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COMMENT

BANS OFF OUR BORDERS: LESSONS FROM THE LAST INTERSTATE COMITY CRISIS AND WHAT IT CAN TEACH MARYLAND ABOUT DEFENDING ABORTION TRAVELERS

BECKY BURROW*

The Supreme Court's ruling in *Dobbs v. Jackson Women's Health Organization*¹ fulfilled a longtime conservative goal of overturning *Roe v. Wade*² and its progeny³, to the acclaim of pro-lifers⁴ and constitutional

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* The author would like to dedicate this Comment in memory of her mother, Diane, who would, on numerous occasions, make the time to listen to the author's long-winded rabbit holes on constitutional history while researching this piece. This would often devolve into wonderful discussions about fundamental rights and political theory, conversations characteristic of those which were an ever-present and cherished feature of their relationship. Although she cannot, as she had hoped, read the finished work, the author hopes it can do justice to her mother's spirit of insatiable curiosity. She would also like to extend an immeasurable, unrepayable debt of gratitude to her family, the names of whom are too many to possibly mention; but deserving of special mention is are: her wife Toria, for tolerating the author's pregnancy-length writing journey while carrying a pregnancy of her own, resulting in extra sacrifices, missed dinners, and long-winded rabbit holes along the way; her daughters Tillie and Dorothy for tolerating all the missed bedtimes and for giving it all meaning; and of course, her father Bruce for a lifetime of love and support for which a single footnote cannot contain. Finally, the author would like to thank the editors of Maryland Law Review for their time, thoughtful feedback, and dedication to making this piece the best it could be, as well as appreciation to Professor Mark Graber for his invaluable wisdom and guidance.

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

2. 410 U.S. 113 (1973).

3. See generally *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 416 (1983); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Stenberg v. Carhart*, 530 U.S. 914 (2000).

4. E.g., Gerard V. Bradley, *Dobbs Decision: A Monumental Moment in the March for Equal Rights for Every Human Life*, NAT'L CATH. REG. (June 24, 2022), <https://www.ncregister.com/commentaries/dobbs-decision-a-monumental-moment-in-the-march-for-equal-rights-for-every-human-life>.

originalists alike.⁵ The majority characterized the nature of its ruling as restoring a historic right that *Roe* had repressed, wherein “the people and their elected representatives” may enact their views on abortion—whether that be protection or prohibition—through the political process rather than the courts.⁶ Despite the Court’s restorative intentions, the burgeoning post-*Dobbs* era is much more than a mere reinstatement of the pre-*Roe* landscape.⁷ The world has changed markedly since *Roe* was decided in 1973: Abortion pills⁸ have made self-managed abortion safer and more accessible,⁹ telehealth services have allowed prescriptions to be accessed anywhere,¹⁰ and advancements in sonography have improved the detection of fetal abnormalities earlier in pregnancy.¹¹ Moreover, the digital era has given the state unprecedented surveillance tools, from browsing histories to period tracking mobile applications, which may give prosecutors the ability to monitor pregnancies and miscarriages to enforce abortion laws.¹² Unprecedented legal challenges will define the future landscape of

5. *E.g.*, Donald A. Daugherty, Jr., *Originalism Carries On*, 24 FED. SOC. REV. 77, 81–84 (2023) (reviewing ERWIN CHEMEKINSKY, *A MOMENTOUS YEAR IN THE SUPREME COURT: OCTOBER TERM 2021* (2022)).

6. *Dobbs*, 142 S. Ct. at 2259; *cf.* Daugherty, *supra* note 5, at 81–82 (praising *Dobbs* for “its restorative effect on our constitutional structure of government, including requiring citizens to govern themselves, even in areas they may prefer not to face”).

7. See Jensen Lillquist, *Comity & Federalism in Extraterritorial Abortion Regulation*, 31 MICH. J. GENDER & L. (forthcoming 2024) (characterizing four eras of abortion regulation: (1) the “common law era” where abortion was criminalized after “quickening” or when fetal movement could be felt, (2) the “criminalization” era in the nineteenth century where states began to criminalize abortions actively, (3) the “*Roe* and *Casey* era” where abortion could only be regulated to a limited extent, and finally (4) the “emerging *Dobbs* era”).

