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CONFLICTS OF LAW AND THE ABORTION WAR BETWEEN THE STATES

Paul Schiff Berman,[*] *Roey Goldstein,*[**] *and Sophie Leff*[***]

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ABSTRACT

On the subject of abortion, the so-called "United" States of America are becoming more disunited than ever. The U.S. Supreme Court's precipitous decision in Dobbs v. Jackson Women's Health Organization overturned the nationwide framework for abortion rights that had uneasily governed the country for fifty years. In the immediate aftermath of that decision, it is becoming increasingly clear that states governed by Republicans and those governed by Democrats are moving quickly and decisively in opposite directions. Since the U.S. Supreme Court agreed to hear the Dobbs case, at least twenty-four states have enacted statutes or state constitutional provisions restricting abortion access, while at least sixteen states have adopted new legal regimes that explicitly seek to protect the right to an abortion.

These partisan and geographic divides create perhaps the biggest set of nationwide conflicts-of-law problems since the era of the Fugitive Slave Act before the Civil War. Indeed, practically every aspect of the new abortion legal landscape is now characterized by uncertainty, creating potential constitutional and federal preemption questions, state v. state conflicts of law issues, and new concerns based on various forms of private regulation related to abortion access.

This Article seeks to provide a comprehensive survey of the current state of the law with regard to how such conflicts-of-law questions might be resolved in the abortion context. Part One briefly surveys the widely divergent state laws being debated or enacted in the country in the wake of Dobbs. Part Two discusses potential constitutional challenges to the extraterritorial application of these abortion statutes. If statutes criminalize or impose civil liability on the actual pregnant person seeking the abortion, such statutes might be challenged under the Privileges and Immunities Clause of Article IV specifically, or as a violation of the constitutional right to travel more generally. Alternatively, if statutes seek to impose criminal or civil penalties on out-of-state healthcare providers or other actors, those statutes may be vulnerable to a challenge under the

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Commerce Clause. Part Three turns to potential federal preemption of state anti-abortion laws under the Food, Drug, and Cosmetics Act or the Emergency Medical Treatment and Active Labor Act. Part Four addresses the question of whether states can impose civil liability on out-of-state acts or actors—even beyond the right to travel and Commerce Clause concerns—focusing on the classic conflicts-of-law doctrines of jurisdiction, choice of law, and judgment recognition. Finally, Part Five considers the activities of private actors as sources of regulatory authority that create conflicts questions. Here, we discuss the degree to which a state can prevent employers from covering abortion-related expenses as part of their health insurance plans, the privacy concerns that arise when private actors collect data that might be used in criminal prosecutions or civil suits regarding abortions, and the possibility that private religious groups might invoke the First Amendment to claim exemptions from state anti-abortion laws.

INTRODUCTION

On the subject of abortion, the so-called "United" States of America are becoming more disunited than ever. The U.S. Supreme Court's precipitous decision in *Dobbs v. Jackson Women's Health Organization*[1] overturned the nationwide framework for abortion rights that had uneasily governed the country for fifty years. In the immediate aftermath of that decision, it is becoming increasingly clear that states governed by Republicans and those governed by Democrats are moving quickly and decisively in opposite directions. Indeed, since the U.S. Supreme Court agreed to hear the *Dobbs* case, at least twenty-four states have enacted statutes or state constitutional provisions restricting abortion access,[2] while at least sixteen states have adopted new legal regimes that explicitly seek to protect the right to an abortion.[3]

These partisan and geographic divides create perhaps the biggest set of nationwide conflicts-of-law problems since the era of the Fugitive Slave Act before the Civil War.[4] Indeed, practically every aspect of the new abortion legal landscape is now characterized by uncertainty.

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[1] 142 S. Ct. 2228 (2022).

[2] Elizabeth Nash & Isabel Guarnieri, *Six Months Post-*Roe*, 24 US States Have Banned Abortion or Are Likely to Do So: A Roundup*, GUTTMACHER INST., https://www.guttmacher.org/2023/01/six-months-post-roe-24-us-states-have-banned-abortion-or-are-likely-do-so-roundup (last visited Jan. 15, 2023).

[3] *Abortion Policy in the Absence of Roe*, GUTTMACHER INST. (Dec. 2022), https://www.guttmacher.org/state-policy/explore/abortion-policy-absence-roe (last visited Jan. 15, 2023); *see also* Christine Vestal, *Blue States Enact New Laws to Create Abortion Havens*, PEW (Apr. 1, 2022), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/04/01/blue-states-enact-new-laws-to-create-abortion-havens. Twenty-two states plus Washington, D.C. protected abortion rights either by law or the state constitution before *Dobbs*: Alaska, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Jersey, New York, Oregon, Rhode Island, Vermont, and Washington. In response to *Dobbs*, 16 states created new protections: California, Colorado, Connecticut, Delaware, Hawaii, Maine, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Pennsylvania, and Rhode Island. There are also four states that allow access to abortion, though it is not explicitly protected by state law. These states are New Hampshire, New Mexico, Pennsylvania, and Virginia. For further discussion, see Part I, *infra*.

[4] Fugitive Slave Act of 1793, ch. 7, 1 Stat. 302 (1793) (repealed 1864). For a discussion of many cases in which courts addressed fugitive slave issues as technical conflicts-of-law questions rather than tackling broader constitutional or moral questions about slavery, see generally*, e.g.,* H. Robert Baker, *The Fugitive Slave Clause and the Antebellum Constitution*, 30 L. & HIST. REV. 1133 (2012).

Out-of-state abortion activity may give rise to in-state criminal prosecutions, as anti-abortion states attempt to punish those seeking abortions beyond their borders or those who perform the procedures.[5] Anti-abortion states are also seeking to ban the provision of abortion pills to in-state residents, a growing issue given that medication abortions now account for over half the abortions in the United States.[6] In addition, civil suits may be brought by citizen "bounty hunters" against patients, abortion providers, their staff, and anyone who "aids and abets" abortion, especially those associated with abortion funds.[7] These suits, whether criminal or civil, will be brought in the courts of anti-abortion states, but many defendants will have the procedure performed or reside out of state. Meanwhile, on the other side of the divide, pro-access states are enacting provisions seeking to block such extraterritorial criminal and civil enforcement of abortion bans or to allow its citizens to file retaliatory suits against those who file out-of-state suits against them.[8]

All of this legal activity will create a complex set of conflicts-of-law questions. To begin, there are potential "vertical" conflicts between state and federal law. Courts will be forced to probe the extent to which the U.S. Constitution restricts state extraterritorial enforcement of these various civil and criminal schemes, either under the rubric of the equal treatment guarantee of the Privileges and Immunities Clause of Article IV,[9] the right to travel more broadly,[10] or the so-called "Dormant" Commerce Clause of Article I, section 8.[11] In addition, federal preemption may prevent states from limiting or prohibiting the use of the abortion drug mifepristone for its Food and Drug Administration ("FDA")-approved purpose, and provisions of the federal Emergency Medical Treatment and Active Labor Act ("EMTALA") might require hospitals even in anti-abortion states to provide emergency abortion care to patients experiencing pregnancy-related complications and other emergent medical conditions, potentially in conflict with their own state law.

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[5] John Kruzel, *Battle Lines Emerge Over Out-of-State Abortion*, THE HILL (July 14, 2022), https://thehill.com/regulation/3558330-battle-lines-emerge-over-out-of-state-abortion/; Ava Sasani, *Is it Legal for Women to Travel Out of State for an Abortion*, N.Y. TIMES (June 24, 2022), https://www.nytimes.com/2022/06/24/us/abortion-travel-bans.html.

[6] Rachel K. Jones et al., *Medication Abortion Now Accounts for More than Half of All US Abortions,* GUTTMACHER INST. (Feb. 24, 2022), https://www.guttmacher.org/article/2022/02/medication-abortion-now-accounts-more-half-all-us-abortions; see also Christine Vestal, *Abortion Medications Set to Become Next Legal Battlefield*, PEW (July 13, 2022), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/07/13/abortion-medications-set-to-become-next-legal-battlefield; *see, e.g.*, Kimberlee Kruesi, *Tennessee Advancing Bill Banning Abortion Pills by Mail*, ASSOCIATED PRESS (Apr. 4, 2022), https://apnews.com/article/abortion-health-business-tennessee-medication-6b230381b71f55e778a75104a9bcc0cd.

[7] Alan Feuer, *The Texas Abortion Law Creates a Kind of Bounty Hunter. Here's How it Works.*, N. Y. TIMES (Sep. 10, 2021), https://www.nytimes.com/2021/09/10/us/politics/texas-abortion-law-facts.html; Irin Carmon, *Abortion Funds Are a Lifeline. And a Target. The Right's Attacks on Grassroots Groups Have Already Begun*, N.Y. MAG. (May 7, 2022), https://nymag.com/intelligencer/2022/05/roe-v-wade-abortion-funds.html.

[8] Kierra B. Jones, *Expanding Access and Protections in States Where Abortion is Legal*, CTR. FOR AM. PROGRESS, (July 25, 2022), https://www.americanprogress.org/article/expanding-access-and-protections-in-states-where-abortion-is-legal/; *see, e.g.*, *Governor Hochul Signs Nation-Leading Legislative Package to Protect Abortion and Reproductive Rights for All*, GOVERNOR KATHY HOCHUL, https://www.governor.ny.gov/news/governor-hochul-signs-nation-leading-legislative-package-protect-abortion-and-reproductive (last visited Jan. 15 2023).

[9] U.S. CONST. art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.").

[10] *See infra* Part II.A.ii.

[11] *See infra* Part II.B.

Turning to horizontal choice-of-law questions, statutes that allow civil suits against out-of-state entities inevitably raise questions of legal jurisdiction, as courts in anti-abortion states seek to assert legal authority over activity taking place entirely beyond their territorial borders. Such suits also create choice-of-law problems because of the conflicting legal regimes of the state asserting jurisdiction and the state where the relevant activity occurred. And, assuming judgments are actually issued against out-of-state actors, will those judgments be enforced in other states, and are statutes authorizing retaliatory suits permissible under the U.S. Constitution's Full Faith and Credit Clause[12]?

Finally, as legal pluralists have long observed, non-state entities make decisions that regulate behavior.[13] In the abortion context, for example, the choices of employers with respect to health coverage for abortion and related expenses matter a great deal. Can an employer that chooses to provide coverage for such costs do so despite state civil or criminal laws to the contrary? Conversely, if "abortion sanctuary" states adopt regulations seeking to require private insurance plans to cover abortion services, are religious exemptions required? In addition, given that private companies now routinely collect online search, location, and health data, how will conflicts among state abortion laws impact data privacy for people seeking abortions? And will private religious organizations be able to claim exemption from either anti-abortion or pro-access state laws by invoking the First Amendment?[14]

The answers to most of these questions are not at all clear under current law. And this uncertainty has serious consequences. Already, both medical providers and abortion funds across the country have felt compelled to curtail their operations even when care is provided only in states where abortion is legal. For example, Planned Parenthood of Montana ("PPMT") announced that it would no longer provide medication abortion to patients who were not Montana residents.[15] This change was designed to shield providers and staff from potential civil or criminal liability in an out-of-state patient's home state. In an email to staff, Martha Fuller, President and CEO of PPMT wrote that, "the risks around cross-state provision of services are currently less than clear, with potential for both civil and criminal action for providing abortions in states with bans."[16] The issue for PPMT is that medication abortions are usually administered using two different drugs, one of which, mifepristone, is generally taken at a clinic, and the other, misoprostol, is taken at home twenty-four hours later.[17] Thus, if a patient from a state such as South Dakota, where abortion is illegal,[18] completed a medication abortion in South Dakota, the state might treat the abortion as having occurred in South Dakota and therefore pursue legal action against PPMT under its abortion ban. In theory, South Dakota's existing abortion ban law applies only within its borders, but

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[12] U.S. CONST. art. IV, § 1, cl. 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.").
[13] *See, e.g.,* Paul Schiff Berman, *The New Legal Pluralism*, 5 ANN. REV. OF L. & SOC. SCI. 225 (2009) (summarizing some of the vast legal pluralist literature).
[14] U.S. CONST. amend. I.
[15] Nicole Girten, *Planned Parenthood of Montana Halts Medication Abortions or Patients from "Trigger Law" States*, IDAHO CAPITAL SUN (July 1, 2022), https://idahocapitalsun.com/2022/07/01/planned-parenthood-of-montana-halts-medication-abortions-for-patients-from-trigger-law-states/.
[16] *Id.*
[17] *The Availability and Use of Medication Abortion*, KAISER FAM. FOUND. (Jan. 4, 2023), https://www.kff.org/womens-health-policy/fact-sheet/the-availability-and-use-of-medication-abortion/.
[18] S.D. CODIFIED LAWS §34-23A-5 (2019).

characterizing or localizing abortion expansively could allow the state to widen the class of abortions impacted by their law. This is a clear example of how confusion about what law applies to abortion-related conduct paralyzes care. The same is true of services that assist patients in obtaining abortion.

Abortion funds—private charitable organizations that provide monetary and logistical support for individuals who need help obtaining abortions—face similar challenges. The work of these funds is more important than ever because when residents of anti-abortion states are forced to travel to obtain abortions, they will need far more financial and logistical help to do so than if they were able to obtain an abortion locally. They will need to pay for travel, care, and often lodgings because many states require multiple visits across multiple days before a person can obtain an abortion. Anti-abortion states, however, are likely to create liability for conduct that "aids and abets" abortion, even if that abortion ultimately occurs elsewhere. Notably, leaders of various Texas abortion funds have already been sued under Texas Senate Bill 8 ("SB 8") for "aiding and abetting" abortion.[19] Some abortion funds operating in anti-abortion states have already begun to curtail their operations.[20]

This Article seeks to provide a comprehensive survey of the current state of the law with regard to how the various conflicts-of-law questions summarized above might be addressed in the abortion context.[21] Part One briefly surveys the widely divergent state laws being debated or enacted in the country in the wake of *Dobbs*. Part Two discusses potential constitutional challenges to the extraterritorial application of these abortion statutes. If statutes criminalize or impose civil liability on the actual pregnant person seeking the abortion, such statutes might be challenged under the Privileges and Immunities Clause of Article IV specifically, or as a violation of the constitutional right to travel more generally.[22] Alternatively, if statutes seek to impose criminal or civil penalties on out-of-state healthcare providers or other actors, those statutes may be vulnerable to a challenge under the Commerce Clause. Part Three turns to potential federal preemption of state anti-abortion laws under the Food, Drug, and Cosmetics Act and EMTALA. Part Four addresses the question of whether states can impose civil liability on out-of-state acts or actors—even beyond the right to travel and Commerce Clause concerns—focusing on the classic conflicts-of-law doctrines of jurisdiction, choice of law, and judgment recognition. Finally, Part Five considers the activities of private actors as sources of regulatory authority that create conflicts questions. Here, we discuss the degree to which a state can prevent employers from covering abortion-related expenses as part of their health insurance plans, the privacy concerns that arise when private actors collect data that might be used in criminal prosecutions or civil suits regarding

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[19] *See* Carmon, *supra* note 7.

[20] Erin Douglas & Eleanor Klibanoff, *Abortion Funds Languish in Legal Turmoil, their Leaders Fearing Jail Time if the Help Texans*, THE TEX. TRIB. (Jun 29, 2022), https://www.texastribune.org/2022/06/29/texas-abortion-funds-legal/; Sarah Swetlik, *Alabama Abortion Organizations Pause Services Amid Review of Law*, ADVANCE LOC. ALA. (Jun. 29, 2022), https://www.al.com/news/2022/06/alabama-clinics-pause-referrals-some-services-amid-review-of-abortion-law.html.

[21] We are grateful for, and seek to build upon, an initial work covering some of these same questions. *See* David S. Cohen et. al., *The New Abortion Battleground*, 123 COLUM. L. REV. ___ (forthcoming, 2023).

[22] *See infra* Part II.A.

abortions, and the possibility that private religious groups might invoke the First Amendment to claim exemptions from state anti-abortion laws.

I. The New Abortion Legal Landscape

The new abortion legal landscape is increasingly fragmented as a result of the partisan and geographic divides that tend to define twenty-first century America.[23] On one side of this divide, many states enacted "trigger laws," as early as 2007 to ban and criminalize abortion immediately upon the U.S. Supreme Court's reversal of such rights and continue to introduce similar legislation.[24] Some states have also authorized civil suits, leaving enforcement of anti-abortion statutes to individual bounty hunters.[25] On the opposite side, pro-access states are not only guaranteeing access to abortion within their borders, but are directly responding to enacted laws in anti-abortion states by opening their borders to out-of-state individuals seeking such services and even creating causes of action to retaliate against those who sue them under out-of-state laws.[26]

A. *The Anti-Abortion States*

In the pre-*Dobbs* era and before the twenty-first century brought a wave of restrictive abortion laws, many abortion clinics likely had few or no out-of-state contacts. Especially in states where clinics were relatively plentiful, abortion practice could be very local. Clinics would serve patients in their community and not many others. This state of affairs has changed dramatically.

After 1992, when the U.S. Supreme Court's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[27] allowed a greater range of anti-abortion regulation, state legislatures focused their efforts on regulating abortion both in the name of potential life, and "maternal health."[28] *Casey* itself "dealt principally with regulations justified as protecting unborn life" by regulating patient behavior to discourage and prevent abortion.[29] The restrictions at issue in *Casey* included requirements that patients receive extensive counseling, undergo a 24-hour waiting period prior to an abortion, and notify parents and spouses.[30] The Court left all but the spousal notification provision intact.[31] What remained are still common elements of state law today, even states that are relatively hospitable to abortion rights.[32] Not content with this

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[23] For a broader discussion of these demographic shifts and the problems they cause for American democracy, see Paul Schiff Berman et al., *Democracy and Demography*, 24 U. PA. J. CONST. L. 766 (2022).

[24] Elizabeth Nash & Isabel Guarnieri, *13 States Have Abortion Trigger Bans—Here's What Happens When* Roe *is Overturned*, GUTTMACHER INST., https://www.guttmacher.org/article/2022/06/13-states-have-abortion-trigger-bans-heres-what-happens-when-roe-overturned (last visited Jan. 15, 2023).

[25] Elizabeth Nash et al., *2022 State Legislative Sessions: Abortion Bans and Restrictions on Medication Abortion Dominate*, GUTTMACHER INST., https://www.guttmacher.org/article/2022/03/2022-state-legislative-sessions-abortion-bans-and-restrictions-medication-abortion (last visited Jan. 15, 2023).

[26] *See* Jones, *supra* note 8.

[27] 505 U.S. 833 (1992).

[28] *See* Linda Greenhouse & Reva B. Siegel, Casey *and the Clinic Closings: When "Protecting Health" Obstructs Choice*, 125 YALE L.J. 1428, 1430 (2016); Dawn Johnsen, *"Trap"ing* Roe *in Indiana and a Common-Ground Alternative*, 118 YALE L.J. 1356, 1384 (2009).

[29] Greenhouse & Siegel, *supra* note 28, at 1438.

[30] 505 U.S. at 844.

[31] *Id.* at 901.

[32] *An Overview of State Abortion Laws*, GUTTMACHER INST., https://www.guttmacher.org/state-policy/explore/overview-abortion-laws (last visited Jan.15, 2023).

regulatory scheme, antiabortion legislatures shifted their approach and began to regulate abortion providers and clinics themselves, rather than patients.[33]

Such regulations, called Targeted Regulation of Abortion Provider ("TRAP") laws, imposed onerous conditions on abortion providers, such as requiring extensive physical plant specifications and difficult-to-obtain admitting privileges for physicians.[34] These requirements were so difficult and expensive to comply with that they forced many clinics to close.[35] The more scarce abortion providers have become as a result of these laws, the farther patients have had to travel for care, both within and outside their state of residence.[36] The most recent data available puts the rate of patients leaving their state of residence for abortion between eight and ten percent of total abortions.[37] It is virtually certain that this figure will increase dramatically as more states move to ban or severely restrict abortion in the wake of the *Dobbs* decision.

Broad-based abortion bans are currently or soon will be in effect in seventeen states.[38] These states restrict abortion by (1) criminalizing medical procedures that have the intent to terminate a pregnancy; (2) criminalizing the administration, prescription, or sale of medicine, drugs, and substances to individuals who have the intent to terminate a pregnancy;[39] and (3) subjecting those who seek, aid, abet, or perform an abortion to potential civil liability.[40]

Individuals subject to these laws in each of the seventeen states vary. Some states focus on "licensed healthcare professionals," seeking to prevent them from intentionally or knowingly performing or attempting to perform an abortion,[41] while other state laws have a broader scope,

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[33] *See* Greenhouse & Siegel, *supra* note 28, at 1449–51; Johnsen, *supra* note 28, at 1361.
[34] *Targeted Regulation of Abortion Laws*, GUTTMACHER INST. https://www.guttmacher.org/evidence-you-can-use/targeted-regulation-abortion-providers-trap-laws (last visited Jan. 15, 2023).
[35] *See* Greenhouse & Siegel, *supra* note 28, at 1449-1451; *see e.g.*, Manny Fernandez, *Decision Allows Abortion Law, Forcing 13 Texas Clinics to Close*, N. Y. TIMES (Oct. 2, 2014), https://www.nytimes.com/2014/10/03/us/appeals-court-ruling-closes-13-abortion-clinics-in-texas.html (describing the intermediate court decision in *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582 (2016), which was later abrogated by the Supreme Court in *Dobbs*).
[36] *Targeted Regulation of Abortion Laws*, *supra* note 34.
[37] Mikaela H. Smith et al., *Abortion Travel Within the United States: An Observational Study of Cross-State Movement to Obtain Abortion Care in 2017*, 10 LANCET REG'L HEALTH – AMS. 4 (2022); Jeff Diamant & Besheer Mohamed, *What Data Says About Abortion in the U.S.*, PEW RSCH. CTR. (Jan. 11, 2023), https://www.pewresearch.org/fact-tank/2022/06/24/what-the-data-says-about-abortion-in-the-u-s-2/.
[38] ALA. CODE § 13A-13-7 (2019); ARIZ. REV. STAT. ANN. §§ 36-2321 to 36-2326 (2022); ARK. CODE ANN. § 5-61-404 (West 2021); IDAHO CODE ANN. § 18-622 (West 2020); KY. REV. STAT. ANN. § 311.772 (West 2019); LA. REV. STAT. ANN. § 40:1061 (2018), as amended by S.B. 342, 2022 Leg., Reg. Sess. (La. 2022) and S.B. 388, 2022 Leg., Reg. Sess. (La. 2022); MISS. CODE ANN. § 41-41-45 (West 2007); MO. ANN. STAT. § 188.017 (West 2019); N.D. CENT. CODE ANN. § 12.1-13-12 (West 2021); OKLA. STAT. tit. 63, § 1-731.4 (West 2022), as amended by S.B. 1555, 2022 Leg.. Reg. Sess. (Okla. 2022), and S.B. 612, 2022 Leg., Reg. Sess. (Okla. 2022); S.D. CODIFIED LAWS § 22-17-5.1 (2022); TENN. CODE ANN. § 39-15-213 (West 2022); TEX. HEALTH & SAFETY CODE ANN. § 170A (West 2021); UTAH CODE ANN. § 76-7a-201 (West 2022); W. VA. CODE ANN. § 61-2-8 (1882); WIS. STAT. ANN. § 940.04 (1849); WYO. STAT. ANN. § 35-6-102 (West 2022), as amended by H.B. 92, 66th Leg., 2022 Budget Sess. (Wyo. 2022).
[39] *E.g.*, KY. REV. STAT. ANN. § 311.772 (West 2019).
[40] TEX. HEALTH & SAFETY CODE ANN. §§ 171.201 to 171.211 (West 2021), as amended by S.B. 8, 87th Leg., Reg. Sess. (Tex. 2021); IDAHO CODE ANN. § 18-8807 (West 2022); OKLA. STAT. tit. 63, § 1-745.39 (West 2022); H.B. 480, 134th Gen. Assemb. (Ohio 2021).
[41] IDAHO CODE ANN. § 18-8805 (West 2022).

sweeping in "every person"[42] or "any person"[43] who intentionally or knowingly performs or attempts to perform an abortion. Most anti-abortion states have thus far resisted authorizing the criminal prosecution of the actual person seeking the abortion,[44] although at least one state legislative bill would criminalize self-abortion,[45] and given the ongoing rhetoric that describes the fetus as an "unborn child,"[46] it appears to be just a matter of time before mothers and other pregnant persons are deemed criminally or civilly liable for aborting a pregnancy or for crossing state lines in order to do so.[47]

Criminal penalties in anti-abortion states range from four months[48] to ninety-nine years[49] in prison and may include felony fees that range from $4,000[50] to $100,000.[51] Additionally, healthcare professionals in five of these seventeen states can be charged with professional misconduct that may result in a suspended or revoked license.[52]

The laws in each of these seventeen states currently apply to abortions performed within the state. An amendment introduced by Rep. Mary Elizabeth Coleman to a legislative bill banning abortion in Missouri, however, aims to prevent Missouri residents and citizens from seeking such services across state borders.[53] Specifically, the amendment aims to ban transportation to and from abortion clinics, along with communication over the telephone and through internet websites for the purpose of obtaining an abortion.[54] It is likely that other anti-abortion states will follow Missouri's lead and introduce similar legislation.

In addition to criminalizing abortion, states are creating civil liability not only for the person performing an abortion, but also for anyone who "aids and abets" an abortion, even if the abortion occurs in another state.[55] Such laws permit any individual to bring a civil action against those who perform an abortion, those who knowingly "aid and abet" an individual in obtaining an abortion, and those who simply have the intent to do either.[56] Some states are also targeting insurance companies that may reimburse costs for abortion services, common carriers that

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[42] IDAHO CODE ANN. § 18-622 (West 2020).
[43] KY. REV. STAT. ANN. § 311.772.
[44] *E.g.*, MISS. CODE ANN. § 41-41-45 (West 2007); N.D. CENT. CODE ANN. § 12.1-13-12 (West 2021).
[45] *See* A. 7437, 2021-2022 Leg., Reg. Sess. (N.Y. 2021).
[46] *See* Kate Zernike, *Is a Fetus a Person? An Anti-Abortion Strategy Says Yes*, N.Y. TIMES (Aug. 21, 2022), https://www.nytimes.com/2022/08/21/us/abortion-anti-fetus-person.html).
[47] *See* Jaclyn Diaz, *Pregnant? Georgia Says that Fetus Counts as a Dependent on Your Taxes*, NAT'L PUB. RADIO (Aug. 2, 2022), https://www.npr.org/2022/08/02/1115204443/georgia-fetus-pregnant-dependent-taxes.
[48] *See* ARIZ. REV. STAT. ANN. § 36-2324 (2022).
[49] *See* ALA. CODE § 13A-13-7 (2019).
[50] *See* S.D. CODIFIED LAWS § 22-17-5.1 (2022).
[51] *See* ARK. CODE ANN. § 5-61-404 (West 2021); LA. REV. STAT. ANN. § 40:1061 (2018), as amended by S.B. 342, 2022 Leg., Reg. Sess. (La. 2022).
[52] ARIZ. REV. STAT. ANN. §§ 36-2321 to 36-2326 (2022); IDAHO CODE ANN. § 18-8805 (West 2022); LA. REV. STAT. ANN. § 40:1061 (2018); MO. ANN. STAT. § 188.017 (West 2019); UTAH CODE ANN. § 76-7-314 (West 2022), amended by H.B. 136, 2019 Gen. Sess. (Utah 2019).
[53] *See* H. Amend. 4488H03.21H, H.B. 2012, 101st Gen. Assemb., Reg. Sess. (Mo. 2022).
[54] *Id.*
[55] TEX. HEALTH & SAFETY CODE ANN. §§ 171.201 to 171.21, as amended by S.B. 8, 87th Leg., Reg. Sess. (Tex. 2021); IDAHO CODE ANN. § 18-8807; OKLA. STAT. tit. 63, § 1-745.39; H.B. 480, 134th Gen. Assemb. (Ohio 2021).
[56] *E.g.*, TEX. HEALTH & SAFETY CODE ANN. §§ 171.201 to 171.21, as amended by S.B. 8, 87th Leg., Reg. Sess. (Tex. 2021).

knowingly transport pregnant individuals to abortion providers, and individuals who aid another individual in paying for those services, even without the knowledge that the funds will be used to obtain an abortion.[57] These states, however, exclude civil action against pregnant individuals who obtained or attempted to obtain an abortion.[58]

B. The Pro-Access States

Abortion services are currently legal in twenty states and the District of Columbia with few to no restrictions.[59] Out of these twenty states, eleven have enacted laws or introduced legislation to declare that laws in another state authorizing criminal and civil action against individuals who assist in, provide, or seek an abortion do not apply in those eleven state courts.[60] The enacted laws and introduced legislation in these states seek to protect continued access to abortion regardless of the individual's place of residence or state citizenship.

Currently, five states have express commitments that they will not cooperate with investigations and proceedings initiated in another state against individuals that assist in, provide, or seek abortion services.[61] Such states may refuse to issue a summons in an anti-abortion prosecution from another state,[62] or they may decline requests by another state to arrest or surrender an individual for prosecution,[63] or they may refuse to authorize interstate extradition,[64] or they may refuse to enforce subpoenas issued by another state for information in anti-abortion civil actions.[65]

Additionally, four states have introduced bills explicitly protecting healthcare professionals and facilities against licensing repercussions for providing abortion services to out-of-state individuals.[66] These statutes are meant to ensure that physicians, nurses, physician assistants, hospitals, clinics, and private medical practices are not charged with professional misconduct that could result in suspended or revoked licenses.

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[57] *E.g.*, *id.*; *see* OKLA. STAT. tit. 63, § 1-745.39 (West 2022).
[58] *Id.*
[59] *See After* Roe *Fell: Abortion Laws by State*, CTR. FOR REPROD. RIGHTS, https://www.plannedparenthoodaction.org/abortion-access-tool/MT (last visited Jan. 15, 2023).
[60] CAL. HEALTH & SAFETY CODE § 123467.5 (West 2022); CONN. GEN. STAT. ANN. § 22-19 (West 2022); DEL. CODE ANN. tit. 24 § 1922 (West 2022); H.B. 1464, 102d Gen. Assemb. (Ill. 2022); Me. Exec. Order No. 4 (July 5, 2022); H.B. 4954, 2022 Leg., 192d Gen. Court (Mass. 2022); H.B. 5090, 2022 Leg., 192d Gen. Court (Mass. 2022); N.J. REV. STAT. § 2A:160-14.1 (2022); N.Y. EDUC. LAW §§ 6531-b, 6505-d (McKinney 2022); R.I. Exec. Order No. 22-28 (July 5, 2022); H.B. 3391, 2017 Leg., 79th Leg. Assemb., Reg. Sess. (Or. 2017); WASH. REV. CODE §§ 9.02.100, 9.02.110, 9.02.130 (West 2022).
[61] DEL. CODE ANN. tit. 10 §§ 3928 (West 2022); Me. Exec. Order No. 4 (July 5, 2022); H.B. 4954, 2022 Leg., 192d Gen. Court (Mass. 2022); H.B. 5090, 2022 Leg., 192d Gen. Court (Mass. 2022); N.J. REV. STAT. § 2A:160-14.1 (2022); R.I. Exec. Order No. 22-28 (July 5, 2022).
[62] DEL. CODE ANN. tit. 10 §§ 3928(b)(2).
[63] Me. Exec. Order No. 4.
[64] N.J. REV. STAT. § 2A:160-14.1 (2022); R.I. Exec. Order No. 22-28.
[65] DEL. CODE ANN. tit. 10 §§ 3928(b)(3).
[66] H.B. 1464, 102d Gen. Assemb. (Ill. 2022); H.B. 4954, 2022 Leg., 192d Gen. Court (Mass. 2022); H.B. 5090, 2022 Leg., 192d Gen. Court (Mass. 2022); N.Y. EDUC. LAW §§ 6531-b, 6505-d (McKinney 2022); R.I. Exec. Order No. 22-28 (July 5, 2022).

Finally, as anti-abortion states continue to create civil liability for abortion related conduct, some pro-access states have addressed the growing possibility that an out-of-state civil action may be brought against individuals that assisted in, provided, or sought abortion services within those three states.[67] These states aim to allow civil defendants in such out-of-state actions to seek injunctive, monetary, or appropriate relief against the party that brought the lawsuit.[68]

C. Practical Impacts

As noted above, the growing divergence between anti-abortion states and pro-access states means that people seeking abortions are increasingly likely to seek them from providers in other states. For example, Texas's notorious SB 8, which went into effect in 2021, not only prohibited all abortions performed after six weeks from the time of conception, but also empowered private citizens to bring civil suits against those who aid, abet, or perform an abortion.[69] Data examining the effects of Texas SB 8 show that, after the law went into effect, the number of Texans who received abortions out of state skyrocketed.[70] In 2019, about 514 Texas patients travelled out of state for abortions between September and December. In the same period in 2021, after SB 8 went into effect, 5,574 patients travelled for abortion.[71] Indeed, the total number of abortions provided to Texas residents decreased by only 10%, meaning that the primary effect of Texas's six-week abortion ban was to push patients out of state, not reduce the total number of abortions provided to Texas citizens.[72]

Importantly, a major effect of SB 8 was a dramatic change in the patient population at clinics in surrounding states. Almost half of patients displaced by SB 8 obtained abortion at just four Oklahoma facilities.[73] The number of Texans seen by the Oklahoma clinics each month after SB 8 was more than double the total number of abortions performed in the state before the law went into effect.[74] One in four Texans obtaining abortion care out of state did so in New Mexico.[75] The number of Texans seen per month in New Mexico in the post-SB 8 months exceeded the average total number of abortions performed per month in previous years.[76] When abortion

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[67] CONN. GEN. STAT. ANN. § 22-19 (West 2022); DEL. CODE ANN. tit. 10 §§ 3929 (West 2022); H.B. 4954, 2022 Leg., 192d Gen. Court (Mass. 2022); H.B. 5090, 2022 Leg., 192d Gen. Court (Mass. 2022); CAL. HEALTH & SAFETY CODE § 123469 (West 2023); CONN. GEN. STAT. ANN. § P.A. 22-19, § 1 (West 2022); DEL. CODE ANN. tit. 10, § 3929 (West 2022); 69 D.C. Reg. 014641 (Dec. 2, 2022); Ill. Leg. Serv. P.A. 102-1117 (West 2023); H.B. 5090, 2022 Leg., 192nd Gen. Court (Mass. 2022).

