

# ROE ON THE REZ: THE CASE FOR EXPANDING ABORTION ACCESS ON TRIBAL LAND

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*While the courts have codified and reaffirmed the right to abortion, some state legislatures have enacted increasingly burdensome restrictions on abortion. In a number of states, there is only one abortion clinic available for thousands of people. This Note explores whether Native American tribes, as sovereigns, may establish holistic reproductive health clinics on tribal land. It analyzes abortion law in Wisconsin under the framework of Public Law 280 jurisprudence to determine that clinics in Indian Country would not be subject to state abortion regulations. This Note also explores the practical implications of a Native-owned-and-operated clinic, and concludes that these clinics would greatly increase access to safe reproductive health care for Native and non-Native people.*

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## I. INTRODUCTION

In early 2006, the South Dakota state legislature passed a near-total ban on abortions without exceptions for cases of incest or sexual assault.<sup>1</sup> At that time (and to date), there was only one abortion clinic to service the entire state.<sup>2</sup>

<sup>1</sup> Women's Health and Human Life Protection Act, 2006 S.D. Sess. Laws ch. 119. A voter referendum later struck down the bill. Monica Davey, *South Dakotans Reject Sweeping Abortion Ban*, N.Y. TIMES (Nov. 8, 2006), <https://www.nytimes.com/2006/11/08/us/politics/08issues.html> [https://perma.cc/3CLK-QV4V].

<sup>2</sup> *South Dakota Governor Signs Abortion Ban*, NBC NEWS (Mar. 7, 2006), <http://www.nbcnews.com/id/11699703/ns/politics/t/south-dakota->

Concerned about the effects of the ban on her community, Cecilia Fire Thunder, the first woman president of the Oglala Lakota<sup>3</sup> Tribe on the Pine Ridge Reservation, vowed to open an abortion clinic on her tribe's land.<sup>4</sup> Cecilia Fire Thunder imagined a full-service reproductive health clinic named Sacred Choices<sup>5</sup> that would provide contraception, sexual education, and support for sexual assault victims.<sup>6</sup> In response to Fire Thunder's statements, South Dakota Attorney General Larry Long, known for his anti-abortion<sup>7</sup> views,<sup>8</sup> admitted that the federally recognized tribe was not required to follow state law, thus opening a path for a lawful abortion clinic on the reservation.<sup>9</sup> For her part, Fire Thunder made clear that because the tribe was sovereign, South Dakota had no jurisdiction to prohibit abortion on Pine Ridge.<sup>10</sup> After several attempts, the all-male Oglala Tribal Council ousted

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governor-signs-abortion-ban/#.WUw-ZOpnow [https://perma.cc/4XH8-EC35].

<sup>3</sup> The Oglala Lakota are also known as the Oglala Sioux, the name under which the tribe was federally recognized. I refer to them as Lakota as this appears to be the tribe's preference.

<sup>4</sup> *Hail Cecilia Fire Thunder: A Voice for Women and the Indian Family*, INDIAN COUNTRY TODAY (Nov. 17, 2004), <https://indiancountrymedianetwork.com/news/hail-cecilia-fire-thunder-a-voice-for-women-and-the-indian-family-2/> [https://perma.cc/58Z3-A73A].

<sup>5</sup> *Fire Thunder's Lightning*, ECONOMIST (June 29, 2006), <http://www.economist.com/node/7119415> [https://perma.cc/KVE5-M754].

<sup>6</sup> Rose Aguilar, *The Power of Thunder*, ALTERNET (Apr. 3, 2006), [https://www.alternet.org/story/34314/the\\_power\\_of\\_thunder](https://www.alternet.org/story/34314/the_power_of_thunder) [https://perma.cc/N42E-4Y96].

<sup>7</sup> A note on language: Typically, those against abortion refer to themselves as "pro-life." I refer to them as anti-abortion, consistent with the language utilized in reproductive justice circles. I use the "pro-life" moniker when referring to a person's self-identification.

<sup>8</sup> See Press Release, Office of the S.D. Att'y Gen., Eighth Circuit Court Reverses Abortion Decision, <https://atg.sd.gov/OurOffice/Media/pressreleasesdetail.aspx?id=412> [https://perma.cc/GU5T-TR23] (noting Attorney General Larry Long's frequent declarations opposing abortion).

<sup>9</sup> The Balt. Sun, *S.D. Tribe May Offer Abortions*, DENV. POST (Apr. 1, 2006), <https://www.denverpost.com/2006/04/01/s-d-tribe-may-offer-abortions/> [https://perma.cc/PSN2-KCNJ].

<sup>10</sup> Tim Giago, *Oglala Sioux President on State Abortion Law*, INDIANZ.COM (Mar. 21, 2006), <https://www.indianz.com/News/2006/013061.asp> [https://perma.cc/696C-YP6R].

Fire Thunder from her presidency and subsequently banned all abortions on the reservation.<sup>11</sup>

This Note asserts that tribes should consider establishing full-service reproductive health clinics on their sovereign land. Despite the increasingly divided legal and social landscape of abortion, tribes may greatly expand access to safe and legal abortion for both their membership and the general public. Courts have codified and reaffirmed the right to abortion.<sup>12</sup> States may not impose an “undue burden” upon the right to choose, defined as a state regulation that places a substantial obstacle in the path of a woman seeking to terminate her pregnancy.<sup>13</sup> However, some state legislatures have enacted increasingly burdensome restrictions on abortions. These restrictions include requirements that abortions be performed before a certain gestational age, limitations on the use of Medicaid funds to pay for the procedure, state mandated counseling, and mandatory waiting periods.<sup>14</sup> In Kentucky, North Dakota, South Dakota, West Virginia, and Wyoming, there remains but one clinic in each state to service hundreds of thousands of women.<sup>15</sup> On the federal level, Justice Anthony Kennedy, a crucial swing vote on abortion, announced his retirement from the Supreme Court in June 2018,<sup>16</sup> prompting critics to wonder if *Roe* will be overturned.<sup>17</sup>

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<sup>11</sup> Carson Walker, *Tribal Leader Ousted over Abortion Clinic*, WASH. POST (Jun. 30, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/06/30/AR2006063000700.html> [<https://perma.cc/5NAC-FV94>].

<sup>12</sup> See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992); *Roe v. Wade*, 410 U.S. 113, 153 (1973).

<sup>13</sup> *Casey*, 505 U.S. at 876.

<sup>14</sup> *An Overview of Abortion Laws*, GUTTMACHER INST., <https://www.guttmacher.org/state-policy/explore/overview-abortion-laws> [<https://perma.cc/9RE6-8F97>].

<sup>15</sup> Linley Sanders, *Inside the States with One Abortion Clinic: Kentucky Fights for Its Last Provider in 2018*, NEWSWEEK (Jan. 8, 2018), <http://www.newsweek.com/state-without-abortion-clinic-kentucky-772692> [<https://perma.cc/6PCW-H27F>].

<sup>16</sup> Michael D. Shear, *Supreme Court Justice Anthony Kennedy Will Retire*, N.Y. TIMES (June 27, 2018), <https://www.nytimes.com/2018/06/27/us/politics/anthony-kennedy-retire-supreme-court.html> [<https://perma.cc/GZ6R-MFCA>].

<sup>17</sup> Victoria Albert, *Anthony Kennedy's Retirement Has Sparked a Push to Get IUDs*, DAILY BEAST (June 27, 2018), <https://www.thedailybeast.com/anthony-kennedy-retirement-has-sparked-a-push-to-get-iuds>.

Part II will briefly discuss the legal history of tribal sovereignty, the Supreme Court's abortion jurisprudence, and Native American attitudes towards abortion. It will also introduce Public Law 280 ("P.L. 280"), the federal statute that grants states jurisdiction to legislate over certain conduct in Indian Country. In Part III, this Note examines Wisconsin's government and abortion laws, because Wisconsin has adopted P.L. 280 and the Guttmacher Institute identified it as a state hostile towards abortion.<sup>18</sup> Part III explores whether Wisconsin's abortion statutes are regulatory or prohibitory in nature, as Wisconsin would not have jurisdiction over a tribal clinic if its statutes are regulatory. Part IV will conclude that P.L. 280 does not apply to tribes with regard to abortion, because Wisconsin's abortion statutes are regulatory. Thus, tribes are free, within their rights as inherent sovereigns, to pursue Fire Thunder's proposal. Part IV will then consider whether Congress would abrogate tribal sovereignty. This Note concludes with a discussion of the benefits of tribal reproductive health clinics and recommendations for tribes wishing to execute Fire Thunder's proposal.

## II. TRIBAL SOVEREIGNTY AND ABORTION THROUGH TIME

### A. A Legal History of Inherent Tribal Sovereignty

Pre-European contact, Native American tribes were largely autonomous, self-governing entities.<sup>19</sup> During the colonial period, Europeans interacted with tribes as separate sovereigns.<sup>20</sup> European governments and individual colo-

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beast.com/anthony-kennedys-retirement-has-sparked-a-push-to-get-iuds [https://perma.cc/5S72-QWCC].

<sup>18</sup> The Guttmacher Institute, a research and policy organization committed to reproductive health and rights, declared that twenty-nine states were either hostile or extremely hostile to abortion rights in 2017. *States Hostile to Abortion Rights, 2017*, GUTTMACHER INST. (Jan. 2, 2018), <https://www.guttmacher.org/infographic/2018/states-hostile-abortion-rights-2017> [https://perma.cc/M8QB-8VUX].

<sup>19</sup> COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.01[1][a], at 206 (Nell Jessup Newton ed., 2012 ed. 2012) [hereinafter COHEN'S HANDBOOK] (citing STEPHEN CORNELL, *THE RETURN OF THE NATIVE: AMERICAN INDIAN POLITICAL RESURGENCE* 72–76 (1988)).

<sup>20</sup> Felix S. Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, 31 GEO. L.J. 1, 13–14 (1942).

nists, for instance, engaged with tribes through official treaties.<sup>21</sup> These pre-Revolution patterns of engagement, in turn, influenced the fledgling United States' relationship with tribes.<sup>22</sup> In *Worcester v. Georgia*, one of the foundational decisions in the seminal Marshall trilogy of Indian law cases,<sup>23</sup> Justice Marshall noted, "Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial."<sup>24</sup> In *Worcester*, the State of Georgia had enacted statutes to assert jurisdiction over tribal land.<sup>25</sup> The Supreme Court held that states could not interfere with or inhibit tribal sovereignty.<sup>26</sup> Only the federal government could act in such a manner pursuant to the Indian Commerce Clause, which grants Congress plenary and exclusive power over tribes.<sup>27</sup>

The treatment of Native Americans as distinct entities was partially founded upon racist and paternalistic notions about tribes' savagery.<sup>28</sup> As noted by Justice Marshall in *Cherokee Nation v. Georgia* and *Johnson v. M'Intosh*, tribes were "fierce savages"<sup>29</sup> from "[a] people once numerous, powerful, and truly independent . . . gradually sinking beneath our superior policy."<sup>30</sup> Thus, despite possessing sovereignty, Justice Marshall reasoned that tribes should be considered "domestic dependent nations" whose "relation to the United States resembles that of a ward to his guardian."<sup>31</sup> The

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<sup>21</sup> RUSSEL LAWRENCE BARSH & JAMES YOUNGBLOOD HENDERSON, *THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY* 33 (1980).

<sup>22</sup> Cohen, *supra* note 20, at 16–21.

<sup>23</sup> *Worcester v. Georgia*, 31 U.S. 515 (1832); *see also* *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Johnson v. M'Intosh*, 21 U.S. 543 (1823). Taken together, these cases form the foundation of federal Indian law in American jurisprudence.

<sup>24</sup> *Worcester*, 31 U.S. at 559.

<sup>25</sup> *Id.* at 516.

<sup>26</sup> *Id.* at 538, 540.

<sup>27</sup> *United States v. Lara*, 541 U.S. 193, 200 (2004).

<sup>28</sup> *See* ROBERT A. WILLIAMS, JR., *LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA* 51–52, 72 (2005) (discussing White racial superiority under European law and racial judicial language in the Marshall trilogy).

<sup>29</sup> *Johnson v. M'Intosh*, 21 U.S. 543, 590 (1823).

<sup>30</sup> *Cherokee Nation v. Georgia*, 30 U.S. 1, 15 (1831).

<sup>31</sup> *Id.* at 13.

Supreme Court has since reiterated the domestic dependent status of tribes.<sup>32</sup>

Retaining sovereignty grants Native American tribes certain benefits. These include sovereign immunity from suit,<sup>33</sup> the power to determine their government structure and membership,<sup>34</sup> the power to make substantive laws<sup>35</sup> and tax members and nonmembers,<sup>36</sup> the power to create court systems,<sup>37</sup> and the power to exclude people from their territories.<sup>38</sup> However, though tribes may create judicial systems and enact penal codes, the federal government retains jurisdiction over crimes committed on reservations by Natives and non-Natives.<sup>39</sup> In 1883, the Supreme Court ruled in *Crow Dog* that tribal law governs crimes committed among Native Americans in Indian Country.<sup>40</sup> In response, Congress passed the Indian Major Crimes Act of 1885 (Major Crimes Act), granting the federal government jurisdiction over an enumerated list of crimes committed among Native Americans, including murder, rape, and kidnapping.<sup>41</sup> The Court upheld the Major Crimes Act in *Kagama*, noting that it was necessary and constitutional because of tribes' dependence on the federal government.<sup>42</sup> Tribes' "very weakness and helplessness" granted the federal government "the duty of protection, and

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<sup>32</sup> See *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141 (1982).

<sup>33</sup> *Bay Mills*, 572 U.S. at 788.

<sup>34</sup> *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55–56 (1978).

<sup>35</sup> COHEN'S HANDBOOK, *supra* note 19, § 4.02.

<sup>36</sup> *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152 (1980).

<sup>37</sup> *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14–15 (1987).

<sup>38</sup> *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141 (1982).

<sup>39</sup> Indian Major Crimes Act, 18 U.S.C. § 1153 (2017) (original version at ch. 341, 23 Stat. 362, 382 (1885)).

<sup>40</sup> *Ex parte Crow Dog*, 109 U.S. 556, 572 (1883).

