can be obtained” (footnote omitted)); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976) (holding that “the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient’s pregnancy. . .”).

146 *Smith*, 321 U.S. 664 (citing *Lane v. Wilson*, 307 U.S. 268, 275 (1939)).

147 *Perkins*, 400 U.S. at 387.

election day there was no physical place to carry out that right.¹⁴⁸ The same analogy holds true in the case of the right to an abortion. When TRAP laws threaten to close the only clinic left in a state, as they do today, the physical location of a clinic used to carry out the right is just as crucial as the polling location referred to in *Perkins*. Just as a primary election is “an integral part of the election” process,¹⁴⁹ an abortion clinic is an integral part of the abortion process: “there is an intimate relationship between Planned Parenthood and its patients and the right of a pregnant woman to secure an abortion is inextricably bound up with the ability of Planned Parenthood to provide one.”¹⁵⁰

Lawmakers in states such as Mississippi and North Dakota are threatening to shut down their states’ last abortion clinics and are suggesting that if a woman needs an abortion, she should simply travel out of state. In a state like Mississippi, a hospital will only perform an abortion in the cases of rape, incest, fetal abnormalities, or when the life of the mother is endangered.¹⁵¹ When a woman in Mississippi needs an abortion but does not fall into one of the four allowable categories, she will thus be forced to travel out of state to obtain an abortion, since no other Mississippi facilities besides the Jackson Women’s Health Organization provide abortion services.¹⁵²

Travelling out of state is not a “solution.” While the cost of the abortion itself may already be cost probative, the added cost of out of state transportation, accommodations, food, childcare, and taking time off of work can certainly make the abortion cost prohibitive. As Judge Hamilton of the U.S. District Court for the District of Mississippi wrote:

[T]he cost increases resulting from Regulation 61-12 will likely force Dr. Lynn to close his Beaufort practice. While traveling seventy miles on secondary roads may be inconsequential to my brethren in the majority who live in the urban sprawl of Baltimore, as the district court below and I conclude, such is not to be so casually addressed and treated with cavalier when considering the plight and effect of a woman residing in rural

148 *Id.*

149 *Smith*, 321 U.S. at 660.

150 *Planned Parenthood of Kan. & Mid-Mo., Inc. v. Drummond*, No. 07-4164-CV-C-ODS, 2007 U.S. Dist. LEXIS 70808 at *1, *9 (W.D. Mo. Sept. 24, 2007) (citing *Planned Parenthood of Minn., Inc. v. Citizens for Cmty. Action*, 558 F.2d 861, 865 n.3 (8th Cir. 1977)).

151 *Miss. Code Ann.* § 41-41-91 (2012).

152 *Jackson Women’s Health Org. v. Currier*, 940 F. Supp. 2d 416, 421 (S.D. Miss. 2013) (stating that even the State concedes that the practical effect of closing the state’s last abortion clinic is that women would have to travel to another state to obtain abortions).

Beaufort County, South Carolina.¹⁵³

In addition to these financial concerns, travelling out of state to obtain an abortion increases health risks. Mississippi's abortion laws do not currently have a health exception.¹⁵⁴ While many pregnancies have no complications, others may be medically risky: diabetes, heart disease, cancer, heart valve disorders, and mental illness¹⁵⁵ are only some of the many reasons why a woman may face the difficult decision of terminating her pregnancy in order to protect her health and/or the health of her family by extension. Forcing an already ill woman to make arrangements to travel out of state for days or weeks to seek vital and time-sensitive medical care does not reinforce the state's interest in protecting maternal health. It does the opposite.

Further, when women are forced to travel long distances for care, many will hold off on obtaining an abortion until they can secure the time and resources to do so.¹⁵⁶ Delaying the abortion until later in pregnancy significantly increases risks of complications and death.¹⁵⁷ Moreover, delaying the abortion may also cause a woman to go past the point in her pregnancy in which she may legally terminate her pregnancy. Lastly, travelling out of state does not guarantee that a woman is able to obtain an abortion. If Mississippi is allowed to make itself abortion free, what is stopping other states from following suit? If the states surrounding Mississippi do the exact same, where will she turn? Out of state travel begs the question of just how far a woman will have to travel in order to obtain a safe and legal abortion. Travelling out of state is not a "solution" to Mississippi's refusal to provide abortions.¹⁵⁸

153 *Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 202 (4th Cir. 2000) (Hamilton, J., dissenting).