[68] *See supra* note 67.

[69] TEX. HEALTH & SAFETY CODE ANN. §§ 171.201 to 171.21, as amended by S.B. 8, 87th Leg., Reg. Sess. (Tex. 2021).

[70] Kari White et al., *Out-of-State Travel for Abortion Following Implementation of Texas Senate Bill 8*, TEX. POL'Y EVALUATION PROJECT (Mar. 2022), https://sites.utexas.edu/txpep/files/2022/03/TxPEP-out-of-state-SB8.pdf; Margot Sanger-Katz et al., *Most Women Denied Abortions by Texas Law Got Them Another Way*, N.Y. TIMES (Mar. 6, 2022), https://www.nytimes.com/2022/03/06/upshot/texas-abortion-women-data.html.

[71] White et al., *supra* note 70, at 1.

[72] *Id.*

[73] Sanger-Katz et al., *supra* note 70.

[74] White et al., *supra* note 70, at 2.

[75] *Id.*

[76] *Id.*

becomes illegal in one state, clinics in surrounding states will suddenly have much more contact with residents of the anti-abortion state.[77]

To give a sense of what is happening around the country, consider the three abortion clinics operating in close proximity to the Illinois/Missouri border: Planned Parenthood St. Louis in Missouri, and Hope Clinic for Women and Planned Parenthood Fairview Heights in Illinois. The clinic on the Missouri side is the state's only remaining abortion clinic and is subject to increasingly onerous and extreme abortion regulation.[78] Conversely, the two on the Illinois side are beneficiaries of Illinois's efforts to expand abortion access. The three are less than a twenty-minute drive from one another.[79] They share providers, and the St. Louis clinic and Fairview Heights clinics are even operated by the same Planned Parenthood affiliate.[80] Recently the Illinois clinics partnered to open a "Regional Logistics Center," which operates out of the Fairview clinic and caters directly to Missouri patients:

> the RLC was designed as a one-stop shop for any patient traveling to Illinois. Patients calling for appointments at either facility are connected to the nation's network of financial aid and practical support groups; case managers help arrange transportation and lodging or line up cash for food and child care. It is a first-of-its kind operation — and couldn't come online a minute too soon.[81]

These services, of course, have spurred a backlash from anti-abortion forces within the Missouri legislature. As noted above, in March 2022 Republicans introduced HB 1987, which, like the Texas statute, would allow private citizens to sue anyone who aids a Missouri resident in obtaining an abortion, including out-of-state physicians.[82]

All of this extraterritorial regulatory activity creates uncertainty across the nation about how the various jurisdictional, choice-of-law, and judgment recognition battles will play out in the coming years. And this uncertainty itself carries extreme health risks for patients seeking an abortion. Indeed, even within one state, Texas, a qualitative survey of physicians practicing under the state's six-week abortion ban revealed:

> Health systems and clinicians caring for patients with complex pregnancies will have diverse interpretations of the laws' narrow exemptions, which will result in unequal access to care. Patients without the resources to travel will assume the risks of continuing their pregnancy and term delivery, until they are deemed "sick enough" to receive care. In states where abortion remains legal, clinicians will need to care for people who can travel but have had to assume other health risks, such as

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[77] For more on the effects of *Dobbs* on state border towns, see Shia Kapos, *America's Abortion Access Divide Is Reshaping Blue-State Border Towns*, POLITICO (Jan. 11, 2023), https://www.politico.com/news/2023/01/11/abortion-access-blue-state-border-towns-00077367.
[78] Jordan Smith, *Crossing the Abortion Line: The Interstate Tug-of-War Over Reproductive Freedom*, THE INTERCEPT (June 17, 2022), https://theintercept.com/2022/06/18/abortion-roe-state-laws-missouri-illinois/.
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] *See* H. Amend. 4488H03.21H, H.B. 2012, 101st Gen. Assemb., Reg. Sess. (Mo. 2022).

> sepsis, hemorrhage, or delivery en route. . . . [A]llowing politicians and fear to determine what care can be provided is dangerous for patients and clinicians alike.[83]

Likewise, doctors may discontinue the use of abortifacient and teratogenic drugs in patients for the treatment of entirely unrelated conditions, out of fear that they may be prosecuted if patients miscarry while on such drugs.[84] This is also true of emergency contraception and drugs that could be used in an abortion but are being prescribed for some other purpose.[85] The lack of clarity about how and when these anti-abortion laws apply is inhibiting the provision of health care unrelated to abortion. And, of course, the additional uncertainty about how out-of-state laws might be applied increases the likelihood that doctors will be forced to turn away patients out of fear of prosecution or civil liability.

Therefore, a thorough analysis of the various constitutional and conflicts-of-law questions is necessary for courts, advocates, medical providers, and patients. It is to that analysis that this Article now turns.

II. CONSTITUTIONAL RESTRICTIONS ON EXTRATERRITORIAL ABORTION REGULATION

In his concurring opinion in *Dobbs*, Justice Kavanaugh suggested that states could not, under the U.S. Constitution, ban their residents from leaving the state to obtain an abortion, even going so far as to say that the issue was "not especially difficult as a constitutional matter."[86] In this Part, we examine whether the question of extraterritorial abortion regulation is quite as clear as Justice Kavanaugh suggests. Presumably, the Justice was referring to the Privileges and Immunities Clause of Article IV of the Constitution, which has been interpreted to require the equal treatment of citizens as they cross state borders, as well as to protect the right to interstate travel more broadly.[87] Thus, we consider these two potential ways in which anti-abortion regulation may implicate constitutional concerns. First, states penalizing the out-of-state activities of their citizens effectively denies those citizens the right to be treated the same as all other citizens of the state to which they are traveling. Second, restrictions on extraterritorial abortion are tantamount to a restriction on the ability of those citizens to travel out of state.

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[83] Whitney Arey et al., *A Preview of the Dangerous Future of Abortion Bans—Texas Senate Bill 8*, 5 NEW ENG. J. OF MED. 387, 390 (Aug. 4, 2022).

[84] Kristin Della Volpe & Nikke Kean, *How Will Abortion Bans Affect Women's Health?*, CLINICAL ADVISOR (May 20, 2022), https://www.clinicaladvisor.com/home/topics/ob-gyn-information-center/abortion-ban-womens-health-roe-v-wade/; Jamie Ducharme, *Abortion Restrictions May Be Making It Harder for Patients to Get a Cancer and Arthritis Drug*, TIME (July 6, 2022), https://time.com/6194179/abortion-restrictions-methotrexate-cancer-arthritis/; Lisa Jarvis, *Abortion Pill Won't Be the Only One Restricted by State Bans*, THE WASH. POST (Jul. 7, 2022), https://www.washingtonpost.com/business/abortion-pill-wont-be-the-only-one-restricted-by-state-bans/2022/07/07/b71269c8-fdf9-11ec-b39d-71309168014b_story.html.

[85] Savannah Hawley, *Major Health System Stops, the Resumes Plan B Amid Missouri's Abortion Ban Ambiguity*, NAT'L PUB. RADIO (Jun. 29, 2022), https://www.npr.org/sections/health-shots/2022/06/29/1108682251/kansas-city-plan-b; Emily Woodruff, *As an Abortion Ban is Reinstated Doctors Describe 'Chilling Effect' on Women's Care*, NOLA.COM (Jul. 10, 2022), https://www.nola.com/news/healthcare_hospitals/article_238af184-ff02-11ec-9bce-dfd660a21ce1.html?utm_medium=social&utm_source=twitter&utm_campaign=user-share.

[86] 142 S. Ct. 2228, 2309 (2022) (Kavanaugh, J., concurring).

[87] *See infra* text accompanying notes 132–142.

It is worth emphasizing, however, that Justice Kavanaugh's interpretation would extend only to regulation of the person *obtaining* the abortion, rather than to possible regulation of out-of-state residents who *perform* or *help facilitate* the abortion. And the Privileges and Immunities Clause, by and large, has not traditionally protected individuals or corporations engaged in interstate business from the reach of extraterritorial legislation.[88] Thus, we also need to turn to the Court's jurisprudence surrounding the "Dormant" Commerce Clause, deriving from Chief Justice Marshall's opinion in *Gibbons v. Ogden.*[89] Here, we see important limitations that generally prohibit state laws from impermissibly regulating interstate commerce.[90] Nevertheless, as with any constitutional provision, the limitations placed on states by the Dormant Commerce Clause are not absolute, and it is also worth noting that during the October 2022 Term the Supreme Court has been asked to resolve a circuit split regarding the reach of the Dormant Commerce Clause's extraterritoriality principle.[91] Although the Court may not conclusively resolve the circuit split in that case, the possibility of large-scale changes to the Court's Dormant Commerce Clause jurisprudence would have significant consequences for the question of extraterritorial application of state anti-abortion laws, along with many other areas of law.

A. The Privileges and Immunities Clause of Article IV

As many scholars have noted,[92] any state-based abortion regulation that has an extraterritorial effect could potentially violate the Privileges and Immunities Clause of Article IV, which provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[93] Simply reading the text of the Clause, however, one might wonder why it is relevant to such regulations at all. This is because the Clause seems to set forth only a simple command: in enforcing their laws, states may not discriminate against out-of-state residents.[94] Thus, cases brought under the Clause generally focus on whether states are imposing some penalty on visitors from out of state.[95] In the abortion context, the U.S. Supreme Court held

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[88] *See* Paul v. Virginia, 75 U.S. (8 Wall.) 168, 177–78 (1868), *overruled on other grounds by* United States v. Se. Underwriters Ass'n, 322 U.S. 533 (1944).
[89] 22 U.S. (9 Wheat.) 1 (1824).
[90] *See infra* Part II.B.
[91] Nat'l Pork Producers Council v. Ross, No. 21-468 (U.S. *argued* Oct. 11, 2022).
[92] *See* Seth F. Kreimer, *The Law of Choice and Choice of Law: Abortion, the Right to Travel, and Extraterritorial Regulation in American Federalism*, 67 N.Y.U. L. REV. 451, 497–519 (1992); Richard H. Fallon, Jr., *If Roe Were Overruled: Abortion and the Constitution in a Post-Roe World*, 51 ST. LOUIS U. L.J. 611, 635 (2007); Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1536–41 (2007).
[93] U.S. CONST. art. IV, § 2.
[94] *See, e.g.,* Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 262 (1992) ("Article IV . . . provides that citizens of one state shall be treated like citizens in other states."). The Privileges *and* Immunities Clause of Article IV is distinct from the Privileges *or* Immunities Clause of the Fourteenth Amendment. The Privileges and Immunities Clause is "an equality right"—that is, one that affords residents of other states the same rights as locals within the state. *Id.* The Privileges or Immunities Clause, on the other hand, decrees that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. CONST. amend. XIV, § 1, cl. 2. This Clause produces "substantive right[s]" because they are guaranteed "without regard to how any other person is treated." Laycock, *supra*, at 262. Thus, "the Article IV clause created equality rights; the Fourteenth Amendment clause created substantive rights." *Id.*
[95] *See e.g.*, Lunding v. N.Y. Tax Appeals Tribunal, 522 U.S. 287, 314 (1998) (striking down a New York tax statute for discriminating against nonresidents); Sup. Ct. of Va. v. Friedman, 487 U.S. 59, 70 (1988) (holding that Virginia's

in *Doe v. Bolton*[96] that Georgia could not prohibit out-of-state residents from obtaining an abortion in the state given that in-state residents were allowed to do so. Specifically, the Court held that "[j]ust as the Privileges and Immunities Clause protects persons who enter other States to ply their trade so must it protect persons who enter Georgia seeking the medical services that are available there."[97]

Extraterritorial anti-abortion laws, however, do not on their face discriminate by placing in-state residents in a different position from those traveling from out of state.[98] Indeed, these laws are in many respects the *reverse* of the law in *Doe v. Bolton*. The law struck down in that case prohibited out-of-state residents from accessing services that were lawful in Georgia for Georgia residents.[99] States imposing extraterritorial abortion bans, by contrast, seek to ban the procedure for their residents when their residents travel to *another* state. Within the borders of an anti-abortion state, all are treated equally: residents and out-of-state visitors alike are barred from obtaining abortions. Indeed, the purportedly neutral character of extraterritorial abortion bans has led some commenters to dismiss the whole idea that the Privileges and Immunities Clause could pose any kind of barrier to statutes of this sort.[100]

Nevertheless, we contend that the Privileges and Immunities Clause cannot be so easily dismissed. Indeed, despite their seemingly nondiscriminatory nature, extraterritorial abortion bans may still run afoul of the Privileges and Immunities Clause in at least two different ways. First, criminal or civil penalties for extraterritorial activities may have the unconstitutional effect of denying to some people who are located within a state the privileges of abortion access that the state extends to all others in that state. Second, the threat of penalties for activities conducted in another state may constitute a violation of the right to travel.[101] Both issues implicate the fundamental structural importance of the Privileges and Immunities Clause as "first and foremost a national unity provision, eliminating a source of interstate divisiveness."[102] And because these aspects of the Privileges and Immunities Clause focus on interstate relations, it is irrelevant whether the underlying conduct is deemed a federal constitutional right or not.

i. The Right to Equal Treatment

As noted above, although the Privileges and Immunities Clause prohibits states from discriminating against nonresident travelers, it offers no explicit guidance with regard to the reach

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residency requirement for admission to the State's bar without examination violates the Privileges and Immunities Clause); Austin v. New Hampshire, 420 U.S. 656, 666–67 (1975) (invalidating a New Hampshire tax on commuters from Maine); Ward v. Maryland, 79 U.S. (12 Wall.) 418, 430–32 (1870) (striking down a Maryland statute that taxed in-state sales of goods from out-of-state traders at a higher rate than in-state traders).

[96] 410 U.S. 179, 200 (1973), *abrogated on other grounds by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

[97] *Id.* (citations omitted).

[98] *See supra* notes 53–58 and accompanying text.

[99] *Doe*, 410 U.S. at 200.

[100] *See e.g.*, C. Steven Bradford, *What Happens if* Roe *Is Overruled? Extraterritorial Regulation of Abortion by the States*, 35 ARIZ. L. REV. 87, 91 n.22 (1993).

[101] As noted below, although we locate the general right to travel in Article IV, both courts and scholars have also found a right to travel in other provisions of the U.S. Constitution and the very structure of the document itself. *See infra* text accompanying notes 132-42.

[102] Laycock, *supra* note 94, at 263.

of a state's law on its citizens who travel *out* of the state. Instead, two competing approaches to the issue present themselves.

First, the Privileges and Immunities Clause could be interpreted narrowly such that it would have no relevance to the question of out-of-state activity at all. Under this narrow interpretation, the Clause would only be implicated if an anti-abortion state denied to travelers into the state the privileges and immunities extended to residents *within* its borders. From this perspective, the Clause would prevent a state from discriminating against foreigners operating in the state, but would have nothing to say about in-state citizens operating elsewhere.[103]

This seems to us an overly limited reading of the Privileges and Immunities Clause. As the U.S. Supreme Court recognized as far back as the 19th Century, the Privileges and Immunities Clause of Article IV is far more expansive in its application. More generally, the Clause works to "place the citizens of each State upon the same footing with citizens of other States" by "reliev[ing] them from the disabilities of alienage in other States."[104] From this perspective, the Privileges and Immunities Clause works in tandem with the Fourteenth Amendment's Citizenship Clause,[105] which ensures that national citizenship is "paramount and dominant instead of being subordinate and derivative" to state citizenship.[106] To be a national citizen means to have freedom of movement throughout the country and, further, that a state cannot impose burdens on its citizens even when they are elsewhere.

Thus, the Privileges and Immunities Clause is best understood as a "norm of comity"[107] that is not subject-specific. It prevents states from interfering with the legal entitlements provided in other states. The "disabilities of alienage" are, of course, most apparent when a host state discriminates against out-of-state citizens by preventing them from exercising all of the privileges and immunities of state law on the same basis as locals.[108] It is therefore unsurprising that the Court's Privileges and Immunities Clause jurisprudence has developed predominantly in this context. Indeed, we know of no case in which the Court has directly addressed the application of the Privileges and Immunities Clause to the question at issue here: a person traveling from one state to another for purposes of doing what is legal in the latter, but not in the former.[109] Yet when citizens are forced to "carry around on their backs" the legal system of their home state which penalizes them for accessing the privileges and immunities offered by other states, they are branded with the same badge of alienage.[110] The home state is effectively imposing a scarlet letter

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[103] Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. PA. L. REV. 855, 897–99 (2002).
[104] Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1868).
[105] U.S. CONST. amend. XIV, § 1, cl. 1.
[106] Aver v. United States (*Selective Draft Cases*), 245 U.S. 366, 389 (1918); *see also* Edwards v. California, 314 U.S. 160, 182 (1941) (Jackson, J., concurring) ("[The Fourteenth Amendment's Citizenship Clause] was adopted to make United States citizenship the dominant and paramount allegiance among us.").
[107] Austin v. New Hampshire, 420 U.S. 656, 660 (1975).
[108] *See supra* notes 93–95 and accompanying text.
[109] The Court arguably came close when it held in *Bigelow v. Virginia*, 421 U.S. 809 (1975) that a Virginia newspaper editor could not be convicted for printing advertisements for an abortion referral service in New York.
[110] Laurence H. Tribe, Comment, Saenz *Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110, 152 (1999).

on its citizens when they travel to another state to engage in legal, and in many cases protected, activities by exposing them to civil or criminal punishments upon their return home.

From this perspective, anti-abortion states would violate the Privileges and Immunities Clause when they, either directly or indirectly, forbid their residents from enjoying the "privileges and immunities" available under the law and within the borders of pro-abortion states—namely, the right to terminate a pregnancy. This is because the very idea of national citizenship requires that a person "entitled" to an abortion in a host state cannot be denied this entitlement by the laws of their home state.[111] Efforts by a home state to prevent its residents from obtaining an abortion in states where it is legal prevent the home state's citizens from exercising the same privileges and immunities "upon the same footing" as citizens of the host state.[112] If all aspects of a state's law were to follow its citizens when they cross state lines, those citizens would carry the "disabilities of alienage" into their host state, solely by virtue of their foreign citizenship.[113] As Seth Kreimer has argued, if "a California citizen is entitled, under the California Constitution's right of privacy, to obtain an abortion, Utah cannot reduce the Utah citizen who visits California to second class alien status."[114]

Thus, as we understand it, the Privileges and Immunities Clause protects the sovereignty of each state to extend those privileges and immunities the state deems appropriate to all within its borders. Citizens traveling outside of their state of residence, in turn, receive the protection pf each state's privileges and immunities, extended to them on "the same footing" as they are to locals.[115] Of course, after *Dobbs*, no state is *required* by the Federal Constitution to allow access to abortion, but *Dobbs* itself recognizes that each state may decide how to regulate abortion as it sees fit, arguing that "[o]ur Nation's historical understanding of ordered liberty does not prevent the people's elected representatives from deciding how abortion should be regulated."[116] Extraterritorial abortion laws that criminalize conduct deemed legal by the state where it occurs hamstring a state's ability to define for itself the privileges and immunities granted within its borders. This in turn usurps the constitutionally determined balance of equal power among the several states, critical the peace and stability of their union.

ii. The Right to Travel

In considering some of the downstream legal consequences of *Dobbs*, Justice Kavanaugh opined:

> [A]s I see it, some of the other abortion-related legal questions raised by today's decision are not especially difficult as a constitutional matter. For example, may a State bar a resident of that State from traveling to another State to obtain an abortion? In my view, the answer is no based on the constitutional right to interstate travel.[117]

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[111] Kreimer, *supra* note 92, at 509–10.
[112] *Id.* at 511.
[113] *Id.*
[114] *Id.* at 509–10.
[115] Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1868).
[116] 142 S. Ct. 2228, 2257 (2022).
[117] *Id.* at 2309 (Kavanaugh, J., concurring).

This pronouncement raises several questions: What is the right to travel? Where does it come from? Is it really so obvious that a state may not bar its residents from traveling to another state to obtain an abortion? Unfortunately—and despite Justice Kavanaugh's assurances to the contrary—these questions are not so easy to answer.

When it comes to the constitutional right to interstate travel, two things seem to be clear: everyone recognizes that the right exists, but there is little agreement as to precisely where it is located in the Federal Constitution. The right to travel is generally thought to have originated in the original Articles of Confederation, which stated in Article IV that, "[t]he better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this union . . . the people of each state shall have free ingress and regress to and from any other state."[118] Although this language was not ultimately imported into the Constitution, the Supreme Court has suggested that the reason the right to travel was omitted from the Constitution's text was because it was "a right so elementary [that it] was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created."[119] Despite the lack of constitutional textual support, the right to travel was explicitly recognized, albeit in a dissenting opinion, as far back as 1849,[120] when Chief Justice Taney wrote that,

> every citizen of the United States . . . is entitled to free access . . . . We are all citizens of the United States, and as members of the same community must have the right to pass and repass through every part of it without interruption, as freely as in our own States.[121]

This position was later adopted in Justice Miller's 1867 majority opinion in *Crandall v. Nevada*,[122] when the Court struck down a state statute on the basis that it violated the right to travel. The Court specifically relied on the reasoning from the earlier dissent, ruling that Nevada's tax on people as they left the state was "inconsistent with the rights which belong to citizens of other States as members of the Union, and with the objects which that Union was intended to attain."[123]

Since the nineteenth century, the Supreme Court has regularly struck down federal[124] and state laws,[125] and even private actions,[126] that were deemed to interfere unconstitutionally with the right to travel between states. The Court has noted that "freedom to travel throughout the United States has long been recognized as a basic right under the Constitution,"[127] and that "the right to

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[118] ARTICLES OF CONFEDERATION OF 1781, art. IV. At one point, the Court even linked the right to travel to the Magna Carta. *See* Kent v. Dulles, 357 U.S. 116, 125 (1958).
[119] United States v. Guest, 383 U.S. 745, 758 (1966).
[120] Smith v. Turner (*Passenger Cases*), 48 U.S. (7 How.) 283 (1849).
[121] *Id.* at 492 (Taney, C.J., dissenting).
[122] 73 U.S. (6 Wall.) 35 (1867).
[123] *Id.* at 48 (quoting *Passenger Cases*, 48 U.S. (7 How.) at 492 (Taney, C.J., dissenting).
[124] *See e.g.*, Kent v. Dulles, 357 U.S. 116, 125 (1958).
[125] *See e.g.*, Shapiro v. Thompson, 394 U.S. 618, 634 (1969), *overruled on other grounds by* Edelman v. Jordan, 415 U.S. 651 (1974).
[126] *See e.g.*, Griffin v. Breckenridge, 403 U.S. 88, 105 (1971).
[127] United States v. Guest, 383 U.S. 745, 758 (1966).

migrate is firmly established and has been repeatedly recognized by our cases."[128] It is beyond the scope of this Article to provide a complete recitation of the Court's right-to-travel jurisprudence.[129] It is sufficient to say, as others have,[130] that if there were ever a right so "deeply rooted in this Nation's history and tradition [to be considered] implicit in the concept of ordered liberty,"[131] it would be the right to travel.

Despite this largely uncontested history, the actual textual source of the right to travel in the Constitution remains a mystery. Although, in accordance with some Supreme Court precedent our discussion focuses on Article IV,[132] the Supreme Court has at various times also located the right to travel in the Commerce Clause,[133] the First Amendment,[134] the Due Process Clause of the Fifth Amendment,[135] the Thirteenth Amendment,[136] the Privileges or Immunities Clause of the Fourteenth Amendment,[137] and the Due Process Clause of the Fourteenth Amendment.[138] It has also recognized that the right "has also been inferred from the federal structure of government" itself.[139] Similarly, scholars have identified "no less than ten possible sources for the right" to interstate travel.[140] Indeed, the Court has at times been reluctant to tie the right to travel to any

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[128] Att'y Gen. of N.Y. v. Soto-Lopez, 476 U.S. 898, 902 (1986).

[129] For such a recitation, see, *e.g.,* Richard Sobel, *The Right to Travel and Privacy: Intersecting Fundamental Freedoms*, 30 J. MARSHALL J. INFO. TECH. & PRIVACY L. 639, 641–48 (2014).

[130] *See e.g.*, Noah Smith-Drelich, *The Constitutional Right to Travel Under Quarantine*, 94 S. CAL. L. REV. 1367 (2021).

[131] Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997).

[132] *See e.g.*, Mem'l Hosp. v. Maricopa Cnty., 415 U.S. 250, 261 (1974) ("[T]he right of interstate travel must be seen as ensuring new residents the same right to vital government benefits and privileges in the States to which they migrate as are enjoyed by other residents."); Corfield v. Coryell, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (No. 3230) (Washington, J.) (listing "[t]he right of a citizen of one state to pass through . . . as [one] of the particular privileges and immunities of citizens [under Article IV], which are clearly embraced by the general description of privileges deemed to be fundamental").

[133] Edwards v. California, 314 U.S. 160, 173, 175–76 (1941) (invalidating a California law that prohibited "the 'bringing' or transportation of indigent persons into California" because such activity "clearly falls within [the] class of subjects" governed by the Commerce Clause). Although this may not seem like a "right to travel" case on its face, the Court has subsequently described it as such. *See* United States v. Guest, 383 U.S. 745, 758 (1966).

[134] Aptheker v. Sec'y of State, 378 U.S. 500, 507 (1964) (finding that the statutory denial of passports to Communists violated the right to travel via an impermissible restriction on the freedom of association guaranteed in the First Amendment).

[135] Kent v. Dulles, 357 U.S. 116, 125 (1958) ("The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without the due process of law under the Fifth Amendment.").

[136] *See e.g.*, Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 278 (1993) (recognizing that the Thirteenth Amendment protects the right to interstate travel from purely private, as well as state, actions)

[137] Saenz v. Roe, 526 U.S. 489, 502–03 (1999) ("[I]t has always been common ground that [the Privileges or Immunities] Clause protects the . . . right to travel."); *see also Edwards*, 314 U.S. at 173, 178 (Douglas, J., concurring) ("The right to move freely from State to State is an incident of national citizenship protected by the privileges and immunities clause of the Fourteenth Amendment against state interference.").

[138] Williams v. Fears, 179 U.S. 270, 274 (1900) ("Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty, and the right, ordinarily, of free transit from or through the territory of any state is a right secured by the 14th Amendment and by other provisions of the Constitution.").

[139] Att'y Gen. of N.Y. v. Soto-Lopez, 476 U.S. 898, 902 (1986) (plurality opinion).

[140] Christopher S. Maynard, Note, *Nine-Headed Caesar: The Supreme Court's Thumbs-Up Approach to the Right to Travel*, 51 CASE W. RSRV. L. REV. 297, 314 (2000).

one constitutional provision.[141] As Justice Brennan wrote in his concurring opinion in *Zobel v. Williams*,[142] "[the right's] unmistakable essence [is] in that document that transformed a loose confederation of States into one Nation."

Given its deep-rooted and relatively uncontroversial status as a right, the next question is to determine what the right to travel actually protects. Although the Court has never fully explained the entire scope of the right to travel, its most comprehensive iteration was provided in *Saenz v. Roe*.[143] At issue in that case was a California law that limited newly-arrived residents to the welfare benefits they had obtained in their previous home state.[144] In holding that the California statute violated the constitutional right to travel, the Court established that the right is made up of "at least three different components."[145] These components are: (1) "the right of a citizen of one State to enter and to leave another State," (2) "the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State," and (3) "for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State."[146] Regarding components (2) and (3), the Court identified the constitutional source as the Privileges and Immunities Clause of Article IV and the Privileges or Immunities Clause of the Fourteenth Amendment.[147] At issue in *Saenz* was component (3); the challenged California

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[141] *See e.g.*, Shapiro v. Thompson, 394 U.S. 618, 630 (1969) ("We have no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision."); Oregon v. Mitchell, 400 U.S. 112, 237–38 (1970) ("From whatever constitutional provision this right may be said to flow, both its existence and its fundamental importance to our Federal Union have long been established beyond question." (footnote omitted)).

[142] 457 U.S. 55, 67 (1982) (Brennan, J., concurring). Of course, the constitutional source of the right might matter in some contexts. For example, if the right is based in the Privileges or Immunities Clause of the Fourteenth Amendment, then Congress would have the power to prevent states from infringing it. U.S. CONST. amend. XIV, § 5 ("The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."). If, however, the right to travel is located in the Privileges and Immunities Clause of Article IV, then congressional authority becomes, at the very least, ambiguous. *See* Metzger, *supra* note 92, at 1475 ("Article IV's text is ambiguous when it comes to the question of *congressional* authority."). Although we place the right to travel within our discussion of Article IV, our argument does not depend on the precise source of the right, nor does it depend on Congress's ability to protect that right.

[143] 526 U.S. 489 (1999).

[144] *Id* at 493, 498.

[145] *Id.* at 500.

[146] *Id.* Some circuit courts appear to have taken an unduly rigid view of the three components to the right to travel expressed in *Saenz*. *See e.g.*, Minn. Senior Fed'n Metro. Region v. United States, 273 F.3d 805, 810 (10th Cir. 2001) ("Appellants' right-to-travel claims do not fall within the three components identified in *Saenz*."). This is a curious result given *Saenz*'s express qualification that there are "*at least* three different components" of the right to travel. 526 U.S. at 500 (emphasis added). Indeed, other circuits have recognized that there may be additional components to the right beyond those expressed in *Saenz*. *See e.g.*, Matsuo v. United States, 586 F.3d 1180, 1184 (9th Cir. 2009) ("While the right might have other components, being provided with the same federal benefits after moving as before isn't among them."); Selevan v. N.Y. Thruway Auth., 584 F.3d 82, 100 (2d Cir. 2009) (recognizing a right to *intra*state and interstate travel); Johnson v. City of Cincinnati, 310 F.3d 484, 498 (6th Cir. 2002) (same).

[147] *Saenz*, 526 U.S. at 501–04. The significance of the use of the Privileges or Immunities Clause of the Fourteenth Amendment as a source of the right, or a component of the right, should not be overlooked. This is because just after the Fourteenth Amendment was enacted, the *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1872) "sapped the Clause of any meaning." *Id.* at 527 (Thomas, J., dissenting). Thus, the Clause lay dormant for nearly 130 years until it was resurrected in *Saenz*. *See generally*, Kevin Maher, Comment, *Like a Phoenix from the Ashes:* Saenz v. Roe*, the Right to Travel, and the Resurrection of the Privileges or Immunities Clause of the Fourteenth Amendment*, 33 TEX. TECH. L. REV. 105 (2001). Although the case has not yet led to a resurgence in Privileges or Immunities Clause

statute created different classes between long-time California residents and those who have resided in the state for less than a year, and created further sub-classes of the latter based on the location of their prior residence.[148] Applying a higher level of scrutiny than "mere rationality []or some intermediate standard of review," the Court held that the statute discriminated amongst equally eligible citizens, that "the discriminatory classification is itself a penalty," and that none of the state's supposed interests could constitutionally justify this discrimination.[149]

Unlike *Saenz*, the components of the right to travel most relevant to our discussion are component (1) and, perhaps to a lesser extent, component (2). Because component (1) was not at issue in *Saenz*, the Court did not identify the constitutional source of "the right of a citizen of one State to enter and to leave another State,"[150] nor did the Court elaborate on what this component protects other than the "'free ingress and regress to and from' neighboring States."[151] Thus, there remains debate about whether this component would preclude extraterritorial abortion bans and prosecution of the traveler upon return to the home state.[152]

It seems beyond dispute that component (1) of the right to interstate travel prevents states from establishing "actual barriers to interstate movement."[153] Most plainly, this would prevent a state from establishing physical barriers to movement, such as building a wall or establishing checkpoints to screen travelers coming in and out of the state.[154] If, in his *Dobbs* concurrence, Justice Kavanaugh referred merely to this prohibition, then assessing the constitutionality of such measures is, indeed, "not especially difficult as a constitutional matter."[155] But it is hard to imagine this was Justice Kavanaugh's true meaning, for none of the Court's major cases regarding the right to travel involved physical barriers to movement. Nor are such obstacles likely to be erected in the abortion context, though given the extreme rhetoric surround the issue, we allow for the possibility that one day physical border controls from state to state could become a reality.