<sup>41</sup> 18 U.S.C. § 1153 ("Any Indian who commits . . . any of the following offenses . . . shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.").

<sup>42</sup> *United States v. Kagama*, 118 U.S. 375, 383–84 (1886) ("They are communities *dependent* on the United States,-dependent [sic] largely for their daily food; dependent for their political rights. They owe no allegiance to the states, and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies.").

with it the power” to exercise jurisdiction over tribes.<sup>43</sup> *Kagama*, in granting the federal government the power to legislate over matters typically left up to individual tribes, effectively weakened tribal sovereignty.<sup>44</sup>

Post-*Kagama*, Congress terminated the practice of treaty making with tribes, ushering an “increase in statutory power vested in Indian service officials and a steady narrowing of the control and rights of individual Indians and tribes.”<sup>45</sup> This set the stage for a shift toward federal Indian policies aimed at assimilation. Policies such as the General Allotment Act of 1887, which encouraged tribal members to surrender communally-owned lands for individual tracts,<sup>46</sup> and Indian boarding schools designed to “[k]ill the Indian ... and save the man,”<sup>47</sup> devastated tribes across the country. From 1881 to 1934, tribes lost roughly 150 million acres of land through allotment, sale, or concession.<sup>48</sup>

## 1. The Termination Era and Public Law 280

Recognizing the negative effects of assimilationist policies on tribes, Congress implemented new policies designed to promote tolerance and respect for Native American culture. This is reflected in the passage of the Indian Reorganization Act (“IRA”).<sup>49</sup> Congress designed the IRA to remedy the loss of tribal land by permitting the federal government to take land in trust for tribes as well as encouraging tribal economic

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<sup>43</sup> *Id.* at 384.

<sup>44</sup> See Daniel L. Rotenberg, *American Indian Tribal Death—A Centennial Remembrance*, 41 U. MIAMI L. REV. 409 (1986).

<sup>45</sup> COHEN’S HANDBOOK, *supra* note 19, § 1.04, at 72 (citing PAUL STUART, *THE INDIAN OFFICE: GROWTH AND DEVELOPMENT OF AN AMERICAN INSTITUTION, 1865–1900* (1979)).

<sup>46</sup> *Id.*

<sup>47</sup> Richard H. Pratt, *The Advantages of Mingling Indians with Whites*, in PROCEEDINGS OF THE NATIONAL CONFERENCE OF CHARITIES AND CORRECTION AT THE NINETEENTH ANNUAL SESSION HELD IN DENVER, COL., JUNE 23–29, 1892, at 45, 46 (Isabel C. Barrows ed., Boston, Press of Geo. H. Ellis 1892).

<sup>48</sup> COHEN’S HANDBOOK, *supra* note 19, § 1.04, at 73.

<sup>49</sup> Indian Reorganization (Wheeler-Howard) Act, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. § 5108 (2017)).

development.<sup>50</sup> Tribes were to have complete dominion over trust lands. This trend, however, did not last long. During the postwar period, Congress shifted away from remedial policies towards the “Termination Era,” during which the government again turned to assimilationist policies aimed at terminating tribes.<sup>51</sup>

One of the hallmarks of the Termination Era was P.L. 280, a statute broadly authorizing state jurisdiction over criminal and civil adjudicative matters in Indian Country.<sup>52</sup> P.L. 280 was a response to perceived lawlessness on tribal land.<sup>53</sup> With the hope that state jurisdiction would reduce lawlessness, P.L. 280 grants Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin almost complete jurisdiction over criminal offenses by or against Natives in Indian Country.<sup>54</sup> It also grants the same states jurisdiction over civil causes of action when Natives are one or more parties to a suit.<sup>55</sup> The statute does not grant states general civil or regulatory jurisdiction over Indian Country. Tribes are free to regulate administrative matters as they see fit. Other states may opt into the statute’s jurisdictional scheme. At the time of P.L. 280’s passage, tribes had no say in whether state jurisdiction would apply to them. Fifteen years after the

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<sup>50</sup> Lawrence Kelly, *The Indian Reorganization Act: The Dream and the Reality*, 44 PAC. HIST. REV. 291, 294 (1975).

<sup>51</sup> See H.R. Con. Res. 108, 83d Cong., 67 Stat. B132 (1953) (terminating the federal-tribe relationship with enumerated tribes); see also Charles F. Wilkinson & Eric R. Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139, 151–54 (1977) (“[A]pproximately 109 tribes and bands were terminated. A minimum of 1,362,155 acres and 11,466 individuals were affected.”).

<sup>52</sup> Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 (2017); 25 U.S.C. §§ 1321–26 (2017); 28 U.S.C. § 1360 (2017)).

<sup>53</sup> See *Bryan v. Itsaca County*, 426 U.S. 373, 379 (1976) (“The primary concern of Congress in enacting Pub. L. 280 that emerges from its sparse legislative history was with the problem of lawlessness on certain Indian reservations, and the absence of adequate tribal institutions for law enforcement.”); Vanessa J. Jiménez & Soo C. Song, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 AM. U. L. REV. 1627, 1658–60 (1998). Some scholars have argued that P.L. 280 actually increased lawlessness in Indian Country. See generally Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. REV. 1405, 1415–37 (1997).

<sup>54</sup> 18 U.S.C. § 1162 (2017).

<sup>55</sup> 28 U.S.C. § 1360 (2017).

passage of P.L. 280, Congress mandated that Native Americans must consent to their state's assumption of jurisdiction.<sup>56</sup> Fifteen states currently have either partial or mandatory jurisdiction pursuant to P.L. 280.<sup>57</sup>

Though P.L. 280 only grants states jurisdiction over criminal matters, scholars and tribes alike have criticized P.L. 280 as abrogating tribal sovereignty.<sup>58</sup> This assertion is partly based on the legal context in which Congress passed P.L. 280.<sup>59</sup> Other Termination Era policies included the transfer of educational responsibilities from tribes and the federal government to states, authorization for sale and lease of tribal land to non-Natives, and relocation programs that encouraged Natives to move away from reservations.<sup>60</sup> Land and population loss threaten tribal sovereignty. Tribes can only exercise sovereignty to the extent they own the land and their members reside within it.

Despite evidence to the contrary, the Supreme Court held in *California v. Cabazon Band of Mission Indians* that P.L. 280 "plainly was not intended to effect total assimilation of Indian tribes into mainstream American society."<sup>61</sup> The Court adopted a test to determine whether a state's law falls within P.L. 280: If the state law intends to prohibit certain conduct, P.L. 280 applies and grants the state jurisdiction over those affairs in Indian Country.<sup>62</sup> If the state law generally permits

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<sup>56</sup> Civil Rights Act of 1968, Pub. L. No. 90-284, § 406, 82 Stat. 73, 80 ("State jurisdiction acquired pursuant to this title with respect to criminal offenses or civil causes of action . . . shall be applicable in Indian [C]ountry only where the enrolled Indians within the affected area of such Indian [C]ountry accept such jurisdiction by a majority vote of the adult Indians voting at a special election held for that purpose.").

<sup>57</sup> See COHEN'S HANDBOOK, *supra* note 19, at 92.

<sup>58</sup> See, e.g., Ross Naughton, Comment, *State Statutes Limiting the Dual Sovereignty Doctrine: Tools for Tribes to Reclaim Criminal Jurisdiction Stripped by Public Law 280?*, 55 UCLA L. REV. 489, 493, 516 (2007).

<sup>59</sup> See generally H.R. Con. Res. 108, 83d Cong., 67 Stat. B132 (1953) (terminating the federal-tribe relationship with enumerated tribes). See Wilkinson & Biggs, *supra* note 51, at 158-59.

<sup>60</sup> Wilkinson & Biggs, *supra* note 51, at 149-50.

<sup>61</sup> *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 208 (1987) (citing *Bryan v. Itsaca County*, 426 U.S. 373, 387 (1976) (holding that P.L. 280 does not grant states general civil regulatory authority)), *superseded by statute*, Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988).

<sup>62</sup> *Id.*

that conduct, then the statute is civil or regulatory and P.L. 280 does not authorize enforcement.<sup>63</sup> For example, a penal law criminalizing armed robbery and describing penalties for such conduct would fall within the criminal or prohibitory category. Conversely, a statute governing cosmetology licenses is civil or regulatory. States cannot exercise jurisdiction over those matters on Indian land. *Cabazon* appears to limit P.L. 280's infringement on tribal sovereignty.

## 2. The Current State of Tribal Sovereignty

Though the Court's decision in *Cabazon* reflects contemporary federal Indian policy, which prioritizes tribal self-determination, the state of tribal sovereignty is still precarious. The *Cabazon* Court noted that granting states civil jurisdiction would destroy tribal institutions and values.<sup>64</sup> Tribes are more empowered than ever to create policy without federal intervention.<sup>65</sup> But federal Indian policy is, to quote Justice Thomas, "schizophrenic."<sup>66</sup> As the preceding summary of tribal sovereignty suggests, federal Indian policy is cyclical, ebbing between assimilation and promotion of tribal self-determination.<sup>67</sup> Federal Indian policy may swing back towards assimilation again. Indeed, Indian law scholar Matthew Fletcher wrote in a 2006 article that "it is a dangerous time for Indian tribes," because courts now tend to make policy in federal Indian law cases.<sup>68</sup> In general, the Supreme Court prefers its own federal Indian policies to congressional policy statements.<sup>69</sup> Because of the inconsistencies between

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<sup>63</sup> *Id.*

<sup>64</sup> *Id.* (citing *Itsaca County*, 426 U.S. at 388).

<sup>65</sup> Matthew L.M. Fletcher, *The Supreme Court and Federal Indian Policy*, 85 NEB. L. REV. 121, 123–24 (2006) ("Federal Indian law and policy is no longer driven by Congress, the bureaucracy, or even the states. Indian tribes lead the way and the rest have to catch up . . . Indian tribes in recent decades have outpaced the law in many ways. Through their commitment to tribal self-determination, Congress and the Executive have opened the door—and tribes have finally sprinted through.").

<sup>66</sup> *United States v. Lara*, 541 U.S. 193, 219 (2004) (Thomas, J., concurring).

<sup>67</sup> Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069, 1117 (2004).

<sup>68</sup> See Fletcher, *supra* note 65, at 125.

<sup>69</sup> *Id.* at 163.

federal and judicial policy on Indian law, tribal sovereignty is in flux.

### B. A Brief Summary of the Supreme Court's Abortion Jurisprudence

In order to understand the context of Cecilia Fire Thunder's proposal, a brief examination of abortion jurisprudence is necessary. From the mid-1800's to the 1960's, abortion was largely illegal and underground.<sup>70</sup> By the 1960's, some states reformed their abortion laws, spurred in part by the American Law Institute's proposing a Model Penal Code provision that legalized abortion in limited circumstances, such as pregnancies resulting from rape.<sup>71</sup> In 1973, the *Roe* Court held that the right to abortion is protected under the Due Process Clause of the Fourteenth Amendment as part of a general right to privacy.<sup>72</sup> Since then, the Supreme Court has reaffirmed its major holding that access to abortion is a fundamental right, but has largely abandoned the *Roe* framework.<sup>73</sup> In *Roe*, the Court used strict scrutiny to determine that abortion falls under the right to privacy.<sup>74</sup> The *Roe* Court also set forth that states could regulate abortion during the second and third trimesters of pregnancy, when the state's interest in potential life becomes "compelling."<sup>75</sup>

Twenty years later, the Court in *Casey* upheld *Roe*'s holding that (1) the state may not unduly interfere with the right to abortion before viability, (2) the state nonetheless may restrict abortion after the fetus becomes viable, and (3) the state has legitimate interests in protecting the

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<sup>70</sup> See Rachel Benson Gold, *Lessons from Before Roe: Will Past Be Prologue?*, 6 GUTTMACHER POL'Y REV. 8, 8 (2003), [https://www.guttmacher.org/sites/default/files/article\\_files/gr060108.pdf](https://www.guttmacher.org/sites/default/files/article_files/gr060108.pdf) [<https://perma.cc/3V2V-XQLM>]. For more on underground abortions pre-*Roe*, see Rickie Solinger, *Extreme Danger: Women Abortionists and Their Clients Before Roe v. Wade*, in NOT JUNE CLEAVER: WOMEN AND GENDER IN POSTWAR AMERICA, 1945-1960, at 335, 335-57 (Joanne Meyerowitz ed., 1994).

<sup>71</sup> DAVID P. CLINE, CREATING CHOICE: A COMMUNITY RESPONDS TO THE NEED FOR ABORTION AND BIRTH CONTROL, 1961-1973, at 23-24 (2006).

<sup>72</sup> *Roe v. Wade*, 410 U.S. 113, 153-54 (1973).

<sup>73</sup> See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846-47 (1992).

<sup>74</sup> *Roe*, 410 U.S. at 154-55.

<sup>75</sup> *Id.* at 162-63.

mother's health and the fetus's future life.<sup>76</sup> The Court then replaced the application of strict scrutiny with the current undue burden standard.<sup>77</sup> This standard asks a Court to determine whether "state regulation imposes an undue burden on a woman's ability" to seek abortion, thus triggering the protection of the Due Process Clause.<sup>78</sup> In adopting the undue burden standard, the Court rejected the trimester framework.<sup>79</sup>

Since *Casey*, scholars have argued that the case inadvertently created a roadmap for more state regulation of abortion.<sup>80</sup> The Court explicitly noted that what was at stake in the case was "the woman's right to make the ultimate decision."<sup>81</sup> Unless it affects a woman's right to choose, a state law designed to "persuade [a woman] to choose childbirth over abortion will be upheld if reasonably related to that goal."<sup>82</sup> Using this logic, the Court upheld Pennsylvania's informed consent requirement, which entailed a twenty-four-hour waiting period between mandatory counseling and the abortion procedure.<sup>83</sup> With the Court's tacit approval, states were free to enact statutes with the express goal of dissuading abortion.

The Court addressed some of these restrictive state statutes in *Whole Woman's Health v. Hellerstedt*. There, the Court upheld the undue burden framework. It also clarified that courts must consider "the burdens a law imposes on abortion access together with the benefits those laws con-

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<sup>76</sup> *Casey*, 505 U.S. at 846.

