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Taking on TRAP Laws: Protecting Abortion Rights through Property Rights

Hope Silberstein[†]

ABSTRACT

In deciding the constitutionality of abortion regulations, courts often apply an “undue burden” standard in order to determine whether such regulations impermissibly hinder the ability of women to exercise their right to obtain abortion care. That standard focuses on patients rather than abortion clinics, despite the fact that a significant number of abortion regulations target clinic operations in order to make abortion more difficult to provide. Such regulations also make it difficult to operate and work at such clinics, given the frequent disruptions such laws cause. Rather than depending on the somewhat unclear legal foundation of undue burden, this Comment proposes a strategy that clinic owners and other advocates for abortion rights could use to invalidate the targeted regulation of abortion providers (TRAP laws). Abortion clinic owners could argue that regulation of their clinics—which makes them much more expensive to operate—constitutes a regulatory taking under the Takings Clause of the Fifth Amendment. This Comment analyzes the feasibility of applying takings law to typical state TRAP laws using both federal doctrine (particularly the Penn Central factors) and state-level takings statutes. Although this strategy remains untested, abortion clinic owners could fare well using the Takings Clause as a means to stay open, protect their employees, and keep treating patients.

I. INTRODUCTION

Regulations of abortion providers and their facilities create uncertainty and confusion for those who work at these clinics. Rather than treat healthcare providers similarly across the board, state legislatures have enacted regulations that apply specifically to abortion clinics. These regulations are known by their opponents as TRAP laws—the targeted regulation of abortion providers. One result of these regulations is that owning and operating an abortion clinic has become inor-

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dinately more difficult, more so than for owners of other types of practices in other fields of medicine. Running abortion clinics is an extremely unsteady enterprise with constant legal challenges that make it difficult for clinic owners and employees to organize business affairs and activities or even maintain steady employment, especially in planning for the future.

Laws that intend to make abortion more difficult to obtain have shifted their focus in recent years from the patient to the clinic. Starting in the 1970s, anti-abortion organizations and attorneys began to lobby

for state regulations that would gradually strip away physicians' ability to provide the procedure. Much of the legislation makes it more expensive for clinics to operate, and the strategy has proved effective. Since 2011 at least 162 abortion providers have closed or stopped performing abortions, and [only] 21 clinics have opened.¹

This kind of government action puts at risk the livelihood of these business owners and all those who work at abortion clinics, a reality made even starker by the fact that other healthcare providers are not subject to the same kinds of regulations. Although the intended result of these laws is usually to decrease abortion access and therefore the number of abortions, the fact that legislatures have gone after the providers (as opposed to patients) creates an opportunity for a novel legal strategy to combat TRAP laws.

Successful arguments against government restrictions of abortion are often made under the Fourteenth Amendment² and the right to privacy, which are oriented around the patient and her level of access to the procedure. The most recent of these cases is *Whole Woman's Health v. Hellerstedt*,³ where the Supreme Court ruled that Texas state laws created an "undue burden" on abortion access for "women seeking a previability abortion."⁴ Such due process and privacy arguments can be muddy. For example, privacy rights are somewhat amorphous because no particular amendment enumerates such rights. Additionally, other Fourteenth Amendment arguments, such as equal protection, have not

¹ Meaghan Winter, *Why It's So Hard to Run an Abortion Clinic*, BLOOMBERG BUSINESSWEEK (Feb. 24, 2016), <http://www.bloomberg.com/features/2016-abortion-business/> [<https://perma.cc/VA9Y-EZF4>].

² U.S. CONST. amend. XIV, § 1.

³ 136 S. Ct. 2292 (2016).

⁴ *Id.* at 2303.

been effective in advancing abortion rights, despite the call for sex equality arguments from pro-choice attorneys and advocates.⁵

Instead of relying on the more traditional strategies to fight burdensome abortion regulations, abortion clinics could try a different tack to fight against government restrictions, like licensing and facility requirements, which “go beyond what is necessary to ensure patients’ safety.”⁶ Using an argument based on property rights and treating abortion clinics like privately owned businesses, clinic owners and other pro-choice parties could argue that the special regulations that target abortion providers constitute a regulatory taking, violating the Takings Clause of the Fifth Amendment, which states that “private property [shall not] be taken for public use, without just compensation.”⁷ Because abortion clinics exist as workplaces and strive to operate as any other healthcare facility, a takings analysis seems especially apt. Additionally, many states with conservative legislatures (that is, states more likely to enact abortion restrictions) have relatively expansive laws protecting property rights. In this way, proving a taking will likely be less onerous in these states than the typical strategies lawyers use to protect abortion rights.

This Comment argues for applying the Takings Clause to abortion clinic regulations. In doing so, Part II of this Comment will begin with a description of average abortion clinic operations, including the financial and legal issues they tend to face in the United States. Part III will describe the current state of abortion law and then focus on the law of regulatory takings. This section will mainly deal with federal takings law, but it will also discuss state property rights regimes. Part IV will apply federal takings law to typical TRAP laws that are currently in effect. It will also analyze the role state law might play in takings claims, including an analysis of Arizona’s just compensation statute in order to provide an example. Part IV ends with a discussion of the limitations in using takings law to combat TRAP laws. The Comment will conclude in Part V by acknowledging potential issues that may arise from making a Takings Clause argument.

⁵ See, e.g., Priscilla J. Smith, *Give Justice Ginsburg What She Wants: Using Sex Equality Arguments to Demand Examination of the Legitimacy of State Interests in Abortion Regulation*, 34 HARV. J.L. & GENDER 377 (2011).

⁶ *State Laws and Policies: Targeted Regulation of Abortion Providers*, GUTTMACHER INST. (Apr. 1, 2017), <https://www.guttmacher.org/state-policy/explore/targeted-regulation-abortion-providers> [<https://perma.cc/249G-Q3J8>].

⁷ U.S. CONST. amend. V.

II. OPERATION OF ABORTION CLINICS IN THE UNITED STATES

Before making the case that abortion clinic owners and directors should be viewed as property owners running workplaces and businesses, and thus are deserving of the Takings Clause's protection, it is useful to show how abortion clinics operate. Ninety-four percent of abortion procedures happen in clinics (as opposed to hospitals or private doctors' offices), and independent abortion clinics perform two-thirds of these abortions; Planned Parenthood facilities perform the other third.⁸ The fact that clinics perform such a vast majority of abortions results in the procedure being "siloed" from other types of medical treatment and reproductive healthcare.⁹ Therefore, clinics will often try to integrate abortion care into other women's health services in order to stay afloat.¹⁰

Many clinics, even if not a part of Planned Parenthood, are often part of a somewhat larger network.¹¹ Although Planned Parenthood is a nonprofit organization, many small clinics have for-profit status and so must operate as businesses in a more conventional way.¹² While there is no doctrinal difference between nonprofits and other property owners in their ability to bring takings claims, the fact that many clinics must operate as for-profits makes the financial losses they suffer because of TRAP laws more acute. The following sections will describe the various types of issues that make operating an abortion clinic difficult and make the industry unstable. However, many of the legal and financial hurdles clinics deal with often bleed into each other, as the legal attacks on clinics will purposely create financial obstacles.

A. Legal Issues Clinics Face

The Supreme Court has held that a woman's right to an abortion can only be regulated to further the state's interest in protecting potential life and the health of the mother.¹³ When such state regulations create a substantial obstacle for a woman to get an abortion, the regulations are an impermissible means of serving the state's legitimate

⁸ Madeleine Schwartz, *Abortion Clinics in Blue States Are Closing, Too*, FIVETHIRTYEIGHT (May 2, 2016), <http://fivethirtyeight.com/features/abortion-clinics-in-blue-states-are-closing-too/> [<https://perma.cc/F25W-ZATP>].

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* For example, Women's Health Specialists of California is a group of six abortion clinics, and Whole Woman's Health (the plaintiff in the 2016 Supreme Court decision) is a network of seven clinics throughout the United States.

