

**United States House of Representatives
Committee on the Judiciary
Subcommittee on the Constitution**

**Hearing on H. R. 748, the
“Child Interstate Abortion Notification Act”
March 3, 2005**

**Testimony of Richard S. Myers, Professor of Law
Ave Maria School of Law, Ann Arbor, Michigan**

I am pleased to have been invited to address the constitutional issues raised by H. R. 748, the Child Interstate Abortion Notification Act (hereinafter “Act”). I have been asked to address two constitutional questions: (1) is the Act a proper exercise of one of Congress’s enumerated powers, and (2) does the Act violate principles of federalism, perhaps by endorsing the view that states may legislate in an extraterritorial manner.

First, “[t]he Constitution creates a Federal Government of enumerated powers.” *United States v. Lopez*, 514 U. S. 549, 552 (1995). But despite recent cases affirming that there are judicially enforceable limits on the scope of the commerce power, see, e.g., *Lopez*, *United States v. Morrison*, 529 U. S. 598 (2000), the Act is well within Congressional authority. These recent cases have dealt with Congressional efforts to reach noneconomic local activity under the theory that the local activity had a substantial effect on interstate commerce. The scope of these limits on Congressional power is currently before the Supreme Court. See *Raich v. Ashcroft*, 352 F. 3d 1222 (9th Cir. 2003), cert. granted, 124 S. Ct. 2909 (2004).

These recent developments do not, however, raise any concern about whether the Act is within Congressional power to regulate commerce among the several states. The Court has long affirmed Congressional power to prohibit interstate transportation of items of commerce. *United States v. Darby*, 312 U. S. 100 (1941); *Champion v. Ames*, 188 U. S. 321 (1903). To transport another person across state lines is to engage in commerce among the states and is, thus, within Congressional power to regulate such commerce. *Cleveland v. United States*, 329 U. S. 14 (1946); *Caminetti v. United States*, 242 U. S. 470 (1917); *Hoke v. United States*, 227 U. S. 308 (1913).

The landmark case of *United States v. Darby*, 312 U.S. 100 (1941), makes this point clear. In *Darby*, the Court made it clear that Congressional power “extends not only to those regulations which aid, foster and protect the commerce, but embraces those which prohibit it.” 312 U. S. at 113. In *Darby* and in other cases, the Court has clearly established that this power does not depend on Congress legislating in furtherance of the policy of the destination state. As the *Darby* Court stated: “The power of Congress over interstate commerce ...can neither be enlarged nor diminished by the exercise or non-exercise of state power. Congress, following its own conception of public policy

concerning the restrictions which may appropriately be imposed on interstate commerce, is free to exclude from the commerce articles whose use in the states for which they are destined it may conceive to be injurious to the public health, morals or welfare, even though the state has not sought to regulate their use.” Id. at 114 (citations omitted). The Court was willing to sustain the federal law involved even on the assumption that Congress was primarily concerned about the local activity and not the interstate transport itself. As the Darby Court stated: “The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control.” Id. at 115.

Moreover, as John Harrison stated in his testimony on a prior bill prohibiting interstate transport of a minor to evade the parental involvement law in the minor’s home state: “This legislation, unlike the child labor statute at issue in *Hammer v. Dagenhart*, does not rest primarily on a congressional policy independent of that of the State that has primary jurisdiction to regulate the subject matter involved. Rather, in legislation like this Congress would be seeking to ensure that the laws of the State primarily concerned, the State in which the minor resides, are complied with. In so doing Congress would be dealing with a problem that arises from the federal union, not making its own decisions concerning local matters such as domestic relations or abortion.” Hearing on H.R. 1755 (The Child Custody Protection Act) before the Subcommittee on the Constitution of the Committee on the Judiciary, House of Representatives, 108th Congress, 2d Session 51 (July 20, 2004)(statement of John C. Harrison).