154 NARAL PRO-CHOICE AMERICA, ABORTION BANS WITHOUT EXCEPTIONS ENDANGER WOMEN'S HEALTH, 6 (2014), available at <http://www.prochoiceamerica.org/media/fact-sheets/abortion-bans-no-exceptions-endanger-women.pdf> [hereinafter *Abortion Bans*] (affirming that Mississippi is among the eight states that have no health exceptions in the wake of the *Carhart* decision).

155 *Id.* at 3-4.

156 Grossman Decl. for Pet'r at 5, 6, *Jackson Women's Health Org. v. Currier*, 940 F. Supp. 2d 416 (S.D. Miss. 2013) (No. 3:12-CV-00436-DPJ-KFB) ("It is extraordinarily important for women to have meaningful access to legal abortion. Women of childbearing age who do not have access to the procedure face significantly increased risks of death and poor health outcomes . . . [and] [w]hen legal abortion is unavailable or difficult to access, some women turn to illegal, and unsafe methods to terminate unwanted pregnancies.").

157 *Id.* at 5.

158 *Jackson Women's Health Org. v. Currier*, 940 F. Supp. 2d 416, 422 (S.D. Miss.

A right is meaningless if it cannot be relied upon on the day it is needed¹⁵⁹ and a constitutional right is protected in more than the initial allocation of the franchise.¹⁶⁰ Such is the case with voting and such is the case with the right to abortion. When TRAP laws have the cumulative effect of shutting down abortion clinics, especially a state's only remaining abortion clinic, a state makes it impossible for a woman to exercise her right to an abortion. The right to an abortion, like the right to vote, can be denied by a debasement or dilution of the weight of the citizen's right just as effectively as an outright prohibition on that right.¹⁶¹ TRAP laws are invalid because they prevent the means through which the right to an abortion can be obtained and because they afford the means of exercising the right less protection than the right itself.

III. POLICY RECOMMENDATIONS

When states sufficiently erode federal rights, Congressional intervention may be required. An example of such Congressional intervention occurred with the passage of the Voting Rights Act of 1965.¹⁶² Similarly, due to state erosion of the federal right to abortion in recent years, evidenced by the unprecedented number of state attacks on reproductive rights across the nation, Congress recently introduced the Women's Health Protection Act of 2013.¹⁶³ The purpose of the bill is to address the use of TRAP laws that severely restrict abortion access.¹⁶⁴ Though the bill does not overturn already existing antiabortion laws, it allows the U.S. Attorney General or a private individual to challenge the law in federal court.¹⁶⁵ Moreover, the bill directs judges to consider certain factors in determining whether a

2013) (“[T]he states position would result in a patchwork system where constitutional rights are available in some states but not others.”).

159 *Perkins v. Matthews*, 400 U.S. 379, 387 (1971).

160 *Bush v. Gore*, 531 U.S. 98, 104 (2000).

161 *Id.* at 105.

162 *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2619 (2013) (explaining that Congress intervened on the onslaught of state attacks on voting rights in the Southern states by enacting the Voting Rights Act of 1965).

163 See generally *Women's Health Protection Act of 2013*, H.R. 3471, 113th Cong. (2013); *Women's Health Protection Act of 2013*, S. 1696, 113th Cong. (2013).

164 Laura Bassett, *Historic Pro-Choice Bill to be Introduced In Congress*, HUFFINGTON POST (Nov. 13, 2013, 10:03 AM), http://www.huffingtonpost.com/2013/11/13/pro-choice-bill-womens-health-protection-act_n_4266599.html.

165 H.R. 3471 (“Any individual or entity aggrieved by an alleged violation of this Act may commence a civil action for prospective injunctive relief against the government official that is charged with implementing or enforcing the restriction that is challenged as unlawful under this Act.”).

restriction is constitutional, such as whether the restriction interferes with a doctor's good-faith medical judgment or whether the restriction is likely to result in a decrease in the availability of abortion services in the state.¹⁶⁶ Passage of the Women's Health Protection Act would provide a much-needed prophylactic against state erosion of the federal right to abortion and against future enactment of TRAP laws.

In many ways, the Women's Health Protection Act is akin to Section 2 of the Voting Rights Act. Section 2 prohibits voting laws that discriminate on the basis of race, color, or membership in a language minority groups.¹⁶⁷ It also forbids any "standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color."¹⁶⁸ Like the Women's Health Protection Act, Section 2 allows either the federal government or a private individual to sue to enforce the section¹⁶⁹ and for injunctive relief to prevent a voting restriction from going into effect.¹⁷⁰ Section 2 is still good law,¹⁷¹ applies to every state, and is permanent (meaning without an expiration date like other sections of the Voting Rights Act).¹⁷²

Despite its good intentions, Section 2 has been criticized as being an insufficient remedy for those wronged by state voter discrimination, since Section 2 litigation occurs only after the fact, once the discriminatory voting law has already been put in place and citizens have been subjected to it.¹⁷³ The same problem could also present an obstacle in the case of the Women's Health Protection Act: while it allows a person to sue to strike down an already enacted abortion restriction, it might not provide a sufficient remedy for a pregnant woman in need of an abortion but unable to obtain one due to her state's TRAP laws. A woman in such a predicament may be out of luck if the litigation proves too slow to enjoin the law in time.