¹² *Id.*

¹³ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

ends and are thus unconstitutional.¹⁴ This doctrine comes from *Planned Parenthood of Southeastern Pennsylvania v. Casey*,¹⁵ which states that the government can regulate pre-viability abortions as long as such regulations do not create an “undue burden” on a woman’s decision to have the procedure.¹⁶

Recently, the Supreme Court reaffirmed the validity of this test in *Whole Woman’s Health*.¹⁷ In that case, the Court struck down a 2013 Texas state bill (H.B. 2), which had two provisions: one required all abortion clinics to be ambulatory surgical centers, and the other required doctors performing abortions to have admitting privileges at local hospitals.¹⁸ These requirements put an enormous burden on the abortion clinics in Texas and caused many of them to close; the added cost to any clinic of running an ambulatory surgical center is \$40,000 per month.¹⁹ The result of the enactment of H.B. 2 was that “almost half” of the clinics in Texas were forced to shut down.²⁰ Additionally, it is worth noting that the “two requirements [in H.B. 2] erect a particularly high barrier for poor, rural, or disadvantaged women.”²¹

The majority in *Whole Woman’s Health* held that the provisions of H.B. 2 did not confer medical benefits sufficient enough to justify the burdens they imposed on women seeking to exercise their constitutional right to an abortion.²² Whether an appeals court should defer to the trial court’s factual findings regarding the veracity of medical benefits of abortion regulations remains unclear, but in *Whole Woman’s Health*, the Court agreed with the trial court’s findings and concluded that the provisions unconstitutionally imposed an undue burden.²³

The malleable nature of the “undue burden” standard²⁴ and the uncertain role privacy plays in abortion rights both suggest that a differ-

¹⁴ *Id.*

¹⁵ 505 U.S. 833 (1992).

¹⁶ *Id.* at 874 (“Only where state regulation imposes an undue burden on a woman’s ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.”).

¹⁷ *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

¹⁸ *Id.* at 2300.

¹⁹ Winter, *supra* note 1.

²⁰ *Whole Woman’s Health*, 136 S. Ct. at 2301.

²¹ *Id.* at 2302.

²² *Id.* at 2299.

²³ *See id.* at 2302.

²⁴ The malleable nature of the undue burden standard is evident from the fact that abortion restrictions are often upheld, even after application of the standard, and in inconsistent ways. Compare *Stenberg v. Carhart*, 530 U.S. 914 (2000) (invalidating a law prohibiting, *inter alia*, the dilation and evacuation procedure on undue burden grounds), with *Gonzales v. Carhart*, 550 U.S.

ent approach to fighting abortion regulations, particularly those targeting clinics, may help more clinics stay open. Rather than relying on the traditional argumentation in abortion cases, pro-choice advocates would benefit from finding an alternative method to secure abortion rights, especially since abortion regulations are so costly to clinics.

Despite the recent Supreme Court ruling in *Whole Woman's Health*, TRAP laws similar to H.B. 2 are still in effect in twenty-five states in the United States.²⁵ These laws generally regulate either the facility itself where abortion procedures are performed or the physicians who perform them.²⁶ In some conservative states, such as North Dakota, anti-abortion bills can come up every two years; clinics in these states often rely on nonprofit legal organizations, such as the Center for Reproductive Rights, to help keep their doors open.²⁷

Anti-abortion legislation is one of the top reasons why clinics have closed down or stopped providing abortions since 2011.²⁸ Abortion clinic restrictions from roughly 2011 to 2016 have exacerbated the closures of abortion clinics nationwide.²⁹ Much of this legislation has an economic impact on clinic owners and their employees. For example, half of all states restrict abortion coverage in private insurance plans offered through Affordable Care Act exchanges.³⁰ Additionally, Republican state legislatures often slash public funding for any group associated with an abortion provider, causing some clinics to shut down.³¹ In fact, cuts to family-planning dollars caused two clinics in Texas to close even before the laws at issue in *Whole Woman's Health* went into effect.³² In this way, many of the legal challenges aimed at clinics directly create the financial challenges that also threaten to close them.

124, 164 (2007) (holding that a law prohibiting the same procedure did not create an undue burden); *see also* *Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 170 (4th Cir. 2000) (holding that state regulations that would make it more difficult and expensive to get an abortion did not pose an undue burden).

²⁵ *Targeted Regulation of Abortion Providers*, *supra* note 6.

²⁶ *Id.*

²⁷ *Id.*

²⁸ Esmé E. Deprez, *Abortion Clinics Are Closing at a Record Pace*, BLOOMBERG BUSINESSWEEK (Feb. 24, 2016), <https://www.bloomberg.com/news/articles/2016-02-24/abortion-clinics-are-closing-at-a-record-pace> [<https://perma.cc/6AB2-P2FP>] (citing data from U.S. Census Bureau).

²⁹ Danielle Paquette, *Why Abortion Clinics in the U.S. Are Rapidly Closing*, WASH. POST (Feb. 25, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/02/25/why-americas-abortion-clinics-are-rapidly-closing/?utm_term=.216097351eb1 [<https://perma.cc/E27U-5B2Z>].

³⁰ Schwartz, *supra* note 8.

³¹ Olga Khazan, *Hell for Abortion Providers*, ATLANTIC (June 27, 2016), <http://www.theatlantic.com/health/archive/2016/06/hell-for-abortion-providers/488315/> [<https://perma.cc/LZP8-JRZH>].

³² *Id.*

B. Financial Issues Clinics Face

Aside from the direct state action that causes financial hardship to abortion clinic owners, other external issues also contribute. All clinics try to keep the price of abortion as low as possible because forty-two percent of women who seek abortions live below the poverty line.³³ In order to make sure that most patients seeking the procedure can get it, clinics' fees for abortion services are often too low to make any profit, and reimbursements from Medicaid and other insurance plans are too small and infrequent to make a difference.³⁴ One clinic owner, for example, reported that Medicaid owed the clinic \$90,000 in backlogged claims.³⁵ Economic difficulties operating a clinic, a generally hostile environment, and declining demand for the procedure make running an abortion clinic a risky venture. Even in traditionally liberal states, clinics can have a hard time staying open. One clinic office manager has even said, "We have cut salaries. We haven't given raises. We're still hanging on by our fingernails."³⁶ In this way, clinic owners' responsibilities as employers to their employees are unstable in the abortion clinic context.

However, despite the fact that the cost of the procedure has remained stable throughout the years, running a clinic has become more expensive.³⁷ A clinic in upstate New York reported that for every patient who gets an abortion through Medicaid, a clinic loses around ninety to a hundred dollars. Additionally, innovation in the abortion procedure itself has added costs: medication abortion now accounts for a third of all abortions, but it costs more than surgical abortion.³⁸ The laws that directly attack clinics, and the sources of their funding, often make these financial hurdles more dire by adding extra costs to clinics whose operations are already financially precarious.

C. Hostile Environment

In addition to the economic and legal opposition to which clinics are exposed, hostile climate and harassment also contribute to the difficulty

³³ Schwartz, *supra* note 8.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* Research indicates that the increased cost of medical abortion "may reflect the cost of the drug . . . and the greater perceived need for active follow-up of medical abortion clients, to ensure that the abortion was completed without complications." Stanley K. Henshaw & Lawrence B. Finer, *The Accessibility of Abortion Services in the United States, 2001*, 35 PERSP. ON SEXUAL & REPROD. HEALTH 16, 23 (2003).

of running a clinic. Abortion remains a controversial subject, and its opponents use various means to combat access to the procedure and its providers. Some protestors photograph patients and their license plate numbers. One Planned Parenthood facility in Midland, Texas reported that anti-abortion groups would trace patients' license plates to their addresses and then mail threatening letters to their homes purporting to be from Planned Parenthood.³⁹ The same clinic once had a contractor quit during renovations of the facility because someone had threatened his life.⁴⁰ At least five clinics since 2011 have cited hostile climate as the reason they shut down or stopped providing abortion services.⁴¹

Such hostility, combined with the mounting legal and financial struggles most clinics face, make abortion clinics an unsteady industry, especially for the employees who work there. A 2014 survey of abortion providers and clinics indicate that 51.9 percent of clinics face "threats and targeted intimidation" directed at doctors and staff.⁴² Such intimidation can include the "distribution of pamphlets targeting doctors and clinic staff" with personal information printed on them.⁴³ The risk of intimidation and threats likely impact the ability of clinic employees to enjoy comfort and security in their jobs.