8. *Questions and Answers on Mifepristone for Medical Termination of Pregnancy Through Ten Weeks Gestation*, FDA (Sept. 1, 2023), <https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/questions-and-answers-mifepristone-medical-termination-pregnancy-through-ten-weeks-gestation>.

9. See Marcela @ Planned Parenthood, *Let’s Talk About Self-Managed Abortion*, PLANNED PARENTHOOD (July 11, 2023), <https://www.plannedparenthood.org/blog/lets-talk-about-self-managed-abortion> (claiming that self-managed abortion with pills such as mifepristone can be safe and effective).

10. See generally Fekede Asefa Kumsa et al., *Medication Abortion Via Digital Health in the United States: A Systemic Scoping Review*, 6 NPJ DIGIT. MED. 1 (2023).

11. See generally S. Campbell, *A Short History of Sonography in Obstetrics and Gynecology*, 5 FACTS, VIEWS, & VISION OBGYN 213 (2013).

12. See Cat Zarkzewski et al., *Texts, Web Searches About Abortion Have Been Used to Prosecute Women*, WASH. POST, July 3, 2022 (reporting on police using a Mississippi woman’s iPhone search of “buy Misopristol Abortion Pill Online” as evidence that her miscarriage was an illegal abortion); Bridget G. Kelly & Maniza Habib, *Missed Period? The Significance of Period-Tracking Applications in a Post-Roe America*, 31 SEXUAL & REPRODUCTIVE HEALTH MATTERS 1, 2 (2023) (cautioning that “[s]ome period-tracking apps even explicitly state [in their terms of service] that they may disclose users’ personal data at the request of law enforcement or government agencies” and that “miscarriages, irregularities in menstrual cycles, and/or imperfect engagement with a period-tracking app have the potential to be mischaracterised [sic] as abortions”).

abortion—a landscape that will be further complicated by the fact that *Dobbs* has reinvigorated advocacy on both sides of the debate, leading to a proliferation of new state abortion laws, which create a complicated state-by-state landscape.¹³ A once national constitutional matter has become defined by geographies, lines on a map where fundamental liberties such as the right to life and the right to body autonomy may radically differ depending on what side of a border one finds oneself on; in consequence, this divergent landscape has created border wars.¹⁴

Some states have taken up this newfound right granted by *Dobbs*, rushing to implement sometimes near-total abortion bans.¹⁵ For instance, Indiana¹⁶ and North Dakota¹⁷ have outlawed abortion starting at conception, Iowa¹⁸ has banned the procedure starting at fetal heartbeat,¹⁹ South Carolina has enacted a six-week ban,²⁰ and both North Carolina²¹ and Nebraska²² have enacted twelve-week bans. Other states, such as Alabama in 2019, had passed abortion bans in anticipation of *Dobbs* that went into effect once the ruling

13. See The Associated Press, *Where Abortion Laws Stand in Every State a Year After the Supreme Court Overturned Roe*, AP (June 22, 2023), <https://apnews.com/article/abortion-status-list-state-protection-ban-4466ae6e6141745b71c824522aac47b9>, for an overview of abortion laws as of June 22, 2023.

14. Geoff Mulvihill & John Hanna, *Next Abortion Battles May Cross State Borders*, AP (Apr. 10, 2023), <https://apnews.com/article/abortion-trafficking-state-legislature-border-5fc92621bcd0d7f018d95dd15d6f98c>.

15. See *infra* Section I.A.

16. IND. CODE § 16-34-2-1 (2022).

17. S.B. 2150, 68th Leg. Sess., Reg. Sess. (N.D. 2023) (codified at N.D. CENT. CODE § 12.1-19.1 (2023)).

18. H.F. 732, 19th Gen. Assemb., 2023 1st Extraordinary Sess. (Iowa 2023) (codified at IOWA CODE § 146E (2023)) (currently enjoined by judicial order, see *Planned Parenthood of the Heartland v. Reynolds*, No. EQCE089066, slip op. at 14 (Iowa Dist. Ct. Polk Cnty. July 17, 2023)).