To address this quandary in the voting arena, Sections 4 and 5 of the Voting Rights Act were created. Section 5 established a scheme through which jurisdictions with a history of voter discrimination are required to obtain permission from the federal government if they wish to change their

166 *Id.*

167 The Voting Rights Act of 1965, 42 U.S.C. § 1973 (2013).

168 *Id.*

169 *See, e.g.*, Johnson v. De Grandy, 512 U.S. 997, 1005 (1994).

170 § 1973j(d).

171 Shelby Cnty v. Holder, 133 S. Ct. 2612, 2619 (2013) (stating that Section 2 is not at issue in the case).

172 *Id.*

173 *Id.* at 2640 (Ginsburg, J., dissenting).

voting laws; Section 4 devised a formula for determining which jurisdictions are required to do so.¹⁷⁴ Specifically, Section 5 created a preclearance regime which requires covered jurisdictions to submit proposed changes in voting laws or procedures to the Department of Justice (DOJ), which has sixty days to respond to the changes.¹⁷⁵ Such a change will be approved unless DOJ finds it has “the purpose [or] . . . the effect of denying or abridging the right to vote on account of race or color.”¹⁷⁶ In the alternative, the covered jurisdiction may seek approval by a three-judge District Court in the District of Columbia.¹⁷⁷ Though the Section 4 criteria have been amended over the years, the most recent formula dictates that jurisdictions that utilized a voting test and also had less than fifty percent voter registration or turnout as of 1972 are bound by Section 5 and will thus require preclearance.¹⁷⁸

Upon its initial review of Sections 4 and 5 one year after their enactment, the Supreme Court found them to be a valid Congressional measure which rationally linked the problem of voter discrimination to the legislative solution.¹⁷⁹ The Court found that “[t]ests and devices are relevant to voting discrimination because of their long history as a tool for perpetrating the evil; a low voting rate is pertinent for the obvious reason that widespread disenfranchisement must inevitably affect the number of actual voters.”¹⁸⁰ Concluding that the coverage formula was rational, the Court stated that it accurately reflected those jurisdictions uniquely characterized by voting discrimination on a pervasive scale.¹⁸¹

This changed in 2013, when the Supreme Court decision of *Shelby County v. Holder*¹⁸² left Section 5 intact, but demanded a new formula be developed in Section 4, calling the current formula outdated and out of touch with today’s voting landscape. The majority found that in the jurisdictions covered by Section 4, “voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are

174 *Id.* at 2618.

175 § 1973c(a).

176 *Id.*

177 *Id.*

178 *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2620 (allowing for jurisdictions to “bail out” of Section 5 if the jurisdictions have not used a forbidden test or device, or failed to receive pre-clearance).

179 *Id.* at 2627 (“The formula looked to cause (discriminatory tests) and effect (low voter registration and turnout), and tailored the remedy (preclearance) to those jurisdictions exhibiting both.”).

180 *South Carolina v. Katzenbach*, 383 U.S. 301, 330 (1966).

181 *Id.* at 308.

182 *Holder*, 133 S. Ct. at 2612.

rare. And minority candidates hold office at unprecedented levels.”¹⁸³ Therefore, the Court found there was no longer a need to subject these covered jurisdictions to the preclearance requirements. The Court concluded that Congress is still free to draft a new coverage formula – a more updated one that is more in line with current voting patterns across the country.¹⁸⁴ While the dissent and civil rights activists condemned the decision as a devastating set back in the quest for fair elections,¹⁸⁵ Section 5 can be up and running again as soon as Congress develops a new coverage formula.

Just as the Voting Rights Act requires voter hostile states to obtain permission to make changes to their voting laws, federal legislation should require abortion hostile states to obtain permission to make changes to their abortion laws. A system similar to the one employed in Section 5 of the Voting Rights Act could be established in the reproductive rights context.