<sup>77</sup> *Id.* at 846–47.

<sup>78</sup> *Id.* at 874.

<sup>79</sup> *Id.* at 872–73.

<sup>80</sup> See JENNIFER NELSON, *MORE THAN MEDICINE: A HISTORY OF THE FEMINIST WOMEN'S HEALTH MOVEMENT* 134, 145, 157 (2015); Caitlin E. Borgmann, *Abortion, the Undue Burden Standard, and the Evisceration of Women's Privacy*, 16 WM. & MARY J. WOMEN & L. 291 (2010); Thomas J. Molony, *Roe, Casey, and Sex-Selection Abortion Bans*, 71 WASH. & LEE L. REV. 1089 (2014); Mark H. Woltz, Note, *A Bold Reaffirmation? Planned Parenthood v. Casey Opens the Door for States to Enact New Laws to Discourage Abortion*, 71 N.C. L. REV. 1787 (1993).

<sup>81</sup> *Casey*, 505 U.S. at 887.

<sup>82</sup> *Id.* at 888.

<sup>83</sup> *Id.* at 881.

fer.”<sup>84</sup> In *Whole Woman’s Health*, the Court struck down two major targeted regulations of abortion providers in Texas: the admitting privileges requirement (doctors performing abortions must have admitting privileges at a local hospital no further than thirty minutes away from the abortion clinic)<sup>85</sup> and the surgical center requirement (abortion clinics must be equipped as ambulatory surgical centers).<sup>86</sup>

Despite the Court affirming the right to abortion, access to abortion remains limited. Admitting privileges and surgical center requirements are still common in states hostile toward abortion.<sup>87</sup> The Guttmacher Institute found that seventeen states have “onerous licensing standards” for abortion providers that are “comparable or equivalent” to Texas’s ambulatory surgical center standards overturned in *Whole Woman’s Health*.<sup>88</sup> Twelve states require doctors to have some kind of affiliation with a local hospital, two requiring admitting privileges and ten requiring either admitting privileges or an alternative agreement.<sup>89</sup> Women still face other regulatory barriers to abortion, such as mandatory waiting periods of up to seventy-two hours<sup>90</sup> and ultrasounds.<sup>91</sup>

### C. Historical and Contemporary Perspectives from Native American People on Abortion

Native American communities have a unique perspective on abortion. Historical accounts show that Native women engaged in abortive practices. Writings from the early

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<sup>84</sup> *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2309–10 (2016).

<sup>85</sup> *Id.* at 2310–13.

<sup>86</sup> *Id.* at 2314–18.

<sup>87</sup> *States Hostile to Abortion Rights, 2017*, *supra* note 18.

<sup>88</sup> *Targeted Regulation of Abortion Providers*, GUTTMACHER INST. (Jan. 1, 2019), <https://www.guttmacher.org/print/state-policy/explore/targeted-regulation-abortion-providers> [<https://perma.cc/2M4Q-7JZL>].

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

<sup>90</sup> *Counseling and Waiting Periods for Abortion*, GUTTMACHER INST. (Jan. 1, 2019), <https://www.guttmacher.org/state-policy/explore/counseling-and-waiting-periods-abortion> [<https://perma.cc/NB2A-95W4>].

<sup>91</sup> *Requirements for Ultrasound*, GUTTMACHER INST. (Jan. 1, 2019), <https://www.guttmacher.org/print/state-policy/explore/requirements-ultrasound> [<https://perma.cc/4SDT-NZ7R>].

1700's indicate that Native American women<sup>92</sup> induced abortions.<sup>93</sup> According to at least one scholar, most tribes had different abortive and contraceptive practices.<sup>94</sup> In 1826, the Cherokee Council passed a statute penalizing “infanticide” committed during pregnancy.<sup>95</sup> The Seneca-Cayuga also prohibited abortion during the early 1800's.<sup>96</sup> Some Native women may have induced abortion by consuming plant abortifacients or applying pressure to the abdomen.<sup>97</sup> Navajo women in captivity at Bosque Redondo<sup>98</sup> were suspected to terminate pregnancy so frequently that an army doctor speculated it would “finally wipe [the tribe] out of existence.”<sup>99</sup>

Currently, the Indian Health Service (IHS) is the largest medical provider for Natives living in Indian Country. The IHS is financed by federal funds as an arm of the Department of Health and Human Services (HHS).<sup>100</sup> Pursuant to the Hyde Amendment, which has been attached to appropriations bills since 1976,<sup>101</sup> federal Medicaid funds

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<sup>92</sup> I acknowledge that not everyone who seeks an abortion identifies as a woman. For the sake of clarity, I refer to those who seek abortions as women or patients.

<sup>93</sup> Zoila Acevedo, *Abortion in Early America*, 4 WOMEN & HEALTH 159, 159 (1979).

<sup>94</sup> *Id.* (citing ELISE BOULDING, THE UNDERSIDE OF HISTORY: A VIEW OF WOMEN THROUGH TIME (1976)).

<sup>95</sup> NANCY SHOEMAKER, AMERICAN INDIAN POPULATION RECOVERY IN THE TWENTIETH CENTURY 48–49 (1999).

<sup>96</sup> *Id.*

<sup>97</sup> See *id.*; Acevedo, *supra* note 93, at 160.

<sup>98</sup> Richard W. Hughes, *Indian Law*, 18 N.M. L. REV. 403, 406 (1988). For more on the “Long Walk” from Arizona to Bosque Redondo, see Howard W. Gorman, *Narrative About the Long Walk to Fort Sumner*, in NAVAJO STORIES OF THE LONG WALK PERIOD 23–42 (Broderick H. Johnson ed., 1973), and Gerald E. Thompson, “*To the People of New Mexico*”: Gen. Carleton Defends the Bosque Redondo, 14 J. SW. 347 (1972).

<sup>99</sup> Letter from M. Hillary, Brevet Captain & Assistant Surgeon, U.S. Army, to Colonel Theo. H. Dodd, Agent for Navajo Indians (Sept. 6, 1866), in REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS FOR THE YEAR 1866, at 150 (Washington, D.C., Gov't Printing Office 1866).

<sup>100</sup> *Annual Budget*, INDIAN HEALTH SERV., U.S. DEP'T OF HEALTH & HUMAN SERVS., <https://www.ihs.gov/aboutihs/annualbudget/> [<https://perma.cc/9KKH-3QSU>].

<sup>101</sup> See Department of Labor Appropriation Act, Pub. L. No. 94-439, § 209, 90 Stat. 1418, 1434 (1976) (making appropriations for the Departments of Labor, Health, Education, and Welfare, and related agencies, for the fiscal year ending September 30, 1977, and for other purposes).

cannot cover abortions, except in narrowly defined exceptions. More than two million Natives currently receive medical care through the IHS,<sup>102</sup> roughly one-third of the Native population.<sup>103</sup> IHS Assistant Surgeon General Michael H. Trujillo clarified in a 1996 memo that the IHS may use IHS funds to provide abortions only in the same circumstances as the HHS—when necessary to save the mother’s life or when the pregnancy is the result of rape or incest.<sup>104</sup> The IHS is often the only reproductive health care provider for Native people. Thus, Native women have less access to abortion than American women living outside of reservations.<sup>105</sup>

Scholars have posited that the IHS is unequipped to provide abortions, even under the exceptions provided by the Hyde Amendment.<sup>106</sup> In 2002, the Native American Women’s Health Education Resource Center (NAWHERC) found that sixty-two percent of IHS service units did not provide abortions, even when the mother’s life was in danger.<sup>107</sup> That year,

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<sup>102</sup> *IHS Profile*, INDIAN HEALTH SERV., <https://www.ihs.gov/newsroom/index.cfm/factsheets/ihsprofile/> [<https://perma.cc/CEU6-TMMZ>].

<sup>103</sup> JENNY PORTER, PROFILE AMERICA FACTS FOR FEATURES: AMERICAN INDIAN AND ALASKA NATIVE HERITAGE MONTH: NOVEMBER 2016 (2016), [https://www.census.gov/content/dam/Census/newsroom/facts-for-features/2016/cb26-ff22\\_aian.pdf](https://www.census.gov/content/dam/Census/newsroom/facts-for-features/2016/cb26-ff22_aian.pdf) [<https://perma.cc/5H3A-LV87>].

<sup>104</sup> MICHAEL H. TRUJILLO, INDIAN HEALTH SERV., U.S. DEP’T OF HEALTH & HUMAN SERVS., SPECIAL GENERAL MEMORANDUM 96-01, CURRENT RESTRICTIONS ON USE OF INDIAN HEALTH SERVICE FUNDS FOR ABORTIONS (1996), [https://www.ihs.gov/ihs/index.cfm?module=dsp\\_ihm\\_sgm\\_main&sgm=ihs\\_sgm\\_9601](https://www.ihs.gov/ihs/index.cfm?module=dsp_ihm_sgm_main&sgm=ihs_sgm_9601) [<https://perma.cc/2DWR-T2UN>].

<sup>105</sup> Shaye Beverly Arnold, *Reproductive Rights Denied: The Hyde Amendment and Access to Abortion for Native American Women Using Indian Health Service Facilities*, 104 AM. J. PUB. HEALTH 1892 (2014).

<sup>106</sup> ANDREA SMITH, CONQUEST: SEXUAL VIOLENCE AND AMERICAN INDIAN GENOCIDE 96–97 (2015). A caveat to Andrea Smith’s work: Several Native scholars have criticized Ms. Smith for falsifying claims to Cherokee heritage. Ms. Smith strongly denies the claims but has never provided proof of her membership in the tribe. She is prolific in the field of indigenous studies, but such claims, if true, question the validity of some of her scholarship. For more on this controversy, see Samantha Allen, *Meet the Native American Rachel Dolezal*, DAILY BEAST (June 30, 2015), <https://www.thedailybeast.com/meet-the-native-american-rachel-dolezal> [<https://perma.cc/6E99-V9KX>], and *Open Letter from Indigenous Women Scholars Regarding Discussions of Andrea Smith*, INDIAN COUNTRY TODAY (July 7, 2015), <https://indiancountrymedianetwork.com/news/opinions/open-letter-from-indigenous-women-scholars-regarding-discussions-of-andrea-smith/> [<https://perma.cc/X5MM-G2GR>].

<sup>107</sup> Smith, *supra* note 106.

only five percent of IHS facilities performed abortions.<sup>108</sup> In 2017, the IHS published a report finding that twenty-nine percent of Native women experienced an obstetric complication during delivery.<sup>109</sup> While Native women have similar maternal morbidity rates to American women of other ethnicities, the IHS found that Native women have higher rates of severe complications, such as gestational diabetes.<sup>110</sup>

Native American women have disproportionately high indices of intimate partner violence,<sup>111</sup> sexual assault,<sup>112</sup> and unplanned pregnancy,<sup>113</sup> creating a need for expanded access to abortion. According to NAWHERC, Native women have a relatively high rate of abortion but tend to seek abortions further along in pregnancy due to a mix of shame, lack of information, and lack of resources.<sup>114</sup> Despite limited access to abortion through their regular providers and financial challenges, Native women do terminate pregnancy. Barbara Gurr argues that for Native women, abortion is “not a private decision between a woman and her doctor (as intended in *Roe v. Wade*) but rather a very public negotiation between a Native woman, her Tribal Council, the regional

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<sup>108</sup> *Id.*

<sup>109</sup> Stephen J. Bacak et al., *Maternal Morbidity During Delivery Hospitalizations in American Indian and Alaska Native Women*, 32 IHS PRIMARY CARE PROVIDER 33, 35 (2007).

<sup>110</sup> *Id.* at 36.

<sup>111</sup> Lorraine Halinka Malcoe et al., *Socioeconomic Disparities in Intimate Partner Violence Against Native American Women: A Cross-Sectional Study*, 2 BMC MED. 1, 6–7 (2004).

<sup>112</sup> *Id.*; see also STEVEN W. PERRY, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, A BJS STATISTICAL PROFILE, 1992–2002: AMERICAN INDIANS AND CRIME 5 (2004), <https://www.bjs.gov/content/pub/pdf/aic02.pdf> [<https://perma.cc/9SBK-6TTA>] (highlighting that Native Americans are twice as likely to experience a rape or other sexual assault when compared to all other racial groups).

<sup>113</sup> KATI SCHINDLER ET AL., NATIVE AM. WOMEN'S HEALTH EDUC. RES. CTR., INDIGENOUS WOMEN'S REPRODUCTIVE RIGHTS: THE INDIAN HEALTH SERVICE AND ITS INCONSISTENT APPLICATION OF THE HYDE AMENDMENT 2 (2002), [http://prochoice.org/pubs\\_research/publications/downloads/about\\_abortion/indigenous\\_women.pdf](http://prochoice.org/pubs_research/publications/downloads/about_abortion/indigenous_women.pdf) [<https://perma.cc/77X6-V4C2>]; see also URBAN INDIAN HEALTH INST., SEATTLE INDIAN HEALTH BD., REPRODUCTIVE HEALTH OF URBAN AMERICAN INDIAN AND ALASKA NATIVE WOMEN: EXAMINING UNINTENDED PREGNANCY, CONTRACEPTION, SEXUAL HISTORY AND BEHAVIOR, AND NON-VOLUNTARY SEXUAL INTERCOURSE 29 (2010).

<sup>114</sup> BARBARA GURR, REPRODUCTIVE JUSTICE: THE POLITICS OF HEALTH CARE FOR NATIVE AMERICAN WOMEN 132 (2015).

state in which she lives, and the federal government.”<sup>115</sup> Native women must not only contend with federal and state statutes regulating abortion; some tribes have criminalized or outlawed abortion on reservations. For example, the Turtle Mountain Band of Chippewa in North Dakota has made it a “Class 2 offense” to sell “any means . . . of causing abortion or miscarriage.”<sup>116</sup> To date, there is no data on tribal attitudes towards abortion, but it is likely that some of the 567 federally recognized tribes<sup>117</sup> harbor anti-abortion sentiment.<sup>118</sup>

Though more data is needed on Indian Country perspectives toward abortion, at least one scholar has posited that the pro-life/pro-choice paradigm does not necessarily fit Native American women’s experiences.<sup>119</sup> On the one hand, the pro-choice perspective supports the expansion of reproductive justice and self-determination. But pro-choice organizations did not support remedial action for the forced sterilization of Native women during the 1970’s.<sup>120</sup> On the other hand, pro-life movements organize against forced population control policies. Yet, anti-abortion organizations support the expansion of racially discriminatory policies like the Hyde Amendment.<sup>121</sup> Neither ideological perspective fully encompasses the Native experience. Fire Thunder’s proposal empowers Native women to create their own framework in this debate, one that emphasizes self-determination for the community and the individual.