19. Embryologists and development biologists typically consider the human heart to begin beating at twenty-one days post-fertilization (approximately four weeks); however, because the date of fertilization is difficult to determine, physicians use gestational age, which is based on the date of menstruation (typically fourteen days before fertilization), making a person already approximately two weeks pregnant at the date of conception. Jörg Männer, *When Does the Human Embryonic Heart Start Beating? A Review of Contemporary and Historical Sources of Knowledge About the Onset of Blood Circulation in Man*, 9 J. CARDIOVASCULAR DEV. & DISEASE 2 (2022). Thus, a fetal heartbeat would occur at roughly six weeks when using gestational age. *Id.* at 1–4. Gestational age (based on menstruation) is what most abortion statutes use for determining when an abortion is lawful. See, e.g., N.D. CENT. CODE § 12.1-19.1-01 (2023).

20. S. 474, 125th Gen. Assemb., Spec. Sess. (S.C. 2023) (codified at S.C. CODE ANN. § 44-41-610 (2023)).

21. N.C. GEN. STAT. § 90-21.81A (2023).

22. NEB. REV. STAT. § 28-335 (2011).

was enacted.²³ Still, states such as West Virginia²⁴ and Wisconsin²⁵ had holdover pre-*Roe* bans, or “trigger laws,” that went into effect immediately post-*Dobbs*.²⁶

Yet despite this legislation, abortion seekers can still, with relative ease, circumvent their home state’s legislation by merely traveling out of state to terminate their pregnancies.²⁷ In response, post-*Dobbs* anti-abortion advocates have quickly pivoted their advocacy into two different strategies.²⁸ The first strategy is exemplified by S. 4840, which was introduced in 2022 by Senator Lindsey Graham and seeks to implement some form of uniform abortion ban nationally.²⁹ The second strategy, employed by state legislatures, attempts to dissuade citizens from traveling or helping others travel out of state to obtain an abortion, either by using the threat of civil litigation, like Texas’s S.B. 8,³⁰ or by imposing criminal liability, like Idaho’s H.B. 242.³¹

In his *Dobbs* concurrence, Justice Kavanaugh stated that he believed the Court’s decision would not grant states the right to enforce abortion bans beyond their borders.³² However, anti-abortion state legislation has attempted just that: Idaho’s anti-abortion law criminalizes aiding and abetting an abortion, with a provision specifically stating that “[i]t shall *not* be an affirmative defense . . . that the abortion provider or the abortion-inducing

23. H.B. 314, 2019 Reg. Sess. (Ala. 2019) (codified at ALA. CODE § 26-23B-5 (2019)).

24. W. VA. CODE § 61-2-8 (1848). The original statute was enacted in Virginia before West Virginia seceded from Virginia in 1861 but remained law in West Virginia.

25. WIS. STAT. § 940.04 (1849). The statute has since been interpreted in a 2022 ruling to only apply to feticide and not consensual abortions. *Kaul v. Urmanski*, No. 22 CV 1594, slip op. at 1 (Wis. Cir. Ct. Dane Cnty. Dec. 5, 2023).

26. Heidi S. Alexander, *The Theoretical and Democratic Implications of Anti-Abortion Trigger Laws*, 61 RUTGERS L. REV. 381, 383 (2009).

27. See Rebecca Shabad, *How People Are Getting Around the New Texas Abortion Law*, NBC NEWS (Sept. 25, 2021), <https://www.nbcnews.com/politics/politics-news/how-people-are-getting-around-new-texas-abortion-law-n1279961> (describing the methods that antiabortion laws are easily circumvented). But see Jenna Jerman et al., *Barriers to Abortion Care and Their Consequences for Patients Traveling for Services: Qualitative Findings from Two States*, 49 PERSPS. ON SEXUAL & REPROD. HEALTH 95, 95–98 (2017) (describing how transportation costs, lost wages, and childcare expenses may make traveling out of state to obtain an abortion more difficult, especially for those who are low-income).

28. See *infra* notes 29–31.

29. See S. 4840, 117th Cong. (2021–2022). This legislation, proposed by Senator Lindsey Graham, criminally bans abortions after the gestational age of fifteen weeks. *Id.*

30. S.B. 8, 86th Gen. Assemb., Reg. Sess. (Tex. 2021) (codified as amended at TEX. HEALTH & SAFETY CODE ANN. §§ 171.201–212 (West 2022)). Although Texas S.B. 8 was passed *before Dobbs*, it exemplifies abortion bans with civil action provisions.