The abortion notification portion of the Act is also a proper exercise of the commerce power. Although this portion of the Act does not focus on transporting the minor across state lines, this portion of the Act is a regulation of an economic transaction. The many court cases upholding the constitutionality of the Freedom of Access to Clinic Entrances Act (FACE) make it clear that the abortion industry is a major interstate industry that Congress may properly regulate. Some lower court cases have probably pushed Congressional authority too far, see *United States v. Bird*, 2005 U.S. App. LEXIS (%th Cir. February 28, 2005); *Norton v. Ashcroft*, 298 F. 3d 547 (6th Cir. 2002), cert. denied, 537 U. S. 1172 (2003); *United States v. Gregg*, 226 F. 3d 253 (3d Cir. 2000), cert.denied, 523 U. S. 971 (2001), by upholding FACE even when noncommercial activity was involved, but surely recent cases such as *Lopez* and *Morrison* create no obstacle to Congressional regulation of the clearly economic side of the abortion industry.

Second, opponents of this law contend that it is inconsistent with principles of federalism, in large part because it allegedly permits a state to legislate in an extraterritorial manner. This objection was set forth by Peter Rubin in his testimony before the Senate Judiciary Committee in June 2004. He stated: “The proposed law amounts to a statutory attempt to force a most vulnerable class of young women to carry the restrictive laws of their home states strapped to their backs, bearing the great weight of those laws like the bars of a prison that follows them wherever they go (unless they are willing to go alone). Such a law violates the basic premises upon which our federal system is constructed.... [According to Rubin,] the proposition that a state may not project its laws into other

states by following its citizens there is bedrock in our federal system.” The Child Custody Protection Act: Protecting Parents’ Rights and Children’s Lives: Hearing on S. 851 before the Senate Committee on the Judiciary, 108th Congress, 2d Session 2-3 (June 3, 2004)(statement of Peter J. Rubin).

It seems clear that opposition to the substantive vision of the Act (that is, to protect the rights of parents to be involved in decisions that profoundly affect their children) is driving much of this analysis. It is important and more conducive to a sound analysis of the relevant constitutional principles to remove the negatives labels and to keep in mind that the transportation portions of the Act simply are designed to prevent the evasion of the law of the minor’s home state. As others have explained, so understood this Act reinforces a proper conception of federalism.

This point was well-expressed by Mark Rosen in his testimony before this Subcommittee in July 2004. He stated: “one of the great benefits of federalism is that with respect to policies that are not foreclosed by the Federal constitutional law or Federal statutory law, there can be diversity of approaches that States take, and when you have a law that by its nature can readily be circumvented through travel, as parental notification laws can be, then a Federal statute that helps to ensure the efficacy of constitutional policies does not undermine federalism, but helps to enhance the diversity across States with regard to policies that they’re able to pursue.” Hearing on H. R. 1755 (The Child Custody Protection Act) before the Subcommittee on the Constitution of the Committee on the Judiciary, House of Representatives, 108th Congress, 2d Session 10 (July 20, 2004)(statement of Mark D. Rosen). See Mark D. Rosen, Extraterritoriality and Political Heterogeneity in American Federalism, 150 U. Pa. L. Rev. 855 (2002).

The basic idea—to prevent people from evading the laws of their home states when the home state is attempting to advance entirely proper objectives that are at the core of its sovereign authority—is quite common. Strangely, the critics adopt a strict territorial view of state power that was characteristic of American legal thought in the late 19th century and the early 20th century, but has been largely abandoned. The same sort of mistaken objection has recently been made in the area of marriage. So, some modern critics, most of whom are not experts in the relevant field of law, argue that it is unconstitutional for a state to refuse to recognize a marriage that is valid under the law of the state of celebration. Such a refusal is, supposedly, an unconstitutional effort to extend the regulatory reach of the couples’ home state. Yet, even in the absence of federal law, such a state policy—that is, to refuse to respect the couples’ efforts to evade the law of their home state--has long been regarded as appropriate. For discussion of this issue, see Richard S. Myers, The Public Policy Doctrine and Interjurisdictional Recognition of Civil Unions and Domestic Partnerships, 3 Ave Maria L. Rev. (2005)(forthcoming); Richard S. Myers, Same-Sex “Marriage and the Public Policy Doctrine, 32 Creighton L. Rev. 45 (1998).