Nevertheless, since the erection of physical barriers is not currently at issue, the question becomes whether a home state's extraterritorial abortion ban can be considered a *constructive* barrier. That is, can a state's threat to prosecute its own citizen in connection with an abortion obtained out of state be construed as an "actual barrier[] to interstate movement," albeit an

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jurisprudence, it cemented the fact that the right to travel is a right of national citizenship protected by the Clause. Tribe, *supra* note 110110, at 129. For further discussion of how the Fourteenth Amendment in general—and the Privileges or immunities Clause in particular—changed the fundamental character of the U.S. Constitution, see generally Christopher L. Eisgruber, *The Fourteenth Amendment's Constitution*, 69 S. CAL. L. REV. 47 (1995).

[148] *Saenz*, 526 U.S. at 505.

[149] *Id.* at 504–07.

[150] *Id.* at 500–01.

[151] *Id.*

[152] *Compare* Seth F. Kreimer, *"But Whoever Treasures Freedom . . .": The Right to Travel and Extraterritorial Abortions*, 91 MICH. L. REV. 907, 914–15 (1993), *and* Lea Brilmayer, *Interstate Preemption: The Right to Travel, the Right to Life, and the Right to Die*, 91 MICH. L. REV. 873, 880–89 (1993), *with* Joseph W. Dellapenna, *Abortion Across State Lines*, 2008 BYU L. REV. 1651, 1689–92, *and* Bradford, *supra* note 100, at 158–60. As can be seen from these articles, this debate long predates *Saenz*.

[153] Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 277 (1993) (quoting Zobel v. Williams, 457 U.S. 55, 60 n.6 (1982))

[154] *See* Smith-Drelich, *supra* note 130, at 1394–97 (evaluating the constitutionality of border controls implemented to stop the spread of COVID-19).

[155] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2309 (2022) (Kavanaugh, J., concurring).

intangible one? The answer is far from simple, but we are inclined to say yes, it can be. Both Court precedent and the very structure of federalism lead us to the conclusion that, if a state punishes its citizens for traveling to another state to procure an abortion *after* they have returned to the state, such a prosecution would indeed violate the right to travel.

We begin with the precedents. The Supreme Court has held that "[a] state law implicates the right to travel when it actually deters such travel, when impeding travel is its primary objective, or when it uses 'any classification which serves to penalize the exercise of that right.'"[156] Punishing citizens who cross state borders to receive an abortion certainly deters such travel and certainly imposes a "classification [that] serves to penalize" the traveler, branding them as an outlaw, if not a felon. In addition, given its fundamental status, the right to travel is implicated by criminal and civil actions, whether it is initiated by the state or by a private "bounty-hunter."[157] Thus, whether the state itself imposes constructive barriers to free movement or farms the task out to private citizens, these cases suggest that broad protections from extraterritorial legislation are rooted in the right to travel.

The problem, however, is that it might be difficult to connect the punishment contained in these anti-abortion statutes with the right to travel itself. In *Bray v. Alexandria Women's Health Clinic*,[158] a majority of the Court held that private persons obstructing access to abortion clinics in the Washington, D.C. metropolitan area did not amount to a conspiracy to deprive women seeking abortions of their right to interstate travel and therefore did not violate 42 U.S.C. § 1985(3).[159] In finding that the defendants lacked the requisite intent to deprive women of their right to travel to Washington, D.C. to receive an abortion, the Court held that the abortion protesters did not "act at least in part for the very purpose of" denying the women's right to interstate travel.[160] Rather, the protesters simply "oppose abortion, and it is irrelevant to their opposition whether the abortion is performed after interstate travel."[161] The Court further concluded that the right to interstate travel was not even implicated in this case, because the only "actual barriers to . . . movement" posed by the demonstrators "would have been in the immediate vicinity of the abortion clinics, restricting movement from one portion of the Commonwealth of Virginia to another," which would be outside the scope of the right to interstate travel.[162] The Court's reasoning in this case has led some

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[156] Att'y Gen. of N.Y. v. Soto-Lopez, 476 U.S. 898, 903 (1986) (citations omitted) (quoting Dunn v. Blumstein, 405 U.S. 330, 338 (1972)).

[157] Griffin v. Breckinridge, 403 U.S. 88, 102–03 (1971); *see also* United States v. Guest, 383 U.S. 745, 760 (1966) ("[I]f the predominant purpose of the [private] conspiracy is to impede or prevent the exercise of the right of interstate travel, or to oppress a person because of his exercise of that right, then, whether or not motivated by racial discrimination, the conspiracy becomes a proper object of the federal law under which the indictment in this case was brought.").

[158] 506 U.S. 263 (1993).

[159] This federal statute provides a cause of action to any party injured by a conspiracy of two or more persons "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws." 42 U.S.C. § 1985(3).

[160] *Bray*, 506 U.S. at 275–76.

[161] *Id.* at 276.

[162] *Id.* at 277.

scholars to dismiss the idea that the right to travel poses any sort of barrier to extraterritorial abortion bans.[163]

Although the Court's holding in *Bray* may seem to present a hurdle for those arguing that extraterritorial abortion bans violate the right to travel, it is one that can be overcome. First, *Bray* was not interpreting the constitutionally-based right to travel at all. Instead, it was a pure statutory interpretation case, interpreting the text of a particular federal statute permitting a cause of action against conspiracies to deprive certain rights or privileges, and there is no reason to expand the holding of the case outside of that context. This is particularly true with regard to the Court's ruling that the "purpose" of a restrictive state statute or state action must be to "interfere with travel as such" to give rise to a cause of action under the federal statute.[164] Such a ruling may make sense as an interpretation of the intent provision of statutory language, but as a constitutional matter it does not. After all, the Supreme Court has frequently noted that "[c]onstitutional rights would be of little value if they could be . . . indirectly denied."[165]

To be sure, there are several right-to-travel cases involving attempts to directly impede the right to interstate travel.[166] But the majority of right-to-travel cases "principally involved . . . [an] indirect manner of burdening the right."[167] In *Dunn v. Blumstein*,[168] for example, the issue was whether Tennessee could require citizens to reside in Tennessee for one year prior to being able to vote in the state and three months before being able to vote in their county of residence. Tennessee officials tried to defend the law on the grounds that it did not specifically target interstate travel and that it did not actually deter anyone from traveling to the state.[169] According to the Court, however, that view "represents a fundamental misunderstanding of the law."[170] Instead, the Court clarified that, when evaluating whether the right to travel has been infringed, evidence of actual deterrence is not required.[171] Rather, all that is necessary to show an infringement is that the state law *penalizes* the exercise of the right to interstate travel.[172] These "durational residency"[173] cases,

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[163] *See e.g.*, Dellapenna, *supra* note 152, at 1691.
[164] *Id.*
[165] U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 829 (1995) (quoting Harman v. Forssenius, 380 U.S. 528, 540 (1965)).
[166] *See e.g.*, Edwards v. California, 314 U.S. 160, 174 (1941) (finding that the California statute at issue has an "express purpose and inevitable effect . . . to prohibit the transportation of indigent persons across the California border"); Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1867) (invalidating a direct tax on all persons exiting Nevada via common carrier); *see also* R. Linus Chan, *The Right to Travel: Breaking Down the Thousand Petty Fortresses of State Self-Deportation Laws*, 34 PACE L. REV. 814, 875–77 (2014) (discussing what might be the first direct attempt to prohibit interstate travel in the Missouri Compromise).
[167] Att'y Gen. of N.Y. v. Soto-Lopez, 476 U.S. 898, 903 (1986) (plurality opinion).
[168] 405 U.S. 330 (1972).
[169] *Id.* at 339.
[170] *Id.*
[171] *Id.* at 339–40 & 322 n.9.
[172] *Id.* at 341 ("It has long been established that a State may not impose a penalty upon those who exercise a right guaranteed by the Constitution . . . . Constitutional rights would be of little value if they could be . . . indirectly denied." (quoting Harman v. Forssenius, 380 U.S. 528, 540 (1965)).
[173] Durational residency requirements, which seek to "treat established residents differently based on the time they migrated into the state," are distinct from bona fide residency requirements, "which seek to differentiate between residents and nonresidents." *Soto-Lopez*, 476 U.S. at 903 n.3. The Court explained in *Martinez v. Bynum*, 461 U.S.

which fall under component (3) of *Saenz*'s tripart framework,[174] have found that the right to travel is violated when the targeted privileges include free medical care for indigent residents,[175] preference for civil service applicants,[176] tax exemptions for military veterans,[177] as well as general welfare benefits.[178] Importantly, in these cases, it was irrelevant whether the underlying benefit itself was a constitutional right or whether the explicit purpose of the statute was to deny travel. Instead, the key question was only whether the state, either in conferring benefits or exacting penalties, was burdening one group of people present in the state at the without burdening another.

Even outside this durational residency line of cases, the Court has similarly made clear that denying travel need not be the "express purpose" of a law for it to create sufficient "barriers to interstate movement" to violate the right to travel. For example, in *Edwards v. California*,[179] the statute at issue did not even target the traveler directly, but rather made it a misdemeanor for any "person, firm or corporation" to help bring an indigent person to the state.[180] Nevertheless, the fact that travel was not directly targeted posed no obstacle for the Court in striking down the statute as unconstitutional. And although the majority ultimately held that the California statute was unconstitutional under the Commerce Clause,[181] four of the nine justices would have preferred to base the decision on the right to travel.[182] In his concurrence, Justice Douglas rejected the majority's reliance on the Commerce Clause, expressing his opinion that "the right of persons to move freely from State to State occupies a *more protected* position in our constitutional system than does the movement of" interstate commerce.[183]

Thus, even if extraterritorial abortion bans do not explicitly block travel, they may still pose a constructive barrier to travel and therefore violate the right to travel (whether that right is deemed to reside in the Commerce Clause or the Privileges and Immunities Clause). Indeed, if we replace the word "indigent" in *Edwards* with the word "pregnant," and replace the destination state

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321, 328–29 (1983) that "[a] bona fide residence requirement, appropriately defined and uniformly applied, furthers the substantial state interest in assuring that services provided for its residents are enjoyed only by residents." These requirements do not violate the right to travel because "any person is free to move to a State and to establish residence there" and "bona fide residency requirement[s] simply require[] that the person *does* establish residence before demanding that the services are restricted to residents." *Id.*

[174] 526 U.S. 489, 502–03 (1999).

[175] Mem'l Hosp. v. Maricopa Cnty., 415 U.S. 250, 261–62 (1974).

[176] *Soto-Lopez*, 476 U.S. at 905. This is an example of a "fixed point" durational residency requirement because the benefit afforded to New York veterans was based on the "fixed point" during which they served in the armed forces. *Id.*

[177] Hooper v. Bernalillo Cnty. Assessor, 472 U.S. 612, 619 (1985). This is an example of a "fixed date" durational residency requirement because the state granted tax exemptions only to veterans that established residency in the state before a certain date—in this case, May 8, 1976. *Id.*

[178] Saenz v. Roe, 526 U.S. 489, 492–93 (1999) (striking a California statute that limited new residents to the same welfare benefits they received in their prior state of residence for up to a year after they established residency in California); Shapiro v. Thompson, 394 U.S. 618, 622–24 (1969) (invalidating various statutes in Connecticut, Pennsylvania, and the District of Columbia that conditioned receipt of welfare benefits on one year of residence in the jurisdiction).

[179] 314 U.S. 160 (1941).

[180] *Id.* at 171.

[181] *Id.* at 177. We discuss the Commerce Clause arguments in Part II.B, *infra*.

[182] *Id.* at 177–81 (Douglas, J., joined by Black and Murphy, JJ., concurring); *Id.* at 182–86 (Jackson, J., concurring).

[183] *Id.* at 177 (Douglas, J., concurring).

of California with the home state of Texas, it is difficult to distinguish the two cases. If a state abortion ban prohibits its residents from traveling to another state to receive an abortion, where it is legal, and subjects them, along with anyone who aids or abets them, to criminal punishment upon their return, then it is hard to argue that such a system would neither "obstruct[] [n]or in substance prevent[]" such movement, nor would do so to a lesser extent than a tax or misdemeanor penalty.

In the abortion context it is the home state and not the host state that is obstructing travel because, unlike the law criminalizing helping an indigent person enter the state, extraterritorial abortion laws effectively seek to keep residents in, rather than keep them out. Yet this distinction is without constitutional significance. Recall that *Crandall*, which is the fount of the Court's right-to-travel jurisprudence, invalidated a Nevada statute taxing people *leaving* the state.[184] Thus the inward or outward position of the state vis-à-vis the flow of movement (either into or out of the state) seems to make no difference in analyzing a right-to-travel case. Likewise, it is irrelevant that extraterritorial abortion bans only target travel into another state for the specific purpose of procuring an abortion.[185] The *Edwards* Court made clear that the state of being indigent "is neither a source of rights nor a basis for denying them,"[186] and it is difficult to see why the state of being pregnant should be treated differently, unless the Court wishes to wade into the question of whether the fetus itself has constitutional rights, a debate the Court has thus far avoided.[187] Indeed, if there was one thing that Justice Kavanaugh sought to stress most of all in his *Dobbs* concurrence, it is that "the Constitution is neutral on the issue of abortion."[188] Thus, being pregnant is, like indigency, a "neutral fact—constitutionally an irrelevance, like race, creed, or color."[189]

All of this leads us to the conclusion that even when travel itself is not the object of a state statute, extraterritorial abortion bans erect constructive barriers to the exercise of the right to travel. This is well demonstrated by the Court's precedents described above. But it is also intrinsic to the Constitution's federalist structure.

Once *Dobbs* cleared the way for states to regulate abortion at any stage, states were left to perform their role "as laboratories for experimentation"[190] to either further restrict or further protect access to the procedure.[191] In order for states to fulfill this "vital function,"[192] however, people must be able to move freely between each laboratory so that they may determine their own legal and political climate, protect their liberties, and, in addition to literally voting, actually vote with their feet by moving around and thereby inform states of the level of public interest or support

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[184] 73 U.S. (6 Wall.) 35, 39 (1867).
[185] *See Edwards*, 314 U.S. at 184 (Jackson, J., concurring); Jones v. Helms, 452 U.S. 412 (1981).
[186] *Id.* 314 U.S. at 184 (Jackson, J., concurring).
[187] *See e.g.*, Benson v. McKee, 273 A.3d 121 (R.I. 2022), *cert. denied sub nom.*, Doe *ex rel.* Doe v. McKee, 143 S. Ct. 309 (2022) (denying a petition for certiorari from a Rhode Island Supreme Court case holding that the "unborn" have no standing to challenge the state's law codifying the right to an abortion).
[188] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2305 (2022) (Kavanaugh, J., concurring).
[189] *Edwards*, 314 U.S. at 184–85 (Jackson, J., concurring).
[190] United States v. Lopez, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring).
[191] *See supra* notes 60–67 and accompanying texts (describing state statutes protecting or restricting abortion access).
[192] Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 859 (2015) (Thomas, J., dissenting).

in the states' ongoing experiments.[193] As William Blackstone observed, "personal liberty consists in the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law."[194]

Fully aware of this fundamental liberty, the Founders "structure[d] a federal union under the Constitution to create a strong political union and a common market composed of sovereign states," the success of which depends on the right to travel.[195] As one scholar has argued, "the Framers saw the structure of government as the best protection of individual rights."[196] In order to preserve liberty through the Founders' federalist structure, however, citizens must be allowed to "move from a state where they feel unduly restrained to one with less restrictive laws."[197] Thus, for anti-abortion states to curtail the right to travel by criminalizing extraterritorial abortions where they are legal not only infringes on the personal, national rights of American citizens;[198] it also infringes on the structural limits federalism places on states that preserve civil liberties and national unity.[199] To subject any citizen to criminal prosecution (or civil liability) for participating in activities that the state deems to be lawful while within the state's territory, would be to frustrate the equal status of states to each other, their status as laboratories of experimentation for difficult social, political, and moral issues, and the citizens' role in limiting tyranny through travel.[200] As

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[193] *See* Patrick M. Garry, *The Constitutional Lynchpin of Liberty in an Age of New Federalism: Replacing Substantive Due Process with the Right to Travel*, 45 BRANDEIS L.J. 469, 486–87 (2007); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 546 (1954) ("The consequence [of federalism], of course, is that the states are the strategic yardsticks for the measurement of interest and opinion, the special centers of political activity, the separate geographical determinants of national as well as local politics."). Political movement, or "voting with one's feet," has been deemed a bedrock of horizontal interstate competition that serves to protect the people from tyranny at all levels of government. *See, e.g.*, John O. McGinnis & Ilya Somin, *Federalism vs. States' Rights: A Defense of Judicial Review in a Federal System*, 99 NW. L. REV. 89, 107–12 (2004).

[194] 1 WILLIAM BLACKSTONE, COMMENTARIES 134 (J.B. Lippincott Co. 1893) (1753).

[195] Sobel, *supra* note 129129, at 647–48.

[196] Garry, *supra* note 193193, at 473; *see also* New York v. United States, 505 U.S. 144, 181 (1992) ("[T]he Constitution divides authority between federal and state governments for the protection of individuals."); Coleman v. Thompson, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting) ("[F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power.").

[197] Garry, *supra* note 193, at 473.

[198] Edwards v. California, 314, U.S. 160, 183 (1941) (Jackson, J., concurring) ("This Court should, however, hold squarely that it is a privilege of citizenship of the United States, protected from state abridgment, to enter any state of the Union, either for temporary sojourn or for the establishment of permanent residence therein and for gaining resultant citizenship thereof. If national citizenship means less than this, it means nothing.").

[199] *See* Tribe, *supra* note 110110, at 147 ("[S]uch a law is at odds with the postulates of our constitutional nationhood that structure how the several states relate to one another, and how each state relates to its own citizens.").

[200] *Id.* at 152 ("No state may enclose its citizens in a legal cage that keeps them subject to the state's rules of primary conduct (at least vis-á-vis the world in general), including rules enforced through criminal prosecution, as they travel to other states in order to satisfy their needs or preferences or simply to sample what the rest of the nation may have to offer." (footnote omitted)); McGinnis & Somin, *supra* note 193193, at 108 ("The citizenry's ability to exit makes their political leaders more responsive to them and less apt to show favor to interest groups whose objectives conflict with those of the majority of citizens.").

the Court has announced in the context of punitive damages, "[a] State cannot punish a defendant for conduct that may have been lawful where it occurred."[201]

Finally, an originalist-style, historical analysis surely results in a robust reading of the right to travel. The right to travel has its roots in the Magna Carta,[202] was recognized by William Blackstone as an attribute of "personal liberty,"[203] was expressly included in the Articles of Confederation,[204] and was considered "broad and plenary" by the Founders.[205] With the exception of southern slave codes and plantation law that restricted the movements of those in bondage,[206] the right to interstate travel was well understood during the Antebellum Period.[207] And when anti-travel laws were passed during this period, they were primarily dependent on a person's status under state law (i.e., as a slave, pauper, etc.),[208] distinctions that were rendered "constitutionally

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[201] State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 421 (2003); *see also* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 572 (1996) ("[A] State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States."); Bigelow v. Virginia, 421 U.S. 809, 824 (1975) ("A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State."); N.Y. Life Ins. Co. v. Head, 234 U.S. 149, 161 (1914) ("[I]t would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State . . . without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends. This is so obviously the necessary result of the Constitution that it has rarely been called in question and hence authorities directly dealing with it do not abound."); Huntington v. Attrill, 146 U.S. 657, 669 (1892) ("Laws have no force of themselves beyond the jurisdiction of the State which enacts them, and can have extra-territorial effect only by the comity of other States.").

[202] *See* Kent v. Dulles, 357 U.S. 116, 125 (1958).

[203] 1 WILLIAM BLACKSTONE, COMMENTARIES 134–35 (J.B. Lippincott Co. 1893) (1753).

[204] ARTICLES OF CONFEDERATION OF 1781, art. IV.

[205] Sobel, *supra* note 129, at 647; *see also* Thomas Jefferson, *Argument in the Case of* Howell vs. Netherlands, *in* 1 THE WORKS OF THOMAS JEFFERSON 470, 474 (Paul Leicester Ford, ed. 1904) (1770) ("Under the law of nature, all men are born free, every one comes into the world with a right to his own person, which includes the liberty of moving and using it at his own will. This is what is called personal liberty, and is given him by the author of nature, because necessary for his own sustenance.").

[206] *See e.g.*, Mitchell F. Crusto, *Enslaved Constitution: Obstructing the Freedom to Travel*, 70 U. PITT. L. REV. 233, 258–62 (2006) (describing the regulation of "black travel" during the Antebellum South); *see also* KERMIT L. HALL & PETER KARSTEN, THE MAGIC MIRROR 144–46 (2d ed. 2009) (describing the role of slave codes on controlling the status and movement of slaves).

[207] In fact, as one scholar notes, one of the key defining features of freed slaves was their ability to travel freely throughout the United States—a freedom that was assumed for whites but had to be proven for Blacks. *See* JOHN D. COX, TRAVELING SOUTH: TRAVEL NARRATIVES AND THE CONSTRUCTION OF AMERICAN IDENTITY 64–67, 74, 81, 89 (2005); *see also* James Grossman, *Migration, Black*, *in* 3 THE NEW ENCYCLOPEDIA OF SOUTHERN CULTURE 179, 181 (Charles Reagan Wilson, ed., 2006) ("Movement [after the Civil War,] became as central to southern black life as it has been to the American experience in general. Because blacks for so long had been unable to move freely, however, it acquired a special mystique manifested as a major theme in black music and symbolized by the recurrent image of the railroad as a symbol of the freedom to move and start life anew.").

[208] *See* Paul Finkelman, *Slavery in the United States: Persons or Property?*, *in* THE LEGAL UNDERSTANDING OF SLAVERY: FROM HISTORICAL TO CONTEMPORARY 105, 126 (Jean Allain, ed., 2012). The indigent, for example, were subject to several restrictions on their ability to travel outside of their state or local community. *See* KRISTIN O'BRASSILL-KULFAN, VAGRANTS AND VAGABONDS: POVERTY AND MOBILITY IN THE EARLY AMERICAN REPUBLIC 17–25 (2019). Such laws were upheld as "precautionary measures" against the physical and moral "pestilence" of indigent travelers. New York v. Miln, 36 U.S. (11 Pet.) 102, 142 (1837). Similarly, anti-travel laws were passed targeting free Black persons as tools to scrutinize their free status. *See* ELIZABETH STORDEUR PRYOR, COLORED TRAVELERS: MOBILITY AND THE FIGHT FOR CITIZENSHIP BEFORE THE CIVIL WAR 48–49 (2016). But these laws were

an irrelevance" by the adoption of the Fourteenth Amendment.[209] Indeed, Justice Thomas, in a separate opinion in *Saenz*, recounted the history of the Privileges and Immunities Clause of Article IV and its relationship to the Privileges or Immunities Clause of the Fourteenth Amendment, linking the two through Justice Washington's "landmark opinion" in *Corfield v. Coryell*.[210] That case specifically recognized "[t]he right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise" as a fundamental right protected under Article IV.[211] As Thomas makes clear, cases such as *Corfield* "indisputably influenced the Members of Congress who enacted the Fourteenth Amendment."[212] And by 1868, numerous state constitutions contained specific provisions protecting the right to travel, including rights to immigration, emigration, and protection of in-state property when temporarily absent from the state.[213]

Given the history, tradition, precedents, and structural importance of the right to travel, courts should, and to a large extent have, viewed the right as the Founders conceived: both "broad and plenary."[214] That being said, states may perhaps infringe on the right to travel if the infringement can survive strict scrutiny by showing that the law at issue is "necessary to further a

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also controversial at the time. For example, free Black sailors were prohibited from entering many southern ports, causing "considerable interstate, federal-state, and international problems." PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM AND COMITY 109 n.28 (1981). When Missouri attempted to exclude all free Black and mulatto people from settling in its territory upon its entry into the Union, it "caused an uproar in the divided Senate," and resulted in a compromise that attached a "strange caveat" to Missouri's constitution that prohibited the state from restricting the travel of any "citizen" of any other state into and out of its territory. Chan, *supra* note 163, at 875–77. Furthermore, at both the state and federal levels, courts continued to recognize the right to travel as either being fundamental, Corfield v. Coryell, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (No. 3230); Beekman v. Saratoga & Schenectady R.R. Co., 3 Paige Ch. 45 (N.Y. 1831) (recognizing that when there is a compelling public interest, citizens are equally entitled to enjoy new instrumentalities of travel that emerge with new technologies, such as railroads), or a barrier to extraterritorial jurisdiction, Lemmon v. People, 20 N.Y. 562, 608–09 (1860); People v. Merrill, 2 Parker Crim. Rep. 590, 596 (1865) (dismissing criminal indictments of New York residents who sold slaves in the District of Columbia because "it cannot be pretended or assumed that a state has jurisdiction over crimes committed beyond its territorial limits"); *see also* JOSEPH STORY, CONFLICTS OF LAW § 20 (8th ed. 1883) ("Another maxim or proposition is, that no state or nation can by its laws directly affect or bind property out of its own territory, or bind persons not resident therein, whether they are natural-born subjects or others. . . .[F]or it would be wholly incompatible with the equality and exclusiveness of the sovereignty of all nations, that any one nation should be at liberty to regulate either persons or things not within its territory.").

[209] Edwards v. California, 314 U.S. 160, 185 (1941) (Jackson, J., concurring).

[210] 6 F.Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (No. 3230).

[211] *Id.* at 552; Saenz v. Roe, 526 U.S. 489, 521–28 (1999) (Thomas, J., dissenting).

[212] 526 U.S. 489, 526 (1999) (Thomas, J., dissenting); *see also* John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1418 (1992). Even if one has a more limited conception of what should count as a privilege and immunity of national citizenship for purposes of interpreting the Fourteenth Amendment, *see, e.g.,* Ilan Wurman, *Reconstructing Reconstruction Era Rights*, ___ U. VA. L. REV. ___ (2023) (arguing that the privileges and immunities of national citizenship excludes political rights and public privileges), the right to travel in order to obtain contracted medical services likely qualifies.

[213] *See* Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition*, 87 TEX. L. REV. 7, 92–93 (2008).

[214] Sobel, *supra* note 129, at 647.

compelling state interest."[215] But that would require the Court to determine whether the state's "legitimate interest in protecting 'potential life'"[216] overcomes the burden the state's law places on the right to travel.[217] In *Dobbs*, the Court made clear that it is not in a position to conduct such a balancing inquiry, explicitly stating that it "has neither the authority nor expertise to adjudicate . . . [the] weighing of the relative importance of the fetus and mother."[218] Thus, there is likely no basis for allowing state anti-abortion laws to abridge the constitutional right to travel.

B. The "Dormant" Commerce Clause of Article I, Section 8

Although we conclude that extraterritorial enforcement of state anti-abortion laws might violate the right to travel and the Privileges and Immunities Clause of Article IV, that is not the end of the discussion because the right to travel is only implicated to the extent the anti-abortion laws are targeting the actual person traveling out of state to obtain an abortion. Yet, as described above, the state anti-abortion laws in effect or being proposed are not necessarily focused on the person obtaining the abortion and certainly they are not the *exclusive* target of the laws.[219] And as to those who *aid or abet* the abortion, the right to travel would not be implicated. Therefore, we must look further and consider whether extraterritorial enforcement of anti-abortion laws against such persons might violate the Commerce Clause of Article I, section 8.

To some extent, the holding in *Edwards*, discussed above,[220] may offer protection to those who aid travelers in procuring an abortion. Recall that in *Edwards* the statute at issue did not target the traveler, but rather made it a misdemeanor for any "person, firm or corporation" to help bring an indigent person to the state.[221] Because *Edwards* based its analysis on the Commerce Clause, as opposed to the Privileges and Immunities Clause or the personal right to travel, the Commerce

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[215] Att'y Gen. of N.Y. v. Soto-Lopez, 476 U.S. 898, 904 n.4 (1986) (plurality opinion); *see also* Shapiro v. Thompson, 394 U.S. 618, 634 (1969) ("But in moving from State to State or to the District of Columbia appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional."); Mem'l Hosp. v. Maricopa Cnty., 415 U.S. 250, 258 (1974) ("[A] classification which 'operates to Penalize those persons . . . who have exercised their constitutional right of interstate migration,' must be justified by a compelling state interest." (quoting Oregon v. Mitchell, 400 U.S. 112, 238 (1970) (Brennan, J., dissenting in part)). There is some disagreement regarding the level of scrutiny to be applied when the right to travel is at issue, and whether the level of scrutiny changes depending on the type of burden the state imposes. *See e.g.*, *Soto-Lopez*, 476 U.S. at 906 n.6; Zobel v. Williams, 547 U.S. 55, 60 (1982); *see also* Garry, *supra* note 193, at 486 n.111. Without wading into the debate extensively, we think that strict, or at least heightened scrutiny, is appropriate due to the right's status as a fundamental right of national citizenship, the history and tradition of the right, and its role in establishing the structural limitations of federalism. *See* Garry, *supra* note 193, at 486–87; Tribe, *supra* note 110, at 123 ("[A] suitable structural analysis might convincingly show that this right to travel is fundamental with respect to judicial scrutiny of government obstacles to unfettered personal mobility, whether the right to travel is viewed as a means of exploring alternative legal, cultural, and physical environments or is regarded as an aspect of the citizen's right to select a political home.").

[216] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2241 (2022) (quoting Roe v. Wade, 410 U.S. 113, 163 (1973)).

[217] *See e.g.*, Dunn v. Blumstein, 405 U.S. 330, 343 (1972) ("In pursuing that important interest, the State cannot choose means that unnecessarily burden or restrict constitutionally protected activity.").

[218] 142 S. Ct. at 2277.

[219] *See supra* notes 38–57 and accompanying text (describing state abortion bans).

[220] *See supra* notes 179–189 and accompanying text.

[221] 314 U.S. 160, 171 (1941).

Clause may be better suited to defend against extraterritorial regulation of abortion with regard to these "aiders and abettors."

The Dormant Commerce Clause is an implied restriction on the States that is derived from the Commerce Clause of Article I. The Constitution's Commerce Clause gives the U.S. Congress sole authority to "regulate Commerce . . . among the several States."[222] The Supreme Court has long recognized that "this affirmative grant of authority to Congress also encompasses an implicit or 'dormant' limitation on the authority of the States to enact legislation affecting interstate commerce."[223] In other words, the Commerce Clause restricts States' ability to directly or indirectly regulate interstate commerce because the Federal Constitution allocates that power solely to Congress. Although not explicitly stated in the Commerce Clause, this restriction lies "dormant" until a state violates it.

The Dormant Commerce Clause idea has been applied to a wide variety of state actions, including civil and criminal statutes.[224] Irrespective of the criminal or civil nature of the regulation, the Court's Dormant Commerce Clause analysis proceeds along similar lines, albeit lines that have "not always been easy to follow."[225] Generally, the Court has followed a two-tiered approach.

The first level of inquiry seeks to eliminate economic protectionism between the states. As the Court has made clear, "[w]hen a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry."[226] In such cases, the Court will apply a "virtually per se rule of invalidity."[227] The Constitution's prohibition on economic protectionism between the states was born from the failures of the Articles of Confederation to prevent interstate trade wars that arose after the Revolutionary War.[228] This type of state regulation, however, is unlikely to arise in the abortion context, as anti-abortion states have shown little, if any, indication that new or preexisting abortion statutes have the purpose or effect of economic protectionism.[229] Thus, in most if not all cases, extraterritorial abortion statutes will need to be reviewed under the Dormant Commerce Clause's second test.

If a state law is not discriminatory and thus not virtually per se invalid, then courts "examine[] whether the State's interest is legitimate and whether the burden on interstate

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[222] U.S. CONST. art I, § 8, cl. 3.
[223] Healy v. Beer Inst., Inc., 491 U.S. 324, 326 n.1 (1989).
[224] *See* Daniel Francis, *The Decline of the Dormant Commerce Clause*, 94 DEN. L. REV. 255, 258–59 (2017) (collecting cases). As others have noted, for better or worse, "[t]he Commerce Clause has been 'generally ignored' in the civil choice-of-law context." Bradford, *supra* note 100, at 148 (quoting Harold W. Horowitz, *The Commerce Clause as a Limitation on State Choice-of-Law Doctrine*, 84 HARV. L. REV. 806, 807 (1971)). Choice-of-law doctrines are further examined in Part III.B., *infra*.
[225] CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 87 (1987).
[226] Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986).
[227] City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978).
[228] *See* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2089 (2018); *see also Healy*, 491 U.S. at 335–36 (noting that the guiding principles of the Court's Dormant Commerce Clause jurisprudence "reflect the Constitution's special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres" (footnote omitted)).
[229] *See* Bradford, *supra* note 100, at 149; Dellapenna, *supra* note 152, at 1691–92.

commerce clearly exceeds the local benefits."[230] As the Court stated in *Pike v. Bruce Church, Inc.*,[231] "[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." Thus, courts undertake a case-specific inquiry to determine whether "a legitimate public purpose is found" in the state's regulation and whether such an interest "could be promoted . . . with a lesser impact on interstate activities."[232] The relevant question for a non-discriminatory statute that burdens interstate commerce is "one of degree."[233] Where the burden on interstate commerce is great, the local interest of the state must also be great and must be of a nature that cannot be promoted by less burdensome means.[234]

Known sometimes as a "burden review" or application of the "*Pike* doctrine,"[235] the Court's inquiry is often deferential to the interests of the states, particularly when the state law at issue is aimed at health and safety.[236] Because of this deference, some scholars have dismissed the possibility that the Dormant Commerce Clause could ever be used successfully as a basis for challenging most extraterritorial anti-abortion laws.[237] We believe the next few years of abortion-related litigation is likely to test this theory, both with regard to drug manufacturers themselves and to abortion providers.