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<sup>115</sup> *Id.*

<sup>116</sup> TURTLE MOUNTAIN BAND OF CHIPPEWA CODE § 26.1208.01 (2018), <https://www.tm.edu/wp-content/uploads/files/Academics/Paralegal%20Resources/Title26-%20OffensesPenalties.pdf> [<https://perma.cc/CS45-V83L>].

<sup>117</sup> Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 82 Fed. Reg. 4915 (Jan. 17, 2017).

<sup>118</sup> National Right to Life, a prominent anti-abortion organization, has an “Indians for Life” subgroup. Clementine “Little Hawk” Hernandez (Lakota Sioux) founded Indians for Life. *Indians for Life*, NAT’L RIGHT TO LIFE, <https://www.nrlc.org/outreach/ifl/> [<https://perma.cc/J8DV-TQHJ>].

<sup>119</sup> ANDREA SMITH, NATIVE AMERICANS AND THE CHRISTIAN RIGHT: THE GENDERED POLITICS OF UNLIKELY ALLIANCES 232–34 (2008) (“[W]hile the pro-choice and pro-life camps on the abortion debate are often articulated as polar opposites, they both depend on similar operating assumptions that do not necessarily support either life or real choice for Native women.”).

<sup>120</sup> *Id.* at 233.

<sup>121</sup> *Id.* at 233–34.

The following section of this Note will draw on the history and jurisprudence of P.L. 280 to contextualize the problem explored in this Note—whether Cecilia Fire Thunder’s proposal to open a full-service reproductive health clinic on Indian land is legally valid and functionally practicable for tribes.

### III. ABORTION IN WISCONSIN

In her statements regarding her intent to open an abortion clinic at Pine Ridge, Cecilia Fire Thunder invoked tribal sovereignty. She said, “An Indian reservation is a sovereign nation, and we’re going to take it as far as we can to exercise our sovereignty. . . . As Indian women, we fight many battles. This is just another battle we have to fight.”<sup>122</sup> Fire Thunder’s proposal passes constitutional muster because P.L. 280 does not limit tribes from opening clinics in Indian Country in states that have applied the law. This Part will examine the current status of abortion law in Wisconsin, a mandatory P.L. 280 state.<sup>123</sup> Wisconsin is home to substantial and diverse Native populations, thus providing a framework to ultimately determine whether Fire Thunder’s proposal may be executed. Moreover, Wisconsin’s anti-abortion statutory policies are representative of those found in other states hostile towards abortion.<sup>124</sup> Therefore, an examination of the statutory and regulatory landscape of abortion in Wisconsin is useful, as the analysis employed in this Part is applicable to other states should they choose to adopt P.L. 280.

This Part then will consider whether Wisconsin’s extensive regulation of abortion constitutes a series of criminal prohibitions on abortion or merely civil or regulatory laws. If these statutes are criminal or prohibitory, the state may enforce them on Indian reservations. If the statutes are civil or regulatory, the state has no jurisdiction.<sup>125</sup> Whether P.L. 280 grants Wisconsin jurisdiction over abortion in Indian Country

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<sup>122</sup> The Balt. Sun, *supra* note 9.

<sup>123</sup> Wisconsin is one of the six states expressly granted jurisdiction over Indian Country by P.L. 280.

<sup>124</sup> See *An Overview of Abortion Laws*, *supra* note 14.

<sup>125</sup> *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 208 (1987), *superseded by statute*, Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988).

depends on the state's intentions when passing legislation and the statutes' scope.

A. The Supreme Court's *Cabazon* Test to Determine Whether Public Law 280 Grants States Jurisdiction over Conduct in Indian Country

In *Cabazon*, the Supreme Court elaborated on a test to determine whether P.L. 280 applies to conduct on reservations. Under P.L. 280, states have criminal jurisdiction but not general civil regulatory power.<sup>126</sup> To determine whether a law is applicable on a reservation, a court must determine whether the law is prohibitory, thus granting the state jurisdiction pursuant to P.L. 280, or regulatory. States do not have jurisdiction to enforce civil or regulatory statutes under P.L. 280 unless the statute grants the state jurisdiction to adjudicate civil controversies arising in Indian Country between Native parties.<sup>127</sup> The Supreme Court held that if a state law's intent is to prohibit certain conduct, it falls under P.L. 280. Otherwise, if the state law's intent is to merely constrain or regulate the conduct, it does not fall under P.L. 280.<sup>128</sup> However, the Court clarified that this test is not a bright-line rule, because a grant of broad civil jurisdiction would "result in the destruction of tribal institutions and values."<sup>129</sup> This implies that if the equities tip in favor of a tribe, courts may decline to extend the state jurisdiction.

The *Cabazon* case was a dispute over whether California's prohibition on bingo games applied to two federally recognized Indian tribes in Riverside County, both of which operated gaming enterprises.<sup>130</sup> The Supreme Court held that the state did not have jurisdiction to ban the games—California's penal code restricting bingo was not criminal in nature and was thus inapplicable to the tribes.<sup>131</sup> This is because the statute did not expressly prohibit bingo—games were permissible so long as the money went towards

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<sup>126</sup> See 18 U.S.C. § 1162 (2017); 28 U.S.C. § 1360 (2017).

<sup>127</sup> See *Cabazon*, 480 U.S. at 207; *Bryan v. Itsaca County*, 426 U.S. 373, 388–90 (1976).

<sup>128</sup> *Cabazon*, 480 U.S. at 207.

<sup>129</sup> *Id.* at 208.

<sup>130</sup> *Id.* at 206.

<sup>131</sup> *Id.* at 209.

charity—or other forms of gambling, such as the lottery or horse race betting.<sup>132</sup> The state argued that pursuant to P.L. 280, prohibitions on gambling applied to the tribes because they were part of the California Penal Code.<sup>133</sup> California also argued that Congress had abrogated the tribes' sovereignty with respect to bingo games through the Organized Crime Control Act ("OCCA"). The Supreme Court rejected this argument, noting that the federal government had expressly approved of and even assisted tribes' establishing gaming operations.<sup>134</sup> The Supreme Court's decision in *Cabazon* ushered in the modern-day era of tribal gaming,<sup>135</sup> spurring Congress's passage of the Indian Gaming Regulatory Act ("IGRA") in 1988.<sup>136</sup> With IGRA, tribes established large-scale tribal casinos like Foxwoods<sup>137</sup> and Mohegan Sun.<sup>138</sup>

### 1. Abortion and Abortion Law in Wisconsin

Determining whether P.L. 280 would grant Wisconsin jurisdiction over abortions in Indian Country requires a survey of current abortion trends and statutes in Wisconsin.

Wisconsin women, especially Native women, face considerable hurdles to accessing abortion. As of November 2017, there are currently three abortion clinics in Wisconsin.<sup>139</sup>

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<sup>132</sup> *Id.* at 208.

<sup>133</sup> California is also one of the aforementioned six states expressly granted jurisdiction over Indian Country by P.L. 280. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 (2017); 25 U.S.C. §§ 1321–26 (2017); 28 U.S.C. § 1360 (2017)).

<sup>134</sup> *Cabazon*, 480 U.S. at 209–10.

<sup>135</sup> See RALPH A. ROSSUM, *THE SUPREME COURT AND TRIBAL GAMING: CALIFORNIA V. CABAZON BAND OF MISSION INDIANS* (2011).

<sup>136</sup> Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified as amended at 25 U.S.C. §§ 2701–21 (2017)).

<sup>137</sup> Foxwoods Casino, one of the largest casinos in the world, opened its doors in 1992. *About Us*, FOXWOODS RESORT CASINO, <https://www.foxwoods.com/aboutus.aspx> [<https://perma.cc/QB2F-5BP7>].

<sup>138</sup> Mohegan Sun, housing more than 300,000 square feet of gaming, opened its doors in 1996. *About Mohegan Sun*, MOHEGAN SUN, <https://mohegansun.com/about-mohegan-sun.html> [<https://perma.cc/F7P5-D8E4>].

<sup>139</sup> Jessie Opoien, *Inside Planned Parenthood: Doctors, Patients Struggle to Navigate Wisconsin's Restrictive Abortion Laws*, CAP TIMES (Nov. 8, 2017), [http://host.madison.com/ct/news/local/govt-and-politics/inside-planned-parenthood-doctors-patients-struggle-to-navigate-wisconsin-s/article\\_12e49523-2e52-59db-9791-c4a0720ca115.html](http://host.madison.com/ct/news/local/govt-and-politics/inside-planned-parenthood-doctors-patients-struggle-to-navigate-wisconsin-s/article_12e49523-2e52-59db-9791-c4a0720ca115.html) [<https://perma.cc/T926-2DH4>].

According to the Guttmacher Institute, approximately ninety-six percent of counties in Wisconsin have no abortion provider. Sixty-seven percent of women residing in the state live in those counties.<sup>140</sup> In other words, the majority of Wisconsin women do not have a readily accessible abortion provider. Providers appear to be concentrated in the Milwaukee-Madison area in Southern Wisconsin.<sup>141</sup> There is no specific data on the availability of abortion for Native women in Indian Country. However, it is fair to surmise that access is even more restricted for them as reservations are predominately located in more rural areas of northern Wisconsin.<sup>142</sup> According to the state's Department of Health Services, Native American women underwent approximately one percent of abortions in the state, or fifty-one abortions total.<sup>143</sup> Without more data, it is impossible to predict whether that number reflects the number of Native women who wished to abort but did not. The estimated rate of abortion in Wisconsin in 2016 was nearly half of the national average rate.<sup>144</sup>

Aside from the relative scarcity of abortion providers in the state, Wisconsin also has several restrictive abortion regulations. These include mandatory, state-directed counseling that discourages abortion,<sup>145</sup> a twenty-four-hour waiting period between counseling and the abortion procedure,<sup>146</sup> and mandatory ultrasounds before the procedure, during which the provider must show and describe the image contents to the patient.<sup>147</sup> These requirements may be waived in cases of incest or sexual assault, provided the woman

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<sup>140</sup> GUTTMACHER INST., STATE FACTS ABOUT ABORTION: WISCONSIN (2018), <https://www.guttmacher.org/sites/default/files/factsheet/sfaa-wi.pdf> [<https://perma.cc/UYD4-TXWR>].

<sup>141</sup> Catherine Guden, *Wisconsin Now Has Only Two Planned Parenthood Abortion Clinics*, BADGER HERALD (Aug. 22, 2016), <https://badgerherald.com/news/2016/08/22/wisconsin-now-has-only-two-planned-parenthood-abortion-clinics/> [<https://perma.cc/8VZK-5V4A>].

<sup>142</sup> *Where Are the Tribes?*, WIS. ST. TRIBAL REL. INITIATIVE, <http://wi.tribes.wi.gov/section.asp?linkid=731&locid=57> [<https://perma.cc/9EWZ-ZBHX>].

<sup>143</sup> YIWU ZHANG, WIS. DEP'T OF HEALTH SERVS., REPORTED INDUCED ABORTIONS IN WISCONSIN 2016, at 8 (Stephanie Hartwig ed., 2017).

<sup>144</sup> *Id.* at 2.

<sup>145</sup> WIS. STAT. § 253.10(3) (2017–2018).

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* § 253.10(3g).

cooperates with law enforcement.<sup>148</sup> Wisconsin's state health exchange under the Affordable Care Act covers abortion only if the woman's life is in danger or the woman's health is severely compromised and in cases of rape or incest.<sup>149</sup> Telemedicine abortion, which involves a patient taking the "abortion pill"<sup>150</sup> with the remote guidance of a provider, is also prohibited.<sup>151</sup> Abortions are generally prohibited after twenty weeks gestation unless the woman's life is in danger.<sup>152</sup> Legislators justified the twenty-week ban under the assertion that fetuses feel pain after this point in their in utero development, which is widely disputed by the medical community.<sup>153</sup>

The aforementioned statutes are found within the state's Public Health title and are thus not considered criminal prohibitions on abortion.<sup>154</sup> There is also a provision within the Criminal Code that specifies that homicide (both reckless and intentional) does not include "induced" abortions.<sup>155</sup> For the state to prove guilt in a feticide or fetal

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<sup>148</sup> *Id.* § 253.10(3m).

<sup>149</sup> WIS. STAT. § 20.927 (2017–2018); WIS. STAT. § 632.8985 (2017–2018).

<sup>150</sup> Medication abortion, also known as the abortion pill, is a first-trimester abortion method. Patients take mifepristone at the clinic under medical supervision. Six to forty-eight hours after the mifepristone dose, patients must then take a second medication (misoprostol)—usually unsupervised—to complete the procedure. *The Abortion Pill*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/abortion/the-abortion-pill> [https://perma.cc/Y4K4-WMGQ].

<sup>151</sup> WIS. STAT. § 253.105(2)(b) (2017–2018).

<sup>152</sup> WIS. STAT. § 253.107 (2017–2018).

<sup>153</sup> See Pam Belluck, *Complex Science at Issue in Politics of Fetal Pain*, N.Y. TIMES (Sept. 16, 2013), [http://www.nytimes.com/2013/09/17/health/complex-science-at-issue-in-politics-of-fetal-pain.html?\\_r=0](http://www.nytimes.com/2013/09/17/health/complex-science-at-issue-in-politics-of-fetal-pain.html?_r=0) [https://perma.cc/WPD3-4FS4]; see also Susan J. Lee et al., *Fetal Pain: A Systematic Multidisciplinary Review of the Evidence*, 294 [J]AMA 947, 952 (2005) (“[T]he capacity for conscious perception of pain can arise only after thalamocortical pathways begin to function, which may occur in the third trimester around 29 to 30 weeks’ gestational age, based on the limited data available. . . . [Thalamocortical fibers] mere presence is insufficient [to establish fetal pain]—this pathway must also be functional. . . . [N]o human study has demonstrated this early functionality.”).