Physicians themselves also face social and structural hurdles within the field of medicine that make them willing, but unable, to provide abortion care. In her book on why doctors are constrained in choosing whether to provide abortions, sociologist Lori Freedman argues that physicians who do want to offer abortions to their patients generally could only do so by working in abortion clinics rather than in their practices or in hospitals.⁴⁴ "The result is that providing abortions can mean giving up practicing the bulk of what they are trained to do," and many physicians choose not to limit their practices in such a way.⁴⁵ An obstetrician may worry that becoming an abortion provider "means giving up credibility as a generalist," resulting in "only the most politically motivated doctors . . . left to the task."⁴⁶

³⁹ Khazan, *supra* note 31.

⁴⁰ *Id.*

⁴¹ Deprez, *supra* note 28.

⁴² 2014 National Clinic Violence Survey, FEMINIST MAJORITY FOUND. (Oct. 2014), <http://feminist.org/rrights/pdf/2014NCAPsurvey.pdf> [<https://perma.cc/97MQ-LL3V>].

⁴³ *Id.*

⁴⁴ LORI FREEDMAN, WILLING AND UNABLE: DOCTORS' CONSTRAINTS IN ABORTION CARE 145 (2010).

⁴⁵ *Id.*

⁴⁶ *Id.*

III. THE STATE OF RELEVANT TAKINGS LAW

Although the particular H.B. 2 TRAP laws in Texas are no longer valid, anti-abortion advocates recognize that an effective way to curb abortion access is by targeting the clinics themselves. Thirteen states currently have effective laws requiring doctors providing abortions to have admission privileges at local hospitals or some alternative agreement, and twenty-one states require clinics to have structural standards comparable to surgical centers (both of which were at issue in *Whole Woman's Health*).⁴⁷ Aside from these laws, other TRAP laws are still in effect in twenty-five states. Because they either are of a different nature or may be less onerous than the laws in *Whole Woman's Health*, such laws may currently be safe from invalidation by the courts.⁴⁸ That is, despite the success of pro-choice advocates in *Whole Woman's Health*, TRAP laws still loom as a challenge for abortion clinics.

To fight laws that target the clinic owner instead of the patient, legal arguments should focus on the clinic owner as well. One way to do this is for clinic owners to argue that TRAP laws deprive them of their rights as business owners and as employers and thus should constitute a taking that requires compensation.⁴⁹ “The general rule . . . is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”⁵⁰ Supreme Court jurisprudence has held that in cases where a government regulation is not a per se taking, a court must balance three main factors: (1) the “economic impact of the regulation on the claimant”; (2) “the extent to which the regulation has interfered with distinct investment-backed expectations”; and (3) “the character of the governmental action.”⁵¹

A. The Benefits of a Takings Argument against TRAP Laws

There is uncertainty in the law given the state of the Supreme Court and its recent decision in *Whole Woman's Health*. The arguments used in that case and others have succeeded, but they do not always.⁵² Although pro-choice activists were presumably satisfied with the out-

⁴⁷ *Targeted Regulation of Abortion Providers*, *supra* note 6.

⁴⁸ *Id.*

⁴⁹ The rights to privacy and reproductive choice, although firmly established by precedent, are not enumerated in the Constitution. Using an argument from the Fifth Amendment is perhaps more preferable. An *explicit* fundamental right is often better than an implied one.

⁵⁰ *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

⁵¹ *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124–25 (1978).

⁵² *See, e.g., Gonzales v. Carhart*, 550 U.S. 124, 147 (2007).

come of *Whole Woman's Health*, given its clarification and arguable expansion of the “undue burden” standard, anti-abortion legislatures will likely enact different TRAP laws that attempt to diminish access to abortion. Additionally, *Whole Woman's Health* might not prevent a regulatory “creep,” where legislatures pass anti-abortion regulations incrementally to avoid a judicial finding of undue burden that was clearly demonstrated in the far-reaching nature of H.B. 2 in *Whole Woman's Health*. Therefore, it remains to be seen whether *Whole Woman's Health* will be a barrier to TRAP laws in the future or more of a Band-Aid.

Takings law is another strategy that may be easier for an advocate to use in court rather than proving an undue burden. To show why it may be easier, take the following example: Texas passes a new TRAP law that has the effect of closing down one of three abortion clinics in Houston but does not close other abortion clinics throughout the state. If the closed abortion clinic were to sue Texas in order to overturn the new law, the owner would likely lose under an undue burden standard. This is because undue burden analysis may require a focus on broader markets and “customers,” i.e., women seeking abortions: if only one in three clinics in Houston shut down, the “market” for abortion does not significantly decrease. In other words, the clinic that shut down would likely not make a difference in terms of access to abortion for women in Texas, and in such a case a court may not find that there is an undue burden sufficient to overturn the regulation.

Takings claims, on the other hand, are not usually centered on broader markets; they instead focus on an individual's property rights and how invasive the government action is with regard to the property. In the Houston example above, the single abortion clinic that had to shut down because of the new law would have a strong argument that the law was a regulatory taking; what generally matters most for that analysis is how much of a loss the individual property owner takes as a result of the law.⁵³

B. Elements of a Federal Takings Claim

The notion of regulatory takings originated in the Supreme Court case *Pennsylvania Coal Co. v. Mahon*,⁵⁴ where Justice Holmes held that “[t]he general rule . . . is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”⁵⁵

⁵³ See *Penn Cent. Transp. Co.*, 438 U.S. 104.

⁵⁴ 260 U.S. 393 (1922).

⁵⁵ *Id.* at 415.

*Penn Central Transportation Co. v. City of New York*⁵⁶ was the Supreme Court's effort to add substance to the *Pennsylvania Coal* test of "goes too far." The Court did this by constructing a four-part standard. A court is to consider: (1) the economic impact of the regulation on the plaintiff; (2) the plaintiff's distinct investment-backed expectations;⁵⁷ (3) the character of the government action (a physical invasion is more likely to be a taking while a broadly applicable regulation is less likely to be a taking); and (4) the extent to which the government is regulating nuisances or otherwise preventing harms.⁵⁸

The first factor—extent of the loss (i.e., the loss compared to what the plaintiff owned before the government regulation)—is clearly significant in concluding whether a compensable taking has occurred. The second factor, distinct investment-backed expectations, may be explained because making actual improvements in the land helps allay any concerns about problems of proof on the part of the party claiming a taking: if the government enacts a restriction on land, it is always possible for a landowner to claim that, but for the restriction, she was just about to begin a hugely profitable real estate development, for example. The law privileges investments that landowners make prior to the regulation's implementation (other than simply purchasing the land).⁵⁹

The third factor—character of the government action—seems to suggest a hierarchy for different uses of property. Permanent physical occupations are virtually certain to result in takings under *Loretto v. Teleprompter Manhattan CATV Corp.*,⁶⁰ whereas temporary physical invasions are somewhat likely to be takings under *Penn Central*, and pure regulations are the least likely to be takings.⁶¹ Despite the fact that regulatory takings tend to be more difficult to prove compared to physical invasions of property, substantial harm to the plaintiff (in the form of economic loss) should probably result in a taking.⁶² Another fac-

⁵⁶ 438 U.S. 104 (1978).

⁵⁷ JESSE DUKEMINIER, ET AL., PROPERTY 1176–77 (8th ed. 2014).

⁵⁸ *Id.* at 1150–51.

⁵⁹ See, e.g., Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1234 (1967) ("The zoned-out apartment house owner no longer has the apartment investment he depended on, whereas the nearby land speculator who is unable to show that he has yet formed any specific plans for his vacant land still has a package of possibilities with its value, though lessened, still unspecified—which is what he had before.").

⁶⁰ 458 U.S. 419 (1982).

⁶¹ See DUKEMINIER, *supra* note 57, at 1144, 1161.