31. H.B. 242, 67th Leg., Reg. Sess. (Idaho 2023) (codified at IDAHO CODE § 18-623 (2023)).

32. See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2309 (2022) (Kavanaugh, J., concurring) (noting that the Constitution’s Due Process clause protects the right to travel).

drug provider is located in another state.”³³ While the Idaho law only applies to minors, lawmakers in Missouri have attempted to pass bills such as S.B. 603, which ban adults from getting out-of-state abortions if they are residents of Missouri, received prenatal care in Missouri at any point of the pregnancy, have a significant relationship with Missouri, and even includes those who had “[s]exual intercourse . . . within [Missouri] and [whose] child may have been conceived by that act of intercourse”³⁴ The effort has also extended beyond state laws to local ordinances with a growing movement to establish “sanctuary cities for the unborn.”³⁵ For example, in Texas, the city of Slaton passed an anti-abortion ordinance which bans aiding and abetting a city resident in getting an abortion, including “[a]bortions performed outside city limits.”³⁶ There are also local efforts to outlaw using highways that pass through municipalities to obtain an abortion out of state.³⁷ Still further, in Alabama, a state whose anti-abortion statute does not have explicit extraterritorial language, state attorney general Steve Marshall has made statements that he nonetheless believes the “general principles that apply to criminal law” would allow him to bring charges related to accessory liability and conspiracy against someone who “promot[es] themselves out as a funder of abortion out of state”³⁸

A consequence of these extraterritorial laws is that they weaken the power of abortion-protecting states to enact their public policy by threatening

33. IDAHO CODE § 18-623(3) (2023) (emphasis added).

34. S.B. 603, 101st Gen. Assemb., 1st Reg. Sess. §§ 188.550.1(2), (3)(a), (3)(c) (Mo. 2021).

35. See SANCTUARY CITIES FOR THE UNBORN, <https://sanctuarycitiesfortheunborn.com/> (last visited Apr. 1, 2024); David Martin Davies, *Growing Number of Texas Cities and Counties Pass ‘Sanctuary for the Unborn’ Ordinances*, TEX. PUB. RADIO (Oct. 24, 2023), <https://www.tpr.org/government-politics/2023-10-24/growing-number-of-texas-cities-and-counties-pass-sanctuary-for-the-unborn-ordinances>.

36. See SLATON, TEX., CODE OF ORDINANCES § 8.09.004 (2021) (making it unlawful for anyone to provide transportation to an abortion provider, give instructions over the telephone or internet on how to self-administer an abortion, offer money knowing it will be used to pay for an abortion, or provide a referral to an abortion provider for any resident of the city).

37. See Julia Harte, *Fight Over Texas Anti-Abortion Transport Bans Reaches Biggest Battlegrounds Yet*, REUTERS (Oct. 24, 2023, 8:54 AM), <https://www.reuters.com/world/us/fight-over-texas-anti-abortion-transport-bans-reaches-biggest-battlegrounds-yet-2023-10-23/> (explaining how a similar abortion travel ordinance in Slaton’s home county, Lubbock, alongside proposed measures in Amarillo City, may threaten abortion travel across the state because both municipalities are traversed by major highways connecting Texas to New Mexico, where abortion remains legal).

38. Complaint at 9–10, *Yellowhammer Fund v. Marshall*, No: 2:23-cv-00450 (M.D. Ala. July 31, 2023); Complaint at 12, *West Alabama Women’s Center v. Marshall*, No: 2:23-cv-00451 (M.D. Ala. July, 31, 2023); see also Statement of Interest of the United States in Support of Plaintiff’s Right to Travel Claim, *Yellowhammer Fund*, No: 2:23-cv-00450-MHT-KFP (M.D. Ala. Nov. 9, 2023) (statement of interest submitted by United States Department of Justice); *supra* Section II.B (describing the “effects doctrine” theory which would allow extraterritorial enforcement without an explicit extraterritorial clause).

their residents, visitors, and medical professionals alike.³⁹ Physicians may be endangered by lawsuits or license discipline, patient confidentiality may be disturbed by subpoenas, and abortion fund donors may face liability for aiding or abetting an interstate abortion.⁴⁰ Importantly, by complying with another state's extraterritorial anti-abortion laws, abortion-protecting states are unable to treat travelers from other states like "welcome visitor[s]" with the same rights as the citizens of the state—a critical component of the federal right to travel.⁴¹