<sup>154</sup> See § 20.927; § 253.105(2)(b); § 253.107; § 632.8985.

<sup>155</sup> WIS. STAT. § 939.75(2)(b)(1)–(4) (2017–2018). In this context, induced abortion likely means a medically necessary or therapeutic abortion performed in a medical context.

injury prosecution, where the defendant has claimed that there was an induced abortion, the state must prove beyond a reasonable doubt that there was no induced abortion.<sup>156</sup> The Criminal Code's intentional feticide provision expressly does not apply to physicians performing necessary abortions.<sup>157</sup> The Wisconsin Supreme Court held in a 1994 decision that the feticide provision does not apply to medical abortions despite the fact that the provision is titled "Abortion."<sup>158</sup> The Wisconsin Criminal Code also contains another provision, similarly entitled "Abortion," which prohibits abortions after fetal viability unless the mother's life or health is in danger.<sup>159</sup> The Wisconsin Supreme Court found that the latter statute was a permissible restriction on late-term abortions<sup>160</sup> consistent with *Roe*.<sup>161</sup> Taken together, these regulations create barriers to abortion access that affect Native women.

## 2. The Wisconsin Government's Attitudes Toward Abortion and Setting Up the Problem

The Wisconsin state government is openly hostile toward abortion. Wisconsin governor Scott Walker aired ads in 2015 that featured him stating: "I'm pro-life but I can only imagine how difficult a decision must be for someone who's thinking about ending their pregnancy. That's why I support a law that provides more information to someone to make

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<sup>156</sup> *Id.* § 939.75(3).

<sup>157</sup> WIS. STAT. § 940.04(5) (2017–2018).

<sup>158</sup> *State v. Black*, 526 N.W.2d 132, 134 (Wis. 1994) ("The words of the statute are plain and unambiguous. They could hardly be clearer.").

<sup>159</sup> WIS. STAT. § 940.15 (2017–2018).

<sup>160</sup> The language of "late-term abortion" is not consistent with medicine; typically, late-term pregnancy refers to gestation past forty weeks. However, post-viability abortions have become known as late-term abortions in popular lexicon. Robin Marty, *Stop Using the Phrase "Late-Term Abortion,"* COSMOPOLITAN (Oct. 2, 2017), <http://www.cosmopolitan.com/politics/a12766188/late-term-abortion-20-week-ban/> [https://perma.cc/BBM9-4RE8].

<sup>161</sup> *Black*, 526 N.W.2d at 135 ("Section 940.15 places restrictions (consistent with *Roe v. Wade*) on consensual abortions: medical procedures, performed with the consent of the woman, which result in the termination of a pregnancy by expulsion of the fetus from the woman's uterus.").

that decision.”<sup>162</sup> Governor Walker was widely criticized for this statement as being inconsistent with his previous statements about abortion. The state legislature later passed a statute banning abortions after twenty weeks from fertilization.<sup>163</sup> When he later signed the twenty-week ban into law, Governor Walker published on Twitter the following message: “Just signed pain capable bill into law to protect unborn at 5 months when they can feel pain.”<sup>164</sup>

Other governmental actors in Wisconsin have also expressed their disdain for abortion in less obvious anti-abortion language. Regarding his proposed ban on abortion coverage in state employee health plans, former representative Andre Jacque was quoted as saying, “The government should not force taxpayers to fund the killing of pre-born children . . . . Abortion is not health care.”<sup>165</sup> House Speaker Paul Ryan, who represented Wisconsin’s first congressional district, helped push a twenty-week ban before the House of Representatives in early 2018, where it ultimately passed.<sup>166</sup> At the forty-fifth annual March for Life Rally at the nation’s capital, Representative Ryan spoke of the twenty-week ban:

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<sup>162</sup> Dana Bash, *Walker Pushes Back on Flip-Flop Accusation*, CNN (July 19, 2015), <http://www.cnn.com/2015/07/19/politics/scott-walker-flip-flop-2016-election/> [<https://perma.cc/CGL8-FZCT>].

<sup>163</sup> Pregnancy is not calculated from the date of fertilization in standard medical practice as this is difficult to determine in unassisted pregnancies; instead, pregnancy is typically calculated from the woman’s last menstrual period (LMP). Twenty weeks post-fertilization is equivalent to twenty-two weeks LMP. *Committee Opinion: Methods for Estimating the Due Date*, 129 AM. C. OBSTETRICIANS & GYNECOLOGISTS e150 (2017). Though perhaps not the biggest oversight, there is scientific value in maintaining a consistent due date paradigm. Fetal viability typically begins around twenty-four weeks LMP, or twenty-two weeks post-fertilization.

<sup>164</sup> Eliza Collins, *Walker Signs Wisconsin Abortion Bill*, POLITICO (July 20, 2015), <https://www.politico.com/story/2015/07/wisconsin-abortion-20-weeks-not-legal-scott-walker-120370> [<https://perma.cc/F2XT-ANS9>].

<sup>165</sup> Laurel White, *Assembly Approves Ban on Abortion Coverage in State Employee Health Plans*, WIS. PUB. RADIO (Nov. 2, 2017), <https://www.wpr.org/assembly-approves-ban-abortion-coverage-state-employee-health-plans> [<https://perma.cc/YZS6-UWGH>].

<sup>166</sup> Kimberly Leonard, *Paul Ryan: ‘The Pro-Life Movement Is on the Rise,’* WASH. EXAMINER (Jan. 19, 2018), <http://www.washingtonexaminer.com/paul-ryan-the-pro-life-movement-is-on-the-rise/article/2646460> [<https://perma.cc/M7AD-YB3D>].

“We strive to do this not with judgment in our hearts, but with compassion and with love for all of the victims.”<sup>167</sup>

These governmental actors’ language is deeply couched in anti-abortion rhetoric. They evidently identify as “pro-life.” However, their language does not suggest that abortions should be outlawed altogether: Governor Walker’s tweet invokes the alleged rights of the fetus; Representative Jacque’s statements clarify that health insurance plans may not cover elective or medically unnecessary procedures; Representative Ryan’s statements concern the “victims” of late-term abortions. Although these assertions are not founded upon generally accepted scientific facts, they also do not invoke a desire to criminalize abortion.

Wisconsin abortion statutes may be seen as prohibitions, thus granting Wisconsin jurisdiction over abortion on reservations. Courts have noted the state’s attempts to prohibit abortions without instituting an outright ban. In 2015, the Seventh Circuit struck down Wisconsin’s admitting privileges requirement as unconstitutional. Judge Posner, who penned the opinion, noted:

[P]ersons who have a sophisticated understanding of the law and of the Supreme Court know that convincing the Court to overrule *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey* is a steep uphill fight, and so some of them proceed indirectly, seeking to discourage abortions by making it more difficult to obtain them.<sup>168</sup>

Judge Posner then went on to criticize the State’s attempts to mask its anti-abortion legislation as being in the best interests of the mother’s health: “Opponents of abortion reveal their true objectives when they procure legislation limited to a medical procedure—abortion—that rarely produces a medical emergency.”<sup>169</sup> Here, Judge Posner relied

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<sup>167</sup> *Id.*

<sup>168</sup> *Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908, 920–21 (7th Cir. 2015).

<sup>169</sup> *Id.* at 921.

upon decades of public health data that abortion is exceedingly safe.<sup>170</sup>

Liberal scholars and commentators have echoed Judge Posner's critiques that states seek to make abortions as difficult as possible to obtain in lieu of an outright ban.<sup>171</sup> President and CEO of the National Abortion Federation Vicki Soporta argued that "this was a very calculated and coordinated effort to end abortion by putting up barriers that are sometimes too great for women to overcome."<sup>172</sup> The Wisconsin state legislature has expressed anti-abortion sentiment on numerous occasions, including a suggestion to ban abortions to increase the labor force,<sup>173</sup> a proposal to block the University of Wisconsin-Madison medical school faculty from providing abortion training—which is necessary for the school to retain accreditation—to "get UW out of the abortion business,"<sup>174</sup> and a proposed bill that restricts fetal tissue donation for scientific research because it would "reduce incentives for abortions and thereby possibly reduce some abortions."<sup>175</sup> "Pro-life" organizations in the state boast

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<sup>170</sup> *Id.* at 921–22.

<sup>171</sup> See CAROL SANGER, ABOUT ABORTION: TERMINATING PREGNANCY IN TWENTY-FIRST-CENTURY AMERICA (2017); Jon Healey, *The Trump Administration Just Found Another Way to Deny Women Their Right to an Abortion*, L.A. TIMES (Jan. 19, 2018), <http://www.latimes.com/opinion/opinion-la/la-ol-abortion-conscience-protections-20180119-story.html> [<https://perma.cc/SK7P-8S6Z>]; Erica Hellerstein, *Inside the Highly Sophisticated Group That's Quietly Making It Much Harder to Get an Abortion*, THINKPROGRESS (Dec. 2, 2014), <https://thinkprogress.org/inside-the-highly-sophisticated-group-thats-quietly-making-it-much-harder-to-get-an-abortion-9db723232471/> [<https://perma.cc/74WK-MRJP>].

<sup>172</sup> See Lisette Mejia, *The Calculated Plan to Outlaw Abortion in the US*, POPSUGAR (June 8, 2016), <https://www.popsugar.com/news/Abortion-Restrictions-States-41262255> [<https://perma.cc/6ZJ8-EX4T>].

<sup>173</sup> See Jacqueline Thomsen, *Wisconsin State Lawmaker Suggests Banning Abortions to Add to Labor Force*, HILL (Nov. 4, 2017), <http://thehill.com/blogs/blog-briefing-room/news/358806-wisconsin-state-lawmaker-suggests-banning-abortions-to-add-to> [<https://perma.cc/9JAH-EYKL>].

<sup>174</sup> Todd Richmond, *UW-Madison Warns Anti-Abortion Bill Could Worsen Ob-Gyn Shortage*, WIS. ST. J. (July 17, 2017), [http://host.madison.com/wsj/news/local/govt-and-politics/uw-madison-warns-anti-abortion-bill-could-worsen-ob-gyn/article\\_856b0d29-d296-5e6e-b4fb-673f98cd44f6.html](http://host.madison.com/wsj/news/local/govt-and-politics/uw-madison-warns-anti-abortion-bill-could-worsen-ob-gyn/article_856b0d29-d296-5e6e-b4fb-673f98cd44f6.html) [<https://perma.cc/E8L9-UQJE>].

<sup>175</sup> Scott Bauer & Todd Richmond, *Wisconsin Legislature Takes Up Anti-Abortion Bills*, WASH. TIMES (Nov. 2, 2017), <https://www.washington>

about the reduced abortion rate in the state over the past several years.<sup>176</sup> These organizations have lobbied to assist in the passage of such restrictions.<sup>177</sup> Wisconsin's extremely restrictive and hostile legislation on abortion, combined with the state legislature's largely anti-abortion sentiment, evince a desire to get as close to a total ban as possible.

#### IV. THE PROMISE OF ABORTION IN INDIAN COUNTRY

This Part applies the Supreme Court's framework in *Cabazon* to determine whether P.L. 280 extends Wisconsin jurisdiction over abortion on tribal land. It concludes that because abortion is largely still legal and regulated in a non-criminal manner, P.L. 280 does not apply and tribes are thus free to pursue Cecilia Fire Thunder's proposal. This Part then considers whether Congress may abrogate tribal sovereignty over reproductive health, describes practical considerations for establishing a tribal clinic, and provides suggestions on best practices.

##### A. Whether Public Law 280 Grants Wisconsin Jurisdiction over Abortions on Tribal Land

Wisconsin's anti-abortion statutes fall within the *Cabazon* Court's regulatory category; thus, P.L. 280 does not apply. The state government is hostile towards abortion, especially abortions in the second or third trimester as demonstrated by the criminalization of late-term abortions.<sup>178</sup> Judge

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times.com/news/2017/nov/2/wisconsin-legislature-taking-up-anti-abortion-bill/ [https://perma.cc/9GF8-26UN].

<sup>176</sup> See, e.g., *2017 Accomplishments*, WIS. RIGHT TO LIFE, <https://www.wisconsinrighttolife.org/accomplishments/> [https://perma.cc/Q86K-E5ZZ]; Barbara Lyons, Wisconsin Once Again Leads Nation in Abortion Decline, WIS. RIGHT TO LIFE (July 1, 2009), <https://www.wisconsinrighttolife.org/wrtl-blog/2009/07/01/wisconsin-once-again-leads-nation-in-abortion-decline/> [https://perma.cc/7R2U-ACTD] ("It is the best news because it is the reason why Wisconsin Right to Life exists. Abortions are down again in 2008, the fifth straight year of decline!").

<sup>177</sup> See *Right-to-Life Laws Passed*, WIS. RIGHT TO LIFE, <http://www.wrtl.org/legislationelections/right-to-life-laws-passed/> [https://perma.cc/MYA6-W8J7].

<sup>178</sup> Eighty-nine percent of abortions occur in the first twelve weeks LMP. In fact, less than two percent of abortions occur twenty-one weeks LMP.

Posner is likely correct that governmental actors seek to discourage abortions by implementing as many targeted regulations of abortion providers as constitutionally permissible. Despite this implicit (or explicit) intent, the statutory scheme, when taken as a whole, is largely non-criminal.

Analogizing to *Cabazon* substantiates that Wisconsin's abortion statutes are regulatory or civil in nature. In *Cabazon*, the Court reasoned that since California penalized only non-charitable bingo games, the state "regulates rather than prohibits gambling in general and bingo in particular."<sup>179</sup> In Wisconsin and other similarly hostile states, abortion is largely regulated through the Public Health Code, not the Penal Code. Abortion is still legal and available, even if access to the procedure is limited by targeted regulations of abortion providers. Statutorily, abortion is treated similarly to other reproductive health procedures, such as sterilization,<sup>180</sup> in vitro fertilization,<sup>181</sup> and contraception.<sup>182</sup> State legislation about women's reproductive health is civil or regulatory.