⁶² See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005) ("[regulatory takings inquiries aim] to identify regulatory actions that are functionally equivalent to the classic taking in which

tor, though not explicit in *Penn Central*, is whether the government interference is preventing a harm or nuisance versus forcing a benefit. Forcing a benefit is more likely to be a compensable taking, while preventing a harm or nuisance tends to be justifiable motivation for government interference on the use of private property that need not be compensated.⁶³ That being said, determining whether a law forces a benefit or prevents a nuisance is often in the eye of the beholder, and such analysis may depend on how a court characterizes the regulation.⁶⁴

To help clarify when a regulation “goes too far,” subsequent Supreme Court opinions have created concepts of per se, or total, takings and partial regulatory takings.⁶⁵ Per se regulatory takings usually involve permanent, physical occupation of a property owner’s land.⁶⁶ Because TRAP laws will rarely create per se takings (as they do not tend to involve physical occupation of the property), the assumption here is that abortion clinic owners will only be able to claim partial regulatory takings. In those cases, a court must balance at least the three enumerated *Penn Central* factors to determine whether a partial regulatory taking has taken place: (1) economic impact of the regulation on the property owner, (2) degree of interference with the owner’s reasonable investment-backed expectations, and (3) character of the taking.⁶⁷

The extent to which a government regulation appears to single out a particular property owner is a factor that may play an important, but less explicit, role in takings inquiries. Professor Saul Levmore, in describing patterns in takings law, has made the following assessment:

[W]hen the government singles out a private party, in the sense that the government’s aims could have been achieved in many ways but the means chosen placed losses on an individual or on persons who are not part of an existing or easily organized political coalition, then we can expect to find a compensable taking. Thus, most taxes and rent control schemes are not compensable takings because they are the products of political exchanges. . . .

government directly appropriates private property or *ousts the owner from his domain*. Accordingly, each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights”) (emphasis added).

⁶³ See, e.g., *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); Robert Meltz, *Takings Law Today: A Primer for the Perplexed*, 34 *ECOLOGY L.Q.* 307, 343 (2007) (“a government restriction viewed as creating a public benefit (e.g., a park) is compensable, while a restriction seen as averting a public harm (e.g., pollution) is not”).

⁶⁴ A court hostile to abortion rights, for example, might find a particular TRAP law prevents a nuisance, while a more sympathetic court might find that it forces an (unnecessary) benefit, making it compensable.

⁶⁵ Meltz, *supra* note 63, at 329.

⁶⁶ See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 433 (1982).

⁶⁷ *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

In contrast, individuals who are subjected to “spot zoning” are often politically unprotected, because they are burdened in a way that makes it unlikely that they can find political allies, and takings law will often protect them from majoritarian exploitation.⁶⁸

In other words, courts appear to be more willing to find that a taking has occurred when the government regulation at issue appears to be singling out, or “spot zoning,” an individual (or perhaps a small and/or politically unpopular group of individuals) for adverse treatment. “The rationale appears to be that singling out offends ‘fairness and justice’ and suggests bad faith, or points to an absence of average reciprocity of advantage.”⁶⁹ Levmore’s assessment is in line with one of the Supreme Court’s factors in *Pennsylvania Coal*—whether there is an “average reciprocity of advantage.”⁷⁰ This phrase is “understood to mean that the owner has not been singled out for adverse treatment, but instead is simply being required to abide by a reasonably general requirement of widespread applicability.”⁷¹ Therefore, the kind of “spot zoning” and targeted regulation abortion clinic owners face (which other healthcare facilities do not) may strongly support the finding of a compensable taking.⁷²

It is worth noting that even if abortion clinic directors do not own the land on which they operate their clinics, but instead lease the land from another party, they can still recover under the Fifth Amendment. The Supreme Court has stated, “It has long been established that the holder of an unexpired leasehold interest in land is entitled, under the Fifth Amendment, to just compensation for the value of that interest when it is taken upon condemnation by the United States.”⁷³ I use the term “clinic owner” throughout this Comment for simplicity, but the constitutional takings analysis should be no different if a clinic director does not own a fee simple interest in the property but instead leases the land on which the clinic operates. Whether this holds true for the state statutory claims discussed in the next Section is less clear, but given

⁶⁸ Saul Levmore, *Takings, Torts, and Special Interests*, 77 VA. L. REV. 1333, 1344–45 (1991).

⁶⁹ Meltz, *supra* note 63, at 346.

⁷⁰ *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). Note that *Penn Central* does not include this factor in its enumeration of the relevant considerations.

⁷¹ DAVID A. DANA & THOMAS W. MERRILL, *PROPERTY: TAKINGS* 153 (2002).

⁷² *See, e.g., id.* at 134 (noting that “there may be other factors [than those in *Penn Central* and *Pennsylvania Coal*] courts will identify as being relevant to the regulatory takings analysis”).

⁷³ *Alamo Land & Cattle Co. v. Arizona*, 424 U.S. 295, 303 (1976). *See also* Meltz, *supra* note 63, at 319 (“Almost all interests in land are recognized as ‘property’ under the Takings Clause, from fee simples to leaseholds, easements, liens, life estates, and some future interests.”).

that lessees have property interest in the land they lease, it is likely that statutory takings claims are available to lessees as well.

C. States' Expansion of Property Rights

State legislatures are free to provide more protection for property owners than the Supreme Court mandates under the Fifth Amendment's Takings Clause. That is, the Court arguably creates a floor, rather than a ceiling, of protection from regulatory takings. Many state legislatures have enacted protective laws for property rights or otherwise expanded the means by which landowners can be compensated for government regulation that diminishes their property value or limits the use of their property. This expansion of property rights had its heyday in the 1990s and early 2000s.⁷⁴ Many of the states enacting or amending their laws have conservative legislatures.⁷⁵ This means that the states most likely to restrict abortion access going forward are also more likely to have laws that are more amenable to takings claims.

There are generally three types of property rights laws that states have enacted. One type is called "an assessment law, which requires state or local agencies to assess takings of private property rights before their regulations can become effective."⁷⁶ This is considered a procedural requirement rather than a substantive one.⁷⁷ The next type of state property law is called a "compensation law, [which] requires state and local governments to compensate property owners once their property value is reduced by a certain percentage or when the use of their property is 'inordinately burdened' by state and local regulations."⁷⁸ The last type is "a combination of both assessment and compensation laws."⁷⁹

⁷⁴ See Meltz, *supra* note 63, at 311 & n.7 ("some states have recently adopted *statutory* routes by which landowners may obtain compensation or regulatory relief from government restrictions"); see generally ILYA SOMIN, *THE GRASPING HAND: "KELO V. CITY OF NEW LONDON" AND THE LIMITS OF EMINENT DOMAIN* 141–60 (2015).

⁷⁵ Hannah Jacobs, Note, *Searching for Balance in the Aftermath of the 2006 Takings Initiatives*, 116 *YALE L. J.* 1518, 1524–26 & n.40 (2007) ("Republican groups . . . supported the regulatory takings initiatives in their states. . . . Legislatures in Florida, Louisiana, Mississippi, and Texas have passed legislation providing compensation opportunities for partial regulatory takings. . . . And at least seventeen states require governments to assess the impacts of potential takings before enacting legislation."). Note that Florida, Louisiana, Mississippi, and Texas, as well as ten of those seventeen states, have all enacted TRAP laws, according to the Guttmacher Institute, *supra* note 6.

⁷⁶ Daowei Zhang, *State Property Rights Laws: What, Where, and How?*, 94 *J. FORESTRY* 10, 11 (1996).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

Most states that enacted such property rights legislation have the assessment type of statute. These statutes (as well as the ones with a combination of assessment and compensation laws) require government entities—often an agency and/or attorney general—to produce and disclose an analysis of how the adoption of a law or regulation could reduce private property values.⁸⁰ However, most relevant to the inquiry of whether TRAP laws could constitute a regulatory taking are the compensation laws. These kinds of laws “establish a remedy if property use is *partially* restricted by governmental actions,” as opposed to the perhaps more stringent federal case law that requires a substantial—if not virtually complete—loss before a regulatory taking is found.⁸¹

For example, the state of Florida has its own law separate from federal takings law—and in fact creates a separate cause of action—that provides extra protection. The statute itself begins with the following explanation:

[I]t is the intent of the Legislature that, as a separate and distinct cause of action from the law of takings, the Legislature herein provides for relief, or payment of compensation, when a new law, rule, regulation, or ordinance of the state or a political entity in the state, as applied, unfairly affects real property.⁸²

Florida’s is perhaps one of the most landowner-friendly state property laws, as it does not have a threshold percentage of economic loss in order to qualify for compensation. Rather, the only requirement is that the private property rights be “inordinately burden[ed].”⁸³ If a Florida abortion clinic owner were to argue under state law, as opposed to the U.S. Constitution, that a TRAP law raised her operating costs so high that she was unable to operate her existing clinic, it appears more likely that a court would find a compensable taking.