Take, for example, Mississippi's attempt to ban mifepristone, one of the FDA-approved medications for abortion.[238] GenBioPro, the generic manufacturer of the drug, sued the state, arguing that the state's ban excessively burdens interstate commerce.[239] Although the Mississippi statute does not favor domestic production of mifepristone over out-of-state producers,[240] it is, in effect, a ban on all abortion medications, including mifepristone.

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[230] *Brown-Forman*, 476 U.S. at 579.
[231] 397 U.S. 137, 142 (1970).
[232] *Id.*
[233] *Id.*
[234] *See also* Raymond Motor Transp. v. Rice, 434 U.S. 429, 441 (1978) ("Our recent decisions make clear that the inquiry necessarily involves a sensitive consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce.").
[235] Francis, *supra* note 224224, at 266.
[236] *See* Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941, 956 (1982) (noting that a state's power to regulate commerce for the purpose of "protecting the health of its citizens . . . is at the core of its police power" and that the Court's Commerce Clause jurisprudence recognizes "a difference between economic protectionism, on the one hand, and health and safety regulation, on the other"); City of Philadelphia v. New Jersey, 437 U.S. 617, 623–24 (1978) ("[I]ncidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people.").
[237] *See* Dellapenna, *supra* note 152, at 1691–92.
[238] Mississippi's attempt to ban mifepristone and the federal preemption implications of the FDA's authorization are discussed in greater detail in Part III.A. *infra*.
[239] *See* Complaint, *GenBioPro, Inc. v. Dobbs*, No. 3:20-CV-00652-HTW-LRA (S.D. Miss. *filed* October 9, 2020) [hereinafter GenBioPro's Complaint].
[240] *See* Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986); United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 342 (2007) (finding that local waste ordinances that "treat[] all private parties exactly the same" was not discriminatory).

Such total bans on articles of commerce have not fared particularly well under the Dormant Commerce Clause,[241] especially when the state statutes at issue regulate a market that requires national uniformity.[242] In an early case, *Schollenberger v. Pennsylvania*,[243] the Supreme Court held that states cannot rely on their police powers to enforce an "absolute [criminal] prohibition of an unadulterated, healthy, and pure article" of commerce. At issue in the case was a Pennsylvania statute banning the import or sale of oleomargarine (margarine), which was at the time "newly invented."[244] Even though Pennsylvania's regulation of margarine was based on health and safety, this justification was deemed inadequate to support the Commonwealth's "absolute prohibition" on margarine where health and safety concerns could be addressed in a more tailored, albeit more difficult, manner.[245]

Schollenberger can be seen as a precursor to the *Pike* balancing test for reviewing absolute prohibitions that are not discriminatory.[246] To the extent Mississippi's trigger law, and others like it, constitutes an absolute prohibition on medication abortions, this restriction would likely place a heavy burden on interstate commerce in an article that is already regulated and approved at the federal level.[247] Furthermore, banning FDA-approved medications could significantly disrupt the

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[241] In some of these cases, the Court found that by banning the in-state sale of an article in commerce, states were implicitly favoring in-state producers while burdening out-of-state producers on the basis of the article's origin. *City of Philadelphia*, 437 U.S. at 628–29 (finding that New Jersey's ban on imports of waste to "slow[] the flow of refuse into New Jersey's remaining landfill sites" was "clearly impermissible under the Commerce Clause" because it "saddle[d] those outside the State with the entire burden" of accomplishing the New Jersey legislature's goal); Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 350–51 (1977) (holding that North Carolina's prohibition on marketing apples with more than one grade (the Department of Agriculture's grade) discriminated against Washington apple producers and favored North Carolina producers). Certain circuit courts have found that total bans on products that do not distinguish between products based on their state of origin are not discriminatory and therefore do not violate the Dormant Commerce Clause. *See e.g.*, Empacadora de Carnes de Fresnillo, S.A. de C.V. v. Curry, 476 F.3d 326, 335–37 (5th Cir. 2007) (upholding Texas's ban on the production and sale of horsemeat because "both intrastate and interstate trade of horsemeat [is treated] equally by way of a blanket prohibition"); Pacific Nw. Venison Producers v. Smitch, 20 F.3d 1008, 1012 (9th Cir. 1994) (rejecting arguments that Washington's import ban on shark fins is a per se violation of the Dormant Commerce Clause because such a ban "simply effectuates a complete ban on commerce in certain items is not discriminatory"). *But see* Dorrance v. McCarthy, 957 F.2d 761, 765 (10th Cir. 1992) (adopting a per se rule of invalidity with regard to import bans because they "discriminate[] against interstate commerce on [their] face").

[242] *See* Ray Motor Transp., Inc. v. Rice, 434 U.S. 429, 443–45 (1978) (concluding that Wisconsin's prohibition on trucks longer than fifty-five feet impermissibly burdened interstate commerce); Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 529–30 (1959) (finding that Illinois' regulation of mudguards was "one of those cases . . . where local safety measures that are nondiscriminatory place an unconstitutional burden on interstate commerce"); S. Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761, 779–80 (1945) (rejecting Arizona's argument that its police powers enabled it to regulate the size of rail cars because "a state may not regulate interstate commerce so as substantially to affect its flow or deprive it of needed uniformity in its regulation").

[243] 171 U.S. 1, 13 (1898).

[244] *Id.* at 6. This was Pennsylvania's characterization of margarine. The Court questioned this characterization but reasoned that even if margarine was in fact "newly discovered," its effects on health (mostly beneficial) were well known at the time, so its purported "newness" was not an adequate justification for Pennsylvania's ban. *See id.* at 14–15.

[245] *Id.* at 15.

[246] Pike v. Bruce Church, 397 U.S. 137, 142 (1970).

[247] *See infra* notes 310–315 and accompanying text. To be sure, Mississippi's trigger law only creates a ban on medication abortions by prohibiting *all* abortions, including those performed via medication. *See* MISS. CODE ANN. § 41-41-45(1), (2) (West 2022). This may be relevant because some circuit courts have interpreted the *Pike* balancing

national scheme for medication abortions, which the FDA has administered for over twenty years.[248] This burden on interstate commerce is even greater if, for example, Mississippi's trigger law also banned even the *marketing* of medication abortions as a form of aiding and abetting illegal conduct.[249] Thus, although not discriminatory and presumably confined within the state's borders, it may be shown that state bans on FDA-approved medication abortions significantly burden interstate commerce, especially considering the FDA's approval and national scheme for prescription drugs. This argument, of course, would be in addition to the possibility that federal law actually preempts the state law in this context, an argument that is discussed in greater detail in Part III.

Even without a pre-existing national regulatory regime, the Supreme Court has been highly critical of any state extraterritorial regulation that "exceeds the inherent limits of the enacting State's authority."[250] This limitation on extraterritorial state law is a natural extension of the Commerce Clause: the Commerce Clause allows only *indirect* regulation of interstate commerce and where states regulate actions that are wholly outside of their borders they are *directly* regulating across state lines.[251] Although the Supreme Court has never recognized extraterritorial regulation as a distinct class of regulations for purposes of the Dormant Commerce Clause, nine of the thirteen circuit courts have.[252] These circuits have indicated that extraterritorial regulation

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test to require that a regulation's burden on interstate commerce be *greater* than its regulation on intrastate commerce. *See* Nat'l Solid Waste Mgmt. Ass'n v. Pine Belt Reg'l Solid Waste Mgmt. Auth., 389 F.3d 491, 502 (5th Cir. 2004); Automated Salvage Transp., Inc. v. Wheelabrator Env't Sys., Inc., 155 F.3d 59, 75 (2d Cir. 1998). Although a total ban on medication abortions in Mississippi may indicate equal burdens on inter- and intrastate commerce, the ban's effect should be viewed in light of the "need for national uniformity in the regulations" of prescription drugs. Morgan v. Virginia, 328 U.S. 373, 386 (1946) (ruling against a Virginia statute that required segregation of interstate bus travelers on the basis of race in light of the "balance between the exercise of the local police power and the need for national uniformity in the regulations for interstate travel").

[248] *See infra* notes 310–315 and accompanying text; GenBioPro, Inc.'s Memorandum in Support of Its Motion for Leave to File Amended Complaint at 3, *GenBioPro, Inc. v. Dobbs*, No. 3:20-CV-00652-HTW-LGI (S.D. Miss. *filed* July 21, 2022) [hereinafter GenBioPro's Amended Complaint]..

[249] *See* GenBioPro's Amended Complaint at 6–7. Mississippi's trigger law does not specifically subject those who "aid and abet" to criminal punishment, but others do. *See e.g.*, KY. REV. STAT. ANN. § 311.772 (West 2019) (effective June 24, 2022) (making it a criminal offense for any person to knowingly "[a]dminister to, prescribe for, procure for, or sell to any pregnant woman any medicine, drug, or other substance with the specific intent of *causing or abetting* the termination of the life of an unborn human being" (emphasis added)). Nevertheless, it is typical for states to make it a crime to aid and abet another person to commit a crime and thus medication abortion manufacturers and marketers may be subject to criminal penalties even if the statute does not explicitly say so. *See* Sequoia Carrillo & Pooja Salhotra, *Colleges Navigate Confusing Landscapes as New Abortion Laws Take Effect*, NPR (July 19, 2022), https://www.npr.org/2022/07/19/1112014281/abortion-laws-college-campus.

[250] Healy v. Beer Inst., Inc., 491 U.S. 324, 336 (1989) (invalidating a Connecticut statute that required out-of-state beer shoppers to affirm that their prices are no higher than prices they offer in neighboring states); Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 582–83 (1986) (striking a New York statute that had the "practical effect" of setting liquor prices in other states); Edgar v. MITE Corp., 457 U.S. 624, 642 (1982) (finding an Illinois statute regulating tender offers by out-of-state corporations unconstitutional due to its "sweeping extraterritorial effect" on out-of-state shareholders); Baldwin v. G.A.F. Seeling, Inc., 294 U.S. 511, 521 (1935) (holding that it was unconstitutional for New York to require that out-of-state milk producers abide by the same minimum prices charged to in-state distributors as was required of in-state milk producers).

[251] Francis, *supra* note 224, at 267–68.

[252] *See* Int'l Dairy Foods Ass'n v. Boggs, 622 F.3d 628, 645–46 (6th Cir. 2010) (joining the First, Second, Third, Fourth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits in recognizing extraterritoriality as a distinct tier of interstate commerce regulation or at least as a category distinct from the usual *Pike* balancing test for nondiscriminatory regulation).

is subject to the same or similar scrutiny as discriminatory regulation—that is, they are virtually per se invalid.[253]

In order to determine whether a state statute is extraterritorial, and therefore "highly suspect," the Court has repeatedly held that the "critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State."[254] A statute that has such a "practical effect" on out-of-state commerce "exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature."[255] Furthermore, the statute in question is not viewed in isolation. Instead, courts consider whether the challenged law "may interact with the legitimate regulatory regimes of other States" and what would result "if not one, but many or every, State adopted similar legislation."[256] This latter concern is a natural factor for courts to consider, even if hypothetical, because the Commerce Clause was intended to address the "central concern of the Framers" that state "tendencies toward economic Balkanization" would lead to interstate fission that would threaten the Union as a whole.[257] Accordingly, the Framers designed a federal system that preserved Congress's supremacy over interstate commerce, and thereby limited state autonomy to the extent it conflicts, while also preserving the states' local autonomy from usurpation by extraterritorial regulation.[258]

A recent case from the Eighth Circuit demonstrates how domicile- or residency-based regulation can impermissibly violate the extraterritoriality principle of the Commerce Clause by

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[253] *See* All. of Auto. Mfrs. v. Gwadosky, 430 F.3d 30, 35 (1st Cir. 2005) ("A state statute that purports to regulate commerce occurring wholly beyond the boundaries of the enacting state outstrips the limits of the enacting state's constitutional authority and, therefore, is per se invalid."); Freedom Holdings, Inc. v. Spitzer, 357 F.3d 205, 219 (2d Cir. 2004) (characterizing extraterritorial regulation as "invalid per se under the Commerce Clause"); Cloverland-Green Spring Diaries, Inc. v. Pa. Milk Mktg. Bd., 462 F.3d 249, 261 (3d Cir. 2006) (stating that discriminatory and extraterritorial regulation are subject to "heightened scrutiny" that "renders all but the most unusual statute invalid"); Carolina Truck & Equip., Inc. v. Volvo Trucks of N. Am., Inc., 492 F.3d 484, 492 (4th Cir. 2007) (including in the virtual per se invalidity rule "those [statutes] with forbidden extraterritorial reach"); *Int'l Dairy Foods Ass'n*, 622 F.3d at 646 ("[A] state regulation is 'virtually per se invalid' if it is either extraterritorial or discriminatory in effect."); Dean Foods Co. v. Brancel, 187 F.3d 609, 616 (7th Cir. 1999) (noting that Seventh Circuit cases regarding extraterritorial regulation "have hewed to the per se rule" of invalidity under the Commerce Clause); Cotto Waxo Co. v. Williams, 46 F.3d 790, 793 (8th Cir. 1995) ("Under the Commerce Clause, a state regulation is per se invalid when it has an 'extraterritorial reach.'" (quoting *Healy*, 491 U.S. at 336)); Nat'l Collegiate Athletic Ass'n v. Miller, 10 F.3d 633, 638, 640 (9th Cir. 1993) (finding that a Nevada statute that is "directed at interstate commerce and only interstate commerce" "violates the Commerce Clause per se"); KT&G Corp. v. Att'y Gen. of State of Okla., 535 F.3d 1114, 1143 (10th Cir. 2008) ("[A] statute will be invalid per se if it has the practical effect of extraterritorial control of commerce occurring entirely outside the boundaries of the state in question." (quoting Grand River Enters. Six Nations, Ltd. v. Pryor, 425 F.3d 158, 168 (2d Cir. 2005))); Bainbridge v. Turner, 311 F.3d 1104, 1112 (11th Cir. 2002) ("In no event can the law directly regulate extraterritorially.").
[254] *Healy*, 491 U.S. at 336.
[255] *Id.*
[256] *Id.*
[257] Hughes v. Oklahoma, 441 U.S. 322, 325 (1979).
[258] *See* Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 338 (2008) ("The law has had to respect a cross-purpose [of the Commerce Clause] as well, for the Framers' distrust of economic Balkanization was limited by their federalism favoring a degree of local autonomy."); *see also* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546 (1985) ("The essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be *equally free* to engage in any activity that their citizens choose for the common weal." (emphasis added)).

regulating wholly out-of-state conduct. In *Styczinski v. Arnold*,[259] the court struck down a Minnesota law requiring "any person" that participates in "Minnesota transactions" involving bullion (i.e., precious metals) to register with the Minnesota Commissioner of Commerce.[260] A "Minnesota transaction" is defined by the state statute as one that, amongst other things, is made between a "dealer and consumer who lives in Minnesota."[261] As the court noted, this expansive definition, "under a plain reading of the statutory scheme," would include any transaction between a dealer and a Minnesota resident, even when the transaction occurs wholly out of state.[262] In other words, Minnesota's regulation attaches to all of its residents, even when those residents are out of state, and requires all those transacting with Minnesota residents to abide by Minnesota's laws, regardless of where the transaction takes place. The Eighth Circuit found that the extraterritorial reach of the statute was too broad. According to the court, "while Minnesota residents certainly subject themselves to certain obligations by residing in Minnesota, this does not give the State *carte blanche* to regulate all conduct of residents regardless of where it occurs."[263] A residency-based abortion ban would have the same extraterritorial reach and therefore should equally fail under the Eighth Circuit's extraterritoriality standard.

In a case more centered on abortion, *Planned Parenthood of Kansas and Mid-Missouri, Inc. v. Nixon*,[264] the Supreme Court of Missouri reviewed a Missouri statute that prohibited anyone from "aid[ing] or assist[ing]" a minor in obtaining an abortion without parental consent.[265] The statute in question also prohibited the affirmative defense that the abortion was "performed or induced pursuant to a consent to the abortion given in a manner that is otherwise lawful in the state or place where the abortion was performed or induced."[266] The Missouri Supreme Court rejected the extraterritorial reach of the statute:

> Of course, it is beyond Missouri's authority to regulate conduct that occurs wholly outside of Missouri, and section 188.250 cannot constitutionally be read to apply to such wholly out-of-state conduct. Missouri simply does not have the authority to make lawful out-of-state conduct actionable here, for its laws do not have extraterritorial effect.[267]

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[259] 46 F.4th 907, 910-11 (8th Cir. 2022).
[260] *Id.* at 910.
[261] *Id.* at 910–11.
[262] *Id.* at 913.
[263] *Id.* at 914.
[264] 220 S.W.3d 732 (Mo. 2007) (en banc).
[265] *Id.* at 736 (citing MO. REV. STAT. § 188.250 (West 2005)).
[266] *Id.* at 743 (quoting MO. REV. STAT. § 188.250.3 (West 2005)).
[267] *Id.* at 742. In order to save the statute from violating the extraterritoriality principle of the Dormant Commerce Clause, the court, as it did elsewhere in the opinion, applied a "narrowing construction" of the statute to hold that it is valid "only to the extent that it provides that the legality of the conduct in the state or place where the abortion is performed or induced is no defense to a violation of the statute based on *conduct occurring in Missouri.*" *Id.* at 743 (emphasis added).

The court was somewhat unclear as to whether its decision was based on the Commerce Clause or the Due Process Clause of the Fourteenth Amendment. The relevant section of its opinion is titled "Commerce Clause and Due Process," and the court summarizes Planned Parenthood of Kansas's arguments under both clauses in the same section. *Id.* at 742. As Judge Posner has explained, however, the concerns of the two clauses are distinct. The Due Process Clause governs the relationship between the State and the citizen and "protects persons from unreasonable burdens imposed by government, including extraterritorial regulation that is disproportionate to the governmental interest."

The *Styczinski* and *Nixon* decisions suggest how the Dormant Commerce Clause might limit the application of extraterritorial anti-abortion statutes. The courts adopt a virtually per se rule invalidating extraterritorial regulation as evidenced by the lack of any *Pike* or *Pike*-like balancing test.[268] This approach bypasses the difficult task of determining whether the state's interest in its regulation is outweighed by the burden placed on interstate commerce—a task that *Dobbs* make even more complicated.[269] And significantly, the courts' decisions on the Dormant Commerce Clause do not rely on any case or doctrine that might be called into question following *Dobbs*.[270]

Although the extraterritoriality principle may be sufficient to doom extraterritorial abortion laws, the related "highly suspect" category of "inconsistent regulation" may also prevent anti-abortion states from achieving their goals. As the U.S. Supreme Court has made clear, "the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State."[271] The concern here is specifically that imposing liability extraterritorially on a person or entity in another state will cause the citizens of other states to be subject to conflicting legal obligations regarding the same act.[272]

Furthermore, the idea of inconsistent state regulation does not necessarily require that two different states impose literally opposite obligations. Instead, such regulation is potentially problematic whenever "nonuniform state regulations impose compliance costs that are so severe that they counsel against permitting the states to regulate a particular subject matter."[273] The question is therefore whether compliance with the extraterritorial regulation would make it "effectively impossible . . . to engage in interstate commerce."[274] For example, in *Legato Vapors,*

Midwest Title Loans, Inc. v. Mills, 593 F.3d 660, 668 (7th Cir. 2010). The Dormant Commerce Clause, on the other hand, "protects interstate commerce from being impeded by extraterritorial regulation" and such extraterritorial effect is compounded when a state's law is imposed "on transactions in another state" rather than solely within the enacting state. *Id.* These distinctions are important as they may lead to divergent results depending on the basis of the constitutional protection. *See e.g.*, Comptroller of the State of Md. v. Wynne, 575 U.S. 542, 557 (2015) ("Maryland's raw power [under the Due Process Clause] to tax its residents' out-of-state income does not insulate its tax scheme from scrutiny under the dormant Commerce Clause."). Nevertheless, the court in *Nixon* made no effort to distinguish between the Due Process Clause and the Dormant Commerce Clause, and there is nothing in the opinion that would suggest a different outcome if the basis for its decision were one clause versus another. *See* 220 S.W.3d at 742–43.

[268] *Id.* at 742–43; *Styczinski*, 46 F.4th at 915 n.4 ("Because we find [Minnesota's statute] unconstitutional under the doctrine of extraterritoriality, it is unnecessary for us to determine whether [the statute] also imposes an undue burden on interstate commerce.").

[269] *See infra* notes 288–**Error! Bookmark not defined.** and accompanying text.

[270] *Nixon*, 220 S.W.3d at 742–43; *Styczinski*, 46 F.4th at 913–15. In fact, with regard to *Nixon*, the Supreme Court has long recognized that parental consent requirements for minors receiving an abortion are constitutional, even under *Roe*'s viability standard and before *Casey*'s undue burden standard. *See H.L. v. Matheson*, 450 U.S. 398, 407–10 (1981).

[271] Healy v. Beer Inst., Inc., 491 U.S. 324, 336–37 (1989); *see also* CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 88 (1987) (noting the various cases in which the Court invalidated statutes that adversely affected interstate commerce through inconsistent regulation).

[272] Bradford, *supra* note 100, at 149–50.

[273] Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 806–07 (2001).

[274] *Id.* at 807.

LLC v. Cook,[275] the Seventh Circuit found that Indiana's "remarkably specific security requirements" for e-cigarette manufacturing facilities could not be applied to out-of-state producers in light of the "obvious" concerns of similar, contrary state regulations and the availability of less intrusive alternatives to support Indiana's legislative goals.[276] As the court explained, where "direct regulation of out-of-state facilities and services has *effects* that are not comparable to mere incidental effects of a facially neutral law regulating labels," such state regulation risks controlling the conduct of out-of-state businesses and therefore impermissibly extends the state's authority beyond its boundaries.[277]

As applied to out-of-state doctors performing an abortion, extraterritorial state regulation may present problems of inconsistent regulation. First, pro-access states may adopt statutes that explicitly require healthcare providers who already provide abortion care to provide these services to out-of-state residents.[278] Such a requirement could be accomplished, for example, by prohibiting healthcare providers from denying abortion services based on the patient's state of residence.[279] If such measures were taken by pro-access states, a direct conflict would ensue under either the "irreconcilable" or "practical effects" understanding of the inconsistent regulation prong. This is because complying with the in-state prohibition on discrimination against out-of-state patients would *require* that the healthcare provider violate the extraterritorial prohibition on performing abortions on residents of the anti-abortion state (and vice versa).

Second, even absent pro-access states requiring abortion services in this context, a legal regime that allows the law of the patient to travel with the patient to an out-of-state medical provider would render medical care exceedingly difficult and expensive. Imagine a large hospital with a national or international reputation. If liability could be imposed on medical providers based on the law of the patient's home jurisdiction, those medical providers would potentially need to adjust their pricing, their risk pools, their standards of care, and their informed consent procedures for every patient, depending on where the patient was from.

This is particularly problematic given that the practice of medicine is generally regulated on a state-by-state basis. For example, if Maryland places limits on malpractice recoveries but its medical providers are exposed to liability under the laws of states without such controls, the charges of persons providing medical services in Maryland will rise to carry the burden of expected

[275] 847 F.3d 825 (7th Cir. 2017).
[276] *Id.* at 834–35.
[277] *Id.* at 834 (emphasis added).
[278] Forty-six states currently have statutes that, to varying degrees, allow healthcare providers to refuse to perform abortions based on personal or religious objections and prohibit state and private entities from discriminating against these providers based on that decision. *See Refusing to Provide Health Services*, GUTTMACHER INST., https://www.guttmacher.org/state-policy/explore/refusing-provide-health-services. As these providers do not provide abortion services to begin with, any requirement to provide abortion services presumably would not apply to them.
[279] Such a statute, which mirrors anti-discrimination statutes, is easily imaginable for state healthcare providers, given that some state laws already prohibit the state from discriminating against, denying, or interfering with the exercise of the right to choose, where such a right is recognized. *See e.g.*, N.Y. PUB. HEALTH LAW § 2599-aa.3 (McKinney 2019) ("The state shall not discriminate against, deny, or interfere with the exercise of the rights set forth in this section in the regulation or provision of benefits, facilities, services or information."); CAL. HEALTH & SAFETY CODE § 123466 (West 2022) ("The state may not deny or interfere with a woman's right to choose or obtain an abortion prior to viability of the fetus, or when the abortion is necessary to protect the life or health of the woman.").

liabilities to out-of-staters. As Judge Stephen Williams has recognized, "[t]his result thwarts not only the ability of each state to establish a policy and secure whatever benefits it may offer, but also the system's capacity to conduct and evaluate experiments in liability policy."[280] Indeed, "[f]or medical providers to screen out incoming patients [from other states] would completely destroy individuals' ability to seek out expert medical help throughout the United States."[281] This is precisely the sort of Balkanization with which the framers of the Constitution were principally concerned and against which the Dormant Commerce Clause protects.[282]

Of course, if a court determines that extraterritorial abortion bans significantly burden out-of-state healthcare providers—and thus interstate commerce in healthcare services—and such extraterritorial effect is not invalid per se, that is not the end of the inquiry. Next, the court must decide that the burden must be "clearly excessive in relation to the putative local benefits."[283] Yet if states will be able to henceforth regulate *any* healthcare service provided out-of-state to one of its citizens, then it is hard to fathom how that could not be deemed an excessive burden. Thus, a court seeking to uphold an extraterritorial application of an abortion statute against a Dormant Commerce Clause challenge on this ground would need to somehow limit its holding only to abortion services and not healthcare services more generally.

Even with regard to abortion specifically, the due diligence doctors would have to undergo to ensure that providing abortion services to out-of-state patients would not subject them to criminal or civil liability "would be enormous."[284] Doctors would be forced to screen each patient and potentially take additional actions to confirm their state of residence, consult hospital lawyers to determine their liability, and, if their initial assessment is wrong, expend resources defending themselves from out-of-state prosecution.[285] These costs are compounded if multiple states seek to apply different extraterritorial abortion bans because each state may have different requirements, restrictions, or exceptions.[286] It is noteworthy that even without express extraterritorial application, healthcare providers in states where abortion is legal are treading carefully, worried about their own legal safety as well as the safety of their patients.[287] Thus, the practical effect of extraterritorial abortion bans as applied to the out-of-state healthcare providers would be significantly burdensome.

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[280] Bledsoe v. Crowley, 849 F.2d 639, 646 (D.C. Cir. 1988) (Williams, J., concurring).
[281] *Id.* at 647.
[282] *See* Hughes v. Oklahoma, 441 U.S. 322, 325 (1979).
[283] Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).
[284] Bradford, *supra* note 100, at 152.
[285] *Id.* Although some state abortion bans create exemptions for saving the life of the mother, they do so only as an affirmative defense. *See e.g.*, MO. ANN. STAT. § 188.017.3 (West 2019) ("It shall be an affirmative defense for any person alleged to have violated the provisions of subsection 2 of this section that the person performed or induced an abortion because of a medical emergency. The defendant shall have the burden of persuasion that the defense is more probably true than not."). Thus, even if an out-of-state doctor performs an abortion to save the life of the pregnant person, the doctor may still be charged and will need to expend significant resources to persuasively demonstrate that the abortion was, in fact, legal.
[286] *See* Bradford, *supra* note 100, at 153.
[287] *See* Selena Simmons-Duffin, *Doctors Weren't Considered in* Dobbs*, But Now They're on Abortion's Legal Front Lines*, NPR (July 3, 2022), https://www.npr.org/sections/health-shots/2022/07/03/1109483662/doctors-werent-considered-in-dobbs-but-now-theyre-on-abortions-legal-front-lines.

Accordingly, for a court to allow extraterritorial abortion bans without opening the door to extraterritorial regulation of healthcare more generally would require that court to "assess the strength of a state's interest in preserving fetal life within a balancing calculus,"[288] which is precisely what the Supreme Court said it could not do in *Dobbs*.[289] The Court listed legitimate interests states may have in regulating abortion, and held that the proper constitutional standard for reviewing such laws is rational basis.[290] The Court did *not*, however, explain how much weight to give these interests in other contexts, such as a Dormant Commerce Clause or choice of law analysis.

Significantly, Justice Kavanaugh went out of his way in his *Dobbs* concurrence to say that "[b]ecause the Constitution is neutral on the issue of abortion, this Court also must be scrupulously neutral."[291] But if the Court is to remain neutral on the issue of abortion, then it must either uphold all extraterritorial healthcare regulation—with potentially disastrous results for the nation's healthcare system—or strike down the extraterritorial application of abortion regulations to healthcare providers. There is no principled middle ground.

III. VERTICAL CHOICE-OF-LAW PROBLEMS AND FEDERAL PREEMPTION

Apart from the potential constitutional limitations on extraterritorial regulation discussed above, the existence of federal statutes and agency regulations can also create vertical choice-of-law problems, where courts must determine the extent to which state laws are preempted by federal law. Under the Supremacy Clause of the Constitution,[292] Congress has the power to preempt state law. The key question is whether "Congress, in enacting the Federal Statute, intended to exercise its constitutionally delegated authority to set aside the laws of a State?"[293] This question may be answered by referencing explicit statutory language, or by looking at the structure and purpose of the statute.[294] There is, however, generally a presumption against preemption where the subject matter in question is traditionally regulated by the states.[295]

There are three generally recognized types of preemption. *Express preemption* occurs when the language of federal law explicitly conveys congressional intent to preclude state control of the subject matter.[296] *Field preemption* implies congressional intent to preempt state law when Congress crafts a regulatory scheme so pervasive that it necessarily leaves no room for a state to

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[288] Fallon, *supra* note 92, at 637.
[289] 142 S. Ct. 2228, 2259 (2022) (faulting supporters of *Roe* and *Casey* for failing "to show that this Court has the authority to weigh" policy arguments regarding abortion); *Id.* at 2273–74 (criticizing *Casey*'s undue burden test for requiring courts to weigh the benefits of abortion regulation with the undue burden imposed on abortion access); *Id.* at 2277 (arguing that the Court "has neither the authority nor expertise to adjudicate . . . [the] weighing of the relative importance of the fetus and mother"); *Id.* at 2305 (Kavanaugh, J., concurring) ("Because the Constitution is neutral on the issue of abortion, this Court also must be scrupulously neutral.").
[290] *Id.* at 2284.
[291] *Id.* at 2305 (Kavanaugh, J., concurring).
[292] U.S. CONST. art. VI, § 2.
[293] Barnett Bank of Marion Cnty., N.A. v. Nelson, 517 U.S. 25, 30 (1996).
[294] Altria Grp., Inc. v. Good, 555 U.S. 70, 76 (2008); 23-34 94th St. Grocery Corp. v. N.Y. City Bd. of Health, 685 F.3d 174, 180-81 (2d Cir. 2012).
[295] Egelhoff v. Egelhoff *ex rel.* Breiner, 532 U.S. 141, 151 (2001) (family law).
[296] United States v. South Carolina, 720 F.3d 518, 528 (4th Cir. 2013).

supplement or where "federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."[297] Lastly, under so-called *obstacle preemption* federal law invalidates any state law that stands as an obstacle to the purpose or execution of federal law,[298] or where it would be impossible to comply with both state and federal law.[299]

Here, we focus on two federal regulatory frameworks that may preempt state anti-abortion laws and that have already been the source of litigation. First, the FDA regulates Mifepristone, a medication that is used to terminate a pregnancy. Therefore, it may be that states cannot, consistent with federal law, deny access to federally approved medication. Second, EMTALA is a federal statute that requires hospitals to treat patients in emergency contexts and therefore might, in some cases, require hospitals to perform abortions even when such treatment is banned under state law.