Even if the statutes constituted a criminal prohibition, the Court clarified that the test is not a bright-line rule to be rigidly applied,<sup>183</sup> such that P.L. 280 would still not apply. In *Cabazon*, the Court weighed the tribes' interests in economic development and tribal sovereignty with California's interest

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or later. GUTTMACHER INST., INDUCED ABORTION IN THE UNITED STATES 2 (2018), [https://www.guttmacher.org/sites/default/files/factsheet/fb\\_induced\\_abortion.pdf](https://www.guttmacher.org/sites/default/files/factsheet/fb_induced_abortion.pdf) [<https://perma.cc/Y8LJ-NQK4>].

<sup>179</sup> *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 211 (1987).

<sup>180</sup> Sterilization is generally covered by health insurance plans. WIS. ADMIN. CODE D.H.S. § 107.06(3) (2018). Wisconsin law grants hospitals the right to deny patients seeking sterilization or abortion. WIS. STAT. § 253.09 (2017–2018).

<sup>181</sup> There appear to be no statutory provisions in Wisconsin regarding in vitro fertilization.

<sup>182</sup> Wisconsin hospitals must provide sexual assault victims with emergency contraception upon their request; emergency contraception does not include abortifacients. WIS. STAT. § 50.375 (2017–2018). Contraception is available per the state's Affordable Care Act Medicaid expansion. The only existing prohibition on contraception is that it may not be sold in a vending machine at a public school. WIS. STAT. § 450.16 (2017–2018). This is hardly a criminal prohibition.

<sup>183</sup> *Cabazon*, 480 U.S. at 210.

in regulating gambling.<sup>184</sup> California argued that gambling attracts organized crime and that the federal government had abrogated sovereignty with respect to organized crime pursuant to the Organized Crime Control Act (“OCCA”). While the Court acknowledged the State’s interest in crime prevention, it ruled that this interest was not nearly as weighty as the tribes’ interest. As a state, California could not enforce a federal criminal statute, nor had the OCCA ever been applied to bingo games. On the other hand, the gaming operations created substantial revenue and employment opportunities for the tribes. Financial stability is crucial to achieving economic development and tribal self-determination. With greater financial stability, tribes may properly administer their governments, create social welfare programs for members, and invest in cultural preservation initiatives such as museums or language programs. The California anti-bingo statute could not possibly apply to the bingo games because it would severely undermine the tribes’ sovereignty. Moreover, the federal government has a vested interest in tribal “self-sufficiency and economic development.”<sup>185</sup>

Applying this logic to Fire Thunder’s proposal, the tribe’s interests outweigh the state’s interests such that the tribe must retain jurisdiction over abortion. The tribe retains its interests in self-determination and sovereignty. It also retains an interest in asserting jurisdiction over public health matters on its land. On the other hand, the state has constitutionally recognized interests in fetal life, the health and safety of patients, and limiting access to certain kinds of post-viability abortions. But presumably, the tribe shares some of the state’s interests—namely preserving the health and safety of patients. Given that abortions are incredibly safe,<sup>186</sup>

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<sup>184</sup> *Id.* at 212–22.

<sup>185</sup> *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334–35 (1983) (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980)) (holding that the State may not regulate on-reservation hunting or fishing by tribal members and nonmembers, which were regulated by a series of federally-approved tribal ordinances).

<sup>186</sup> See Elizabeth G. Raymond & David A. Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 *OBSTETRICS & GYNECOLOGY* 215, 217 (2012) (“Legal abortion in the United States remains much safer than childbirth. The difference in risk of death is approximately 14-fold.”); Ushma D. Upadhyay et al., *Incidence of Emergency Department Visits and Complications After Abortion*, 125 *OBSTETRICS &*

fetuses are generally incapable of feeling pain during the procedure,<sup>187</sup> and late-term abortions are incredibly rare,<sup>188</sup> the tribe's interest in preserving jurisdiction over abortion should be given greater weight. The federal government's interests also align with tribal interests. The federal government has an interest in tribal self-governance and economic development.<sup>189</sup> Tribal jurisdiction over abortion pertains to tribal self-governance.

Abortion access also serves the economic development interest, weakening any grasp for jurisdiction by the state. Family planning bestows great social and economic benefits on communities. Research indicates that unplanned pregnancies, especially at a younger age, hinder educational and professional achievement for women.<sup>190</sup> This research largely focuses on contraception, but the findings apply to abortion. Indeed, women who give birth after being denied an abortion have higher odds of poverty than women who had an abortion.<sup>191</sup> Women denied abortions were more likely to receive

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GYNECOLOGY 175 (2015) (finding that after abortion, the incidence of any complication is 2.1% and the incidence of major complications is 0.23% in a closed system with data from all sources of care and complete follow-up).

<sup>187</sup> Lee et al., *supra* note 153.

<sup>188</sup> GUTTMACHER INST., *supra* note 178.

<sup>189</sup> See COHEN'S HANDBOOK, *supra* note 19, § 1.07 (referring to last fifty-odd years of federal Indian policy as the "self-determination era" and explaining Congress's attempts to grant tribes greater control over their everyday affairs and governance).

<sup>190</sup> Martha J. Bailey et al., *The Opt-In Revolution? Contraception and the Gender Gap in Wages*, 4 AM. ECON. J. 225 (2012) (finding that contraception access amounted to one-third of wage gains for women born in the postwar period); Heinrich Hock, *The Pill and the College Attainment of American Women and Men* (Sept. 15, 2005) (unpublished manuscript), <https://paa2006.princeton.edu/papers/61745> [<https://perma.cc/MHY2-SJM8>] (finding that both men and women see increased college completion with increased access to contraception).

<sup>191</sup> Diane Greene Foster et al., *Socioeconomic Outcomes of Women Who Receive and Women Who Are Denied Wanted Abortions in the United States*, 108 AM. J. PUB. HEALTH 407 (2018). This study uses data from the Turnaway Study—a longitudinal study by Advancing New Standards in Reproductive Health, a research group at the University of California, San Francisco. The Turnaway Study examines the long-term effects of unintended pregnancy. For more, see *Turnaway Study*, ADVANCING NEW STANDARDS REPROD. HEALTH, <https://www.ansrh.org/research/turnaway-study> [<https://perma.cc/426M-B7RQ>].

public assistance and less likely to be employed full time.<sup>192</sup> These differences are statistically significant four years after the denial of abortion.<sup>193</sup> Access to abortion and family planning increases women's earning potential, thereby increasing economic development in the greater community. Because tribal and federal interests in economic development are met by abortion access, Wisconsin should not have jurisdiction over abortion in Indian Country. Tribes, in retaining such jurisdiction, retain self-determination.

### B. Whether Congress Would Retaliate and What May Happen Next If It Did

Congress may, in response to a tribe's decision to pursue Fire Thunder's proposal, abrogate tribal sovereignty with respect to abortion. Congress has rarely limited tribal sovereignty but has the authority to do so.<sup>194</sup> However, Professor Matthew Fletcher argues that as tribes use their immunity "in ways not dreamed of by the . . . Court, Congress may well pay more attention."<sup>195</sup> For example, former Democratic senator Claire McCaskill of Missouri introduced a bill to limit tribal sovereignty in the patent context.<sup>196</sup> The bill was a response to pharmaceutical company Allergan's transfer of patents to the Saint Regis Mohawk Tribe.<sup>197</sup> Allergan transferred ownership of certain patents to shield them from challenge by generic drug companies.<sup>198</sup> The bill saw little activity

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<sup>192</sup> Foster et al., *supra* note 191, at 411.

<sup>193</sup> *Id.*

<sup>194</sup> See, e.g., *United States v. Dion*, 476 U.S. 734, 740 (1986) (holding that the Bald Eagle Protection Act did abrogate the Yankton Sioux Tribe's treaty right to hunt); *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 118 (1960) (holding that the Federal Power Act applies to tribes because Congress specifically intended for its applicability by expressly defining Indian land).

<sup>195</sup> Matthew L.M. Fletcher, *Rights Without Remedies*, 11 N.Y.U. J.L. & LIBERTY 236, 255–56 (2017).

<sup>196</sup> S. 1948, 115th Cong. (2017).

<sup>197</sup> Adam Davidson, *Why Is Allergan Partnering with the St. Regis Mohawk Tribe?*, NEW YORKER (Nov. 20, 2017), <https://www.newyorker.com/magazine/2017/11/20/why-is-allergan-partnering-with-the-st-regis-mohawk-tribe> [<https://perma.cc/9Z9Q-VF3S>].

<sup>198</sup> Jan Wolfe, *Allergan Ruling Casts Doubt on Tribal Patent Strategy*, REUTERS (Oct. 17, 2017), <https://www.reuters.com/article/us-allergan->

after its introduction, and its sponsor lost reelection in November 2018.<sup>199</sup> But it suggests that Congress is willing to act should it perceive the use of tribal sovereignty as a “monetizable commodity that can be purchased by private entities as part of a scheme to evade their legal responsibilities.”<sup>200</sup>

Congress may abrogate tribal sovereignty in an effort to limit access to abortion. In January 2018, the president of the anti-abortion organization March for Life said that the 115th Congress was the “most pro-life Congress in a generation.”<sup>201</sup> Though this is a dramatic statement that likely exaggerated Congress’s track record on abortion, the Republican-dominated Congress did attempt to enact several anti-abortion measures during its tenure. For instance, the House of Representatives passed a twenty-week ban, though the Senate did not debate or vote on it.<sup>202</sup> The congressional sponsor of the twenty-week ban also introduced a bill that would require doctors to “exercise the same degree of professional skill, care, and diligence to preserve the life and health of [a] child” somehow “born alive” after an abortion, as they would to “any other child born alive at the same gestational age.”<sup>203</sup> Given the failure of these two extreme anti-abortion measures, some anti-abortion organizations criticized the 115th Congress for not being sufficiently successful in restricting abortion.<sup>204</sup>

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patents-analysis/allergan-ruling-casts-doubt-on-tribal-patent-strategy-idUSKBN1CM369 [https://perma.cc/JV6R-Q32Z].

<sup>199</sup> Nicholas Fano, *Josh Hawley Defeats Claire McCaskill in Missouri Senate Race*, N.Y. TIMES (Nov. 6, 2018), <https://www.nytimes.com/2018/11/06/us/politics/josh-hawley-claire-mccaskill-missouri.html> [https://perma.cc/XP99-GENR].

<sup>200</sup> *Allergan, Inc. v. Teva Pharm. USA, Inc.*, No. 2:15-cv-1455-WCB, 2017 WL 4619790, at \*3 (E.D. Tex. Oct. 16, 2017) (granting motion to join Tribe as a co-plaintiff).

<sup>201</sup> Leonard, *supra* note 166. *See generally* Pain-Capable Unborn Child Protection Act, H.R. 36, 115th Cong. (2017).

<sup>202</sup> *See* H.R. 36.

<sup>203</sup> Born-Alive Abortion Survivors Protection Act, H.R. 37, 115th Cong. § 3 (2017).

<sup>204</sup> *See* Nicholas Wolfram Smith, *Pro-Life Progress Report: Mixed Record for Congress*, NAT’L CATH. REG. (Oct. 4, 2017), <http://www.ncregister.com/daily-news/pro-life-progress-report-mixed-record-for-congress> [https://perma.cc/44C7-SLMG] (“[W]e are incredibly disappointed that we have a pro-life president and a pro-life Congress, and yet somehow the nation’s largest abortion business is still being funded . . .”); Carol Tobias & Marjorie

The new Congress is comprised of a Republican-controlled Senate and Democrat-controlled House of Representatives.<sup>205</sup> If the 116th Congress were to pass a statute abrogating tribal sovereignty over abortion—which is unlikely given the Democratic majority in the House—President Trump would certainly sign such a bill. During the first year of his first term, President Trump and executive agencies effectuated several anti-abortion policies. First, Trump restored the Mexico City Policy, otherwise known as the Global Gag Rule, which prohibits foreign NGOs from using United States funding to provide abortions or counsel patients on or refer patients for abortion.<sup>206</sup> Next, the Department of Health and Human Services (HHS) issued two interim final rules that greatly expanded religious and moral exemptions to the contraception mandate under the Affordable Care Act.<sup>207</sup> In response, the District Court for the Northern District of California issued a preliminary injunction against the expansion of religious exemptions to the contraception mandate.<sup>208</sup> Additionally, in January 2018, the Centers for Medicare and Medicaid Services under HHS rescinded Obama-era guidance that permitted Planned Parenthood and other abortion providers to receive Medicaid funding—an action

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Dannenfelser, *Republican Congress Must Include Crucial Pro-Life Protections to Earn Our Support*, HILL (Oct. 30, 2017), <http://thehill.com/opinion/health-care/357885-republican-congress-must-include-crucial-pro-life-protections-to-earn-our> [<https://perma.cc/QNR3-M5RF>] (“We urge Congress to go back to the drawing board on health care reform and address the abortion funding catastrophe created by ObamaCare . . .”).

<sup>205</sup> Kelsey Snell, *Election Results Give Split Decision: Democrats Win House & GOP Keeps Senate Majority*, NPR (Nov. 6, 2018), <https://www.npr.org/2018/11/06/664506915/republicans-keep-senate-majority-as-democrats-make-gains-in-the-house> [<https://perma.cc/5B5M-5P9W>].

<sup>206</sup> Presidential Memorandum Regarding the Mexico City Policy, 82 Fed. Reg. 8495 (Jan. 25, 2017).

<sup>207</sup> Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,838 (Oct. 13, 2017) (to be codified at 26 C.F.R. pt. 54; 29 C.F.R. pt. 2590; 45 C.F.R. pt. 147); Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,792 (Oct. 13, 2017) (to be codified at 82 C.F.R. pt. 54; 29 C.F.R. pt. 2590; 45 C.F.R. pt. 147).

<sup>208</sup> *California v. Health & Human Servs.*, 281 F. Supp. 3d 806 (N.D. Cal. 2017), *aff'd in part, vacated in part sub nom. California v. Azar*, 911 F.3d 558 (2018).

which may contravene federal law.<sup>209</sup> In sum, the federal government's administrative actions illustrate the executive branch's anti-abortion sentiment.