Texas⁸⁴ and Michigan⁸⁵ have adopted assessment/compensation statutes, which require that the government both relax the burden on property owners to prove that government action has resulted in a compensable taking and assess whether future regulation could affect private property value. Other states simply have assessment statutes that

⁸⁰ See, e.g., TEX. ATTY GEN., PRIVATE REAL PROPERTY RIGHTS PRESERVATION ACT GUIDELINES, <https://www.texasattorneygeneral.gov/agency/private-real-property-rights-preservation-act-guidelines> [<https://perma.cc/ZM5V-PXXU>].

⁸¹ Zhang, *supra* note 76, at 12 (emphasis added).

⁸² FLA. STAT. § 70.001(1).

⁸³ *Id.*

⁸⁴ TEX. GOV'T CODE §§ 2007.001–2007.045.

⁸⁵ MICH. COMP. LAWS §§ 24.421–24.425.

require procedural compliance, but they do not have any substantive components changing the state and federal government's existing takings law. Despite what is a procedural requirement, a state's failure to conduct an assessment when one is required could result in the repeal of the underlying regulation. For example, Texas's property protection statute states: "A governmental action requiring a takings impact assessment is void if an assessment is not prepared. A private real property owner affected by a governmental action taken without the preparation of a takings impact assessment as required . . . may bring suit for a declaration of the invalidity of the governmental action."⁸⁶ Therefore, if TRAP laws are made without such assessments, abortion clinic owners may have a cause of action even without having to make a regulatory takings claim.

D. Precedent Supporting TRAP Laws as Regulatory Takings

The argument that government regulations targeting abortion clinics should be compensable takings is a novel approach. As such, there are no cases that deal directly with the argument. A case that strongly supports this interpretation of regulatory takings, however, is *PA Northwestern Distributors, Inc. v. Zoning Hearing Board of the Township of Moon*.⁸⁷ In that case, the Township's zoning board created a land-use ordinance just four days after an adult bookstore opened. The ordinance required that any enterprise with a preexisting use that conflicted with the ordinance become compliant within ninety days. Because the new ordinance did not designate the area for adult commercial use, the adult bookstore's preexisting use conflicted with the ordinance, and it had to vacate.⁸⁸ The Pennsylvania Supreme Court ruled that the Township's ordinance violated the Pennsylvania Constitution on its face because it, and other laws like it, could deprive people of their property at any arbitrary time and thus was a taking without just compensation.⁸⁹ The court concluded:

if we were to permit the [ordinance], *any* use could be amortized out of existence without just compensation. Although such a zoning option seems reasonable when the use involves some activity that may be distasteful to some members of the public, *no* use

⁸⁶ TEX. GOV'T CODE § 2007.044(a).

⁸⁷ 584 A.2d 1372, 1375 (Pa. 1991) ("municipalities lack the power to compel a change in the nature of an existing lawful use of property").

⁸⁸ *Id.* at 1376.

⁸⁹ PA. CONST. art. I, § 10 ("private property [shall not] be taken or applied to public use, without authority of law and without just compensation being first made or secured").

would be exempt from the reach of amortization, and *any* property owner could lose the use of his or her property without compensation. Even a homeowner could find one day that his or her “castle” had become a nonconforming use and would be required to vacate the premises within some arbitrary period of time, *without just compensation*.⁹⁰

Abortion clinic owners could argue that TRAP laws are analogous to the zoning ordinance at issue in *PA Northwestern Distributors*, especially given the moral tinge abortion regulations often have.

The closest directly related case may be *P.L.S. Partners, Women’s Medical Center of Rhode Island, Inc. v. City of Cranston*,⁹¹ where partners in a proposed outpatient abortion clinic sued the government for impeding on the facility’s construction by requiring a special use permit to operate as a hospital.⁹² The plaintiff partners argued, among other things, that the special use permit requirement—and the classification of the facility as a hospital—was an unconstitutional taking. The court ruled, however, that the Takings Clause question was not properly before the court because the plaintiffs had not applied for the permit before suing.⁹³ Given that this case never reached an answer on the takings question, it appears that no court has ruled explicitly on the TRAP-laws-as-takings argument.

IV. APPLICATION OF TAKINGS LAW TO ABORTION CLINIC REGULATIONS

The *Penn Central* factors discussed in the previous Part arguably weigh in favor of abortion clinic owners affected by TRAP laws. In a recent documentary that follows the daily operations of clinics in the South that were subjected to strict regulation by the state, Dalton Johnson, the owner of Alabama Women’s Center, described his struggles with maintaining his facility:

We had to relocate into a new facility to meet the new healthcare codes. Finding financing to purchase an abortion clinic is next to impossible. I refinanced my property downtown, pulled all the equity out and then took all the money out of my retirement, so I’ve spent close to a million dollars to meet all of their requirements; and you think you’re done and . . . they’re trying to pass another bill that says I can’t be [with]in two thousand feet of a

⁹⁰ *PA Nw. Distribs.*, 584 A.2d at 1376.

⁹¹ 696 F. Supp. 788 (D.R.I. 1988).

⁹² *Id.* at 790–91.

⁹³ *Id.* at 795–96.

school. . . . I thought that “okay, I’ve met every requirement they’ve had, you know, I have a nice facility,” that they would, you know, leave me alone and move on, but that’s not happening.⁹⁴

From his experience, Johnson could argue that, under all three *Penn Central* factors, the laws targeting his clinic are a taking and that the state of Alabama should compensate him.

A. Application of the *Penn Central* Factors to Abortion Clinic Regulations

For the purposes of the following analysis, I am going to assume that TRAP laws are statutes or zoning requirements that apply only to abortion clinics and increase the cost of operating such clinics. In my analysis, I often apply each factor to the kinds of TRAP laws at issue in *Whole Woman’s Health*, such as those that require clinics to have structural standards comparable to those for surgical centers. Although I recognize that *Whole Woman’s Health* invalidated those specific laws, as of April 1, 2017 twenty-two states still have in effect one or both of the Texas H.B. 2-type regulations that require surgical center facilities and admitting privileges.⁹⁵ Pro-choice advocates will probably continue to challenge these state laws under *Whole Woman’s Health*, but undue burden analysis may not work in striking them all down when a state’s particular circumstances and/or the specific characteristics of the law differ from Texas’s.

1. The economic impact of the regulation on a clinic owner

The first, and the most important, factor in a regulatory taking analysis is how substantial a loss the property owner suffered because of the government regulation.⁹⁶ The fundamental question is, “How much diminution in value is enough to qualify as a taking?”⁹⁷ Usually courts calculate the extent of the loss as a fraction, that is, the numerator is the loss and the denominator is the value of what the plaintiff had before the regulation.⁹⁸ If a regulation forces a clinic to shut down, then this factor strongly points toward a taking.

⁹⁴ TRAPPED (Big Mouth Productions, Cedar Creek Productions, & Trilogy Films 2016).

⁹⁵ See *Targeted Regulation of Abortion Providers*, *supra* note 6.

⁹⁶ See *DANA & MERRILL*, *supra* note 71, at 134 (“The factor that seems most securely grounded in the decisions . . . is the extent to which the regulation has diminished the value of the claimant’s property.”).

⁹⁷ *Id.* at 135.

⁹⁸ *Id.* (“[no] courts have developed any clear benchmarks as to what percentage diminution

However, regulations targeted at abortion clinics do not lower the property value *per se*; they just limit the *use value* of the property. Therefore, some courts might calculate the fraction to reflect the difference in profit before or after the regulation. Either way, most TRAP laws subject abortion clinic owners to significant economic losses, whether through financial or facility-related regulations. With regard to the surgical center requirement at issue in *Whole Woman's Health*, the District Court found that:

The “cost of coming into compliance” with the surgical-center requirement “for existing clinics is significant,” “undisputedly approach[ing] 1 million dollars,” and “most likely exceed[ing] 1.5 million dollars,” with “[s]ome . . . clinics” unable to “comply due to physical size limitations of their sites.” . . . The “cost of acquiring land and constructing a new compliant clinic will likely exceed three million dollars.”⁹⁹

Assuming that other regulations requiring comparable standards to those for surgical centers also impose such high costs, clinic owners can readily show substantial loss.