Likewise, a formula could be devised which would determine which states would and would not be required to obtain preclearance before changing their abortion laws. Such a formula could perhaps make use of the factors for a court to consider listed in the Women’s Health Protection Act. These factors include assessing whether a state abortion restriction: 1) interferes with an abortion provider’s ability to provide care and render services in accordance with her or his good-faith medical judgment; 2) is reasonably likely to delay some women in accessing abortion services; 3) is reasonably likely to directly or indirectly increase the cost of providing abortion services or the cost for obtaining abortion services (including costs associated with travel, childcare, or time off work); 4) requires, or is reasonably likely to have the effect of necessitating, a trip to the offices of the abortion provider that would not otherwise be required; 5) is reasonably likely to result in a decrease in the availability of abortion services in the state; and 6) imposes criminal or civil penalties that are not imposed on other health care professionals for comparable conduct. Just as the Court upheld use of an interpretation test and measurement of voter turnout as a

¹⁸³ *Id.* at 2621 (internal quotations omitted).

¹⁸⁴ *Id.* at 2631.

¹⁸⁵ See, e.g., *Supreme Court Strikes Down Current Coverage Formula to Voting Rights Act*, AM. CIVIL LIBERTIES UNION (June 25, 2013), <https://www.aclu.org/voting-rights/supreme-court-strikes-down-current-coverage-formula-voting-rights-act>; *Supreme Court Stops the Clock on Voting Rights Act – 50 Years of Progress Unraveled!*, LAWYERS’ COMM. FOR CIVIL RIGHTS UNDER LAW (June 25, 2013), http://www.lawyerscommittee.org/newsroom/press_releases?id=0322; Sherrilyn Ifill, *Court Rejects Congress’ Determination of Where the Voting Rights Act Should Apply, Leaving Voters Unprotected*, NAT’L ASS’N FOR THE ADVANCEMENT OF COLORED PEOPLE (June 25, 2013), <http://www.naacpldf.org/update/supreme-court-ruling-voting-rights-opens-door-wave-minority-voter-suppression>.

rational measure of a state's voting discrimination, a court would likely find these factors to be a rational measure of a state's abortion discrimination.

Creating a system akin to Section 4 and 5 in the reproductive rights arena would solve the predicament of a pregnant woman in need of an abortion who challenges her state's TRAP law under the Women's Health Protection Act but is faced with costly and timely litigation. By requiring her state to obtain preclearance *prior* to enacting a TRAP law, there is less risk that she will find herself without abortion access.

In addition to federal legislative efforts, new strategies should be considered in the litigation arena. It is vital that going forward, abortion-rights advocates not limit themselves to defending abortion laws through the right to privacy precedent, but should seek out new lenses, such as the voting rights lens, through which to legally examine antiabortion restrictions. While such novel arguments may not be appropriate for the courtroom, where timely filings for restraining orders on new abortion restrictions require arguments based on precedent rather than new legal arguments, such arguments are crucial for discussion in academia in order for them to eventually gain footing in the courtroom.

IV. CONCLUSION

Constitutional rights are of little value if they can be indirectly denied. While states are free to tailor the right to vote and the right to abortion, those restrictions may never be arbitrary or based on animus. Moreover, while voting restrictions which may make it more difficult for voters to exercise their right have been upheld, restrictions which make it impossible for voters to exercise their right have been rejected. Abortion restrictions that make it impossible for women to exercise their right to an abortion are likewise invalid. Had the Supreme Court examined the right to abortion under the voter disenfranchisement analysis rather than the undue burden standard, TRAP laws would have been disallowed and abortion would have remained a fundamental right, untouched by *Casey's* debasement.

A right that cannot be exercised is a hollow one. Whether assessed under strict scrutiny through *Roe* or undue burden through *Casey*, the fact remains that American women have a right to an abortion. It is a federal, constitutional guarantee, and therefore one that a state may not withhold.

In advocating for the passage of an oppressive antiabortion piece of legislation, Pennsylvania Representative Steven Freind urged that "until *Roe* . . . is reversed, those in the pro-life movement must be as aggressive and creative as possible in drafting and passing legislation which regulates

and restricts abortion as much as possible.”¹⁸⁶ As the antiabortion movement successfully finds new and imaginative means of advancing their cause, so too must the reproductive justice movement if the right to an abortion is to remain anything besides a hollow one.

186 See Julie F. Kowitz, *Not Your Garden Variety Tort Reform: Statutes Barring Claims for Wrongful Life and Wrongful Birth Are Unconstitutional Under the Purpose Prong of Planned Parenthood v. Casey*, 61 BROOK. L. REV. 235, 269 (1995) (quoting Pennsylvania Representative Stephan Freind regarding proposed legislation aimed at limiting a woman’s ability to access an abortion).