### 1. The Supreme Court's Role Should a Challenge Arise

Whether a court would overturn or uphold a statutory abrogation of tribal sovereignty depends on the precise language and subsequent application of interpretive principles in federal Indian law. Courts typically apply special canons of construction when deciding issues of Indian law. The canons require that any ambiguity in a treaty, statute, agreement, or executive order be resolved in favor of the tribe.<sup>210</sup> If a statute or other action somehow implicates Indians despite no express mention of them, courts must "construe a statute abrogating tribal rights narrowly [and most favorably towards tribal interests]."<sup>211</sup> Courts must preserve tribal sovereignty unless Congress expresses a clear and unambiguous intent otherwise.<sup>212</sup> This is especially true if the congressional action abrogates treaty rights. There must be "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty."<sup>213</sup>

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<sup>209</sup> CTRS. FOR MEDICARE & MEDICAID SERVS., U.S. DEP'T OF HEALTH & HUMAN SERVS., SMD No. 18-003, RESCINDING SMD # 16-005 CLARIFYING "FREE CHOICE OF PROVIDER" REQUIREMENT (2018); Jessie Hellmann, *Trump Administration Rescinds Obama Guidance on Defunding Planned Parenthood*, HILL (Jan. 19, 2018), <http://thehill.com/policy/healthcare/369723-trump-administration-rescinds-guidance-protecting-planned-parenthoods> [<https://perma.cc/NDS7-UC4L>].

<sup>210</sup> Bryan H. Wildenthal, *Federal Labor Law, Indian Sovereignty, and the Canons of Construction*, 86 OR. L. REV. 413, 489–502 (2007).

<sup>211</sup> COHEN'S HANDBOOK, *supra* note 19, § 2.02 n.5 (quoting *Rincon Band of Luiseno Mission Indians of the Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019, 1028 n.9 (9th Cir. 2010)).

<sup>212</sup> *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999) ("Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so."); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59–60 (1979) (holding that federal statutes will not be interpreted to "interfere[] with tribal autonomy and self-government . . . in the absence of clear indications of legislative intent" (footnote omitted) (citations omitted)).

<sup>213</sup> *United States v. Dion*, 476 U.S. 734, 740 (1986).

To successfully limit tribal authority to undertake Fire Thunder's proposal, Congress must act unequivocally. However, scholars and Native media outlets have argued that the Supreme Court has a poor record on issues of federal Indian law.<sup>214</sup> Therefore, an anti-Native Court is more likely to uphold an abrogation, as it does not favor the rights of tribes, regardless of the canons of construction.

### C. Whether the Proposal Is Constitutional Should *Roe* Be Overturned

The Supreme Court's abortion jurisprudence is likely to shift in the coming years, which may lead to the elimination of the constitutional right to abortion. Justice Anthony Kennedy, who announced his retirement in late June 2018,<sup>215</sup> has been criticized for leaving a "legacy of anti-tribal votes."<sup>216</sup> However, Justice Kennedy is also regarded as a swing vote on abortion.<sup>217</sup> Justice Kennedy's legacy on abortion is therefore complicated.<sup>218</sup> He upheld the federal government's ban on so-called

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<sup>214</sup> See Matthew L.M. Fletcher, *The Supreme Court's Indian Problem*, 59 HASTINGS L.J. 579 (2008) ("[F]ederal Indian law as practiced before the Supreme Court is in serious normative decline . . . [There is a] general reduction in Indian law cases decided on the basis of established precedent, an increase in cases decided without a guiding legal theory, and an increase in cases that appear to be decided on the basis of the gut reaction of the Justices.").

<sup>215</sup> Michael D. Shear, *Supreme Court Justice Anthony Kennedy Will Retire*, N.Y. TIMES (June 27, 2018), <https://www.nytimes.com/2018/06/27/us/politics/anthony-kennedy-retire-supreme-court.html> [<https://perma.cc/GZ6R-MFCA>].

<sup>216</sup> Matthew Fletcher, *Justice Anthony Kennedy Wasn't Good for Indian Country*, HIGH COUNTRY NEWS (July 6, 2018), <https://www.hcn.org/articles/tribal-affairs-why-justice-anthony-kennedy-wasnt-good-for-indian-country> [<https://perma.cc/XV7X-7WKZ>] ("Kennedy was so disturbed by tribal jurisdiction over non-Indians that he would angrily protect a sexual predator from the horror of being subject to a tribal court, a position completely in line with his previous stands on Indian cases.").

<sup>217</sup> Borgmann, *supra* note 80, at 292.

<sup>218</sup> Scholars and advocates would largely agree. See, e.g., Patrick D. Schmidt & David A. Yalof, *The "Swing Voter" Revisited: Justice Anthony Kennedy and the First Amendment Right of Free Speech*, 57 POL. RES. Q. 209, 210 (2004) ("For every *Casey* decision that seemingly places Kennedy towards the more moderate-to-liberal end of the Court's ideological spectrum, one can find a subsequent decision like *Stenberg v. Cahart* (2000) [sic], in which Kennedy refused to join fellow justices David Souter and Sandra

“partial-birth” abortions, also known as the dilation and extraction (D&X) method of performing late-term abortions, noting more than once that a woman may “regret her choice to abort.”<sup>219</sup> He also wrote a partial concurrence and dissent in *Hodgson v. Minnesota*, indicating that he would uphold Minnesota’s two-parent notice statute, which required the physician to notify both of the minor’s parents before performing an abortion.<sup>220</sup> However, he also sided with the more liberal justices in *Casey* and *Whole Woman’s Health*, cases which reaffirmed *Roe*’s central holding.<sup>221</sup>

In the wake of Kennedy’s retirement, advocates and media outlets on both sides warned of *Roe*’s demise.<sup>222</sup> During his presidential campaign, President Trump vowed to nominate judges who would overturn *Roe*.<sup>223</sup> Several weeks after Kennedy’s retirement announcement, President Trump announced that he would nominate District of Columbia Circuit Judge Brett Kavanaugh to the Supreme Court.<sup>224</sup> Anti-abortion

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Day O’Connor in helping to invalidate a partial-birth abortion restriction in Nebraska.”).

<sup>219</sup> *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007). D&X involves dilating the woman’s cervix, extracting the fetus by its feet, and then puncturing the fetal head and compressing the skull so the remains may pass through the cervix. Julie Rovner, *Partial-Birth Abortion: Separating Fact from Spin*, NPR (Feb. 21, 2006), <https://www.npr.org/2006/02/21/5168163/partial-birth-abortion-separating-fact-from-spin> [<https://perma.cc/9KJA-KHHR>].

<sup>220</sup> See *Hodgson v. Minnesota*, 497 U.S. 417, 481 (1990) (Kennedy, J., concurring in part and dissenting in part).

<sup>221</sup> See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992); *Whole Woman’s Health v. Hellerstedt*, 136 S.Ct. 2292 (2016).

<sup>222</sup> Sarah McCammon, *What Justice Kennedy’s Retirement Means for Abortion Rights*, NPR (June 28, 2018), <https://www.npr.org/2018/06/28/624319208/what-justice-kennedy-s-retirement-means-for-abortion-rights> [<https://perma.cc/F9QA-TK78>] (noting that anti-abortion groups have “seized the moment” to discuss *Roe*’s overturning, while reproductive justice organizations are “extremely concerned” (quoting Helene Krasnoff, vice president of public policy, litigation, and law at Planned Parenthood Federation of America)).

<sup>223</sup> Dan Mangan, *Trump: I’ll Appoint Supreme Court Justices to Overturn Roe v. Wade Abortion Case*, CNBC (Oct. 19, 2016), <https://www.cnn.com/2016/10/19/trump-ill-appoint-supreme-court-justices-to-overturn-roe-v-wade-abortion-case.html> [<https://perma.cc/3JTK-TAAZ>].

<sup>224</sup> Mark Landler & Maggie Haberman, *Brett Kavanaugh Is Trump’s Pick for Supreme Court*, N.Y. TIMES (July 9, 2018), <https://www.nytimes.com/2018/07/09/us/politics/brett-kavanaugh-supreme-court.html> [<https://perma.cc/4PMB-ETV2>].

organizations heralded the nomination.<sup>225</sup> On October 6, 2018, the Senate confirmed Brett Kavanaugh to the Supreme Court.<sup>226</sup>

As with Justice Kennedy, Justice Kavanaugh has a complicated and inconsistent track record on abortion. Kavanaugh encountered abortion in his judicial career in *Garza v. Hargan*. The plaintiff in *Garza*, a seventeen-year-old undocumented immigrant, discovered she was pregnant while detained in a federal shelter.<sup>227</sup> She sought an abortion, but the Office of Refugee Resettlement (ORR) prevented her from pursuing medical care.<sup>228</sup> The plaintiff's guardian ad litem, who was represented by the American Civil Liberties Union, sued ORR and HHS officials.<sup>229</sup> The district court issued a temporary restraining order and ordered HHS to permit the plaintiff to leave the shelter for her abortion.<sup>230</sup> En banc, the D.C. Circuit affirmed the order.<sup>231</sup> Judge Kavanaugh dissented, writing that the panel's decision created "a new right for unlawful immigrant minors in U.S. Government detention to obtain immediate abortion on demand."<sup>232</sup> Kavanaugh further noted that *Roe* and *Casey* are "precedents we must follow."<sup>233</sup> However, in leaked documents obtained by the New York Times, Judge Kavanaugh wrote in a March 2003 email that "not . . . all legal scholars refer to *Roe* as settled law," since the Supreme Court had three Justices who would

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<sup>225</sup> See, e.g., Press Release, Susan B. Anthony List, SBA List Praises Judge Brett Kavanaugh as Supreme Court Pick (July 9, 2018), <https://www.sba-list.org/newsroom/press-releases/sba-list-praises-judge-brett-kavanaugh-supreme-court-pick> [<https://perma.cc/G9WT-EEK7>].

<sup>226</sup> Sheryl Gay Stolberg, *Kavanaugh Is Sworn in After Close Confirmation Vote in Senate*, N.Y. TIMES (Oct. 6, 2018), <https://www.nytimes.com/2018/10/06/us/politics/brett-kavanaugh-supreme-court.html> [<https://perma.cc/9TX5-AYDF>].

<sup>227</sup> See Recent Case, *Garza v. Hargan*, 874 F.3d 735 (D.C. Cir. 2017) (en banc) (per curiam), 131 HARV. L. REV. 1812, 1812 (2018).

<sup>228</sup> *Id.* at 1813.

<sup>229</sup> *Id.*

<sup>230</sup> Temporary Restraining Order at 1, *Garza v. Hargan*, 874 F.3d 735 (D.C. Cir. 2017) (en banc) (per curiam) (No. 17-cv-02122).

<sup>231</sup> *Id.* at 752.

<sup>232</sup> *Id.* at 752 (Kavanaugh, J., dissenting).

<sup>233</sup> *Id.*

overrule precedent.<sup>234</sup> It is unclear whether Justice Kavanaugh would vote to overturn *Roe* and its progeny.

If *Roe* were explicitly overturned, there would be no constitutionally protected or recognized right to abortion; states would be free to protect, prohibit, and regulate abortion. Should a state criminalize abortion, a tribal clinic performing abortions would likely be subject to state criminal jurisdiction under *Cabazon*. If a state regulates abortion through its health or child welfare codes, then state jurisdiction may not necessarily apply. A state-by-state analysis would be necessary to determine the applicability of state jurisdiction.<sup>235</sup>

#### D. Practical Considerations for Tribes That Wish to Undertake Cecilia Fire Thunder's Proposal

Setting aside the possibility of *Roe*'s demise and congressional abrogation, there are practical concerns for a tribe to consider if it chooses to pursue Fire Thunder's proposal. Tribes must have the capital to invest in establishing the clinic. Such capital may be profits from gaming enterprises, grants, or charitable donations. Indeed, Fire Thunder received donations from people across the United States when she announced that she wished to open a clinic, perhaps in partnership with Planned Parenthood.<sup>236</sup> In 2017, Planned Parenthood opened an eight-million-dollar abortion clinic in Milwaukee,<sup>237</sup> which

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<sup>234</sup> See Charlie Savage, *Leaked Kavanaugh Documents Discuss Abortion and Affirmative Action*, N.Y. TIMES (Sept. 6, 2018), <https://www.nytimes.com/2018/09/06/us/politics/kavanaugh-leaked-documents.html> [<https://perma.cc/9UVP-G39M>]. In a memorandum about Kavanaugh's testimony before the Senate Judiciary Committee, the Center for Reproductive Rights identified the three Justices as then Chief Justice Rehnquist, Justice Scalia, and Justice Thomas, who dissented in *Casey*.

<sup>235</sup> The Center for Reproductive Rights has compiled a state-by-state analysis of what would happen if *Roe* fell. The report gathered data on abortion bans predating *Roe* and whether states have laws that would immediately prohibit abortion should the Court overrule *Roe*. *What if Roe Fell?*, CTR. FOR REPROD. RTS., <https://www.reproductiverights.org/what-if-roe-fell> [<https://perma.cc/SZ76-9E2R>].

<sup>236</sup> *Fire Thunder's Lightning*, *supra* note 5. Fire Thunder's impeachment was a result of these donations; the Tribal Council alleged that she solicited these donations using her title without their authorization. *Id.*

<sup>237</sup> Shamane Mills, *Planned Parenthood Opens New Clinic*, WIS. PUB. RADIO (Oct. 6, 2017), <https://www.wpr.org/planned-parenthood-opens-new-clinic> [<https://perma.cc/ESM9-CP42>].

private donors financed after Wisconsin cut the organization's funding.<sup>238</sup> It would likely cost even more for a tribe to open a similar modern and safe clinic. In rural areas, this cost may be higher if land is undeveloped. Though state taxes would likely not apply, there may be federal taxes should Congress levy them. Lastly, there would be legal costs related to counsel on diverse matters such as commercial contracts, defending the constitutionality of the clinic against anti-abortion groups,<sup>239</sup> and medical malpractice. For tribes that are independently wealthy and/or have preexisting tribal health care facilities, these costs would be relatively minimal. Tribes may levy a small tax on members to support operation costs.