A. FDA Regulation of Mifepristone

Medication abortion is a regimen usually composed of two different medications.[300] Currently, medication abortion accounts for over half of all US abortions, so its availability is of great consequence to overall abortion access.[301] The first pill, mifepristone, is a progesterone blocker that halts the development of a pregnancy.[302] The second pill, misoprostol, is taken 24–48 hours later and causes the uterus to contract, expelling the pregnancy.[303] This abortion method is approved for use up to ten weeks of pregnancy and is highly safe and effective.[304] If prescribed at nine weeks' gestation or earlier, pregnancy is terminated successfully and without complications 99.6% of the time.[305] Misoprostol was first developed and approved for use in the prevention of ulcers.[306] It is prescribed off label for use in medication abortion.[307] Because of this alternate use, misoprostol is not subject to any special regulation and is more widely available.[308] If mifepristone is unavailable, misoprostol alone may be used at a higher dose, but it is slightly less effective than the two drug regimen.[309]

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[297] Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).
[298] Hillman v. Maretta, 569 U.S. 483, 490 (2013); Arizona v. United States, 567 U.S. 387, 399–400 (2012).
[299] *Hillman*, 569 U.S. at 490; *Arizona*, 567 U.S. at 399; Mutual Pharm. Co., Inc. v. Bartlett, 570 U.S. 472 (2013).
[300] *The Availability and Use of Medication Abortion*, *supra* note 17.
[301] Jones et al., *supra* note 6.
[302] *The Availability and Use of Medication Abortion*, *supra* note 17; *Medication Abortion Up to 70 Days of Gestation*, AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS (Oct. 2022), https://www.acog.org/clinical/clinical-guidance/practice-bulletin/articles/2020/10/medication-abortion-up-to-70-days-of-gestation.
[303] *Id.*
[304] *The Availability and Use of Medication Abortion*, *supra* note 17.
[305] Luu Doan Ireland et al., *Medical Compared with Surgical Abortion for Effective Pregnancy Termination in the First Trimester*, 126(1) OBSTETRICS & GYNECOLOGY 22 (2015).
[306] Marissa Krugh & Christopher V. Maani, *Misoprostol*, STATPEARLS (July 11, 2022), https://www.ncbi.nlm.nih.gov/books/NBK539873/#:~:text=Currently%2C%20misoprostol%20is%20FDA%20approved,gastric%20ulcers%20with%20other%20etiologies.
[307] Rebecca Allen & Barbara M. O'Brien, *Uses of Misoprostol in Obstetrics and Gynecology*, 2(3) OBSTETRICS & GYNECOLOGY 159 (2009).
[308] *Misoprostol-Alone Medication Abortion Is Safe and Effective*, IBIS REPROD. HEALTH (Nov. 2021), https://www.ibisreproductivehealth.org/publications/misoprostol-alone-medication-abortion-safe-and-effective.
[309] *Id.*; Elizabeth G. Raymond et al., *Efficacy of Misoprostol Alone for First-Trimester Medical Abortion: A Systematic Review*, 133(1) OBSTETRICS & GYNECOLOGY 137 (2019).

Mifepristone has been heavily regulated since it first came to market in the United States in 2000.[310] At the federal level, mifepristone is currently subject to a set of Risk Evaluation and Mitigation Strategies ("REMS").[311] REMS are a fairly unusual type of regulatory framework, applied to only seventy-four of approximately 1,750 FDA approved drugs.[312] The Federal Food, Drug, and Cosmetic Act ("FDCA") authorizes the implementation of REMS when additional regulation is necessary to ensure that the benefits of a drug outweigh its risks.[313] In considering whether to promulgate a set of REMS, the FDA is statutorily bound to consider, among others, the following factors: The estimated size of the population likely to use the drug involved, the seriousness of the disease or condition that is to be treated with the drug, the expected benefit of the drug with respect to such disease or condition, the seriousness of any known or potential adverse events that may be related to the drug, and the background incidence of such events in the population likely to use the drug.[314] The statute expressly provides that requirements under the REMS must "not be unduly burdensome on patient access to the drug" and "be commensurate with the specific serious risk."[315]

Most REMS require that physicians and pharmacists report adverse events to the federal government, while a smaller portion impose additional, more specific requirements on providers, known as "Elements to Assure Safe Use" ("ETASU").[316] Mifepristone is in the latter category.[317] Before the COVID-19 pandemic and President Biden's election, the REMS required that mifepristone be dispensed in a clinic in the presence of a registered provider, though patients could take the medication and undergo their abortion at home.[318] The REMS also prohibited the dispensation of mifepristone through the mail, even with a valid prescription obtained after an in-person or telehealth visit with a provider. Some argue that mifepristone is not the type of drug that ought to be subject to a REMS at all,[319] but providers, patients, and activists have found the in-person dispensation requirement particularly onerous, especially given that mifepristone has an excellent record for safety and efficacy and abortion is already regulated at the state level.[320]

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[310] *See* Lars Noah, *A Miscarriage in the Drug Approval Process?: Mifepristone Embroils the FDA in Abortion Politics*, 36 WAKE FOREST L. REV. 571, 579 (2001) (discussing the FDA approval of mifepristone using special review procedures).

[311] FOOD & DRUG ADMIN., *Information About Mifepristone or Medical Termination of Pregnancy Through Ten Weeks Gestation* (Jan. 19, 2023), https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/information-about-mifepristone-medical-termination-pregnancy-through-ten-weeks-gestation.

[312] Jill Kolesar & Lee Vermeulen, *US Food and Drug Administration REMS Program*, MCGRAW HILL MED. (Mar. 18, 2019), https://www.accessmedicinenetwork.com/posts/45781-us-food-and-drug-administration-remsprogram#:~:text=At%20this%20time%2C%20there%20are,a%20full%20list%20of%20REMS.

[313] Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 355-1(a), (f).

[314] *Id.* § 355-1(a)(1), (f)

[315] *Id.* § 355-1(f)(2)(A), (C).

[316] FOOD & DRUG ADMIN., *What is a REMS?* (Jan. 26, 2018), https://www.fda.gov/drugs/risk-evaluation-and-mitigation-strategies-rems/whats-rems.

[317] *See Information About Mifepristone*, *supra* note 311.

[318] FOOD & DRUG ADMIN., RISK EVALUATION AND MITIGATION STRATEGIES (REMS) SINGLE SHARED SYSTEM FOR MIFEPRISTONE 200MG (Apr. 2019), https://www.fda.gov/media/164650/download.

[319] *Id.*

[320] *Id.*; *A Call to End the Excessive Regulation of Mifepristone*, BIXBY CTR. FOR GLOB. REPROD. HEALTH, https://bixbycenter.ucsf.edu/news/call-end-excessive-regulation-mifepristone (last visited Jan. 16, 2023); *Improving*

The COVID-19 pandemic put more pressure on the in-person dispensation requirement because such in-person visits were both more difficult and more dangerous during the height of the global health crisis. After some litigation and a pandemic-related injunction on the REMS,[321] the Biden FDA voluntarily dropped the in-person dispensation requirement from the REMS, permanently allowing mifepristone to be sent to patients by mail.[322]

In July 2022, President Biden issued an Executive Order directing the Secretary of Health and Human Services ("HHS") to submit a report that identifies "potential actions" to protect and expand access to abortion and other related services and protections within thirty days.[323] In compliance with that order HHS issued an "Action Plan to Protect and Strengthen Reproductive Care."[324] The report noted that the FDA had

> undertaken a full review of the Mifepristone REMS Program and has determined that the in person dispensing requirement is no longer necessary to assure the safe use of mifepristone for medical termination of early pregnancy, provided all the other requirements of the REMS continue to be met and that dispensing pharmacies are certified.[325]

In January of 2023, the FDA finalized its modification of the REMS, allowing brick and mortar pharmacies to sell mifepristone to patients with a prescription from a certified provider.[326] Federal law is now more supportive of access to medication abortion than it has ever been.

Many states have long restricted access to medication abortion even more assiduously than even the REMS regime, especially in contrast with post-pandemic policy changes. A common restriction prohibits the dispensation of mifepristone when a physician is not physically present in the same room as the patient.[327] Some states even require patients to consume the medication in

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Access to Mifepristone for Reproductive Health Indications, AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, https://www.acog.org/clinical-information/policy-and-position-statements/position-statements/2018/improving-access-to-mifepristone-for-reproductive-health-indications.

[321] Am. Coll. of Obstetricians & Gynecologists v. U.S. Food & Drug Admin., 472 F. Supp. 3d 183 (D. Md. 2020); *see also American College of Obstetricians and Gynecologists v. U.S. Food and Drug Administration*, AMERICAN CIVIL LIBERTIES UNION (Feb. 12, 2021), https://www.aclu.org/cases/american-college-obstetricians-and-gynecologists-v-us-food-and-drug-administration.

[322] FOOD & DRUG ADMIN., RISK EVALUATION AND MITIGATION STRATEGIES (REMS) SINGLE SHARED SYSTEM FOR MIFEPRISTONE 200MG, (May 2021), https://www.fda.gov/media/164651/download; Carrie N. Baker, *FDA Lifts Some Abortion Pill Restrictions, Leaves Others in Place*, MS. MAG. (Dec. 17, 2021), https://msmagazine.com/2021/12/17/fda-abortion-pill-medication-biden-mifepristone/.

[323] Exec. Order No. 14076, 87 Fed. Reg. 42,053 (July 13, 2022).

[324] DEP'T OF HEALTH & HUM. SERVS., HEALTH CARE UNDER ATTACK: AN ACTION PLAN TO PROTECT AND STRENGTHEN REPRODUCTIVE CARE (Aug. 2022), https://www.hhs.gov/sites/default/files/hhs-report-reproductive-health.pdf.

[325] *Id.* at 7.

[326] FOOD & DRUG ADMIN., RISK EVALUATION AND MITIGATION STRATEGIES (REMS) SINGLE SHARED SYSTEM FOR MIFEPRISTONE 200MG (Jan. 2023), https://www.accessdata.fda.gov/drugsatfda_docs/rems/Mifepristone_2023_01_03_REMS_Full.pdf; Ahmed Aboulenein, *U.S. FDA Allows Abortion Pills to Be Sold at Retail Pharmacies*, REUTERS (Jan. 4, 2023), https://www.reuters.com/world/us/us-fda-says-abortion-pills-can-be-sold-retail-pharmacies-new-york-times-reports-2023-01-03/. The agency did not issue a formal statement. *Id.*

[327] *Medication Abortion*, GUTTMACHER INST., https://guttmacher.org/state-policy/explore/medication-abortion (last visited Jan. 18, 2023).

the same room as the physician, a limitation that federal law eliminated in 2016.[328] These laws aim to obstruct medication abortions via mail and telehealth, which federal regulations permit. Like Texas's six-week abortion ban, they may also ban all forms of abortion within the time period for which medication abortion is approved.[329] In a June 2022 press release, Attorney General Merrick Garland expressed the position that FDA regulations on mifepristone preempt stricter state regulations, saying "the FDA has approved the use of the medication Mifepristone. States may not ban Mifepristone based on disagreement with the FDA's expert judgment about its safety and efficacy."[330] Our research supports this conclusion.

The Supreme Court has, at least at times, found that FDA regulations do indeed preempt state law on the grounds of impossibility. For example, in *PLIVA, Inc. v. Mensing*[331] the Court found that a state tort law requiring the defendant drug manufacturer to update the label of its generic drug was directly in conflict with FDA regulations that, the Court held, prevent manufacturers from independently changing the labels of such drugs to bring them into conformance with the challenged state law. Justice Thomas wrote for the Court: "We find impossibility here. It was not lawful under federal law for the Manufacturers to do what state law required of them. And even if they had fulfilled their federal duty to ask for FDA assistance, they would not have satisfied the requirements of state law."[332] Two years later, the Court considered a case with a nearly identical fact pattern, *Mutual Pharmaceutical Co. v. Bartlett.*[333] Again the Court found that because "federal law prohibited [defendant] from taking the remedial action required to avoid liability under [state] law," the state cause of action was preempted with respect to "FDA-approved drugs sold in interstate commerce."[334] And in response to the argument that the manufacturer could avoid liability without running afoul of federal law by choosing not to make the drug or sell it in the forum state at all,[335] Justice Alito wrote,

> [W]e reject this "stop-selling" rationale as incompatible with our pre-emption jurisprudence. Our pre-emption cases presume that an actor seeking to satisfy both his federal- and state-law obligations is not required to cease acting altogether in order to avoid liability. Indeed, if the option of ceasing to act defeated a claim of impossibility, impossibility pre-emption would be "all but meaningless." . . . In every instance in which the Court has found impossibility pre-emption, the "direct conflict" between federal- and state-law duties could easily have been avoided if the regulated actor had simply ceased acting.[336]

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[328] *Id.*; Rachel K. Jones & Heather Boonstra, *The Public Health Implications of the FDA's Update to the Medication Abortion Label*, HEALTH AFFAIRS: BLOG, HEALTH EQUITY (June 30, 2016), https://www.healthaffairs.org/do/10.1377/hblog20160630.055639/full/.
[329] TEX. HEALTH & SAFETY CODE ANN. §§ 171.201 to 171.21, as amended by S.B. 8, 87th Leg., Reg. Sess. (Tex. 2021).
[330] Press Release, U.S. Dep't of Just., Attorney General Merrick B. Garland Statement on Supreme Court Ruling in *Dobbs v. Jackson Women's Health Organization* (June 24, 2022).
[331] 564 U.S. 604, 611–12 (2011).
[332] *Id.* at 618.
[333] 570 U.S. 472 (2013).
[334] *Id.* at 486-87.
[335] *Id. a*t 488.
[336] *Id.* (quoting *PLIVA*, 564 U.S. at 616-20).

This analysis suggests that, at least in other contexts, the Court has had little sympathy for state attempts to regulate FDA-approved drugs out of the local market. And although these were cases where the state laws at issue required actions federal law prohibited, federal preemption also applies in reverse situations—such as with mifepristone—where the state law prohibits that which federal law permits.[337]

Significantly, the statutory amendment that created the entire REMS does *not* contain any language eschewing federal preemption, and the entire structure of REMS suggests the opposite: that Congress intended the REMS structure to operate through either field or obstacle preemption to preempt state law.[338] Indeed, the entire REMS approach requires the FDA to perform a complex balancing calculus, weighing numerous considerations, both in determining whether a REMS is necessary at all, and in determining what to include in a REMS when one is required. Under the REMS framework, the FDA has determined that current restrictions on mifepristone are those required to assure safe use of an important treatment while also minimizing burdens on patient access. So, "a court might reasonably conclude that state requirements additional to those in an FDA-required REMS pose an obstacle to the FDA's responsibility to satisfy these Congressional objectives, particularly if courts increasingly view federal regulatory choices as an effort to find the optimal balance between competing policy goals."[339]

Accordingly, a fair reading of the statute and the Supreme Court's precedents suggest to us that FDA determinations regarding the availability of the drugs involved in medication abortions should preempt contrary state laws. Of course, the FDA could, in a future administration, take a far more restrictive approach to mifepristone that, if it survived arbitrary-and-capricious review,[340] would presumably also preempt pro-access states from making the drug more widely available.

B. Emergency Medical Treatment and Active Labor Act (EMTALA)

In July 2022, the Biden Administration announced its position that EMTALA[341] preempts state abortion laws that would deny abortion care when required to stabilize a patient who comes to an emergency room with an emergency medical condition.[342] Anti-abortion states have since challenged the President's authority to preempt their state's laws by interpreting EMTALA in this way. We analyze EMTALA below and conclude that it clearly preempts anti-abortion state law

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[337] See, e.g., *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996) (holding that a federal statute permitting banks to sell insurance in small towns preempts a state statute prohibiting banks from selling most kinds of insurance); *Franklin National Bank of Franklin Square v. New York*, 347 U.S. 373 (1954) (holding that a federal statute permitting national banks to receive savings deposits preempts a state statute prohibiting certain national banks from using the word "savings" in their advertising).
[338] *Id.*
[339] Patricia J. Zettler, *Pharmaceutical Federalism*, 92 IND. L. REV. 845, 875 (2017); *see also* Patricia J. Zettler & Ameet Sarpatwari, *State Restrictions on Mifepristone Access—The Case for Federal Preemption*, 386 NEW ENG. J. OF MED. 705 (2022).
[340] Administrative Procedure Act, 5 U.S.C. § 706(2)(A).
[341] 42 U.S.C. § 1395dd.
[342] Rachel Roubein, *The Administration Clarifies Emergency Room Laws Around Abortion*, WASH. POST (July 12, 2022), https://www.washingtonpost.com/politics/2022/07/12/administration-clarifies-emergency-room-laws-around-abortion/.

that would ban abortion when necessary to stabilize a person undergoing an emergent pregnancy complication.

i. *EMTALA's Regulatory Scheme*

EMTALA was enacted in 1986 as part of the Consolidated Omnibus Reconciliation Act ("COBRA") to prevent the practice of patient dumping "in which uninsured patients were transferred, solely for financial reasons, from private to public hospitals without consideration of their medical condition or stability for the transfer."[343] As such, EMTALA has been called "one of the most comprehensive laws guaranteeing nondiscriminatory access to emergency medical care and thus to the health care system."[344]

EMTALA contains two different requirements, one involving mandatory screening at an emergency room, and one that requires patient stabilization.[345]

With regard to screening, if a hospital has an emergency department, then EMTALA requires it to provide "appropriate medical screening within [its] capability" to any individual who comes to the hospital and makes a request for "examination or treatment of [a] medical condition."[346] Because the law was targeted at eliminating discrimination based on financial means, it does not itself prescribe a standard of care where screening is concerned.[347] Instead, a hospital's assessment of whether a patient actually has an emergency condition usually controls its obligations under EMTALA—even if that assessment turns out to be incorrect or even negligent—so long as the patient was provided with the same medical care that would have been provided to anyone presenting with the same symptoms.[348] Thus, a hospital complies with its duties under the screening requirement if it "utilizes identical screening procedures for all patients complaining of the same condition or exhibiting the same symptoms."[349]

In contrast to the screening requirement, EMTALA's stabilization requirement provides substantive standards of treatment. EMTALA's stabilization provision requires that a patient be given sufficient treatment to prevent clinical deterioration in their condition in a way that poses a risk to life or bodily function.[350] If a hospital discharges or transfers a patient before that patient receives treatment "necessary to assure . . . that no material deterioration of the condition is likely

[343] Joseph Zibulewsky, *The Emergency Medical Treatment and Active Labor Act (EMTALA): What it Is and What it Means for Physicians*, 14(4) BAYLOR U. MED. CTR. PROC. 339, 339 (2001).
[344] *Id.*
[345] EMTALA also contains ancillary provisions regarding patient consent and transfer that are not relevant for our purposes. 42 U.S.C. § 1395dd(a), (c).
[346] *Id.* § 1395dd(a).
[347] Eberhardt v. City of Los Angeles, 62 F.3d 1253, 1258 (9th Cir. 1995).
[348] *See* Power v. Arlington Hosp. Ass'n, 42 F.3d 851, 856 (4th Cir. 1994) (quoting Brooks v. Maryland Gen. Hosp., 996 F.2d 708, 710 (4th Cir. 1993) ("The key requirement is that a hospital 'apply its standard of screening *uniformly* to all emergency room patients, regardless of whether they are insured or can pay. The Act does not impose any duty on a hospital requiring that the screening result in a correct diagnosis.'") (emphasis in original); Summers v. Baptist Med. Ctr., 91 F.3d 1132, 1138 (8th Cir. 1996) ("Patients are entitled under EMTALA, not to correct or non-negligent treatment in all circumstances, but to be treated as other similarly situated patients are treated, within the hospital's capabilities.").
[349] In the Matter of Baby "K," 16 F.3d 590, 593 (4th Cir. 1994).
[350] 42 U.S.C. § 1395dd(e)(3)(B).

to result or occur during the transfer,"[351] the hospital will have committed an EMTALA violation, regardless of whether such a transfer would be within the hospital's normal policy.[352]

The Fourth Circuit underscored this assessment in its landmark decision in *In the Matter of Baby "K."*[353] The court held that a hospital was required to provide aggressive treatment, including mechanical ventilation, to a terminally ill infant even though hospital policy would have been to provide only warmth, nutrition, and hydration.[354] The court explicitly distinguished EMTALA's screening and stabilizing requirements:

> [W]e conclude that the duty of the Hospital to provide stabilizing treatment for an emergency medical condition is not coextensive with the duty of the Hospital to provide an "appropriate medical screening." Congress has statutorily defined the duty of a hospital to provide stabilizing treatment as requiring that treatment necessary to prevent the material deterioration of a patient's condition.[355]

Indeed, to hold otherwise would allow covered hospitals to provide any level of treatment, even if it would permit patients to materially deteriorate, as long as the care provided to all similarly situated patients was uniform.[356] Instead, EMTALA's definition of stabilization is specifically provided by the text of the law and is defined with regard to objective standards, rather than the relative guideposts of the hospital's existing policy.

ii. EMTALA Preemption of State Anti-Abortion Law

Pregnancy complications, even the most serious ones, are common. Thus, for many state abortion bans now in effect, these complications will create situations in which state law demands one course of action, and EMTALA demands another. And while many, though not all, state abortion bans include exceptions to protect the life and health of the pregnant person,[357] the contours of such exceptions could be narrower than EMTALA's construction of what constitutes an emergency condition.[358]

This conflict arises partly because it is so difficult to determine precisely how much of a risk to life or health is sufficient to qualify under one of these state-law exceptions. In an essay for the New England Journal of Medicine, Dr. Lisa Harris, explained that, "it's unclear what,

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[351] *Id.* at (A).
[352] *Id.*
[353] 16 F.3d 590 (4th Cir. 1994).
[354] *Id.* at 594 (4th Cir. 1994). Transfer was not an option under the circumstances of the case. *Id.*
[355] *Id.* at 595.
[356] *Id.* at 596 ("The terms of EMTALA as written do not allow the Hospital to fulfill its duty to provide stabilizing treatment by simply dispensing uniform treatment.").
[357] Aria Bendix, *How Life-Threatening Must a Pregnancy Be to End it Legally?*, NBC (June 30, 2022), https://www.nbcnews.com/health/health-news/abortion-ban-exceptions-life-threatening-pregnancy-rcna36026; Maggie Koerth & Amelia Thomson-DeVeaux, *Even Exceptions to Abortion Bans Pit a Mother's Life Against Doctors' Fears*, FIVETHIRTYEIGHT (June 30, 2022), https://fivethirtyeight.com/features/even-exceptions-to-abortion-bans-pit-a-mothers-life-against-doctors-fears/; Tina Reed, *Defining "Life-Threatening" Can Be Tricky in Abortion Law Exceptions*, AXIOS (June 28, 2022), https://www.axios.com/2022/06/28/abortion-ban-exceptions-women-medical-emergencies.
[358] Tex. H.B. 1280, 87th Reg. Session (Tex. 2021).

precisely, 'lifesaving' means. What does the risk of death have to be, and how imminent must it be? Might abortion be permissible in a patient with pulmonary hypertension, for whom we cite a 30-to-50% chance of dying with ongoing pregnancy? Or must it be 100%?"[359]

EMTALA clearly answers this question. If a patient presents at the emergency room and, after undergoing the hospital's standard screening procedure, is determined to have an emergency medical condition and it is determined that abortion is necessary to prevent material deterioration, federal law does not just *permit*, but *requires* the hospital to provide abortion care. Where, for whatever reason, that condition would not qualify under a life or health exception to the state's abortion ban, complying with both federal law and state law would be impossible. This is the "direct conflict" for which EMTALA provides and is grounds for preemption both under traditional preemption doctrine and under the law's own terms. EMTALA should provide clarity where state abortion bans cause confusion and endanger patient health.

Physicians and researchers have noted that some pregnancy complications that will always be fatal if not treated through abortion care. And yet, the post-*Dobbs* months saw various reports of patients with such conditions being denied abortion care. This is evidence of the confusion and paralysis inflicted on the medical system by unclear and inconsistent anti-abortion state law.

The paradigmatic example of such a condition is ectopic pregnancy, when a fertilized egg attaches to a fallopian tube instead of to the uterine lining.[360] Ectopic pregnancies are never viable—a fetus cannot develop in a fallopian tube—and if left untreated, they are always fatal.[361] Although seemingly this condition would clearly fall within the ambit of both EMTALA and Texas' life or health exception, state abortion bans continue to cause fear among providers and freeze care.[362]

In a letter to the Texas Medical Board, the Texas Medical Association relayed various instances where hospital administrators delayed or prohibited abortion care for fear of running afoul of the state's abortion laws.[363] Allegedly, one hospital instructed providers not to treat an ectopic pregnancy until it ruptured.[364] A ruptured ectopic pregnancy causes severe internal bleeding and requires surgery to treat, whereas, prior to rupture, the condition can be treated with

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[359] Lisa H. Harris, *Navigating Loss of Abortion Services—A Large Academic Medical Center Prepares for the Overturn of* Roe v. Wade, 386 NEW ENG. J. OF MED. 2061 (June 2022).
[360] *Ectopic Pregnancy*, MAYO CLINIC (MAR. 12, 2022), https://www.mayoclinic.org/diseases-conditions/ectopic-pregnancy/symptoms-causes/syc-20372088.
[361] Catherine Pearson, *What Is Ectopic Pregnancy*, N.Y. TIMES (June 28, 2022), https://www.nytimes.com/article/ectopic-pregnancy-symptoms-treatment.html.
[362] *See* Arey et al., *supra* note 83, at 389 ("Patients with pregnancy complications or preexisting medical conditions that may be exacerbated by pregnancy are being forced to delay an abortion until their conditions become life-threatening and qualify as medical emergencies, or until fetal cardiac activity is no longer detectable."); Reese Oxner & María Méndez, *Texas Hospitals Are Putting Pregnant Patients at Risk by Denying Care Out of Fear of Abortion Laws, Medical Groups Says*, TEX. TRIBUNE (July 15, 2022), https://www.texastribune.org/2022/07/15/texas-hospitals-abortion-laws/;
[363] Allie Morris, *Texas Hospitals Fearing Abortion Law Delay Pregnant Women's Care, Medical Association Says*, DALLAS MORNING NEWS (July 14, 2022), https://www.dallasnews.com/news/politics/2022/07/14/texas-hospitals-fearing-abortion-law-delay-pregnant-womens-care-medical-association-says/. Neither the Texas Medical Board nor the Texas Medical Association made the full text of the letter public.
[364] *Id.*

a methotrexate injection.[365] In response to such events, the Texas Medical Association wrote, "delayed or prevented care in this scenario creates a substantial risk for the patient's future reproductive ability and poses serious risk to the patient's immediate physical wellbeing."[366]

Although this sort of condition should be treatable under both state and federal law, patient lives are still being endangered by the fear and confusion created by the state abortion bans. Thus, the preemption of state anti-abortion law by EMTALA is a legal and practical imperative.

iii. Litigation Involving EMTALA's Application to Abortion

On July 11, 2022, HHS Secretary Xavier Becerra wrote to covered health care providers informing them that "as frontline health care providers, the federal EMTALA statute protects your clinical judgment and the action that you take to provide stabilizing medical treatment to your pregnant patients, regardless of the restrictions in the state where you practice."[367] The letter expressed the administration's positions that EMTALA's screening, stabilization, and transfer requirements preempt "any state laws or mandates that employ a more restrictive definition of an emergency medical condition" or "apply to specific procedures."[368] Thus, wrote Becerra, "if a physician believes that a pregnant patient presenting at an emergency department, including certain labor and delivery departments, is experiencing an emergency medical condition as defined by EMTALA, and that abortion is the stabilizing treatment necessary to resolve that condition, the physician must provide that treatment," subject of course to patient consent.[369] HHS's "Action Plan" reiterated its earlier guidance, saying:

> [I]f a physician believes that a pregnant patient presenting at an emergency department . . . is experiencing an emergency medical condition as defined by EMTALA, and that abortion is the stabilizing treatment necessary to resolve the emergency medical condition, the physician must ensure that the patient receives that treatment. And when a state law directly conflicts with EMTALA because it prohibits abortion and does not include an exception for the life and health of the pregnant woman—*or draws the exception more narrowly than EMTALA's emergency medical condition definition*—that state law is preempted in the area of this direct conflict.[370]

The administration's position has resulted in two separate court battles over the federal preemption question, one initiated by the U.S. Department of Justice ("DOJ") in federal court in Idaho, and the other initiated by the State of Texas.

a. The Idaho Suit

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365 Pearson, *supra* note 360.
366 Morris, *supra* note 362.
367 Letter from Xavier Becerra, Sec'y, Dep't of Health & Hum. Servs., to Health Care Providers (July 11, 2022), https://www.hhs.gov/sites/default/files/emergency-medical-care-letter-to-health-care-providers.pdf. The agency also issued formal guidance. Memorandum from Ctrs. for Medicare & Medicaid Servs., U.S. Dep't of Health & Hum. Servs. to State Surv. Agency Dirs. (July 11, 2022), https://www.cms.gov/files/document/qso-22-22-hospitals.pdf.
368 *Id.*
369 *Id.*
370 HEALTH CARE UNDER ATTACK, *supra* note 324 (emphasis added).

In August 2022, DOJ brought suit requesting a declaratory judgment that Idaho's abortion ban was preempted by EMTALA "in situations where an abortion is necessary stabilizing treatment for an emergency medical condition."[371] Idaho's criminal abortion ban creates an affirmative defense, rather than an exception, where the defendant physician "determined, in his good faith medical judgment and based on the facts known to the physician at the time, that the abortion was necessary to prevent the death of the pregnant woman."[372] Notably, this defense is considerably narrower than the administration's EMTALA guidance—and most other state abortion bans—not only because it places the burden on the physician to plead and prove an affirmative defense, but also because it only permits abortion where necessary to save a pregnant person's life, and not when necessary to prevent serious harm or substantial impairment of a major bodily function.

Judge B. Lynn Winmill of the District of Idaho issued a preliminary injunction prohibiting Idaho from enforcing its abortion ban as applied to medical care required by EMTALA.[373] The court found that the Idaho law criminalized treatment required by EMTALA and was therefore preempted under the doctrine of impossibility preemption.[374] The court also wrote that the Idaho statute's affirmative defense did not cure the impossibility of complying with it and with federal law simultaneously.[375] An affirmative defense is "an excuse, not an exception," and requires a defendant to first admit that they have committed a crime before they may assert the defense.[376] A defendant would therefore have to undergo indictment, arrest, pretrial detention, and trial in order to raise the defense.[377] Although a defendant might escape conviction, the statute "still makes it impossible to provide an abortion without also committing a crime," even when such an abortion is required by federal law.[378]

Further, the court ruled, even if an affirmative defense could cure impossibility, "EMTALA requires abortions that the affirmative defense would not cover," namely those necessary to prevent serious impairment to bodily functions, dysfunction of bodily organ or part, or serious jeopardy to a patient's health.[379] Additionally, under Idaho law, death must be "imminent or certain absent an abortion," whereas EMTALA requires abortion where harm (short of death) is probable, or when the patient could be reasonably expected to suffer harm.[380] Any exception so narrow as this would create an impossible conflict with EMTALA, whether structured as an affirmative defense or not.

Finally, according to the court, the Idaho law was also preempted under the theory of obstacle preemption, because "Congress's clear purpose was to establish a bare minimum of

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[371] Press Release, Dep't of Justice, Justice Department Sues Idaho to Protect Reproductive Rights (Aug. 2, 2022), https://www.justice.gov/opa/pr/justice-department-sues-idaho-protect-reproductive-rights.
[372] IDAHO CODE ANN. § 18-622(3)(iii) (West 2020).
[373] United States v. Idaho, No. 1:22-cv-00329, 2022 WL 3692618 (D. Idaho Aug. 24, 2022).
[374] *Id.* at *10.
[375] *Id.* at *9.
[376] *Id.* at *8.
[377] *Id.*
[378] *Id.*
[379] United States v. Idaho, 2022 WL 3692618 at *8.
[380] *Id.*

emergency care that would be available to all people in Medicare-funded hospitals."[381] Because "Idaho's criminal abortion law will undoubtedly deter physicians from providing abortions in some emergency situations," it "stands as a clear obstacle to what Congress was attempting to accomplish with EMTALA," and "would obviously frustrate Congress's intent to ensure adequate emergency care for all patients who turn up in Medicare-funded hospitals."[382]

b. The Texas Suit

In response to the HHS guidance on EMTALA preemption, the State of Texas filed a complaint on July 14, 2022, seeking a declaratory judgment blocking enforcement of the HHS guidance on a variety of constitutional and administrative law claims.[383] With regard to federal preemption, Texas argued that EMTALA "does not authorize—and has never authorized—the federal government to compel healthcare providers to perform abortions."[384]

Texas abortion law contains an exception that is considerably broader than Idaho's affirmative defense. Abortions are permitted in Texas if,

> the pregnant female on whom the abortion is performed, induced, or attempted has a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that places the female at risk of death *or poses a serious risk of substantial impairment of a major bodily* function unless the abortion is performed or induced.[385]

Thus, there is far greater overlap between EMTALA's requirements and the exceptions to the Texas law than there is with the Idaho law. Accordingly, a cautious court could have held for the state on the grounds that, depending on how the state law and EMTALA are interpreted, it may not in fact be impossible to comply with EMTALA and state law simultaneously, thereby avoiding a constitutional conflict.[386] Indeed, the Idaho and Texas laws can easily be distinguished on these grounds.

Instead, Judge James Wesley Hendrix of the Northern District of Texas issued a far more sweeping decision enjoining the HHS guidance.[387] First, the court interpreted EMTALA to create equal stabilization obligations to both the pregnant person and the fetus,[388] and thus held that the guidance was an impermissible construction of the statute because it would prioritize the stabilization of the pregnant person over that of the fetus.[389] For this reason, the guidance was an

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[381] *Id.* at 10.
[382] *Id.*
[383] Complaint, *Texas v. Becerra*, No. 5:22-CV-185-H, 2022 WL 3639525 (N.D. Tex. *filed* July 14, 2022).
[384] *Id*. at 1-2
[385] H.B. 1280 § 2 (to be codified at TEX. HEALTH & SAFETY CODE 170A.002(b)) (emphasis added).
[386] It is, of course, an elementary principle of statutory interpretation that, when a law's language is unclear, courts should construe it to avoid a conflict with state or federal constitutions. *See, e.g.,* FTC v. Am. Tobacco Co., 264 U.S. 298, 305–307 (1924); Clark v. Martinez, 543 U.S. 371, 381 (2005). This canon rests on the need to respect the separation of powers and on "the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Id.*
[387] *Texas v. Becerra*, 2022 WL 3639525.
[388] *Id.* at *20.
[389] *Id.* at *23.

unauthorized exercise of agency power.[390] Second, the court concluded that EMTALA provides no guidance at all as to how maternal-fetal conflicts should be resolved.[391] Accordingly, the court concluded that EMTALA did not directly conflict with state law, and had no preemptive effect, leaving state law to fill the gap allegedly left by EMTALA.[392] We believe this decision is erroneous for three reasons.