Thus, in response, Maryland enacted the 2023 Reproductive Health Protection Act,⁴² which seeks to keep abortion bans away from the state's borders by refusing to grant comity to any state laws that attempt to interfere with Maryland's sovereign right to protect abortion within its territory.⁴³ This act, along with similar shield laws passed in other states, blocks extradition, bars judges from ordering injunctions, and prevents state resources from being used to cooperate with these out-of-state proceedings.⁴⁴

Such laws and counter-laws⁴⁵ have prompted an effort to reckon with this new reality via historical analogy—notably by comparing the current reality with the United States' pre- and post-Civil War periods.⁴⁶ Networks to help abortion seekers cross state lines have been likened to the Underground Railroad,⁴⁷ Texas's S.B. 8 has been described as creating a new class of slavecatchers,⁴⁸ and abortion travel bans have been generally compared to the Fugitive Slave Act.⁴⁹ Critics have subsequently rejected and

39. David S. Cohen et al., *Abortion Shield Laws*, 2 NEW ENG. J. MED. EVIDENCE 1, 3 (2023).

40. *See id.* (describing the policy aims of abortion shield laws and how these statutes protect a state's interests).

41. *Saenz v. Roe*, 526 U.S. 489, 500 (1999).

42. Reproductive Health Protection Act, 2023 Md. Laws ch. 247 (codified in scattered sections of MD. CODE ANN., CTS. & JUD. PROC., CRIM. PROC., HEALTH-GEN., HEALTH OCC., & INS.).

43. *Id.*

44. Cohen et al., *supra* note 39.

45. *See supra* notes 33–44 and accompanying text.

46. *See infra* notes 47–50 and accompanying text.

47. *E.g.*, Tom Lininger, *Abortion, the Underground Railroad, and Evidentiary Privilege*, 80 WASH. & LEE L. REV. 663, 667 (2023); Stephania Taladrid, *The Post-Roe Abortion Underground*, NEW YORKER (Oct. 10, 2022), <https://www.newyorker.com/magazine/2022/10/17/the-post-ro-abortion-underground>.

48. *See, e.g.*, Sally Hershops & Darian Woods, *The Indicator from Planet Money, Do You Want to Live in a Bounty Economy?*, NPR, at 05:45 (Sept. 9, 2021, 4:49 PM), <https://www.npr.org/2021/09/09/1035741353/do-you-want-to-live-in-a-bounty-economy> (describing how the Texas "abortion bounty system" creates a market where individuals are economically incentivized to capture suspected abortion-seekers, akin to slavecatchers).

49. *E.g., id.*; Michael Hiltzik, *Column: Threats to Criminalize Out-of-State Abortions Are a Scary Reminder of 1850s America*, L.A. TIMES (July 12, 2022, 1:58 PM), <https://www.latimes.com/business/story/2022-07-12/threats-to-criminalize-out-of-state-abortion>.

derided any comparisons between abortion and slavery as being reductionist and, possibly, in bad taste.⁵⁰

In defense of these analogies, twenty-first-century constitutionalism increasingly demands the use of historical metaphors to apply the solutions of the past to the problems of the present.⁵¹ The Roberts Court's continuous reliance on "history and tradition"⁵² has put many constitutional liberties on the chopping block if advocates cannot find some historical analogy to tie it to.⁵³ It is, then, perhaps reasonable for abortion rights advocates to seek some form of historical analogy or constitutional anachronism to conceptualize this new reality and to defend this issue in the new post-*Dobbs* world.⁵⁴ The nature of the post-Civil War Amendments means that any application invites, if not mandates, some analogy to slavery.⁵⁵

Comparisons to the pre- and post-Civil War era, are particularly appropriate here. While the issues at hand are very different, this historical period is marked by a similar clash of laws, where disagreements over a highly contentious political debate led to states refusing to recognize the

50. See, e.g., Jade Hurley et al., *Destigmatizing Abortion: You Might Be Doing Abortion Advocacy Wrong!*, NAT'L WOMEN'S L. CTR. (Jan. 14, 2022), <https://nwlc.org/destigmatizing-abortion-you-might-be-doing-abortion-advocacy-wrong> (urging abortion rights advocates to avoid making analogies to slavery as "reproductive healthcare [is not] comparable to chattel slavery in the slightest"); Jessica Pinckney, *We Don't Need an 'Abortion Underground Railroad'—Black and Brown People Already Lead the Most Powerful Abortion Fund Network in the Country*, PRISM (Dec. 15, 2021), <https://prismreports.org/2021/12/15/we-dont-need-an-abortion-underground-railroad-black-and-brown-people-already-lead-the-most-powerful-abortion-fund-network-in-the-country> (deriding the use of "underground railroad" among abortion activists as co-opting the language of another movement led by Black women).