Opening a clinic poses other logistical concerns. Tribes must recruit doctors, nurses, social workers, and staff who are trained in providing culturally competent reproductive care. This may require the provision of tribe-specific training and assessments. For certain populations that have preserved their native languages, it may also require hiring interpreters. Cultural competency is especially important considering that twenty-three percent of Natives reported experiencing discrimination at a health clinic or doctor's office.<sup>240</sup> Tribes may need to hire and train law enforcement to oversee protests or address acts or threats of violence against a clinic.<sup>241</sup> However, these new positions create employment opportunities for

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<sup>238</sup> *Id.*

<sup>239</sup> Tribal sovereign immunity likely prevents entities or individuals from filing suit against the tribe, the clinic, and clinic employees in their official capacities. See *Lewis v. Clarke*, 137 S. Ct. 1285 (2017); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58–59 (1978); *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173 (10th Cir. 2010). This is subject to change should Congress ever abrogate sovereign immunity in this context. Congressional abrogation requires a clear expression and intent to limit immunity. It would not preclude suit against employees in their individual capacities should there be colorable claims.

<sup>240</sup> NPR ET AL., *DISCRIMINATION IN AMERICA: EXPERIENCES AND VIEWS OF NATIVE AMERICANS* 8 (2017), [https://www.rwjf.org/content/dam/farm/reports/surveys\\_and\\_polls/2017/rwjf441678](https://www.rwjf.org/content/dam/farm/reports/surveys_and_polls/2017/rwjf441678) [<https://perma.cc/X44P-CC8U>].

<sup>241</sup> There is also the possibility that nonmembers may come to the tribe's clinic to protest or incite violence. One of tribes' key rights as sovereigns is the ability to exclude persons from tribal territory, which exists independent of any general jurisdictional authority. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141 (1982). Tribes should exercise this right if necessary to ensure the safety of an abortion clinic or provider.

tribe members. A new influx of jobs boosts tribal economic development.

### 1. Services a Tribal Clinic Should Provide

Tribal clinics should provide a wide variety of services under the umbrella of reproductive health, such as abortion, contraception, and sterilization. Tribes should offer medication abortion<sup>242</sup> and aspiration,<sup>243</sup> the two most common first-trimester abortion methods. They should also offer dilation and evacuation (D&E) abortions, another common abortion method typically performed sixteen weeks LMP.<sup>244</sup> Tribes may impose different (or no) gestational limits for abortion. Late-term abortions are extremely rare,<sup>245</sup> and there is little data on the reasons women may seek them.<sup>246</sup> Providing medication abortion, aspiration, and D&E abortions may limit the need for late-term abortions, but offering the service may accommodate mothers who discover congenital defects or severe maternal morbidities, such as hemorrhage,<sup>247</sup> later in pregnancy. Currently, only eight states have no restrictions on abortion after viability or a specific gestational age.<sup>248</sup> On the

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<sup>242</sup> *The Abortion Pill*, *supra* note 150.

<sup>243</sup> Aspiration, also known as suction abortion or vacuum aspiration, is a first-trimester abortion method. It is usually performed during the last weeks of the first trimester at around fourteen to sixteen weeks LMP. *In-Clinic Abortion*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/abortion/in-clinic-abortion-procedures> [<https://perma.cc/W86L-5GNA>].

<sup>244</sup> *What Happens During an In-Clinic Abortion?*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/abortion/in-clinic-abortion-procedures/what-happens-during-an-in-clinic-abortion> [<https://perma.cc/23LP-QWFY>].

<sup>245</sup> Janet E. Gans Epner et al., *Late-Term Abortion*, 280 [J]AMA 724, 725 (1998) (“The number of abortions performed after [twenty-six weeks LMP] nationwide is estimated between 320 and 600.”).

<sup>246</sup> Aida Torres & Jacqueline Darroch Forrest, *Why Do Women Have Abortions?*, 20 FAM. PLAN. PERSP. 169 (1988) (finding that questionnaire responses suggest that out of 1900 women surveyed who sought an abortion sixteen weeks or more LMP, the largest proportion reported that it was because they miscalculated gestational age or did not realize that they were pregnant, followed by difficulty arranging the abortion).

<sup>247</sup> William M. Callaghan et al., *Severe Maternal Morbidity Among Delivery and Postpartum Hospitalizations in the United States*, 120 OBSTETRICS & GYNECOLOGY 1029 (2012).

<sup>248</sup> *An Overview of Abortion Laws*, *supra* note 14.

other hand, twenty states have banned late-term abortions.<sup>249</sup> Federal law has banned so-called “partial-birth” abortions since 2003, also known as the D&X method of performing late-term abortions.<sup>250</sup> Because the Indian Commerce Clause grants the federal government plenary power over tribes,<sup>251</sup> tribal clinics may not perform D&X abortions unless the mother’s life is in danger.

## 2. Tribes Should Consider Permitting Non-Native People to Seek Care at a Clinic

Tribes should consider permitting nonmember visitors to seek services at the clinic, because it may dramatically improve access to abortion and other services for that population. Tribes may, of course, bar nonmembers.<sup>252</sup> This is one of several rights guaranteed to tribes as sovereigns. However, granting nonmembers access to the clinics would greatly affect the landscape of reproductive health in the United States, especially in states hostile towards abortion. Because nonmember women would be on tribal land, the state could not exercise jurisdiction over their actions; it is akin to a woman going to a different state to seek an abortion. Especially in the six states with only one abortion clinic,<sup>253</sup> thousands of women would have greater options for abortion, contraception, sterilization, and sexual education.

Women in states hostile towards abortion may have to travel long distances to reach a tribal clinic, but they would not be additionally burdened by onerous delays and unnecessary requirements. These women would not be subject to mandatory waiting periods,<sup>254</sup> which are especially burdensome on

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<sup>249</sup> *See id.*

<sup>250</sup> Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 (2017) (upheld in *Gonzales v. Carhart*, 550 U.S. 124 (2007)).

<sup>251</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>252</sup> *Id.*

<sup>253</sup> Sanders, *supra* note 15.

<sup>254</sup> According to one source, nearly six out of ten women are subject to mandatory delays when seeking an abortion; fifty-nine percent of the United States population resides in a mandatory waiting period state. Samantha Allen, *6 in 10 Women Now Subjected to Abortion Waiting Period Laws*, DAILY BEAST (Mar. 1, 2016), <https://www.thedailybeast.com/6-in-10-women-now-subjected-to-abortion-waiting-period-laws> [<https://perma.cc/FLS6-K492>]. There are issues with concluding that because fifty-nine percent

poor women and rural women.<sup>255</sup> These waiting periods also accomplish little by way of preventing abortions, as nearly eighty-seven percent of women are certain of their decision to seek abortion.<sup>256</sup> Mandatory waiting periods have been associated with a higher proportion of second-trimester abortions as well as a greater number of women seeking abortions in a different state.<sup>257</sup> In states where telemedicine is permitted, telemedicine medication abortion may be an option for non-

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of people reside in states with mandatory waiting periods, six out of ten women are subject to the waiting periods. Waiting periods are typically waivable in cases of rape, incest, and danger to the mother's health and life. However, the general point that an alarming number of women are subject to these regulations still stands.

<sup>255</sup> When waiting periods are instituted, women must often take multiple days off from work—one for the initial appointment and another for the procedure itself. Women may also take more time off to recover, depending on the type of procedure. Poor women are least likely to have an emergency fund to cover these expenses and time off from work, especially because health insurance providers often do not cover elective abortions. For an illustrative example of the issues poor women face in seeking an abortion, see Jeff Deeney, *If More Funding Went to Safe, Legal Abortions, Would Kermit Gosnell Have Happened?*, ATLANTIC (Apr. 15, 2013), <https://www.theatlantic.com/health/archive/2013/04/if-more-funding-went-to-safe-legal-abortions-would-kermit-gosnell-have-happened/274974/> [https://perma.cc/9X4Y-ZKP9] (“What’s worse is that the cost of the abortion, \$300, would break [her] budget. There was no such thing as an extra \$300 in [her] world.”). Rural women are also disproportionately affected, as clinics tend to be concentrated in larger cities. Rural women may be required to travel hundreds of miles over multiple days. For more, see *Committee Opinion: Health Disparities in Rural Women*, 123 AM. C. OBSTETRICIANS & GYNECOLOGISTS 384 (2014) (“Rural women seeking abortions in 2008 traveled substantially greater distances than nonrural women. Thirty-one percent traveled more than 100 miles and an additional 42.9% traveled between 50 miles and 100 miles, compared with 3.8% and 7%, respectively, for nonrural women.” (footnote omitted)).

<sup>256</sup> Diana Greene Foster et al., *Attitudes and Decision Making Among Women Seeking Abortions at One U.S. Clinic*, 44 PERSP. ON SEXUAL & REPROD. HEALTH 117, 120 (2012).

<sup>257</sup> THEODORE J. JOYCE ET AL., GUTTMACHER INST., THE IMPACT OF STATE MANDATORY COUNSELING AND WAITING PERIOD LAWS ON ABORTION: A LITERATURE REVIEW 9–10 (2009), [https://www.guttmacher.org/sites/default/files/report\\_pdf/mandatorycounseling.pdf](https://www.guttmacher.org/sites/default/files/report_pdf/mandatorycounseling.pdf) [https://perma.cc/TK9L-F5GL]; see also Ushma D. Upadhyay et al., *Denial of Abortion Because of Provider Gestational Age Limits in the United States*, 104 AM. J. PUB. HEALTH 1687, 1691 fig.1 (2014) (showing that sixty-seven percent of near-limit abortion patients and fifty-eight percent of patients rejected for being past the provider’s gestational age reported travel and procedure costs as causing their delay in seeking abortion).

member women, thereby reducing patients' transportation costs and making the clinic run more efficiently. Women would not be required to receive factually incorrect counseling about how the fetus feels pain and/or the possibility of infertility or breast cancer as a result of abortion.<sup>258</sup> Providers would not be required to convey scientifically inaccurate information, such as misinformation about fetal pain, or ask patients if they wish to view the image from a mandatory ultrasound.

#### E. Recommendations for Tribes That Wish to Undertake Cecilia Fire Thunder's Proposal and Benefits a Clinic Would Confer to Native Women

First, a tribe seeking to establish a reproductive clinic should consider whether its membership agrees with the initiative. Though the establishment of clinics in Indian Country would address the growing inaccessibility of abortion, it is ultimately a tribe's decision to pursue such a venture. There are currently 567 federally recognized tribes in the United States.<sup>259</sup> Each of these entities is sovereign and represents a broad spectrum of beliefs about abortion. Tribes should consider voter referendums to gauge community interest. Tribes may also conduct research to assess whether there is a need for comprehensive reproductive health services on the reservation before undertaking such an endeavor.

If a tribe's membership were willing to open a clinic, tribal leadership should consider following the guidance of the American College of Obstetricians and Gynecologists (ACOG) for increasing abortion access.<sup>260</sup> Though ACOG's recommendations are specifically tailored to Congress, the general advice is applicable. First, tribes should repeal anti-abortion legislation that may interfere with the patient-provider relationship, if such laws exist. Second, tribes should

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<sup>258</sup> *Mandatory Counseling for Abortion*, GUTTMACHER INST. (Aug. 24, 2017), <https://www.guttmacher.org/print/evidence-you-can-use/mandatory-counseling-abortion> [<https://perma.cc/S7NB-9LAJ>].

<sup>259</sup> Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 82 Fed. Reg. 4915, 4915 (Jan. 17, 2017).

<sup>260</sup> *Committee Opinion: Increasing Access to Abortion*, 124 AM. C. OBSTETRICIANS & GYNECOLOGISTS 1060 (2014).

ensure that first-trimester abortion methods, namely medication abortion and aspiration, are widely available. Third, they should employ “appropriately trained and credentialed advanced practice clinicians in accordance with individual state licensing requirements.”<sup>261</sup> They may also institute their own licensing requirements if necessary. Fourth, tribes should ensure that law enforcement works in tandem with clinics to ensure patient and provider safety.

Lastly, tribes should establish these clinics as holistic reproductive health care providers. Comprehensive reproductive health services should be made available to all tribal members. Cecilia Fire Thunder envisioned a holistic clinic that provides abortion, contraception, sexual education, and support for sexual assault victims.<sup>262</sup> This broad vision for reproductive services would meet community needs. Native American women face disproportionately high rates of intimate partner violence,<sup>263</sup> sexual assault,<sup>264</sup> and unintended pregnancy.<sup>265</sup> A tribal clinic could address these issues in a culturally competent manner by contracting clinicians with experience in Indian Country. There is a possibility that a clinic could reduce those rates by providing women with resources on family planning and educating the community about affirmative consent. These are laudable goals that would greatly impact women’s lives across Indian Country.

## V. CONCLUSION

Cecilia Fire Thunder accurately assessed the constitutionality of her proposal. As sovereigns, tribes have the absolute right to open a reproductive health or women’s clinic on their lands. Considering the arguments for and against the applicability of Public Law 280 in this context, it appears that because anti-abortion laws are regulatory, state jurisdiction does not apply to abortion in Indian Country. States hostile towards abortion cannot impose restrictive laws against tribes.

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<sup>261</sup> *Id.*

<sup>262</sup> Aguilar, *supra* note 6.

<sup>263</sup> Malcoe et al., *supra* note 111.

<sup>264</sup> PERRY, *supra* note 112.

<sup>265</sup> SCHINDLER ET AL., *supra* note 113.

Despite the considerable barriers to establishing a tribal clinic and the potential that Congress may respond by statutorily abrogating sovereignty, this proposal is a worthwhile endeavor for interested tribes to pursue. A tribal clinic is better positioned to address women's issues than the Indian Health Service. Native women would have greater access to abortions and other family planning services without the burdens of onerous and medically unnecessary barriers to care. In addition, nonmember women, if permitted to access the clinic, would greatly benefit because they would have more options for reproductive health care. A tribal clinic would grant women, Native and non-Native alike, greater autonomy over their bodies and their lives. At the core of tribal sovereignty is the right to retain autonomy over the self. Cecilia Fire Thunder recognized the intersection between reproductive justice, women's rights, and tribal self-determination and sovereignty. Future generations of tribal leaders should heed her counsel.