As mentioned above, such calculations may be unnecessary if a regulation forces an abortion clinic to shut down entirely. It would be difficult for any court to argue that such a result would not have a substantial economic impact on the plaintiff abortion clinic owner. Additionally, such a result could hardly be called a “partial taking.” A regulation that forces a property owner to stop the preexisting use of their property could be sufficient for some courts to find a compensable taking.¹⁰⁰ “[W]hen a landowner can show that the regulatory restriction has caused a severe reduction in use and value, a reduction that is not caused by mere changes in the market, then considerations of fairness militate compensation.”¹⁰¹

2. The clinic owner’s reasonable investment-backed expectations

As Dalton Johnson’s anecdote at the beginning of this Part shows, abortion clinic owners often invest huge amounts of capital in order to

gives rise to a presumption in favor of a finding that there has been a taking”).

⁹⁹ *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2302–03 (2016).

¹⁰⁰ See *PA Nw. Distribs., Inc. v. Zoning Hearing Bd. of Twp. of Moon*, 584 A.2d 1372 (Pa. 1991); *DANA & MERRILL*, *supra* note 71, at 135 (“if the regulation causes a 100 percent diminution in value, it is a taking *per se*”). One issue, therefore, is whether a court would conclude that a wipeout of *use value*, instead of *property value*, is a *per se* taking.

¹⁰¹ James Burling, *Can the Existence of Value in Property Avert a Regulatory Taking When Economically Beneficial Use Has Been Destroyed?*, in *TAKING SIDES ON TAKINGS ISSUES: PUBLIC AND PRIVATE PERSPECTIVES* 466–67 (Thomas E. Roberts ed., 2002).

start operating their clinics. Those amounts are compounded in order to make sure their clinics are compliant with an ever-changing landscape of legislation, especially in areas of the country where legislatures are constantly introducing anti-abortion regulations. Courts, in making their assessments about whether TRAP laws result in a compensable taking, must decide whether improvements that clinic owners make to their property constitute distinct investment-backed expectations. Judges are likely to be receptive to the injustice clinic owners face when they spend large amounts of their own money to comply with a law just to be hit again with a new law that requires them to spend even more.

The Supreme Court, paralleling state courts' treatment of zoning laws, seems to say that once owners have "vested rights" to build what they want, they "are entitled to compensation if permission is withdrawn."¹⁰² In this way, the distinct (or reasonable) investment-backed expectations prong is a way to incorporate the "presumption against retroactive lawmaking."¹⁰³ "[A]n owner who acquires property when it is settled that certain uses are specifically permitted by law should have a stronger claim to compensation if such uses are subsequently prohibited."¹⁰⁴ The issue is that TRAP laws do not, on their face, prohibit the use of providing abortion services; they generally just make that use more costly. However, a significant increase in that cost still negatively affects a property owner's reasonable investment-backed expectations. The Supreme Court has held, for example, that "the imposition on a firm of a retroactive liability for increased retirement benefits for former employees was a taking,"¹⁰⁵ indicating that an increase in cost, as opposed to a newly-prohibited use, can still be a taking under the factor of investment-backed expectations.

Additionally, if the law privileges property owners who have invested in their property because we want to make sure that takings claims are sincere, then courts should easily find for plaintiff abortion clinic owners with regard to this factor. They have credibility because they have been operating a clinic already. This is *not* a case of a landowner trying to argue that if only the government had not passed the regulation, she would have begun a real estate development worth millions of dollars. Abortion clinics are not hugely profitable enterprises, and many clinics struggle to break even in order to keep the procedure

¹⁰² DANA & MERRILL, *supra* note 71, at 159 & n.258 (referencing *Penn Central* and citing *Nectow v. City of Cambridge*, 277 U.S. 183 (1928) as an example of the "vested rights doctrine").

¹⁰³ *Id.* at 160.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 162 (citing *E. Enters. v. Apfel*, 524 U.S. 498 (1998)).

affordable.¹⁰⁶ In other words, their claims of investment-backed expectations (i.e., that they expected their investments to keep their clinics compliant with the law) are arguably as trustworthy as other plaintiffs', if not more so.

3. The character of the government action

The nature of the government action usually refers to whether the government's infringement on a landowner's property is a physical occupation or purely regulatory.¹⁰⁷ This factor would arguably cut against an abortion clinic owner's taking claim; the government action when it passes a TRAP law is just a regulation, as opposed to a permanent or temporary physical occupation. In such a case, the *Penn Central* test could be more difficult to satisfy. However, the strong cases that abortion clinic owners can make with regard to the other factors renders their weakness in this factor less significant. Robert Meltz argues that, according to the Supreme Court, "the character factor . . . is to be given less weight than the previous two *Penn Central* factors."¹⁰⁸ In addition, when a "mere" regulation can eliminate a person's livelihood, the character of the government action is invasive enough that a court could reasonably conclude a compensable taking has taken place.¹⁰⁹

4. Application of *Pennsylvania Coal* factors

Although not explicitly enumerated in *Penn Central*, additional factors from *Pennsylvania Coal* may also be relevant in determining whether a taking has occurred.¹¹⁰ One of these factors is whether and to what extent the government's regulation is preventing a harm. The findings of the District Court in *Whole Woman's Health* are pertinent to analyzing this factor—namely, that abortions were extremely safe before the enactment of H.B. 2 and that the law did not improve safety.¹¹¹

¹⁰⁶ See Winter, *supra* note 1.

¹⁰⁷ But see Meltz, *supra* note 63, at 341–46 (suggesting that the character of the government action factor should be more "elastic" and inclusive, and listing nine sub-factors that may be relevant to the inquiry); DANA & MERRILL, *supra* note 71, at 140 (asking whether this factor does more than create a distinction between physical invasion and regulatory scheme).

¹⁰⁸ Meltz, *supra* note 63, at 342 (citing *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538–39 (2005)).

¹⁰⁹ See *id.* ("[analysis of the character of government action can include] a balancing of the public interest advanced by the government measure against the *burden on the property owner*") (emphasis added).

¹¹⁰ See DANA & MERRILL, *supra* note 71, at 143–56 (listing "destruction of recognized rights of property," "regulation of noxious uses," and "average reciprocity of advantage" as three ad hoc factors courts use to analyze regulatory takings claims).

¹¹¹ *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2302 (2016) ("The great weight of evidence demonstrates that, before the act's passage, abortion in Texas was extremely safe with

The fact that these laws did not actually prevent any harm to women weighs in favor of finding a compensable taking. Despite a legislature's stated reasons for enacting regulations, it is often clear that TRAP laws are *meant* to decrease abortion procedures.¹¹² In other words, the “nuisance” or harm that the TRAP laws purport to solve is not actually occurring. “[W]hen the government is seen as having acted in bad faith, courts tilt toward the plaintiff.”¹¹³

Forcing a benefit is more likely to be a taking, while preventing a harm or nuisance (e.g., *Hadacheck v. Sebastian*¹¹⁴ and *Pennsylvania Coal*) is usually not compensable. Because abortions have proved to be quite safe, especially compared to other medical procedures,¹¹⁵ regulations of abortion clinics are not likely going to prevent any harms. This being the case, it is possible for clinic owners to argue that legislatures are trying to force a “benefit,” thus making the regulation compensable. Such a benefit may be to make the procedure even safer (women's health is often the stated purpose of TRAP laws); however, the “benefit” legislatures may actually intend is the shutdown of clinics, which would also be compensable.

Whether there is average reciprocity of advantage—a factor from *Pennsylvania Coal*—may also do some work here. As discussed in Part III, spot-zoning and regulations that single out particular parties tend to predict whether takings claims are successful. In *Whole Woman's Health*, the facts showed that Texas did not impose similar restrictions to other healthcare facilities that performed procedures more dangerous than abortion, and such a finding would also weigh in favor of a compensable taking.¹¹⁶

particularly low rates of serious complications and virtually no deaths occurring on account of the procedure.’ [R]isks are not appreciably lowered for patients who undergo abortions at ambulatory surgical centers as compared to nonsurgical-center facilities.”)

¹¹² See *id.* at 2311–12.

¹¹³ Meltz, *supra* note 63, at 345.

¹¹⁴ 239 U.S. 394 (1915) (holding that an ordinance prohibiting the manufacture of bricks within specified city limits did not constitute a taking).