It is quite clear that the real objection is not to a proper understanding of the constitutional principles underlying our system of federalism but, rather, to the substantive policy implicated. So, critics of the standard view that states are permitted to

refuse to recognize marriages that violate the strong public policy of the couples' home state are, it seems safe to say, primarily driven by their opposition to the substantive policies of the states with a traditional view of marriage, even if that traditional view enjoys widespread public support, perhaps evidenced by the policy having been adopted by wide majorities of the voting populations in these states. In the context presented here today, the same dynamic seems at work. The real opposition to the Act is not to its understanding of federalism but to the substantive policy (promoting parental involvement in the decision by a minor whether to have an abortion) that the legislation seems designed to permit states to pursue.

States that have the requisite contacts to the individuals and/or the events involved are permitted to apply their own law. We see this even in the area of contracts where a respect for private ordering has long-standing support in our legal traditions. Even here, states do not allow individuals blanket authority to evade the laws of a state that is competent to legislate on the matter under review. Travel to a state with different law or drafting a choice of law clause to select law that is desired by the parties do not invariably result in successful evasion. A forum state will reject such an attempt when the other state's law is contrary to the fundamental policy of the state whose law the parties are attempting to avoid. This outcome is reflected in the Restatement (Second) of Conflict of Laws section 187 (1971) and in the laws of nearly every state. See Myers, 3 Ave Maria L. Rev. (2005)(forthcoming); Myers, 32 Creighton L. Rev. at 52-55.

These principles are quite basic and are quite commonly accepted. As the current debate about the interjurisdictional recognition of same-sex "marriages" and quasi-marital statuses indicates, these principles are challenged when opponents' principal objection is to the substantive policy of the state whose law is being evaded. But basic principles of federalism and long-standing law support a state's authority to avoid evasion of its laws.

This is even more secure when we are not dealing simply with a state law that is being interpreted to apply when some of the relevant events take place outside the state. Here, of course, we are dealing with a proposed federal law, and as Mark Rosen stated, "[a]s a structural matter, a federal government that umpires the sister states' regulatory powers vis-a-vis one another is eminently sensible, and several constitutional provisions...empower Congress to serve that function." Rosen Statement, *supra*, at 15.

Moreover, there is no "right to travel" problem presented by the Act. The Supreme Court has recently considered the right to travel in a case, *Saenz v. Roe*, 526 U. S. 489 (1999), that seems to have been given rather limited scope by subsequent cases. In any event, *Saenz v. Roe* does not suggest that the Act is constitutionally infirm. *Saenz* explained that there are three components to the "right to travel" recognized by the Supreme Court. The first component, the right to enter and leave a sister State is not at all implicated by the Act. See Rosen Statement, *supra*, at 15. The third component, the right of a new citizen to be treated the same as other citizens of the State, is not at all implicated either because the Act deals with situations where the minor has not changed her state citizenship. The second component of the right to travel, the right to be treated as a welcome visitor rather than an unfriendly alien, is not violated by the Act. This second component of the right to

travel is protected by the Privileges and Immunities Clause of Article IV of the Constitution. This Clause prevents “discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States. But it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it.” *Toomer v. Witsell*, 334 U. S. 385, 396 (1948). The kind of discrimination that is constitutionally suspect is discrimination against out-of staters, simply because of their place of origin. That is not at all what the Act attempts to reinforce. The Act is not trying to affirm unreflective bias against non-citizens; rather, the Act is designed to aid states in their efforts to have important substantive policies with regard to their residents followed. Because there is, then, a reason (defined by the law of the minor’s home state) apart from the minor’s status as an out-of stater to treat the minor differently, the presumption against discrimination is not at all implicated. See Myers, 32 Creighton L. Rev. at 56-59 (discussing this issue in the context of interjurisdictional recognition of same-sex “marriages”).

In conclusion, the two constitutional questions I have reviewed do not present any significant obstacle to passage of the Act. The Act is well within the scope of Congressional authority and is perfectly consistent with principles of federalism. Those who oppose this Act would be well-advised to focus their attention on the substance of the legislation.