First, there is no evidence that EMTALA creates equal stabilization requirements for a pregnant person and fetus. Such a contention is contrary to the law's logic and legislative context. EMTALA does include in its definition of "emergency medical condition" any condition that "place[s] the health of the individual (or, with respect to a pregnant woman, the health of the woman or her unborn child) in serious jeopardy."[393] This language, however, has never been held to foreclose abortion, much less at the expense of the pregnant person's health and well-being. Such an interpretation would mean that "every time a hospital emergency room terminated a pregnancy to save a pregnant patient's life, the hospital committed an EMTALA violation."[394] Surely, Congress would not have intended such a result without saying so explicitly. Indeed, Congress routinely makes explicit exceptions for abortion care from generally applicable rules; for example, in every budget, the passage of the Hyde and Weldon Amendments, which, respectively prohibit federal funding for abortion and discrimination against hospitals refusing to provide abortions.[395] Had Congress intended to prohibit abortion as a form of treatment for emergent pregnancy complications, it simply could have said so.

Instead, the inclusion of the language "unborn child" in EMTALA is better understood as an attempt to close loopholes in the stabilization requirement, rather than to create some expansive federal protection for unborn life. If unborn fetuses were not included in the statutory language, a hospital could potentially discharge or fail to stabilize a pregnant patient and escape sanction by arguing that it was the fetus, rather than the pregnant person, that was suffering the emergency medical condition. But this language has never, to our knowledge, been used to preserve fetal life when *inconsistent* with the stabilization or wellbeing of the pregnant person. As one health law scholar writes "a natural explanation is that Congress assumed that when continuing a pregnancy involved serious risk, the pregnant patient and the physician would decide what to do. Congress did not need to dictate whether abortion should be chosen—only that it must be provided if medically necessary and consented to by the patient."[396]

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[390] *Id.* at *20.
[391] *Id.*
[392] *Id.* at *21. The court also ruled that, because the guidance established or changed a substantive legal standard, it should have been subject to notice and comment under the APA. *Id.* at *27. We do not address this argument because the administration may ultimately promulgate the same requirements through notice-and-comment rulemaking.
[393] 42 U.S.C. § 1395dd(e)(1)(A)(i). It also includes conditions that could reasonably expected to result in "(ii) serious impairment to bodily functions," or "(iii) serious dysfunction of any bodily organ or part."
[394] Memorandum in Support of Motion for a Preliminary Injunction, *United States v. Idaho*, No. 1:22-cv-329-BLW (2022).
[395] Consolidated Appropriations Act, 2021, Pub. L. No. 116–260, div. H, tit. V, §§ 506–07, 134 Stat. 1182, 1622 (Hyde Amendment); Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2019, Pub. L. No. 115-245, Div. B., § 507(d), 132 Stat. 2981, 3118 (2018).
[396] Michelle M. Mello, *Resuscitating Abortion Rights in Emergency Care*, 3(9) J. OF AM. MED. ASS'N FORUM (Sept. 8, 2022).

Several district courts have ruled that EMTALA requires abortion care and associated treatment in emergency settings.[397] For example, the Southern District of New York held that the Trump administration's "conscience rule," which broadly allowed individuals and entities to abstain from participating in medical procedures on account of religious or moral objection, violated EMTALA.[398] According to the court, the conscience rule could not be used to relieve physicians of their duty to perform abortions when required by EMTALA.[399] Clearly, EMTALA can require physicians to perform emergency abortion.[400] These cases directly contradict Texas court's conclusion that state law could prohibit such emergency abortions.

Second, interpreting EMTALA to create equal obligations to both the pregnant person and the fetus presupposes that the medical needs of the pregnant person and fetus in an emergency setting can actually be treated separately. Yet, in the type of situations that EMTALA covers—emergencies where the health and well-being of the pregnant person is at risk—the two are inextricably linked because, if the denial of emergency treatment results in the death or serious illness of the pregnant person, the fetus is highly unlikely to survive.

This leads to the third problem: the Texas court's ruling would permit states to mandate that hospitals let a pregnant person die so that they might try to stabilize the fetus. Indeed, the court's decision rests on the idea that EMTALA has nothing to say about what should be done if the interests of the fetus and pregnant person conflict, leaving a void to be filled by state law.[401] This interpretation, in addition to jeopardizing the accessibility of vital emergency treatment in conflict with EMTALA's purpose and basic logic, would permit an unprecedented state intrusion into private medical decisions. Under this interpretation, a state could ignore EMTALA and explicitly require doctors to let their patients die, so as to preserve the life of an unborn fetus that may itself not survive.

Thus, a fair reading of EMTALA is that it preempts state law, at least to the extent that state law would ban abortions when required to stabilize a pregnant patient undergoing a medical emergency. There is no basis for concluding that EMTALA imposes an equal stabilization requirement as to the fetus, particularly if the life or health of the pregnant person is at risk.

IV. CIVIL SUITS AND CONFLICTS OF LAW

Until recently, most, if not all, state abortion laws involved criminal or regulatory penalties imposed by the State through its police power. In May of 2021, however, the Texas legislature enacted an unprecedented abortion restriction, SB8.[402] The law, which took effect on September

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[397] New York v. U.S. Dep't of Health & Hum. Servs., 414 F. Supp. 3d 475, 538 (S.D.N.Y. 2019); Morin v. E. Me. Med. Ctr., 780 F. Supp. 2d 84, 96 (D. Me. 2010) (holding that EMTALA's protections for pregnant women do not depend on the viability of the fetus); *see also* California v. United States, No. 05-cv-328, 2008 WL 744840, at *4 (N.D. Cal. Mar. 18, 2008) (finding that EMTALA protects emergency abortion care).
[398] New York v. U.S. Dep't of Health & Hum. Servs., 414 F. Supp. at 538.
[399] *Id.* at 502-503.
[400] Such a requirement is still subject to the patient's consent. 42 U.S.C. § 1395dd(b)(2).
[401] *Texas v. Becerra*, 2022 WL 3639525, at *20-*23.
[402] TEX. HEALTH & SAFETY CODE ANN. §§ 171.201 to 171.211 (West 2021), as amended by S.B. 8, 87th Leg., Reg. Sess. (Tex. 2021).

1, 2021, prior to the decision in *Dobbs*, banned abortion at approximately six weeks.[403] SB8 eschews all state enforcement and instead creates a private cause of action for individual citizens to bring civil suits in state court against anyone who performs an abortion in violation of the law or who "knowingly engages in conduct that aids or abets" an abortion.[404] "Paying for or reimbursing the cost of an abortion through insurance or otherwise" also constitutes aiding and abetting abortion under the law.[405] Private citizens successful in an action under SB8 may be awarded injunctive relief against the defendant, statutory damages of up to $10,000, and costs and attorney's fees.[406] Thus, SB8 turns private citizens into "bounty hunters" and rewards them for serving as enforcers of an extraordinarily strict anti-abortion regime. Even before *Dobbs*, other anti-abortion state legislatures were preparing "copy-cat laws" that adopted SB8's civil enforcement scheme.[407] The SB8 framework will likely become the blueprint for many new abortion bans and restrictions in the post-*Dobbs* era. By bringing abortion law into civil court, SB8 and its ilk create many new issues with which courts have not previously contended, including the classic conflicts-of-law doctrines of personal jurisdiction, choice of law, and recognition of judgments.

Of course, to the extent that civil suits are brought against the state citizens who are actually seeking the abortion, these conflicts problems are mitigated. After all, there is little doubt that a person domiciled in a state can be subjected to personal jurisdiction in that state in a civil suit, even if the acts giving rise to the liability occurred elsewhere.[408] Likewise, as a matter of choice-of-law doctrine, a state's law generally can be applied against its own citizens. And judgment recognition is not an issue in such cases, at least so long as the defendant remains a citizen of the state.

But it is substantially less clear whether an anti-abortion state may exercise personal jurisdiction over out-of-state healthcare providers or others who act outside of the forum state or

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[403] *Id.* at §171.203(b).

[404] *Id.* at § 171.208(a)(1-2). Because SB8 was enacted prior to *Dobbs*, this enforcement mechanism was designed to avoid judicial review of a law that was, then, unconstitutional on its face. Private civil enforcement aimed to remove state actors from enforcement, therefore frustrating preliminary judicial review of the statute. *See, e.g.*, Kate Zernike & Adam Liptak, *Texas Supreme Court Shuts Down Final Challenge to Abortion Law*, N.Y. TIMES (Mar. 11, 2022), https://www.nytimes.com/2022/03/11/us/texas-abortion-law.html; JOANNA R. LAMPE, CONG. RSCH. SERV., LSB10668, TEXAS HEARTBEAT ACT (S.B. 8) LITIGATION: SUPREME COURT IDENTIFIES NARROW PATH FOR CHALLENGES TO TEXAS ABORTION LAW (Dec. 13, 2021), https://crsreports.congress.gov/product/pdf/LSB/LSB10668.

[405] TEX. HEALTH & SAFETY CODE ANN. § 171.208(a)(2).

[406] *Id.* § 171.208(b).

[407] OKLA. STAT. tit. 63, § 1-745.31; IDAHO CODE §§ 18-8804, 18-8807. Other states have discussed or introduced similar laws, but not yet adopted them. *See* NAT'L ABORTION RTS. ACTION LEAGUE, MEMO*:* FIFTEEN STATES AND COUNTING POISED TO COPY TEXAS' ABORTION BAN, https://www.prochoiceamerica.org/report/memo-fifteen-states-and-counting-poised-to-copy-texas-abortion-ban/ (last visited Jan. 20, 2023).

[408] *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945); *Perkins v. Benguet Consol. Min. Co*., 342 U.S. 437, 447–48 (1951); Goodyear Dunlop Tires Operations S.A. v. Brown, 564 U.S. 915, 924 (2011) ("For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile."); Daimler AG v. Bauman, 571 U.S. 117, 122 (2016); *see also* Leah Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 729–30 (1988) ("Domicile is traditionally the strongest basis supporting general jurisdiction over a party. Domicile provides such a strong foundation for the imposition of general personal jurisdiction because it typically satisfies four of the major theoretical justifications for the assertion of jurisdiction: convenience for the defendant, convenience for the plaintiff, power, and reciprocal benefits.").

whether the state may apply its anti-abortion statutes against such out-of-state actors. And on the flip side, it is uncertain whether pro-access states may authorize its citizens to file retaliatory suits against out-of-state citizens who sue them. This Part takes up these issues.

A. Personal Jurisdiction

As noted above,[409] Republicans in the Missouri legislature recently introduced a bill modeled on Texas SB 8 that subjects out-of-state abortion providers to potential civil suits in Missouri brought by private citizen bounty hunters.[410] The sponsor of the measure, Republican State Representative Mary Elizabeth Coleman provided the following justification: "If a Missouri resident is hurt, even in Illinois, by a product that they bought in Illinois, there is still jurisdiction for them to sue in a Missouri court because that's home for them . . . and this is extending that same kind of thought to abortion jurisprudence."[411] This statement exemplifies the confusion that exists, even among lawmakers, as to how the U.S. Supreme Court's jurisdiction jurisprudence applies to out-of-state defendants.

To begin, the premise of Representative Coleman's analysis is incorrect. It is *not* necessarily true that a Missouri citizen who buys a product in Illinois from an Illinois citizen can sue that Illinois citizen in Missouri. To the contrary, the U.S. Supreme Court, in *Worldwide Volkswagen v. Woodson*[412] ruled that a New York car dealer could *not* be sued in Oklahoma, even though the customer drove the car there, because the dealer had not done anything to purposely solicit business from people in Oklahoma or to purposefully avail itself of the Oklahoma market.[413] In addition, even if, under *Worldwide Volkswagen*, a Missouri patient receiving medical care in another state could somehow justify the assertion of jurisdiction in Missouri over the doctor who treated her, it does not necessarily follow that a *different* Missouri citizen, having no contact whatsoever with the out-of-state doctor, could *also* bring suit in Missouri. Thus, it seems clear that we need to return to first principles and examine the Supreme Court's jurisdiction jurisprudence with regard to cross-border provision of services.

Since the nineteenth century, the U.S. Supreme Court has made it clear that courts can only assert jurisdiction over a defendant if that assertion of jurisdiction satisfies the requirements of constitutional due process.[414] According to the classic formulation, this due process requirement

[409] *See supra* text accompanying note 53.
[410] *See supra* text accompanying notes 53-54.
[411] Alice Miranda Ollstein & Megan Messerly, *Missouri Wants to Stop Out-of-State Abortions. Other States Could Follow.*, POLITICO (Mar. 19, 2022), https://www.politico.com/news/2022/03/19/travel-abortion-law-missouri-00018539.
[412] 444 U.S. 286 (1980).
[413] *Id.* at 297.
[414] *See* Pennoyer v. Neff, 96 U.S. 714, 733 (1877). This requirement is usually located in the Due Process Clause of the Fourteenth Amendment, and federal courts, with limited exceptions, have been deemed to possess no more jurisdictional power under the Due Process Clause of the Fifth Amendment than state courts have under the Fourteenth. *See, e.g.*, Chase & Sanborn Corp. v. Granfinanciera, S.A., 835 F.2d 1341, 1344 (11th Cir. 1988) ("The due process clause of the fifth amendment constrains a federal court's power to acquire personal jurisdiction via nationwide service of process."); Republic of Panama v. BCCI Holdings S.A., 119 F.3d 935, 944 (11th Cir. 1997) ("Because the language and motivating policies of the due process clauses of these two amendments are substantially similar, opinions interpreting the Fourteenth Amendment due process clause provide important guidance for us.").

is met only if the defendant has sufficient "minimum contacts with the forum state such that" the assertion of jurisdiction satisfies "traditional notions of fair play and substantial justice."[415]

The "minimum contacts" inquiry is necessarily fact-specific, and the Supreme Court has repeatedly been forced to clarify the application of the inquiry in a wide variety of factual scenarios. Parsing these many cases, however, certain jurisdictional principles can be gleaned that might be relevant to the new abortion context.

First, the Court has made clear that it is the *defendant's* contacts with the forum state that matter for the due process inquiry, not the plaintiff's.[416] Thus, as in *Worldwide Volkswagen*, if a defendant sells a physical product in one state and the customer then brings that product elsewhere, where it causes harm, that is not enough, by itself, to justify the assertion of jurisdiction in the state where the harm occurred.[417] Indeed, even a sale from a manufacturer into a state through a third-party distributor is not good enough to justify jurisdiction over the manufacturer, absent some indication that the manufacturer was targeting that state specifically.[418] Accordingly, a medical provider operating in a state is likely *not* subject to personal jurisdiction in another state if the provider's only contact with that state is the treatment of a patient who happens to be a citizen of that state.

It is true that the Supreme Court has at times suggested that a defendant could potentially be subject to jurisdiction elsewhere based on the fact that the effects of the defendant's actions were felt in another state. For example, in *Calder v. Jones*,[419] the Court upheld the assertion of personal jurisdiction in California over Florida journalists for an allegedly libelous article published in the *National Enquirer* and written entirely in Florida, but drawing on California sources, directed at California readers, and causing effects in California, including damage to the plaintiff's reputation.[420] California was, according to the Court, the "focal point of both the story and the harm suffered." The defendants in *Calder* never travelled into California for the story, and only consulted California sources by phone, but,

> their intentional, and allegedly tortious, actions were expressly aimed at California. [Defendants wrote and edited] an article that they knew would have a potentially devastating impact upon respondent. And they knew that the brunt of that injury would be felt by respondent in the State in which she lives and works and in which the National Enquirer has its largest circulation. Under the circumstances, petitioners must "reasonably anticipate being haled into court there" to answer for the truth of the statements made in their article.[421]

[415] *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).
[416] *See, e.g.*, *id.* at 319; *Worldwide Volkswagen Corp.*, 444 U.S. at 291-92.
[417] *See Worldwide Volkswagen Corp.*, 444 U.S. at 298; *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) ("[U]nilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State.").
[418] *See* J. *McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 885-86 (2011).
[419] 465 U.S. 783 (1984).
[420] *Id.* at 788–89.
[421] *Id.* at 790 (quoting *Worldwide Volkswagen Corp*., 444 U.S. at 297).

Calder might therefore seem to support the idea that healthcare providers in a state who know they are treating an out-of-state patient could potentially be subject to jurisdiction in the state where the effects of their services are felt. The Supreme Court, however, has never extended the logic of *Calder* that far, and more recent cases have instead limited the application of a broad effects test for jurisdiction. In *Walden v. Fiore*,[422] for example, airport police officers in Georgia allegedly harmed a couple traveling through the airport. The officers knew the travelers were from Nevada and therefore presumably knew that any harm caused to the travelers would ultimately be felt in Nevada.[423] Yet the Supreme Court ruled that was not enough to establish jurisdiction over the officers in Nevada.[424] According to the Court, the citizenship of the plaintiff alone could not be the only connection between the defendant and the forum state.[425] That approach would "impermissibly allo[w] a *plaintiff's* contacts with the defendant and forum to drive the jurisdictional analysis."[426] Instead "it is the defendant's conduct that must form the necessary connection with the forum State that is the basis for its jurisdiction over him."[427]

Applying *Walden* to the abortion context, it seems clear that even under *Calder* it is not sufficient that a doctor treated a patient the doctor knew to be from another state. Accordingly, patients travelling from Missouri to Illinois to obtain an abortion could not sue their Illinois physicians for medical malpractice in a Missouri court if the physicians' only contact with Missouri was performing an abortion on a Missouri resident. The key is whether the relevant doctor has done something to purposely reach out to that state to attract customers or to do business there.

Yet, that is not the end of the analysis because it may often be the case that abortion providers in one state *do* have additional contacts with neighboring anti-abortion states. In fact, one of the primary effects of *Dobbs* and corresponding anti-abortion laws is to increase the market for interstate abortion care. As discussed above with regard to Missouri and Illinois,[428] providers may develop reciprocal referral relationships with out-of-state clinics. In the confusion that ensued after the enactment of Texas SB 8 and the *Dobbs* decision, clinics that were prohibited by law from providing abortion care turned their energy to finding out-of-state appointments for the patients they could no longer serve.[429] For example, in a December 2022 interview, Amy Hagstrom Miller, CEO of Whole Woman's Health, one of the largest groups of abortion clinics in the country, talked to the Austin Chronicle about the reaction of Texas clinics to SB8:

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[422] 571 U.S. 277, 278–81 (2014).
[423] *Id.* at 289.
[424] *Id.*
[425] *Id.*
[426] *Id.*
[427] *Id.* at 290.
[428] *See supra* notes 75-77.
[429] Brenda Goodman, *Clinics Become Travel Agencies to Help Patients with 'Devastating' Lack of Abortion Access* (May 5, 2022), https://www.cnn.com/2022/05/05/health/abortion-providers-shift-services/index.html; Haley BeMiller & Abbey Marshall, *Canceled Appointments, Out-of-State Referrals: 6-Week Ban Uproots Ohio Abortion Access*, COLUMBUS DISPATCH (June 25, 2022), https://www.dispatch.com/story/news/2022/06/25/ohio-abortion-clinics-cancel-appointments-heartbeat-bill/7734347001/; Pocharapon Neammanee, *West Virginia's Only Abortion Clinic Can't Provide the Service After* Roe v. Wade. *But in One Weekend It Raised $75,000 to Help Send Patients Out of State*, INSIDER (July 3, 2022), https://www.insider.com/west-virginias-abortion-clinic-raised-75k-send-patients-out-state-2022-7.

> We can absolutely help anybody who calls our clinic get an abortion in a state where abortion is legal. . . . So we are making referrals, we are guiding people with transportation advice, we're giving people gas gift cards, or helping them with flights or hotels, and helping them if they can't afford the abortion. We're still getting hundreds of phone calls from people who are still calling our phone numbers. Our staff are doing a lot of case management and advocacy.[430]

Referrals such as these may be deemed to create sufficient contacts between the out-of-state doctors and the state, particularly if there is evidence that the out-of-state providers actively solicited the referrals. Alternatively, even in the absence of direct solicitation, it may be enough that the out-of-state doctor knew about the referrals and encouraged them. If clinics work with out-of-state abortion funds that help patients from states where abortion is restricted or illegal travel to and obtain abortion in states where it is not, that also may be enough to establish jurisdiction. And to the extent clinics and providers advertise over state borders, that too might be deemed sufficient volitional contact with the state to justify the assertion of jurisdiction.[431]

Thus, we see two likely paradigm cases that are likely to arise as states attempt to assert personal jurisdiction over out-of-state entities involved with the provision of abortion care: (A) patients reaching out from an anti-abortion forum state and into a pro-access state in pursuit of abortion care, and (B) defendant clinics, providers, or funds reaching into an anti-abortion forum state to help residents of that state obtain abortion elsewhere.

In scenario A, providers could avoid the assertion of jurisdiction in the anti-abortion state so long as the providers eschewed all contact with those anti-abortion states. This would likely require abortion funds or other outreach organizations to take on the brunt of the legal risk and help connect in-state residents to out-of-state providers without the collaboration of those providers. Or it would mean that patients would be left without assistance in seeking out-of-state abortion care. If providers simply received out-of-state patients referred to them by other entities or who found them independently, those providers could argue that, as in *Walden*, even if they know where the patient resides, they have no independent volitional connection to that state. Although this would allow providers to avoid personal jurisdiction in anti-abortion states, it obviously would impact the dissemination of information to pregnant people in those states.

Planned Parenthood of Illinois's Regional Logistics Center is likely an example of scenario B. It operates in a pro-access state and effectively "recruits" Missouri patients, who then travel across state lines to receive abortion care. The abortion occurs wholly in Illinois, but Missouri

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[430] Sara Hutchinson, *Abortion on the Border*, AUSTIN CHRONICLE (Dec. 30, 2022), https://www.austinchronicle.com/news/2022-12-30/abortion-on-the-border/.

[431] SEC v. Carillo, 115 F.3d 1540, 1545 (11th Cir. 1997) ("It is well settled that advertising that is reasonably calculated to reach the forum may constitute purposeful availment of the privileges of doing business in the forum."); *see also* Shute v. Carnival Cruise Lines, 897 F.2d 377, 382 (9th Cir. 1990) (finding there was personal jurisdiction over defendant because it "advertised in the local media, promoted its cruises through brochures sent to travel agents in the state, . . . paid a commission on sales of cruises in that state," and conducted promotional seminars in the forum) *rev'd on other grounds*, 499 U.S. 585 (1991); Sinatra v. Nat'l Enquirer, 854 F.2d 1191, 1195 (9th Cir. 1988) (holding Swiss clinic purposefully availed itself of California law when it solicited clients from California through advertisements, knew of the plaintiff's residence in California, and knowingly caused effects in California by misappropriating plaintiff's image).

plaintiffs and prosecutors might argue that the "harm" is felt in Missouri, and that Planned Parenthood directly targets Missouri. Whether an abortion fund or clinic targets a forum state may depend on the extent to which it advertises, raises awareness of its services, or creates a network in the forum state. But any activity in Missouri relating to abortions in Illinois could arguably be characterized as contributing to minimum contacts there for purposes of enforcing anti-abortion laws. In this scenario, the patient would no longer be the only nexus between the defendant and the forum state, and so personal jurisdiction could be exercised in keeping with the reasoning of *Calder* and *Walden*. Similarly, Missouri could certainly exercise personal jurisdiction over a doctor providing telemedicine to patients located in the state or shipping pills directly into the state, even if the provider were located elsewhere.[432]

In the end, the personal jurisdiction inquiry results in a mixed bag for abortion access. Abortion providers and others operating in pro-access states may, depending on how they structure their operations, be able to avoid being sued in anti-abortion states. In order to avoid jurisdiction, however, providers, clinics, abortion funds, and other organizations will be forced to silo themselves off completely, shun all out-of-state contact, and place the onus entirely on patients to seek out-of-state care. Due process limits on state jurisdiction, therefore, offer only limited protection if abortion clinics, clinicians, and others are to provide effective care to all those who might need their help.[433]

B. Choice of Law

Assuming an anti-abortion state can overcome the hurdles to asserting personal jurisdiction over out-of-state abortion providers or others, will the courts in the state be able to apply their local anti-abortion law to the cause of action given that the relevant conduct occurred elsewhere? Interestingly, with regard to choice of law, unlike in the jurisdictional context, the U.S. Supreme Court has ruled that the U.S. Constitution provides only minimal limitations on a state's

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[432] One final wrinkle is that there may be a distinction, for jurisdictional purposes, between the individual provider and the provider's employer. For example, *Creech v. Roberts* was a medical malpractice suit brought by an Ohio resident against an Oklahoma health care center and its physician employee, who was also domiciled in Oklahoma. The Sixth Circuit found that the Ohio court properly exercised jurisdiction over the Center but not the physician. 908 F.2d 75, 78 (6th Cir. 1990). According to the court, the treatment center had, through a nationally televised program, "invited people to come from around the country, as well as from other countries, to the Hospital and the Center for treatment." *Id.* Ohio was one of the states that received the broadcast, and plaintiff as well as other Ohio residents were "convinced to go to the Hospital and the Center for treatment." *Id.* at 79. The court refused, however, to impute these Ohio contacts to the defendant physician who had never himself advertised in Ohio and had no other contacts in Ohio. *Id.* The court "was unable to find, and [plaintiff did] not cite, any case in which a trial court has asserted personal jurisdiction over a nonresident doctor who committed a tortious act outside the forum state—even where the doctor worked for a hospital that advertised in the forum state. Indeed, every case reported seems to reach the opposite result." *Id.* at 80.

[433] With regard to the provision of medication abortion pills, if the pills are provided to the patient by an out-of-state provider at an out-of-state location, the analysis would likely be the same as above. To the extent a medication abortion distributor is shipping pills directly into an anti-abortion state, however, the jurisdictional inquiry is more straight-forward because the pill distributor is presumably purposely shipping pills into the state, which is likely to be sufficient to constitute minimum contacts for jurisdictional purposes. State assertion of liability against such medical abortion providers, however, may still run into choice-of-law, dormant Commerce Clause or federal preemption issues, discussed elsewhere in this Article. In addition, there is the practical difficulty that medication abortion providers may be located outside the United States and therefore may be difficult to find or to summon to stand trial.

analysis.[434] Thus, states are free to adopt very different approaches to resolving choice-of-law questions.[435]

For states that use the choice-of-law approach contained in the first Restatement of Conflicts, the key starting point is the place of the alleged tort.[436] Joseph Beale, the theory's most prominent advocate wrote, "the chief task of the Conflict of Laws [is] to determine the place where a right arose and the law that created it . . . ," because if "two laws were present at the same time and in the same place upon the same subject, we should . . . have a condition of anarchy."[437] Thus, under the first restatement approach, the law of the place of injury is applied, because injury is the last thing necessary to make something a tort. In the abortion context, place of injury can be somewhat ambiguous depending on the type of abortion performed. For surgical abortions, the relevant incident creating the alleged tort most likely occurs in the provider's home state. Even if a state might argue that the long-term harm, psychological or otherwise, occurs back in the home state of the person who undergoes the abortion, it is difficult to claim that the tort actually occurs later, when the patient is back home, rather than at the time the abortion occurs.

The only wrinkle to this analysis is the case of a medication abortion, where the relevant pills are administered out of state, but the fetus is actually expelled after the pregnant person returns

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[434] *See generally Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981) (plurality opinion). Although the opinion in *Allstate* was only a plurality, it was subsequently adopted as the appropriate choice-of-law framework in *Phillips Petroleum v. Shutts*, 472 U.S. 797, 818-19 (1985).

[435] With regard to the states that have so-far adopted strong abortion restrictions, the following states use an approach drawn from the first Restatement of Conflicts: Alabama, Fitts v. Minnesota Mining & Mfg. Co., 581 So. 2d 819 (Ala. 1991); Arkansas, Gomez v. ITT Educ. Serv., Inc., 71 S.W.3d 542 (Ark. 2002) (identifying Arkansas' choice-of-law approach as the first Restatement, within the framework of the five Leflar factors); Indiana, Simon v. United States, 805 N.E.2d 798 (Ind. 2004), (utilizing a flexible choice-of-law approach under which courts will not apply the law of the place of the injury if that place has only a minimal connection with the dispute); West Virginia, Paul v. Nat'l Life, 352 S.E.2d 550 (W. Va. 1986) (following the first Restatement choice-of-law approach in clear-cut cases); Oakes v. Oxygen Therapy Serv., 363 S.E.2d 130 (W. Va. 1987) (following the Second Restatement choice-of-law approach in more complicated cases); Wyoming, Duke v. Housen, 589 P.2d 334 (Wyo. 1979); Tolman v. Stryker Corp., 926 F. Supp. 2d 1255 (D. Wyo. 2013).

The following anti-abortion states use an approach drawn from the Restatement (Second) of Conflicts: Arizona, Bates v. Super. Ct. of Ariz., 749 P.2d 1367 (Ariz. 1988); Idaho, Grover v. Isom, 53 P.3d 821 (Idaho 2002); Mississippi, Shortie v. George, 233 So. 3d 883 (Miss. Ct. App. 2017); Williams v. Liberty Mut. Ins., 741 F.3d 617 (5th Cir. 2014) (noting that Mississippi applies the first Restatement choice-of-law approach unless a different state has a more substantial relationship to the action); Missouri, Zafer Chiropractic & Sports Injuries v. Hermann, 501 S.W.3d 545 (Mo. Ct. App. 2016); Kentucky, Foster v. Leggett, 484 S.W.2d 827 (Ky. 1972) (stating that Kentucky will apply Kentucky law if there are "significant contacts—not necessarily the most significant contacts"); North Dakota, Issendorf v. Olson, 194 N.W.2d (N.D. 1972); Oklahoma, Brickner v. Gooden, 525 P.2d 632 (Okla. 1974); Graves v. Mazda, 598 F. Supp. 2d 1216 (W.D. Okla. 2009); South Dakota, Chambers v. Dakotah Charter, Inc., 488 N.W.2d 63 (S.D. 1992); Anderson v. Tri State Constr., LLC, 964 N.W.2d 532 (S.D. 2021); Tennessee, Hataway v. McKinley, 830 S.W.2d (Tenn. 1992); Texas, Gutierrez v. Collins, 583 S.W.2d 312 (Tex. 1979); Torrington Co. v. Stutzman, 46 S.W.3d 829 (Tex. 2000); Utah, Waddoups v. Amalgamated Sugar Co., 54 P.3d 1054 (Utah 2002); Wisconsin, NCR Corp. v. Transp. Ins. Co., 823 N.W.2d 532 (Wis. Ct. App. 2012); State Farm Mut. Auto. Ins. Co. v. Gillette, 641 N.W.2d 662 (Wis. 2002) (explaining that Wisconsin uses the Second Restatement choice-of-law approach in addition to a rebuttable presumption that forum law applies).

Finally, Louisiana uses a "comparative impairment" approach, drawn from the scholarship of William Baxter. *See* Marchesani v. Pellerin-Milnor Corp., 269 F.3d 481 (5th Cir. 2001).

[436] *See generally* JOSEPH BEALE, A TREATISE ON THE CONFLICT OF LAWS (1st ed. 1935).

[437] *Id.* at 64.

home. Notably, the comments to section 377 of the first Restatement of Conflicts of Laws state that, "when a person causes another voluntarily to take a deleterious substance which takes effect within the body, the place of wrong is where the deleterious substance takes effect and not where it is administered."[438] This would seem to mean that the relevant territorial nexus is the home state, not the state where the pills were administered.

But in any event, even states using the first Restatement approach sometimes depart from the state of territorial nexus anyway, by using a public policy exception and therefore applying their own law regardless of the place of the tort. This exception, of course, is not meant to be used any time the forum state's law differs from the law of the place of the tort. Otherwise, forum law would simply always apply. Instead, the canonical statement on the scope of the public policy exception is from Judge Cardozo, writing at the time for New York's highest court: "We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home."[439] Thus, according to Cardozo, use of the public policy exception should be reserved for exceptional circumstances, when application of the foreign law would "violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal."[440]

Nevertheless, an anti-abortion law is precisely the sort of circumstance where courts might decide that a fundamental principle of justice or morality is in fact at stake. Thus, we believe it is highly likely that courts in anti-abortion states would ultimately apply their own law to a case against an out-of-state abortion provider, regardless of how the place-of-tort analysis came out.

For similar reasons, a state following the Restatement (Second) of Conflicts[441] might well resolve the choice-of-law analysis in the same way. The Second Restatement incorporates what is called "interest analysis,"[442] but in this sort of case, both states have strong interests in applying their own law, and it seems highly likely that the court would break the tie in favor of applying forum law, given the contentiousness of the public policy at stake.