51. See Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 YALE L.J. 99, 150 (2023) (noting that a problem with using historical understandings to establish contemporary constitutional meaning is that contemporary readers struggle to understand that "the past is a different world") (quoting BERNARD BAILYN, *SOMETIMES AN ART: NINE ESSAYS ON HISTORY* 22 (2015)).

52. E.g., *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2235 (2022); *Timbs v. Indiana*, 139 S. Ct. 682, 685 (2019); *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2128 (2022); *United States v. Texas*, 142 S. Ct. 1964, 1970 (2023); *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2022); *City of Austin v. Reagan Nat'l Adver. Of Austin, LLC*, 142 S. Ct. 1464, 1475, 1490 (2021); *Am. Legion v. Am. Humanist Assoc.*, 139 S. Ct. 2067, 2072 (2019); *Kerry v. Din*, 576 U.S. 86, 93 (2015); *Trump v. Hawaii*, 138 S. Ct. 2392, 2424 (2018) (Thomas, J., concurring); *Nelson v. Colorado*, 581 U.S. 128, 146 (2017) (Alito, J., concurring); see also *Kennedy v. Bremerton School Dist.*, 142 S. Ct. 2407, 2434 (2022) (Sotomayor, J., dissenting) (stating critically that the Court was replacing longstanding precedent with a "new 'history and tradition' test").

53. See *Dobbs*, 142 S. Ct. at 2301–02 (Thomas, J., concurring) (inviting the Court to reconsider other decisions affirming rights that are not rooted in history and tradition, such as same-sex marriage, contraception access, and right to engage in private, consensual sexual acts).

54. See Erwin Chemerinsky, *History and Tradition, the Supreme Court and the First Amendment*, 44 HASTINGS L.J. 901, 901 (1993) (urging that attorneys litigating before the new originalist-oriented Supreme Court should find a way to argue that a right is historically protected).

55. See *infra* 57–62 and accompanying text.

legitimacy of each other's laws.⁵⁶ However, an obstacle to resolving present constitutional questions with the constitutionalism of the Civil War period is that this era resolved its constitutional crises through bloodshed, not jurisprudence.⁵⁷ Thus, if one hopes to find jurisprudential answers to the question of extraterritorial abortion bans within American "history and tradition,"⁵⁸ it is prudent to understand the Constitution that the framers of the Reconstruction Amendments⁵⁹ hoped would resolve these types of comity issues were they to arise again.⁶⁰

This Comment's position is that the Reconstruction Amendments generally, and the Thirteenth Amendment⁶¹ in particular, bar states from enforcing abortion bans beyond their borders.⁶² To do this, this Comment will hold the premise that the questions surrounding abortion travel bans are, in principle, reminiscent of the contentious conflict-of-laws issues that surrounded the era of the American Civil War.⁶³ This Comment does not intend to compare abortion bans nor abortion itself to slavery—such a comparison, as rightly maligned by critics,⁶⁴ does not do justice to an institution whose magnitude has been described as "America's original sin."⁶⁵ Instead, this Comment will consider what the "history and tradition"⁶⁶ of the Constitution has to say about states enforcing their laws beyond their borders.⁶⁷ Likewise, this Comment will not argue the merits for or against *Dobbs*, nor whether the right to abortion should be constitutionally protected. Instead, the focus will be on the pro-democracy reading of *Dobbs*, which, according to the majority, freely grants voters the right to decide either that "abortion right[s] should be even more extensive than . . . *Roe* and *Casey*," or that states should "impose tight restrictions based on their belief that abortion destroys an 'unborn human being.'"⁶⁸ If that is true, then so long as

56. PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY 3–4 (1981).

57. See Arthur Bestor, 69 AM. HIST. REV. 327, 327 (1964) (defining the American Civil War as a series of constitutional crises).

58. See *supra* note 52 and accompanying text.

59. The phrase "Reconstruction Amendments" refers to U.S. CONST. amends. XIII–XV.

60. See *infra* Section II.B.

61. U.S. CONST. amend. XIII.

62. See *infra* Section II.D.

63. See *infra* Part III.

64. See *supra* note 50.

65. Press Release, The White House, Statement by President Joe Biden Marking Slavery Remembrance Day (Aug. 20, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/20/statement-by-president-joe-biden-marking-slavery-remembrance-day>.