¹¹⁵ *Whole Woman's Health*, 136 S. Ct. at 2311–12, 2315 (“the surgical-center provision imposes ‘a requirement that simply is not based on differences’ between abortion and other surgical procedures ‘that are reasonably related to’ preserving women’s health”).

¹¹⁶ *Id.* at 2315.

B. State Laws and Abortion Clinic Regulations

1. State takings regimes are generally more restrictive in what the government can regulate without compensation

Many states have enacted laws in reaction to Supreme Court takings jurisprudence. Some of these laws are “takings assessments,” which “require agencies to determine whether regulatory activity might constitute a taking”; other laws have reduced the necessary impact on value to show a taking of private property.¹¹⁷

The trend in the takings reform movement has been toward decreasing or, most recently, eliminating the threshold values that trigger the right to compensation. Given the negligible or non-existent threshold values in some of these states—for example, in Oregon and Arizona—private property owners could make a compensation claim if a regulation caused a mere 0.5% decrease in the fair market value of their land.¹¹⁸

There is debate, however, about whether this trend has positive benefits. Research by John Echeverria and Thekla Hansen-Young has shown that these “compensation” laws actually undermine community protection by chilling the enforcement and creation of regulations, while conferring benefits mainly to special interest groups.¹¹⁹

Echeverria and Hansen-Young’s deep concern about the negative effects compensation statutes have at the state and local levels shows that the statutes are somewhat effective in either keeping regulation at a minimum or finding for property owners in state takings claims. Although these effects are perhaps troubling on a normative level, the fact that they seem to exist in states with these kinds of laws may help abortion clinics operating in those states. Little litigation appears to stem from such state laws, arguably because the “chilling effect has undoubtedly derailed regulatory initiatives that would have produced litigation if they had been implemented.”¹²⁰ Although this does not have implications for how a court would deal with a TRAP law under a state takings regime, abortion clinic owners could likely benefit from such a chilling.

Assuming that these laws do result in litigation at least in some instances, the procedural hurdles to a regulatory takings claim are

¹¹⁷ DUKEMINIER, *supra* note 57, at 1197.

¹¹⁸ Jacobs, *supra* note 75, at 1529.

¹¹⁹ See JOHN D. ECHEVERRIA & THEKLA HANSEN-YOUNG, THE TRACK RECORD ON TAKINGS LEGISLATION: LESSONS FROM DEMOCRACY’S LABORATORIES 2–3 (2008), http://scholarship.law.georgetown.edu/gelpi_papers/1/ [<https://perma.cc/Z4LA-CNM9>].

¹²⁰ *Id.* at 17.

much lower in some states than they are in federal takings law. Without the bureaucratic obstacles that keep people with only minor or moderate losses from litigating their claims, more people who lose money from regulations of their clinics can sue.¹²¹ Therefore, the fact that a TRAP law did not create an economic “wipeout” of the value of a property would not be a barrier to entry, so to speak, for abortion clinic owners to make use of state takings law.

2. Application of Arizona’s Private Property Rights Protection Act

In order to get a sense of how a state takings regime might affect the result in a clinic owner’s takings claim, it is worth having a detailed look at a particular state’s statute in a state with TRAP laws. By looking at how state courts have interpreted that statute, we can apply the same reasoning to the TRAP provisions in that state. Arizona is a useful example for this analysis because its property rights regime is extremely generous to property owners¹²² and because it currently has TRAP laws that require both structural standards comparable to those for surgical centers and hospital privileges (or some alternative agreement).¹²³ Current Arizona state takings law

requires state and local governments to compensate landowners whenever land use regulations diminish property values. As an alternative to paying compensation, the new law allows the governmental entity imposing a regulation to exempt a landowner from enforcement of the value-reducing regulation. The proposition also allows governments and landowners to come to agreements whereby a landowner agrees to waive the right to sue for compensation regarding a particular regulation.¹²⁴

In this way, the law appears quite permissive, especially compared to the balancing tests in the federal doctrine (i.e., *Penn Central*).

There have not been many litigated cases in Arizona state courts since the law—known as the Private Property Rights Protection Act—went into effect on December 7, 2006. Only eleven cases cite the relevant provision on regulatory takings in the Act, and almost all of those

¹²¹ Jacobs, *supra* note 75, at 1529–30.

¹²² See ARIZ. REV. STAT. § 12-1134.

¹²³ *Targeted Regulation of Abortion Providers*, *supra* note 6.

¹²⁴ Jeffrey L. Sparks, Note, *Land Use Regulation in Arizona After the Private Property Rights Protection Act*, 51 ARIZ. L. REV. 211, 212–13 (2009).

cases involved issues with a party's standing or the Act's statute of limitations, rather than ruling on the merits.¹²⁵ The one case that did rule on the merits, and is therefore relevant to this Comment's inquiry, found for the property owner by reversing the motion for summary judgment granted to the city.¹²⁶ It is worth noting, however, that this general lack of litigation may support the claim that Arizona's Private Property Restoration Act did in fact chill the enactment of land use regulation.¹²⁷ Alex Potapov claims that "many scholars believe that forcing the government to compensate landowners for the cost imposed by regulations actually improves government decisionmaking,"¹²⁸ so perhaps the relative lack of litigation in the decade since Arizona passed the Act is consistent with that theory.

Before looking at the case law, however, it is useful to examine the statute itself. First, there is no minimum threshold for diminution in value in order to have a cause of action under the Act. This could create significant protection for abortion clinic owners that could make them more likely to win in Arizona state court as opposed to federal court (assuming that TRAP laws are ruled to be "land use laws" under the definition in the Act¹²⁹). One possible hurdle clinic owners may face is that the Act creates an exception for, among other things, regulations that affect public health and safety.¹³⁰ The Act states that its just compensation provision will "not apply to land use laws that . . . [l]imit or prohibit a use or division of real property for the protection of the public's health and safety, including rules and regulations relating to fire and building codes, health and sanitation, transportation or traffic control, solid or hazardous waste, and pollution control."¹³¹ State legislatures would certainly argue that the purpose behind abortion clinic regulations is the health of women, as was argued in *Whole Woman's*

¹²⁵ See, e.g., *Aspen 528, L.L.C. v. City of Flagstaff*, No. 1 CA-CV 11-0512, 2012 WL 6601389 (Ariz. Ct. App. Dec. 18, 2012); *Turner v. City of Flagstaff*, 226 Ariz. 341 (Ct. App. 2011); *McDowell Residential Props., L.L.C. v. City of Avondale*, No. 1 CA-CV 09-0301, 2010 WL 2602047 (Ariz. Ct. App. June 29, 2010).

¹²⁶ See *Sedona Grand, L.L.C. v. City of Sedona*, 229 Ariz. 37, 42 (Ct. App. 2012).

¹²⁷ See Bethany R. Berger, *The Illusion of Fiscal Illusion in Regulatory Takings*, 66 AM. U. L. REV. 1, 35 (2016) ("laws . . . in Florida and Arizona also chill land use regulations"); Sparks, *supra* note 124, at 213 ("these laws interfere with the ability of governments to regulate land use for the public good").

¹²⁸ Alex Potapov, *Making Regulatory Takings Reform Work: The Lessons of Oregon's Measure 37*, 39 ENVTL. L. REP. NEWS & ANALYSIS 10516, 10523 (2009).

¹²⁹ See ARIZ. REV. STAT. § 12-1136(3) (defining "land use law" as "any statute, rule, ordinance, resolution or law . . . that regulates the use or division of land or any interest in land").

¹³⁰ See *id.* § 12-1134(B)(1).

¹³¹ *Id.*

Health. Abortion clinic owners have some possible arguments against this exception, however.