One could, of course, argue that choice-of-law doctrines should not be applied in this way. After all, if a state chooses to allow access to an abortion, that is a sovereign choice that should potentially apply to all within its jurisdictional borders, whether those within the borders are domiciliaries of the state or not. In that sense, the choice-of-law analysis might merge with the equal treatment, right-to-travel, and dormant Commerce Clause discussion above,[443] resulting in a principle that territorial location should preempt residence for choice-of-law purposes, at least in the abortion context. Following this reasoning, Lea Brilmayer has argued that even with regard to suits against the actual pregnant person seeking the abortion, the law of the person's domicile

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[438] RESTATEMENT OF CONFLICTS OF LAW § 377 note 2 (AM. L. INST. 1934).
[439] Loucks v. Standard Oil Co., 224 N.Y. 99, 111 (1918).
[440] *Id.*
[441] RESTATEMENT (SECOND) OF CONFLICTS OF L. (AM. L. INST. 1973).
[442] *See* BRAINED CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963); Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171.
[443] *See supra* Part II.

should not be permitted to apply.[444] Her argument presumably would be even stronger as applied to a non-domiciliary medical provider or abortion fund.

Yet, at the end of the day, regardless of the choice-of-law framework a court uses in general, we believe the incredibly strong public policy interests implicated by the abortion question will pull most courts to the application of forum law.[445] And the U.S. Constitution, at least as interpreted by the U.S. Supreme Court over many decades, appears to offer no serious limitations on the ability of courts in anti-abortion states to apply their own law to an out-of-state tort, assuming they can overcome the hurdle of personal jurisdiction.

C. Recognition of Judgments and Retaliatory Suits

Under the Full Faith and Credit Clause of the U.S. Constitution, all states are required to enforce the judgments issued by courts in other states, assuming those courts had proper jurisdiction.[446] This Full Faith and Credit command is exacting, and the U.S. Supreme Court has recognized only very few exceptions.[447] Indeed, in *Baker v. General Motors*,[448] the Court made clear that, although states may interpose their own public policies as a reason to apply their law to a dispute, they may not use a public policy exception to avoid enforcing another state's judgment. According to the Court, the Clause "ordered submission . . . even to hostile policies reflected in the judgment of another State, because the practical operation of the federal system, which the Constitution designed, demanded it."[449] The Court was therefore "aware of [no] considerations of local policy or law which could rightly be deemed to impair the force and effect which the full faith and credit clause."[450] Given this unambiguous command, it seems at first glance, that a tort judgment issued in an anti-abortion state would have to be recognized and enforced even in pro-access states, again assuming the original court had proper jurisdiction.

However, it has long been established that penal laws are not subject to Full Faith and Credit Clause commands.[451] Thus, the question in cases involving Texas SB8 or similar provisions

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[444] Lea Brilmayer, *Interstate Preemption: The Right to Travel, the Right to Life, and the Right to Die*, 91 MICH. L. REV. 873 (1993).

[445] Indeed, one empirical analysis suggests that, in analyzing choice-of-law even in less fraught contexts than abortion, courts tend to gravitate towards using forum law. See Patrick J. Borchers, *The Choice-of-Law Revolution: An Empirical Study,* 49 WASH & LEE L. REV. 357 (1992).

[446] U.S. CONST. art. IV, § 1.

[447] *See generally* Fauntleroy v. Lum, 210 U.S. 230 (1908).

[448] 522 U.S. 222, 233–34 (1998).

[449] Estin v. Estin, 334 U.S. 541, 546 (1948).

[450] *Baker*, 522 U.S. at 234 (quoting Magnolia Petrol. Co. v. Hunt, 320 U.S. 430, 438 (1943)).

[451] Huntington v. Attrill, 146 U.S. 657, 669 (1892) ("Laws have no force of themselves beyond the jurisdiction of the state which enacts them, and can have extraterritorial effect only by the comity of other states."). In U.S. jurisprudence, this principle is usually thought to derive from Chief Justice Marshall's early statement that "The Courts of no country execute the penal laws of another . . . ." *The Antelope*, 10 U.S. 66, 123 (1825). Although Marshall wrote about the laws of other countries, the penal law exception was later adopted for sister-state judgments as well. *See, e.g.*, Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 290 (1888), ("The rule that the courts of no country execute the penal laws of another applies . . . to all judgments for such penalties."), *overruled on other grounds*, Milwaukee Cnty. v. M.E. White Co., 296 U.S. 268 (1935); *see also, e.g.,* Robert A. Leflar, *Extrastate Enforcement of Penal and Governmental Claims*, 46 HARV. L. REV. 193, 196 (2009) (observing that courts have "taken for granted, as a principle fundamental and beyond question, that one state will not enforce the criminal, or penal, laws of another.").

would be whether they should count as penal in nature. We believe that, although styled as civil actions, these suits are penal and are therefore not subject to the Full Faith and Credit command. The U.S. Supreme Court made clear more than a century ago that the relevant question is whether a suit's "purpose is to punish an offense against the public justice of the state, or to afford a private remedy to a person injured by the wrongful act."[452] Indeed, the Court drew an explicit distinction between *private wrongs* and *public wrongs.* Quoting Blackstone, the Court explained that "[t]he former are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals, and are thereupon frequently termed *'civil injuries;'* the latter are a breach and violation of public rights and duties, which affect the whole community, considered as a community."[453] Although suits under Texas SB8 and similar provisions are technically initiated by private citizens rather than the state, those citizen bounty hunters are not directly injured by the alleged wrongful act, the abortion. Instead, the injury, if there is one, is based on a purported public harm to society as a whole. Thus, judgments in these suits are likely to be deemed penal, and courts in other states may deny recognition and enforcement.

In addition, pro-access states have also contemplated or adopted policies explicitly aimed at protecting abortion providers from suits brought under the anti-abortion laws of other states.[454] For example, in 2022 Colorado Governor Jared Polis signed an order prohibiting state agencies and departments from participating in, or providing information to, investigations and proceedings initiated by other states that would impose criminal or civil liability, or professional sanctions on individuals for engaging in conduct relating to providing, seeking, or assisting reproductive health care, if such conduct would be legal under Colorado law.[455] The Order specifies that agencies may share such information only if it is pursuant to a court order. The Governor also stated that he "will exercise the full extent of [his] discretion to decline requests for the arrest, surrender, or extradition of any person charged with a criminal violation of a law of another state" related to the provision of reproductive health services.

Likewise, New York Governor Kathy Hochul signed a six-bill package of reproductive rights protections into law.[456] Among other things, the laws: prohibit professional misconduct charges against abortion providers for providing services to patients who reside in states where such services are illegal; ban medical malpractice insurance companies from taking adverse action against an abortion provider who performs a service that is legal in New York on an out of state patient; create a statutory exception regarding extradition for abortion-related offenses and prohibit courts and law enforcement from cooperating with out-of-state proceedings stemming from abortions that took place legally in New York; and create a cause of action allowing individuals to bring a claim against someone who has sued them or brought charges against them for abortion

[452] Id. at 674.
[453] Id. at 668 (quoting William Blackstone, Commentaries).
[454] *See supra Part I.B; see also* Laurie Sobel & Alina Salganicoff, *State Actions to Protect and Expand Actions to Abortion Services*, KAISER FAM. FOUND. (May 16, 2022), https://www.kff.org/womens-health-policy/issue-brief/state-actions-to-protect-and-expand-access-to-abortion-services/.
[455] Co. Exec. Order No. D 2022 032 (July 6, 2022).
[456] GOVERNOR KATHY HOCHUL, *Governor Hochul Signs Nation-Leading Legislative Package to Protect Abortion and Reproductive Rights for All* (Jun. 13, 2022), https://www.governor.ny.gov/news/governor-hochul-signs-nation-leading-legislative-package-protect-abortion-and-reproductive.

related conduct for the "unlawful interference with protected rights" under New York Law.[457] Other states have enacted or are likely to soon enact similar legislation.[458]

Most of these provisions are likely to comply with the Full Faith and Credit Clause. Certainly, local laws that prevent misconduct charges or malpractice claims based on adverse tort judgments elsewhere seem within the power of pro-access states to adopt because they involve independent state regulatory or licensing authority. More complicated are the provisions that prevent state authorities from extraditing or providing information to the anti-abortion state. The Colorado executive order still requires state authorities to obey a court command, so that is less problematic.[459]

Turning to New York's provision, however, we face the question of whether New York can refuse to extradite a person charged with a criminal offense under the laws of another state. The Extradition Clause of the U.S. Constitution,[460] as well as the federal Extradition Act of 1793 implementing it,[461] contemplate in their express language only the situation of a person indicted or convicted in a state who then flees to a second state. In such circumstances, the Extradition Act requires other states to return the fugitive to the original state. In the abortion context, however, the circumstances are essentially reversed because the person being indicted would be someone who potentially had never entered the state of indictment at all and therefore in no sense could be considered a fugitive. Moreover, as discussed above, it has long been accepted that states need not enforce the penal laws of other states,[462] and this principle should also apply to civil damage awards that are punitive in nature and inure to the State, as with Texas SB8.[463] Thus, we think it likely that state refusal to comply with extradition requests, at least with regard to acts committed in their state by their own citizens, would be permissible.

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[457] *See* 2022 N.Y. Sess. Laws chs. 219 (S. 9077-A), 220 (S. 9079-B), 221 (S. 9080-B), 222 (S. 9384-A) (McKinney).

[458] *See e.g.*, CONN. GEN. STAT. ANN. § 22-19 (West 2022); DEL. CODE ANN. tit. 10 §§ 3929 (West 2022); H.B. 4954, 2022 Leg., 192d Gen. Court (Mass. 2022); H.B. 5090, 2022 Leg., 192d Gen. Court (Mass. 2022); CAL. HEALTH & SAFETY CODE § 123469 (West 2023); CONN. GEN. STAT. ANN. § P.A. 22-19, § 1 (West 2022); DEL. CODE ANN. tit. 10, § 3929 (West 2022); 69 D.C. Reg. 014641 (Dec. 2, 2022); Ill. Leg. Serv. P.A. 102-1117 (West 2023); H.B. 5090, 2022 Leg., 192nd Gen. Court (Mass. 2022); VT. CONST. art. XXII (West, Westlaw through Nov. 2022 amendments).

[459] Co. Exec. Order No. D 2022 032 (July 6, 2022).

[460] U.S. CONST. art. V, § 2 ("A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.").

[461] 18 U.S.C. § 3182 ("Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State, District, or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit … charging the person demanded with having committed treason, felony, or other crime … the executive authority of the State, District, or Territory to which such person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear…").

[462] *See supra* notes 451-53 and accompanying text.

[463] *See supra* notes 451-53 and accompanying text; *see also Pelican Ins. Co.*, 127 U.S. at 290 ("The rule that the courts of no country execute the penal laws of another applies, not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the state for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue, or other municipal laws, and to all judgments for such penalties. If this were not so, all that would be necessary to give ubiquitous effect to a penal law would be to put the claim for a penalty into the shape of a judgment.").

Finally, as to laws that potentially allow retaliatory suits by in-state citizens against out-of-state citizens who sued them in another state, courts might well deem this sort of litigation an impermissible, albeit indirect, interference with the full faith and credit command. To our knowledge, there is no existing caselaw on the constitutionality of retaliatory lawsuits of this kind. And such suits do not technically violate the Full Faith and Credit Clause because they do not refuse enforcement of the out-of-state judgment; they just allow for a separate cause of action back against the party who initiated the original suit. However, if such retaliatory suits were permissible, then one could imagine the anti-abortion state in turn authorizing a new retaliatory suit against those who file a retaliatory suit, and in theory the litigation would be never ending. This is precisely the sort of result that the Full Faith and Credit Clause was designed to avoid.[464] In any event, we would expect the constitutionality of these retaliatory suit provisions to be litigated should they ever be used.

V. PRIVATE ACTORS AND CONFLICTS OF LAW

Nongovernmental entities also play an important role regulating the daily lives of people. In particular, corporations, religious organizations, and other private actors make decisions every day that impact the regulatory environment in which we live. Legal pluralism scholars have long sought to analyze this sort of private, quasi-lawmaking activity.[465] And of course, private actors may seek to assert norms that test the boundaries of state and federal law, creating a form of conflicts-of-law problem.[466]

In this final Part, we briefly touch on three such conflicts questions arising in the abortion context post-*Dobbs*. First, many corporations are seeking to provide health insurance coverage for abortions and abortion-related expenses through their private employee health insurance programs. To the extent states seek to regulate or block such coverage, there may be a question of whether such state regulation is preempted by federal law. Second, search and location data collected by private companies may be commandeered by states in order to find those seeking abortions or those aiding and abetting such activity, setting up battles over privacy rights to information held by third parties. Third, private religious organizations may attempt to use the banner of the First Amendment and federal and state religious freedom law to claim exemption from state anti-abortion (or pro-access) regulations. Because each of these issues justify treatment in a separate article, here we simply lay out the contours of the problem in order to flag the potential legal issues involved.

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[464] *See Baker v. General Motors*, 522 U.S. 222, 232 (1998) (describing the "animating purpose of the full faith and credit command").

[465] *See* Berman, *supra* note 13 (reviewing the literature).

[466] *See, e.g.,* Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT'L L. 999, 1000 (2004) (positing "an 'inter-systemic conflicts law,' derived not from collisions between the distinct nations of private international law, but from collisions between distinct global social sectors"); *see also* PAUL SCHIFF BERMAN, GLOBAL LEGAL PLURALISM: A JURISPRUDENCE OF LAW BEYOND BORDERS, 286-90 (discussing conflicts between state-based and religious law through the lens of conflicts-of-law analysis).

A. Private Employee Benefits for Abortion-Related Expenses

The *Dobbs* aftermath brought forth a flurry of statements from private companies, vowing to provide both health insurance coverage and other funding for employees who must travel out of state for their abortions.[467] These companies include heavyweights such as Starbucks, Yelp, Airbnb, Microsoft, Netflix, PayPal, and Reddit.[468] Uber has committed to funding reproductive health benefits including abortion, while other companies have offered travel stipends of up to $7500, and others still plan to make relocation opportunities available for employees living and working in anti-abortion states.[469] It is unclear if these companies intend to deliver this funding through the normal health insurance infrastructure available to their employees, or in some other way.[470] Some private employers have billed themselves as a last line of defense for abortion rights,[471] but their offers may be only marginally effective because in order to take advantage of these benefits, patients seeking abortions must disclose to their employers both that they are pregnant and that they are seeking to terminate their pregnancy. Given that such an act will likely be illegal in the state of their employment, the employees may fear that, if not safeguarded by employers, the information could be used as evidence in prosecutions of abortion-seekers.

Even apart from the privacy concerns, anti-abortion states will almost certainly continue their efforts to fence their citizens off from vital health care services by taking aim at corporate abortion funding. Indeed, even before the final decision in *Dobbs* was released, a group of Texas legislators, many of whom are members of the Texas Freedom Caucus, had begun to threaten legislative action against companies funding abortion travel for their employers.[472] In a May 2022 letter to the CEO of Lyft, one such company, they wrote, "the state of Texas will take swift and decisive action if you do not immediately rescind your recently announced policy to pay for the travel expenses of women who abort their unborn children."[473] That threatened action would both ban corporations from doing business in Texas if those businesses pay for abortions in states where it is legal and authorize shareholders of publicly traded companies to sue executives for doing so.[474] Private abortion funding could also fall into the ambit of state laws that penalize "aiding and abetting" abortion.

In July 2022, the Texas Freedom Caucus also sent a letter to the law firm Sidley Austin, which was among private employers offering funding for abortion travel.[475] The letter threatened prosecution under Texas' existing and pre-*Roe* abortion bans and demanded that Sidley preserve documents and data relating to abortions performed after SB8 went into effect in anticipation of

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[467] Emma Goldberg et al., *Here Are the Companies that Will Cover Travel Expenses for Employee Abortions*, N.Y. TIMES (June 24, 2022), https://www.nytimes.com/2022/06/24/business/abortion-companies-travel-expenses.html.
[468] *Id.*
[469] *Id.*
[470] *Id.*
[471] *Id.* ("'Employers like us may be the last line of defense,' said Sarah Jackel, the chief operating officer of Civitech.").
[472] Zach Despart, *Businesses that Help Employees Get Abortions Could be Next Target of Texas Lawmakers if* Roe v. Wade *is Overturned*, TEX. TRIBUNE (May 23, 2022), https://www.texastribune.org/2022/05/23/texas-companies-pay-abortions/?utm_campaign=trib-social-buttons&utm_source=twitter&utm_medium=social.
[473] *Id.*
[474] *Id.*
[475] Kathryn Rubino, *Texas Legislators Threaten Sidley Over Abortion Care Travel Costs*, ABOVE L. (July 8, 2022), https://abovethelaw.com/2022/07/texas-legislators-threaten-sidley-over-abortion-care-travel-costs/.

litigation.[476] Lastly, the letter outlined the specific parameters of the legislation alluded to in the May letter to Lyft.[477] The forthcoming law would prohibit employers in Texas from paying for abortions or reimbursing abortion-related expenses, wherever the abortion takes place.[478] It would impose felony criminal sanctions on violators[479] and would include a bounty hunter provision to allow private citizens to sue any individual or entity who pays for an abortion obtained by a Texas resident anywhere in the country.[480] It would also require the State Bar of Texas to disbar any attorney who violates existing Texas abortion law.[481] Lastly, the law would empower district attorneys to criminally prosecute transgressions of Texas abortion bans, a power SB8 did not convey as part of a ploy to evade judicial review of the law while *Roe* was still in place.[482] These eleven members of the Texas legislature concluded their tirade against one of the nation's top law firms by saying, "the state of Texas will ensure that you and colleagues are held accountable for every abortion that you illegally assisted."[483]

The Biden Administration responded to the Texas legislators' threat saying, "The Supreme Court's outrageous decision...has given these Republican officials the green light for a radical agenda...and they are accelerating their agenda to take away Americans' rights, now attacking the Constitutional right to travel between states at will."[484] Indeed, although not as direct as the extraterritorial legislation addressed in Parts I and II, threats against private employers represent the intent of anti-abortion legislators to obstruct every possible avenue to abortion care.

i. ERISA Preemption of State Regulatory Statutes

The efforts of the Texas Freedom Caucus are still pending in the Texas legislature as of this writing. But it is important to note that employer-sponsored health care is a matter of federal law. The Employee Retirement Income Security Act of 1973 (ERISA) provides various guidelines for the administration of employer-provided health insurance plans. The statute was designed, in part, to prevent states from regulating insurance companies out of business by forcing them to contend with 50 different sets of insurance regulations. This emphasis on uniformity was intended to promote the availability of affordable health insurance. For this reason, the law contains very few requirements for what covered plans must pay for, but it does contain "one of the broadest preemption clauses ever enacted by Congress."[485]

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[476] Letter from Texas Freedom Caucus to Sidley Austin (July 7, 2022), https://docs.google.com/viewerng/viewer?url=https://abovethelaw.com/uploads/2022/07/texas-sidley-letter.pdf&hl=en_US.
[477] *See* Despart, *supra* note 467.
[478] *Id.*
[479] Letter from Texas Freedom Caucus to Sidley Austin, *supra* note 471.
[480] *Id.*
[481] *Id.*
[482] *Id.*
[483] *Id.*
[484] Meghan Tribe & Courtney Rozen, *White House Slams Texas Republicans Targeting Sidley on Abortion*, BLOOMBERG L. (July 11, 2022), https://news.bloomberglaw.com/business-and-practice/white-house-slams-texas-republicans-targeting-sidley-on-abortion.
[485] Evans v. Safeco Life Ins. Co, 916 F.2d 1437, 1439 (9th Cir. 1990).

Section 1144(a) of ERISA provides that it supersedes all state laws insofar as they "relate to" employee benefits plans. A law relates to an employee benefit plan when it has a "connection with or reference to such a plan."[486] This definition is intuitive but unhelpful. More specifically, the Supreme Court has held that laws which relate to employee benefit plans are those that would compel plan administrators to change their benefit structure or method of administration.[487] This is because,

> requiring administrators to master the relevant laws of 50 States and to contend with litigation would undermine the congressional goal of minimizing their administrative and financial burdens. Differing state regulations affecting an ERISA plan's system for processing claims and paying benefits impose precisely the burden that ERISA pre-emption was intended to avoid.[488]

In a pair of 2016 cases, *Gobeille v. Liberty Mutual Ins. Co.*[489] and *Rutledge v. Pharmaceutical Care Management Association*,[490] the Supreme Court clarified that state laws governing or significantly impacting plan administration are preempted, whereas state rate regulations that merely increase costs or alter incentives for ERISA plans without forcing plans to adopt any particular scheme of substantive coverage are not. Significantly, in *Gobeille*, the Court noted that "a state law...might have an impermissible connection with ERISA plans if 'acute, albeit indirect, economic effects' of the state law 'force an ERISA plan to adopt a certain scheme of substantive coverage or effectively restrict its choice of insurers.'"[491] Thus, the key determinant seems to be whether the state regulation forces a plan either to cover or not cover particular conditions or treatments.

This is obviously relevant to state statutes or regulations that purport to prevent employer-sponsored healthcare plans from covering abortion-related services. Certainly, such laws or regulations are, under ERISA's terms, "related to" employee benefit plans. If state laws that prohibit "aiding and abetting" abortion are applied to ban employee-sponsored coverage for abortion-related care and travel, the state would be binding plan administrators to one specific, state-approved choice. And the choice of which benefits to provide is clearly a "central matter of plan administration."[492] Moreover, a total state ban on a specific health care benefit is extraordinarily unusual and would indeed create disuniformity in insurance coverage and plan administration across the country because the same insurer and/or employer would be bound to offer different plans in different states. This is precisely what Congress enacted ERISA to prevent.

It is true that, under ERISA, state laws may generally be "saved" from preemption if they merely "regulate insurance."[493] However, that provision only applies if the state law seeks to spread economic risk among the pool of insureds and is specifically aimed at regulating the

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[486] Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96–97 (1983).
[487] N.Y. Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins., 514 U.S. 645, 658–62 (1995).
[488] Egelhoff v. Egelhoff, 532 U.S. 141, 149–50 (2001).
[489] 577 U.S. 312, 319–21 (2016).
[490] 141 S. Ct. 474, 480 (2020).
[491] *Gobeille*, 577 U.S. at 320 (citing *Travelers*, 514 U.S. at 668).
[492] *Egelhoff*, 532 U.S. at 148.
[493] 29 U.S.C. § 1144(b)(2)(A).

insurance industry.[494] Abortion bans can probably not be saved from preemption under this provision because, although they certainly relate to health insurance, they are not specifically aimed at the insurance *industry*: in fact they are aimed at a variety of in-state and out-of-state actors. No anti-abortion policymaker would argue that the policy concern underlying abortion bans is limited to the health insurance industry. Nor does an abortion ban seek to shift the financial risk of loss.

Finally, it is significant that § 1144 ERISA makes *self-insured* employee benefit plans exempt from all state insurance regulation, even those regulations that would not be preempted by ERISA.[495] A plan is self-insured when the sponsoring employer retains the economic risk, specifically the obligation to pay claims, rather than outsourcing it to an insurance company.[496] Therefore, anti-abortion state law, even if not preempted, could not be applied to self-insured plans to ban abortion-related benefits. Employers wishing to provide benefits, including travel, for employees seeking abortion out of state would be well advised to do so using self-insured employee benefit plans to clearly avoid state regulation of abortion-related benefits.

ii. ERISA Preemption of State Criminal Statutes

To the extent that state anti-abortion statutes are part of state *criminal* law, however, the ERISA preemption question is more complicated. Section 1144(b)(4) of ERISA provides that the supersedure clause "shall not apply to any generally applicable criminal law of a state," meaning such laws are not preempted with regard to either employer self-funded or fully funded plans.[497] However, lower courts have found that criminal laws specifically directed at employee benefit plans are still preempted, because

> [o]ne cannot fairly attribute to Congress the purpose in 29 U.S.C. § 1144(b)(4) to except from preemption all the criminal laws of the states. To do so would be to read out of the section the words "generally applicable." Every criminal law, if it is to be consistent with the Constitution, is "general" in the sense that it must apply not to specific acts of a specific individual but to some class of circumstances.[498]

For example, in *Aloha Airlines, Inc. v. Ahue*,[499] the Ninth Circuit held that ERISA preempted a Hawaii law that imposed criminal penalties on employers that failed to include benefits for federally mandated health screenings in their employee benefit plans. The court concluded that "the better and prevailing view is that Congress intended the words 'generally applicable' to refer to criminal laws that apply to general conduct like larceny and embezzlement."[500] Therefore, the state law was not a generally applicable criminal law "because

[494] Ky. Ass'n of Health Plans v. Miller, 528 U.S. 329, 338 (2003); UNUM Life Ins. Co. of Am. v. Ward, 526 U.S. 358, 372 (1999).
[495] 29 U.S.C. § 1144(b)(2)(B).
[496] *Self-Insured Plan*, HEALTHCARE.GOV, https://www.healthcare.gov/glossary/self-insured-plan/ (last visited Jan. 20, 2023).
[497] 29 U.S.C. § 1144(b)(4).
[498] Trs. of Sheet Metal Workers' Int'l Ass'n Prod. Workers' Welfare Fund (N.Y) v. Aberdeen Blower & Sheet Metal Workers, Inc., 559 F. Supp. 561, 562–63 (E.D.N.Y. 1983).
[499] 12 F.3d 1498, 1506–05 (9th Cir. 1993).
[500] *Id.* at 1506 (quoting Aloha Airlines, Inc. v. Ahue, 807 F. Supp. 1501, 1503 n.1 (D. Haw. 1992)).

failure by an employer to pay or provide its employees with employment-related expenses is not general criminal conduct such as larceny and embezzlement."[501] Under this analysis, a state would "not [be] precluded from prosecuting, under a theft statute applicable to the entire population, an employer who steals money from an employee benefit plan, simply because the theft involved such a plan."[502] Instead, courts have found that "Congress manifested a purpose to supersede criminal laws directed specifically at employee benefit plans."[503]

The Texas Freedom Caucus' letter to Sidley Austin details the provisions to be included in the potential anti-abortion law. The legislators write that such a law may include a prohibition on employer funding for abortion or related expenses and will "impose felony criminal sanctions on anyone who pays for these abortions to ensure that it remains enforceable against self-insured plans as a generally applicable criminal law.[504] We have found no evidence that the type of penalty attached to a criminal law, whether a misdemeanor or a felony, determines whether a law is considered "generally applicable" for the purposes of ERISA preemption. The articulated provision certainly seems directed specifically at employee benefit plans; it directly regulates what benefits employers may and may not offer. The Texas Freedom Caucus' proposed law is therefore likely to be preempted by ERISA because, although it may impose criminal sanctions, it is not generally applicable. Yet, this is a matter that undoubtedly will be litigated should Texas or any other state enact such a law.

B. Data Privacy

The post-*Dobbs* surge of new punitive state anti-abortion laws has created a myriad of privacy concerns. In the criminal context, privately-held information is subject to the warrant requirement of the Fourth Amendment,[505] applicable to the states through the Fourteenth Amendment,[506] when the person to whom the information pertains has a "reasonable expectation of privacy."[507] The "third party doctrine," however, holds that when information is voluntarily shared with a third party, such as an accountant,[508] a bank,[509] or telephone company,[510] then the person to whom the information pertains forfeits any reasonable expectation of privacy.[511] As technology has improved over the last several decades, more and more data, some of which is exceptionally private, is stored with third parties rather than with their owner.[512] The scope of the

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[501] *Id.*; *see also* Walker v. CIGNA Ins. Grp., Nos. Civ.A. 99-3274. Civ.A. 99-3576, 2000 WL 687738 at *3 (E.D. La. 2000); Baker v. Caravan Moving Corp., 561 F. Supp. 337, 341 (N.D. Ill. 1983); Blue Cross & Blue Shield of Ala. v. Peacock's Apothecary, Inc., 567 F. Supp. 1258, 1267 (D. Ala. 1983).
[502] Sforza v. Kenco Constructional Contracting, Inc., 674 F. Supp. 1493, 1495 (D. Conn. 1986) (quoting Commonwealth v. Federico, 419 N.E.2d 1374, 1378 (Mass. 1981).
[503] *Trs. of Sheet Metal Workers'*, 559 F. Supp. at 563.
[504] Letter from Texas Freedom Caucus to Sidley Austin, *supra* note 471.
[505] U.S. CONST. amend. IV.
[506] *See* Mapp v. Ohio, 367 U.S. 643 (1961).
[507] Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).
[508] Couch v. United States, 409 U.S. 322 (1973).
[509] United States v. Miller, 425 U.S. 435 (1963).
[510] Smith v. Maryland, 442 U.S. 735 (1979).
[511] *See id.* at 744.
[512] *See e.g.*, Riley v. California, 573 U.S. 373, 397 (2014) (discussing "cloud computing"); *see also* United States v. Jones, 565 U.S. 400, 417 (2012) (Sotomayor, J., concurring) ("More fundamentally, it may be necessary to reconsider

third-party doctrine may be tested in the abortion context, as both states and private parties will seek to obtain abortion-related information held by third parties, such as Google or Apple or the makers of health-tracking apps.

In *Carpenter v. United States*,[513] the Supreme Court added the first modern caveat to the third-party doctrine, with regard to digital information. In that case, police used historical cell-site location information ("CSLI") from telecommunications companies to track a defendant's movements, resulting in "12,898 location points cataloging [defendant's] movements—an average of 101 data points per day."[514] The Court acknowledged that such "digital data . . . does not fit neatly under existing precedents" recognizing the third-party doctrine.[515] Instead of extending the third-party doctrine to cover digital data revealing a person's location, the Court held that use of CSLI "contravenes" society's expectation that law enforcement cannot secretly monitor an individual's movements for an extended period of time.[516] In other words, even though the digital data at issue was voluntarily "shared" with and maintained by a third party, the Fourth Amendment's warrant requirement nevertheless applied because the defendant still maintained a reasonable expectation of privacy in such detailed information about his movements.

The Court's reasoning in *Carpenter* may apply to health-related data stored on third-party servers, such as health-tracking apps, but it may be too early to tell. *Carpenter* indicated that the type of data sought, the technological advancements used to obtain such data, and the voluntariness of disclosure to a third party will likely factor into whether the third-party doctrine applies in future cases.[517] Location- and health-tracking apps contain deeply personal information that may be relevant in the abortion context, such as those that track menstrual cycles or those that could track a user's location to and from an abortion clinic.[518] The deeply personal nature and uniqueness of this data, as well as the technology advancements used to procure them, have led some commentors to argue that health-related data deserves Fourth Amendment protection under *Carpenter*.[519] Although we largely agree with this assessment, the *Carpenter* majority admitted that "[o]ur decision today is a narrow one" that did not address "other business records that might incidentally reveal location information."[520] Thus, it may be too early to tell if the Supreme Court would agree to extend *Carpenter* in the abortion context. Even if it did, however, it would only apply to state-requested information in criminal investigations where the Fourth Amendment applies. It would not, for example, preclude companies from acquiescing to court-issued subpoenas for information

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the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks." (citations omitted)).

[513] 138 S. Ct. 2206 (2018).

[514] *Id.* at 2211–12.

[515] *Id.* at 2214.

[516] *Id.* at 2217.

[517] *Id.* at 2219–20.

[518] *See e.g.*, Rina Torchinsky, *How Period Tracking Apps and Data Privacy Fit Into a Post-*Roe v. Wade *Climate*, NPR (June 24, 2022), https://www.npr.org/2022/05/10/1097482967/roe-v-wade-supreme-court-abortion-period-apps.

[519] *See e.g.*, Ryan Knox, *Fourth Amendment Protections of Health Information after* Carpenter v. United States*: The Devil's in the Database*, 45 AM. J.L. & MED 331 (2019).

[520] 138 S. Ct. at 2220.

in private litigation under citizen-enforced abortion bans.[521] And, of course, even in the criminal context, prosecutors seeking to enforce state anti-abortion criminal law might well be able to obtain a valid warrant in any event.[522] In any event, the potential implications of *Carpenter* in abortion-related cases is a fruitful area for further analysis.

There are also other data privacy considerations relevant to the abortion context. Health information disclosed to an employer is not necessarily protected health information under the Health Insurance Portability and Accountability Act ("HIPAA"), which only covers health care providers and health insurance plans.[523] HIPAA would not prevent a state from subpoenaing a private employer's records or deposing its human resources representatives. It is also unlikely that the Family Educational Rights and Privacy Act ("FERPA")[524] would protect abortion-related information obtained from students by educational institutions, for example if a college student sought advice from a professor or Resident advisor.[525] States might also seek other types of privately held data that might shed light on a person's healthcare choices. Geolocation data, search engine history, Venmo or PayPal payments, menstrual-tracking data, and records of online mifepristone orders could all be used to demonstrate that an individual has sought or obtained an abortion.[526] The third-party entities in possession of this kind of electronic data could sell it or could be forced to turn it over pursuant to a court order such as a geofence or keyword search warrant.[527] Crisis Pregnancy Centers - organizations masquerading as family planning clinics that advertise to pregnant people and attempt to persuade them not to seek an abortion – also collect extraordinary amounts of data about "abortion-minded" women.[528] Even if employers are able to offer abortion benefits to their employees under state law, the lack of comprehensive protections

[521] *See e.g.*, Juliana Kim, *Data Privacy Concerns Make the Post-*Roe *Era Unchartered Territory*, NPR (July 2, 2022), https://www.npr.org/2022/07/02/1109565803/data-privacy-abortion-roe-apps.
[522] *Carpenter*, of course, addressed only one type of data in one factual context, so the scope of its application is still to be developed. For a useful empirical analysis of post-Carpenter cases, see generally Matthew Tokson, *The Aftermath of* Carpenter*: An Emprical Study of Fourth Amendment Law, 2018-2021*, 135 Harv. L. Rev. 1791 (2022).
[523] *Health Insurance Portability and Accountability Act of 1996 (HIPPA)*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 27, 2022), https://www.cdc.gov/phlp/publications/topic/hipaa.html#:~:text=The%20Health%20Insurance%20Portability%20and,the%20patient's%20consent%20or%20knowledge.
[524] 20 U.S.C. § 1232g.
[525] *See, e.g.*, Katie Rose Guest Pryal, *Abortion Bans Put Colleges in Legal Limbo*, CHRON. HIGHER EDUC. (Aug. 4, 2022), https://www.chronicle.com/article/abortion-bans-put-colleges-in-legal-limbo?cid2=gen_login_refresh&cid=gen_sign_in; *see also* Janet Koven Levit, *The Demise of* Roe *Will Weaken American Colleges*, CHRON. HIGHER EDUC. (June 14, 2022), https://www.chronicle.com/article/the-demise-of-roe-will-weaken-american-colleges.
[526] Abby Vesoulis, *How a Digital Abortion Footprint Could Lead to Criminal Charges—And What Congress Can Do About It*, TIME (May 10, 2022), https://time.com/6175194/digital-data-abortion-congress/.
[527] *Id.*; ALBERT FOX CAHN & ELENI MANIS, STOP, PREGNANCY PANOPTICON: ABORTION SURVEILLANCE AFTER *ROE* (May 24, 2022), https://static1.squarespace.com/static/5c1bfc7eee175995a4ceb638/t/6297d83433c19479f037ab8c/1654118453441/2022.6.1_STOP+Report_Pregnancy+Panopticon.pdf.
[528] Abigail Abrams & Vera Bergengruen, *Anti-Abortion Pregnancy Centers Are Collecting Troves of Data that Could Be Weaponized Against Women*, TIME (June 22, 2022), https://time.com/6189528/anti-abortion-pregnancy-centers-collect-data-investigation/; Sharona Coutts, *Anti-Choice Groups Use Smartphone Surveillance to Target "Abortion-Minded Women" During Clinic Visits*, REWIRE NEWS GRP. (May 25, 2016), https://rewirenewsgroup.com/article/2016/05/25/anti-choice-groups-deploy-smartphone-surveillance-target-abortion-minded-women-clinic-visits/.

for data collected by private companies could undercut these efforts, or subject patients to prosecution if they take advantage of such benefits.

Both the federal government and some state governments have taken (or could take) action to address some of these privacy concerns. At the federal level, several bills have been introduced in Congress to specifically protect private data related to reproductive health.[529] The Federal Trade Commission ("FTC") has also stated that it is "committed" to enforcing current privacy laws against the "misuse of mobile location and health information – including reproductive health data," such as "products that track women's periods, monitor their fertility, oversee their contraceptive use, or even target women considering abortion."[530] In August 2022, for example, the FTC sued Kochava, Inc., a major data broker, for selling personal data, including geolocations, that could expose consumers' private visits to sensitive locations, such as abortion clinics.[531] The FTC has also instituted rulemaking procedures "concerning the ways in which companies collect, aggregate, protect, use, analyze, and retain consumer data, as well as transfer, share, sell, or otherwise monetize that data in ways that are unfair or deceptive."[532] There are doubts, however, over whether federal law actually authorizes the FTC to take these steps,[533] and it is likely that any protections provided through the FTC's rulemaking will be challenged in court take years to come into effect.[534] HHS may also initiate formal rulemaking proceedings to update its HIPAA regulations on data privacy,[535] but such a process will likely take years to complete as well.

That said, additional federal privacy protections may be available.[536] Federal agencies not subject to HIPAA, such as the Veterans Benefits Administration in the Department of Veterans Affairs, could update their policies for releasing personal information to law enforcement entities under the Privacy Act of 1974.[537] The Privacy Act generally forbids federal agencies from disclosing records containing personal information, such as those submitted for benefits claims, unless the person to whom the records pertain consents to the disclosure.[538] Although there is an

[529] *See e.g.*, My Body, My Data Act of 2022, H.R. 8111, 117th Cong.; Fourth Amendment Is Not for Sale Act, S. 1265, 117th Cong. (2022).
[530] Kristin Cohen, Acting Assoc. Dir., FTC Div. Priv. & Identity Prot., *Location, Health, and Other Sensitive Information: FTC Committed to Fully Enforcing the Law Against Illegal Use and Sharing of Highly Sensitive Data*, U.S. FED. TRADE COMM'N (July 11, 2022), https://www.ftc.gov/business-guidance/blog/2022/07/location-health-and-other-sensitive-information-ftc-committed-fully-enforcing-law-against-illegal.
[531] *See* Complaint, Fed. Trade Comm'n v. Kochava Inc., No. 2:22-cv-00377-DCN (D. Idaho Aug. 29, 2022), ECF 1. In response, Kochava argues that the FTC is attempting to enforce "non-existent laws and regulations" to the company's past conduct. Mem. in Support of Mot. to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) at 1, Fed. Trade Comm'n v. Kochava Inc., No. 2:22-cv-00377-DCN (D. Idaho Oct. 28, 2022), ECF 7-1.
[532] *Trade Regulation Rule on Commercial Surveillance and Data Security*, 87 Fed. Reg. 51,273 (Aug. 22, 2022) (adv. notice of proposed rulemaking).
[533] *See e.g.*, Jack Gillum & Brody Ford, *FTC Joins Push for Rules on Trade of Smartphone Location Data*, BLOOMBERG (Sept. 16, 2022), https://www.bloomberg.com/news/articles/2022-09-16/location-data-rules-draw-ftc-s-attention-post-roe.
[534] *See e.g.*, Allison Grande, *FTC's Broad Privacy Rulemaking Faces Bumpy Path Forward*, LAW360 (Sept. 1, 2022), https://www.law360.com/articles/1523495/ftc-s-broad-privacy-rulemaking-faces-bumpy-path-forward.
[535] *See* 45 C.F.R. § 164 *et seq*.
[536] *See generally* CHRIS D. LINEBAUGH, CONG. RSCH. SERV., LSB10786, ABORTION, DATA PRIVACY, AND LAW ENFORCEMENT ACCESS: A LEGAL OVERVIEW (2022).
[537] 5 U.S.C. § 552a.
[538] *Id.* § 552a(b).

exception for disclosing records to law enforcement entities in civil or criminal investigations that make specific, written requests for such records,[539] the agency's compliance with such a request appears to be voluntary and is not required by the Act.[540] Thus, unless required by their own regulations, federal agencies may adopt policies refusing to comply with such requests in abortion-related investigations, or may choose to do so on a case-by-case basis, without the need for lengthy notice-and-comment proceedings.[541]

At the state level, several pro-access states have taken steps to further protect sensitive health-related user data. In 2021, for example, Colorado enacted a law requiring data collectors to notify individuals regarding any secondary uses of their personal data.[542] Although this law preceded *Dobbs*, it could limit the data exposure of Coloradoans and those traveling to Colorado for abortion services.[543]

The most comprehensive state action on data privacy following *Dobbs* has come from California. In addition to enshrining the right to an abortion in California's state constitution,[544] the California General Assembly passed a number of measures seeking to limit public and private cooperation with out-of-state investigators. Specifically, Assembly Bill 1242[545] prohibits both public and private entities in California from providing personal data when they know, or should know, that such information is requested or ordered in connection with an out-of-state abortion investigation.[546] Separately, Assembly Bill 2091 prohibits healthcare providers, insurance companies, service plans, and the like from disclosing medical records of a person seeking or obtaining an abortion that is lawful in California for the enforcement of another state's laws banning or limiting access to abortion.[547]

These measures could have significant impact on abortion regulation nationwide because of their broad scope and applicability to major, California-based, technology companies.[548]

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[539] *Id.* § 552a(b)(7).
[540] LINEBAUGH, *supra* note 530, at 4.
[541] Absent a court order, federal agencies would not be required to comply with subpoenas for protected information arising out of private abortion litigation. *See e.g.*, Doe v. DiGenova, 779 F.2d 74 (D.C. Cir. 1985) (holding that an agency cannot release protected personal information in response to a grand jury subpoena because the subpoena was not a "written request" by the "head of the agency" requesting the information).
[542] *See* 2021 COLO. LEGIS. SERV. ch. 483 (S.B. 21-190) (West).
[543] *See* Linda A. Malek, et al., *Pandora's Box of Data Privacy at Risk with Abortion Ruling*, BLOOMBERG L. (July 27, 2022), https://news.bloomberglaw.com/privacy-and-data-security/pandoras-box-of-data-privacy-at-risk-with-abortion-ruling.
[544] CAL. CONST. art. I, § 1.1 (West, Westlaw through Nov. 2022 amendments).
[545] 2022 CAL. LEGIS. SERV. ch. 627 (A.B. 1242) (West).
[546] *Id.* § 1. Specifically, the law prevents public or private entities from cooperating with out-of-state investigations that are known, or should be known, to be based on a "prohibited violation." *Id.* The bill then defines the term "prohibited violation" as a "violation of a law that creates liability for, or arising out of, either providing, facilitating, or obtaining an abortion or intending or attempting to provide, facilitate, or obtain an abortion that is lawful under California law." Id. The law provides an exception to this prohibition only if the out-of-state warrant includes an "attestation that the evidence sought is not related to an investigation into, or enforcement of, a prohibited violation." *Id.*
[547] 2022 CAL. LEGIS. SERV. ch. 628 (A.B. 2091) (West).
[548] *See* Ashley Gold, *California Abortion-Info Law Ups Stakes in Online War Between States*, AXIOS (Sept. 29, 2022), https://www.axios.com/2022/09/29/california-abortion-data-law-privacy-states-civil-war.

Although these features could make California a "data haven" for those seeking abortions,[549] they may also complicate matters for corporations with nationwide offices. For example, it is unclear whether the abortion at issue would necessarily have to be performed within California for the new laws to apply, or whether the abortion at issue would only need to be *legal* in California, regardless of where they occurred. Corporations based in California with offices in anti-abortion states, moreover, may be subject to inconsistent regulations that would require them to comply with an abortion investigation (for example, in Texas) using data stored in California, thereby complying with Texas law while violating California law.[550] Thus, an "all-new legal jujitsu" is likely to arise out of California's law, and the courts will inevitably decide which law controls when California's law comes into conflict with other states' abortion bans.[551]

Finally, it is worth noting that California's data privacy law is at risk of being preempted by federal law. Congress is currently considering bipartisan legislation governing data privacy rules nationwide.[552] Significantly, its protections are weaker than California's new laws and could preempt these stronger protections if enacted.[553] Although uniform privacy laws in this increasingly digital age are welcomed by many, members of Congress should consider how new federal legislation may weaken state protections for those seeking access to abortion services where they are legal.

C. Religious Exemptions

In August 2022, coalitions of religious leaders sued to stop Florida's abortion ban, arguing that the state's ban violated their religious expression under the state and federal constitutions and under the Florida Religious Freedom Restoration Act.[554] Because Florida's abortion ban forbids "aiding and abetting" the procurement of an abortion,[555] these religious leaders argue that they are unable to practice their faith, which may at times call for counseling congregants about abortion services.[556] Judaism, for example, views abortion as an acceptable practice that may even be required if a fetus endangers the life or health of the pregnant person.[557] According to the plaintiffs,

[549] Benjamin Freed, *California Lawmakers Approve Bill Creating 'Data Haven' for Abortion*, STATESCOOP (Sept. 1, 2022), https://statescoop.com/california-abortion-data-privacy-haven/.
[550] For more on inconsistent regulation, *see supra* Part II.B.
[551] Freed, *supra* note 543.
[552] *See* American Data Privacy and Protection Act, H.R. 8152, 117th Cong. (2022).
[553] *See* Jennifer Haberkorn, *Congress Mulls Data Privacy Bill That Would Void California's Tougher Protections*, L.A. TIMES (Sept. 6, 2022), https://www.latimes.com/politics/story/2022-09-06/congress-mulls-data-privacy-bill-that-would-void-california-tougher-protections.
[554] *See* Jacqueline Thomsen, *Florida Clergy Lawsuits Say Abortion Ban Violates Religious Freedom*, REUTERS (Aug. 2, 2022), https://www.reuters.com/world/us/florida-clergy-lawsuits-say-abortion-ban-violates-religious-freedom-2022-08-02/.
[555] FLA. STAT. § 390.0111(10) (2022) (subjecting anyone who "willfully performs, or actively participates in" an unlawful abortion to criminal penalties); FLA. STAT. § 777.011 (2022) (making it a felony to "aid[], abet[], counsel[], hire[], or otherwise procure[]" a criminal offense).
[556] *See* Madeleine Carlisle & Abigail Abrams, *Does Religious Freedom Protect a Right to an Abortion? One Rabbi's Mission to Find Out*, TIME (July 7, 2022), https://time.com/6194804/abortion-religious-freedom-judaism-florida/.
[557] *Id.*

making it a crime to advise a congregant on receiving an abortion, or even prohibiting the congregant from receiving an abortion violates the right to free exercise of religion.[558]

Since then, many more suits have been filed by religious leaders challenging other states' abortion bans on similar grounds. Jewish women in Kentucky filed a suit against its abortion ban in October 2022, arguing that it imposes a "sectarian theology" that violates their religious beliefs.[559] A group known as the Hoosier Jews for Choice and other religious plaintiffs have sued to stop Indiana's abortion ban under that state's Religious Freedom Restoration Act, which prohibits government action that interferes with religious exercise absent a compelling objective.[560] In December 2022, a state judge agreed that Indiana's abortion ban substantially burdened religious exercise and issued a preliminary injunction blocking Indiana's law.[561] Religious freedom arguments have also arisen in challenges to abortion bans in Ohio,[562] Utah, and Wyoming.[563] Given the preliminary success of these cases, additional challenges to abortion bans on religious freedom grounds are likely to arise.

Like Florida, twenty-one states have adopted religious freedom restoration acts, which are largely based on the federal Religious Freedom Restoration Act ("RFRA"), which Congress passed in 1993.[564] RFRA restored strict scrutiny analysis to laws of general applicability that significantly burdened religious expression, a standard that the Supreme Court abandoned in *Employment Division v. Smith*.[565] In *City of Boerne v. Flores*,[566] the Supreme Court held that RFRA could not be applied to the states under section five of the Fourteenth Amendment, and thus RFRA continues to apply to actions of the federal government, but not those of the states.

Because the federal RFRA does not apply to the states, challenges to generally applicable state laws on religious freedom grounds largely rely on state RFRA laws.[567] Nevertheless, because state RFRA laws usually track the federal law, state courts have turned to guidance from the U.S.

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[558] *Id.* The Florida suit was brought not only by Jewish rabbis, but also by a United Church of Christ reverend, a Unitarian Universalist minister, an Episcopal Church priest, and a Buddhist lama. Thomsen, *supra* note 548.
[559] Bruce Schreiner, *Jewish Women Cite Faith in Contesting Kentucky Abortion Ban*, ABC NEWS (Oct. 6, 2022), https://abcnews.go.com/Health/wireStory/jewish-women-cite-faith-contesting-kentucky-abortion-ban-91135292.
[560] Laura Kusisto, *State Abortion Bans Face Religious-Liberty Lawsuits from the Left*, WALL ST. J. (Sept. 16, 2022), https://www.wsj.com/articles/state-abortion-bans-face-religious-liberty-lawsuits-from-the-left-11663343259.
[561] *See* Anonymous Plaintiff 1 v. Individual Members of the Med. Licensing Bd. of Ind., No. 49D01-2209-PL-031056, slip op. (Marion Super. Ct. Dec. 2, 2022). It should be noted that Indiana's abortion law was already blocked in a different case, but because the issues raised in that case were "based on entirely different legal claims and sources of rights," the Indiana court held that an additional injunction was appropriate. *Id.* at 3.
[562] Morgan Trau, *Jewish Community to Join ACLU, Abortion Providers in Lawsuit Against Ohio's Six-Week Abortion Ban*, OHIO CAP. J, (July 12, 2022), https://ohiocapitaljournal.com/2022/07/12/jewish-community-to-join-aclu-abortion-providers-in-lawsuit-against-ohios-six-week-abortion-ban/.
[563] *See* Harry Isaiah Black, *3 Takeaways About Abortion Litigation Since* Dobbs, BRENNAN CTR. FOR JUST. (Dec. 13, 2022), https://www.brennancenter.org/our-work/analysis-opinion/3-takeaways-about-abortion-litigation-dobbs.
[564] Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. § 2000bb *et seq.*); Sophie Martin Schechner, Note, *Religion's Power Over Reproductive Care: State Religious Freedom Restoration Laws and Abortion*, 22 CARDOZO J.L. & GENDER 395, 397 n.9 (2016) (collecting state RFRA statutes).
[565] 494 U.S. 872 (1990); Christopher C. Lund, *Religious Liberty After* Gonzalez*: A Look at State RFRAs*, 55 S.D. L. REV. 466, 471–72 (2010).
[566] 521 U.S. 507 (1997).
[567] *See* Lund, *supra* note 559, at 474–79 (examining state RFRA statutes).

Supreme Court's federal RFRA jurisprudence when analyzing their state-law counterparts.[568] Significantly, the U.S. Supreme Court has, in recent years, greatly enhanced RFRA's protections against generally applicable laws that burden religious expression. In *Burwell v. Hobby Lobby Stores, Inc.*,[569] the Court held that RFRA applies to closely-held corporations and that therefore HHS could not require that cost-free contraceptives be included in mandatory healthcare plans under the Affordable Care Act ("ACA") when doing so would substantially burden the sincerely held religious beliefs of the corporation's owners. More recently in *Little Sisters of the Poor Saints Peter & Paul Holme v. Pennsylvania*,[570] the Court upheld HHS regulations implemented to accommodate religious objectors to the inclusion of contraceptives in the ACA's healthcare mandate. In that decision, the Court stated that its prior decisions "all but instructed [HHS] to consider RFRA going forward."[571] In dissent, Justice Ginsburg lamented that the Court's decision was "benefit[ting] religious adherents at the expense of third parties" (i.e., recipients of birth control).[572] Nevertheless, taken together, *Hobby Lobby* and *Little Sisters* provide that it is appropriate (and perhaps required) for the federal government to consider RFRA when passing generally applicable laws or regulations, and that it can comply with RFRA through religious and/or moral exemptions.[573] Third-party harm from religious exemptions (e.g., in the form of discrimination) appears to have taken a back seat to religious expression.[574]

The irony of this jurisprudence is that now religious-based objections to generally applicable abortion bans have a greater chance of obtaining relief under state RFRA statutes. State RFRA laws have been widely criticized on the left as a basis for discrimination, particularly against LGBTQ persons.[575] Indiana's RFRA law, enacted in 2015, was especially contentious because it was viewed as undermining same-sex marriage and allowed individuals and for-profit businesses to invoke religious beliefs as a defense in private suits.[576] Now, however, groups that previously

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[568] *See e.g.*, Blattert v. State, 190 N.E.3d 417, 421 n.1 (Ind. Ct. App. 2022) (explaining that "federal caselaw provides some useful guidance" because of the similarities between the state and federal RFRA laws); State v. Hardesty, 214 P.3d 1004, 1008 n.7 (Ariz. 2009) ("United States Supreme Court's interpretation of RFRA, although technically not binding in our interpretation of FERA, provides persuasive authority."); Barr v. City of Sinton, 295 S.W.3d 287, 296 (Tex. 2009) (stating that because RFRA, RLUIPA, and Texas's RFRA statute "were animated in their common history, language, and purpose by the same spirit of protection of religious freedom, we will consider decisions applying the federal statutes germane in applying the Texas statute").

[569] 573 U.S. 682, 705–07 (2014).

[570] 140 S. Ct. 2367 (2020).

[571] *Id.* at 2383.

[572] *Id.* at 2408 (Ginsburg, J., dissenting).

[573] For more on religious exemptions, see Alexandra Brown et al., *Religious Exemptions*, 22 GEO. J. GENDER & L. 335 (2021).

[574] *See Chapter Two Reframing the Harm: Religious Exemptions and Third-Party Harm After* Little Sisters, 134 HARV. L. REV. 2186 (2021).

[575] *See e.g.*, Brian Miller, *The Age of RFRA*, FORBES (Nov. 16, 2018), https://www.forbes.com/sites/briankmiller/2018/11/16/the-age-of-rfra/?sh=86b83e77bae8; Louise Melling, *The New Faith-Based Discrimination*, BOST. REV. (Dec. 14, 2022), https://www.bostonreview.net/articles/the-new-faith-based-discrimination/.

[576] *See e.g.*, Joshua Sato, *Indiana's Religious Freedom Restoration Act Sparks Controversy*, ABA (Mar. 31, 2015), https://www.americanbar.org/groups/litigation/committees/minority-trial-lawyer/practice/2015/indianas-religious-freedom-restoration-act-sparks-controversy/.

opposed stringent state RFRA laws are turning to those same laws for protection against generally applicable abortion bans.[577] And so far, they are finding success in doing so.

Cases from Kentucky and Indiana demonstrate how religious objections to abortion bans can succeed in state courts. In Kentucky, a state circuit judge held, *inter alia*, that the state's abortion ban violated section 5 of the Kentucky Constitution, which protects the free exercise of religion and prohibits the establishment of a state religion,[578] because, according to the court, the abortion ban imposes the view that "life begins at the very moment of fertilization," which the court stated was "a distinctly Christian and Catholic belief."[579] The court ruled that, by making this Christian belief the state's policy, and criminalizing noncompliance with such policy, the Kentucky General Assembly "impermissibly establish[ed] a distinctly Christian doctrine of the beginning of life, and . . . unduly interfere[ed] with the free exercise of other religions that do not share the same belief."[580] Thus, Kentucky's abortion ban was unconstitutional under the Kentucky constitution because it "established" a "preferred faith" while ignoring the competing views of others.[581] Although this case focused on a constitutional provision rather than a state RFRA law, the same logic could well apply to RFRA analyses. In addition, this case demonstrates that even absent a state RFRA law, challenges to abortion bans can succeed on state constitutional religious-freedom grounds alone.

In contrast to the Kentucky, case, the Indiana litigation focused on the state's RFRA law. But the result was largely similar. The state had tried to argue that plaintiffs' religious exercise was not burdened by its abortion ban because "abortion is not a religious practice, 'but a secular means to a religious end.'"[582] The court rejected this argument, however, stating that this same argument had been similarly rejected by the U.S. Supreme Court in *Hobby Lobby*.[583] There the Court had ruled that the closely-held for-profit corporation's religious exercise was burdened through the payment for contraceptives included in its mandated healthcare plan, which was also not a "religious practice."[584] Furthermore, the court noted that the Supreme Court has often held that activities that may not have religious significance to some are still considered religious practices "for those who believe" and are therefore entitled to protection.[585] As in the Kentucky case, the court rejected the argument that there is a one-size-fits-all religious understanding of abortion (that it is bad and immoral) and instead recognized that religion and religious freedom is a two-way street: protections of some religious practices (i.e., Christian practices) necessitate the protection of others (i.e., Jewish, Muslim, Buddhist, etc. practices). By extension, the

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[577] *See supra* notes 548–57 and accompanying text.
[578] Ky. Const. § 5.
[579] EMW Women's Surgical Ctr. v. Cameron, No. 22-CI-3225, slip op. at 15 (Ky. Cir. Ct. July 22, 2022).
[580] *Id.* at 16.
[581] *Id.* at 19.
[582] Anonymous Plaintiff 1 v. Individual Members of the Med. Licensing Bd. of Ind., No. 49D01-2209-PL-031056, slip op. at 29 (Marion Super. Ct. Dec. 2, 2022) (quoting State's Brief at 30).
[583] *See id.*
[584] *Id.* at 29–30.
[585] *Id.* at 30 (citing Holt v. Hobbs 574 U.S. 352, 369 (2015) (growth of facial hair); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 525, 547 (1993) (ritual slaughter of animals); and Wisconsin v. Yoder, 406 U.S. 205, 210–12, 234 (1972) (compulsory education beyond eighth grade)).

strengthening of religious protections in *Hobby Lobby* and *Little Sisters* from mandated contraception also strengthens religious protections from mandated births.

The court also found that Indiana's abortion ban substantially burdened the plaintiffs' religious practices because "[t]he government's pressure upon them to abandon their religious beliefs is clear."[586] The court likened the case to *Sherbert v. Verner*,[587] in which the U.S. Supreme Court had held that denial of unemployment benefits to a member of the Seventh-Day Adventist Church burdened her free exercise in violation of the First Amendment because the alternative employment on which the unemployment determination relied required her to work on Saturdays. According to the Court, the denial of unemployment benefits on that basis amounted to "pressure upon her to forego" her religious practice.[588] Likewise, in the Indiana case, the court found that the plaintiffs' religious beliefs would counsel them to obtain an abortion if complications arose in the pregnancy.[589] Banning abortion therefore exerted the state's "pressure upon [the plaintiffs] to abandon their religious beliefs" and amounted to a "substantial burden" on their religious practice.[590]

Of course, the finding of a substantial burden on a sincerely held religious practice does not end the inquiry under either federal or state RFRA statutes. Instead, the burden shifts to the government to show that the burden "is in furtherance of a compelling governmental interest; and is the least restrictive means of furthering that compelling governmental interest."[591] In the Indiana litigation, the state argued that it has a compelling interest in protecting a "vulnerable [class of] human beings" (i.e., zygotes, embryos, and fetuses) because, according to the state, "human physical life begins" at the moment of fertilization.[592] Although the state characterized this as a "simple scientific observation,"[593] the U.S. Supreme Court has consistently indicated that courts have no authority to decide the issue of when life begins or ends as a matter of law.[594] Of course, the state may make this "value judgment,"[595] but in doing so it must recognize that it is doing so at least in part on the basis of theology.[596] And even if this value judgment does not violate the

[586] *Id.* at 31.
[587] 374 U.S. 398 (1963), *abrogated on other grounds as recognized by* Holt v. Hobbs, 574 U.S. 352, 357 (2015).
[588] *Id.* at 404.
[589] *Anonymous Plaintiff 1*, slip op. at 31.
[590] *Id.*
[591] 42 U.S.C. § 2000bb-1(b); IND. CODE § 34-13-9-8 (2022).
[592] *Anonymous Plaintiff 1*, slip op. at 32.
[593] *Id.* (quoting State's Brief at 6).
[594] *See e.g.*, Webster v. Reprod. Health Servs. 492 U.S. 490, 506 (1989) (refusing to rule on Missouri's "value judgment" "about when life begins"); Ohio v. Akron Ctr. For Reprod. Health, 497 U.S. 502, 520 (1990) (Scalia, J., concurring) (calling the question of "when human life begins" a "nonjusticiable question"); Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2261 (2022) ("Our opinion is not based on any view about if and when prenatal life is entitled to any of the rights enjoyed after birth. . . . Nothing in the Constitution or in our Nation's legal traditions authorizes the Court to adopt that 'theory of life.'" (quoting *id.* at 2320–21 (Breyer, Kagan, & Sotomayor, JJ., dissenting))).
[595] *Webster*, 492 U.S. at 506.
[596] *See e.g.*, Thornburgh v. Am. Coll. Of Obstetricians & Gynecologists, 476 U.S. 747, 795 n.4 (1986) (White, J., dissenting) (describing the question of "whether the fetus is a 'human being'" as a "metaphysical or theological question").

Establishment Clause, one must at least acknowledge the value judgments of other religions that counsel for the use of abortions.[597]

Furthermore, as the Indiana court acknowledged,[598] neither the state nor the courts have any business "addressing whether the religious belief asserted in a RFRA case is reasonable."[599] Thus, even if anti-abortion laws themselves do not violate the Establishment Clause, statutorily mandating that the Christian and Catholic version of "when life begins" (i.e., at the moment of fertilization) is the *only* permissible answer might well violate "[t]he clearest command of the Establishment Clause . . . that one religious denomination cannot be officially preferred over another."[600] Accordingly, even if the state has a compelling interest in preserving "fetal life," it does not, and arguably cannot, have a compelling interest in refusing all religiously-based exemptions to an abortion ban because doing so would potentially violate the Establishment Clause and undermine the purpose of RFRA laws.[601]

This brings us to the last RFRA consideration: the least restrictive means test. In the Indiana case, the court found that because Indiana's abortion ban provides some exceptions, i.e., in the case of rape or incest,[602] then a total abortion ban in all other circumstances is by definition *not* the least restrictive means of meeting the state's interests.[603] According to the court, if the state is willing to grant exceptions to the abortion ban in some circumstances, it would necessarily devalue the religious practices that are not exempted.[604] To use the words of *Employment Division*

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[597] *See e.g.*, John M. Breen, *Abortion, Religion, and the Accusation of Establishment: A Critique of Justice Stevens' Opinions in* Thornburgh, Webster, *and* Casey, 39 OHIO N. U. L. REV. 823 (2013) (criticizing the view that anti-abortion laws violate the Establishment Clause and arguing that if the view that places great value on a developing fetus is "religious," then the argument that the fetus has little or no value is equally "religious"). For an extended argument that views on abortion are fundamentally spiritual and should be viewed through the lens of freedom of religion, see generally RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM (1994).

[598] *Anonymous Plaintiff 1*, slip op. at 33 ("[T]he State may not dictate the parameters of what constitutes a question of religion.").

[599] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 724 (2014).

[600] Larson v. Velente, 456 U.S. 228, 244 (1982).

[601] *See Anonymous Plaintiff 1*, slip op. at 36; *see also* Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2743–74 (2019) (holding that there is no legitimate, let alone compelling, state interest in violating the Commerce Clause); Romer v. Evans, 517 U.S. 620, 634–36 (1996) (violating the Equal Protections Clause cannot be a legitimate state interest).

[602] IND. CODE § 16-34-2-1(a)(2) (2022).

[603] *Anonymous Plaintiff 1*, slip op. at 36–39. This raises the question of whether a total abortion ban, with no exceptions even in the cases of rape, incest, or threat to the life of the pregnant person, could ever survive the least restrictive means test. Although we do not address this question, we wonder whether such a ban would be constitution because a majority of the historical statutes regarding abortion that were relied upon in *Dobbs* did indeed contain some form of exception, including to save the life of the mother. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2285–300 (2022) (listing historical statutes).

[604] *See e.g.*, Gonzales v. O Centro Espirita Benficente Uniao do Vegetal, 546 U.S. 418, 433 (2006) (holding that if the government could grant exemptions for the religious use of Class I controlled substances to one group, it could do so for another); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 537–38 (1993) ("Respondent's application of the ordinance's test of necessity devalues religious reasons for killing by judging them to be of lesser import than nonreligious reasons. Thus, religious practice is being singled out for discriminatory treatment.").

v. Smith, "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[605]

As the Indiana and Kentucky cases show, effective arguments can be made against abortion bans on the grounds of religious practice and belief. These cases have had so much success that the Law, Rights, and Religion Project at Columbia Law School has even published a memorandum outlining how to bring religious objections to abortion bans.[606] That said, these cases are ongoing, and it remains to be seen whether the state supreme courts will uphold these lower court decisions. There are also doubts as to whether the U.S. Supreme Court's conservative majority would give religious objections to abortion bans the same weight as they give religious objections to other generally applicable laws.[607] Nevertheless, these cases demonstrate how innovative uses of increasingly robust religious protections can be used to challenge abortion bans.

CONCLUSION

As should be clear from the discussion in this Article, the new abortion legal landscape is fraught with uncertainty on nearly every front. And such legal uncertainty inevitably creates a chilling effect, as those potentially affected by legal enforcement will tend to steer clear of even the possibility of liability or criminal penalty. Yet, in the absence of national legislation or an eventually reversal of course by the U.S. Supreme Court, this is the post-*Dobbs* reality, and it will be necessary for litigants and courts to address the complicated conflicts-of-law issues that are raised by the increasing disunity of the states regarding abortion access. Indeed, resolving such issues could at least create some clarity as to what activities can be regulated by specific states and what cannot. In this Article, therefore, we have sought to provide a roadmap through many of those issues in the hope of informing the litigation strategies, political debates, and judicial decisions that are beginning to arise, as the shockwaves from the demise of *Roe v. Wade* reverberates now, and in the years to come.

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[605] 494 U.S. 827, 884 (1990) (quoting Bowen v. Roy, 476 U.S. 693, 708 (1986)).
[606] *See* LAW, RIGHTS, & RELIGION PROJECT, RELIGIOUS RIGHT TO ABORTION: LEGAL HISTORY & ANALYSIS (Aug. 2022), https://lawrightsreligion.law.columbia.edu/sites/default/files/content/LRRP%20Religious%20Liberty%20%26%20Abortion%20Rights%20memo.pdf.
[607] *See* Richard Schragger & Micah Schwartzman, *Religious Freedom and Abortion*, 108 IOWA L. REV. (forthcoming 2023) (doubting that the Supreme Court would accept religious exemptions in the abortion context as they have in other contexts).