One such argument is that the provision's list of examples included in the public health and safety exception (e.g., "fire and building codes, health and sanitation,"¹³² etc.) may indicate that the drafters of the Act did not intend TRAP laws to be included in its purview. "Health and sanitation" is the listed example most plausibly relevant to abortion clinic regulations, but the grouping of "health" with "sanitation" could suggest that TRAP laws were not what the state legislature envisioned when it drafted the law, as opposed to making sure the property itself did not negatively impact public health. Additionally, it is the state that "has the burden of demonstrating that the land use law is exempt pursuant to [the public health and safety exception]."¹³³ The Court of Appeals of Arizona applied this rule in *Sedona Grand, L.L.C. v. City of Sedona*,¹³⁴ indicating that the burden of proof requirement could do some work in future litigation. The facts in *Whole Woman's Health* showed that Texas's arguments that H.B. 2 improved women's health were weak. The Court even pointed out that "when directly asked at oral argument whether Texas knew of a single instance in which the new requirement would have helped even one woman obtain better treatment, Texas admitted that there was no evidence in the record of such a case."¹³⁵ Although the public health exception could pose a problem for abortion clinic owners, it does not seem insurmountable, and such state laws generally are almost certainly more amenable to clinic owners than the federal counterpart.

The only state court case that analyzed a claim under Arizona's Private Property Rights Protection Act on the merits is *Sedona Grand*. In that case, the City of Sedona had a zoning regulation in place that prohibited short-term rentals of residential property. The plaintiff, *Sedona Grand*, notified the City that it was using what it called "Option Agreements," where it would give prospective buyers the chance to "inspect" the property for a set period of time.¹³⁶ The City responded by telling *Sedona Grand* that its use of Option Agreements violated the short-term rental prohibition, and a year later the City reinvigorated the ban by passing an ordinance making it unlawful to rent "residential property for less than 30 consecutive days to a 'transient.'"¹³⁷ *Sedona*

¹³² *Id.*

¹³³ *Id.* § 12-1134(C).

¹³⁴ 229 Ariz. 37 (Ct. App. 2012).

¹³⁵ *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2311–12 (2016).

¹³⁶ *Sedona Grand*, 229 Ariz. at 39.

¹³⁷ *Id.*

Grand then sued the City pursuant to the Private Property Rights Protection Act.

Most relevant here, the City's main defense was that its zoning regulation was for the "protection of the public's health and safety."¹³⁸ The trial court had granted the City's motion for summary judgment on this question because the ordinance itself had stated that public health and safety was the purpose; the appeals court reversed because "the Act specifically provides that the body enacting the law bears the burden of demonstrating that an exemption applies."¹³⁹ The court held that the City "must establish by a preponderance of the evidence that the law was enacted for the principal purpose of protecting the public's health and safety before the exemption can apply."¹⁴⁰ In cases where the regulation is itself evidence of a public health and safety purpose (such as regulating garbage accumulation or floodplains), the government does not have to provide further evidentiary showing. In cases such as *Sedona Grand*, however, "the nexus between prohibition of short-term occupancy and public health is not self-evident, and the governing body must do more than incant the language of a statutory exception to demonstrate that it is *grounded in actual fact*"; that is, "the City must provide evidence beyond mere 'legislative assertion' to carry [its] burden" under the Act.¹⁴¹ If this is required of TRAP laws as well, then providing such outside evidence will likely prove difficult for the government (as it did in *Whole Woman's Health*).

C. Limitations of Using Takings Law

The result of a successful takings claim for abortion clinic litigants is uncertain. Unlike a case where a plaintiff successfully argues that a law violates the Equal Protection Clause for example, finding a compensable taking does not require that the offending regulation be repealed. The government can repeal the regulation, amend it, commence eminent domain proceedings, or compensate the property owner.¹⁴² Abortion clinic owners arguably would prefer to have the laws repealed than to be compensated, since future abortion clinics built after the regulation would have to comply with the burdensome law. This presents an issue as to whether a successful takings claim will result in the repeal of the regulation or only "just compensation" for property owners.

¹³⁸ *Id.*

¹³⁹ *Id.* at 42.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 43 (emphasis added).

¹⁴² See *DANA & MERRILL*, *supra* note 71, at 183.

In the past, other instances of compensable takings resulted in the government not enforcing the laws rather than compensating property owners.¹⁴³ Even if the government did opt to pay the property owner as opposed to stop enforcing the regulation, such compensation may make the regulation too expensive to continue to enforce. Additionally, it may simply be bad optics for a state to pay abortion clinic owners when, presumably, a segment of its population wanted to enact the TRAP laws in the first place.

Another practical issue with using takings law to combat TRAP laws is that there are appreciable, on-the-ground judicial hurdles in using any innovative framework at the trial level.¹⁴⁴ Abortion litigation tends to be fast-paced because legislatures rapidly adopt anti-abortion restrictions, which often go into effect quickly. Therefore, plaintiffs who fight such laws often bring Motions for a Temporary Restraining Order before a preliminary injunction hearing. At these stages, courts are often reluctant to grant the requested temporary relief if the plaintiff's side presents a complex, novel argument.¹⁴⁵ The typical circumstances of such litigation are plaintiffs trying to *keep* new laws from going into effect or to stop them as soon as possible. But in order to be able to present a takings claim in the most effective manner, plaintiff abortion clinic owners will likely have to make the takings argument with regard to a regulation that has *already been in effect* and caused a diminution in value.

Another practical reality to using takings law is that it may suffer from similar pitfalls present in traditional methods of combating TRAP laws. First, some of the relevant takings factors may end up requiring similar inquiries that happen in traditional Fourteenth Amendment decisions. For example, if one of the questions is whether the government is preventing a harm or nuisance through its regulation, then the data-driven debate about whether TRAP laws are actually protecting women's health is inescapable. Second, takings claims are often very fact-intensive, so perhaps with different and more innovative TRAP laws, the generalities this Comment presents will not be applicable to a wide range of clinics. However, the most relevant fact in a takings inquiry will be the economic damage the property owner suffered. In cases where a TRAP law caused a clinic to close or to lose substantial

¹⁴³ See, e.g., 26 U.S.C. § 9706 (invalidated by *E. Enters. v. Apfel*, 524 U.S. 498 (1998)).

¹⁴⁴ See Smith, *supra* note 5, at 404–05 (“Because anti-abortion statutes are most likely to pass in the most conservative states, litigation is likely to take place in the most conservative courts in front of the most conservative judges and appellate courts. Understandably, litigators are reticent to raise new claims . . . in hostile federal courts.”).

¹⁴⁵ *Id.*

money on renovations, the facts may be different for each clinic, but the takings strategy may still be sound.

While some courts have struck down anti-abortion property regulation through more conventional Fourteenth Amendment means,¹⁴⁶ it is always useful to have another weapon in the arsenal against anti-abortion regulation, especially because conservative judges and legislatures may be more amenable to a takings argument than to other constitutional claims. It is also worth noting that, despite the result in *Whole Woman's Health*, the case itself was a five-four decision, with two of the justices in the majority over eighty years old. It is entirely likely that in coming years, the Court could overrule or limit the scope of *Whole Woman's Health*.

V. CONCLUSION

The argument in this Comment is not intended to replace issues and cases that arise under *Roe v. Wade*¹⁴⁷ and *Casey*. It is simply another means by which abortion clinic owners and their employees, who are targeted in particular and separate ways from patients seeking abortion, can fight back against hostile legislation. Privacy and other substantive due process arguments under the Fourteenth Amendment will still have a role to play as state legislatures continue to enact laws that restrict abortion access through means other than regulating clinic owners, their facilities, and doctors who perform abortions.

Takings law, however, adds a more concrete way to fight TRAP laws by capitalizing on clinics' status as businesses and workplaces, ones that must support their patients and employees. The abortion clinic's existence as a workplace, and its segregation from other types of workplaces, is what makes the takings argument especially feasible by couching the arguments in terms of property ownership and business operations. Abortion clinic owners face an unusually hostile and treacherous landscape. Because the debate over abortion rights can be so politically polarizing, people likely do not think of abortion clinic owners as employers and businesspeople trying to make a living. Viewing an abortion clinic as another type of workplace may not only destigmatize and normalize abortion, but it may also functionally help clinics to resist TRAP laws.

The current political climate will likely engender further attempts to restrict abortion access. Although *Whole Woman's Health* invalidated Texas's TRAP laws, many states still have their own TRAP laws on the

¹⁴⁶ See, e.g., *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328 (5th Cir. 1981).

¹⁴⁷ 410 U.S. 113 (1973).

books, and each must be challenged and litigated separately. By using takings law as a strategy, especially in conservative states that have enacted expansive property rights regimes, clinic owners and advocates can invalidate and perhaps prevent these laws in the future, allowing clinics to operate as more stable and effective workplaces that provide a much-needed service to their patients.