66. See *supra* note 52 and accompanying text.

67. See *infra* Part III.

68. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2257 (2022) (quoting MISS. CODE ANN. § 41-41-191(4)(b) (2019)).

it is the will of Maryland voters to become a “safe haven” for abortion access, *Dobbs* should grant them that right.⁶⁹

In Part I, this Comment will first briefly analyze the doctrine of interstate comity.⁷⁰ From there, Part I will discuss the theories that may justify the imposition of interstate abortion travel bans, followed by the theories that may justify abortion shield laws such as Maryland’s Reproductive Health Protection Act.⁷¹ Part II will first explain that the post-Civil War Constitutionalists were attempting to address similar comity issues when framing the Thirteenth Amendment.⁷² The Amendment was intended as a radical document meant to profoundly reorient the nation by making national citizenship a superseding identity to state citizenship, restricting the ability of states to exercise power over their citizens beyond their borders, and blocking laws that would prevent citizens from exercising the rights granted to this superseding citizenship.⁷³ Further, the framers saw laws that attempted to interfere with a citizen’s right to travel as a “badge and incident” of slavery.⁷⁴ It will then discuss how these theories apply to modern abortion cases,⁷⁵ and finally, will explain why Maryland’s right to defend legal abortions within its territory trumps the right of antiabortion states to enforce bans beyond their borders.⁷⁶ Specifically, it will posit that by enacting such legislation, Maryland is protecting the rights of the citizens of the Union—rights which include the right to travel to states that have laws that conflict with one’s home state.⁷⁷ This Comment will conclude that the Constitution protects the right of citizens to freely cross, and help others cross, state borders in order to take advantage of favorable laws and better their lives as they see fit, and that Maryland’s efforts to protect such rights are well-aligned with “history and tradition.”⁷⁸

69. Danielle J. Brown, *Moore Declares Maryland a ‘Safe Haven’ for Abortion Access; Approves Protections for Trans Health Care*, MD. MATTERS (May 3, 2023), <https://www.marylandmatters.org/2023/05/03/moore-declares-maryland-a-safe-haven-for-abortion-access-approves-protections-for-trans-health-care/>.

70. *See infra* Section I.A.

71. *See infra* Section I.C.

72. *See infra* Part II.

73. *See infra* Section II.A.

74. *See infra* Section II.B.

75. *See infra* Section II.C.

76. *See infra* Section II.D.

77. *See infra* Section II.D.

78. *See infra* Conclusion.

I. BACKGROUND

“While other states are dead set on ripping away reproductive rights . . . we’re doing the opposite.”⁷⁹ These words from Maryland Lieutenant Governor Aruna Miller marked the May 2023 signing of a legislative package to expand reproductive rights protection in Maryland.⁸⁰ This legislation joins Maryland to a coalition of eleven states that have passed “shield laws” to safeguard abortion providers and patients against prosecution from other states.⁸¹ Known as the Reproductive Health Protection Act, this legislation prohibits judges from ordering a person within Maryland to comply with out-of-state subpoenas, production orders, or *ex parte* orders to aid in investigating healthcare legally protected within Maryland.⁸² It also forbids the Governor from surrendering a person to the executive authority of another state if the extradition is related to legally protected healthcare in Maryland.⁸³

Maryland’s Act is predicated on a specific theoretical scenario, so this Comment will suppose this particular interaction of laws occurs. Idaho H.B. 242 imposes criminal liability on an adult who aids an unemancipated minor to get an abortion—even an out-of-state abortion—without the consent of the parents or guardians.⁸⁴ Say an adult in Maryland does precisely this and knowingly provides a sixteen-year-old Idahoan with money to fly from Idaho to Maryland to obtain an abortion without parental consent. Maryland law requires parental notification, but not consent, for a minor to obtain an abortion,⁸⁵ and doctors may bypass notice requirements if they deem the minor “mature and capable of giving informed consent.”⁸⁶ An Idaho prosecutor, empowered by this new statute,⁸⁷ decides to bring charges against the Marylander who never set foot in the state, yet whose actions had effects within Idaho.⁸⁸ Maryland, in turn, attempts to protect its citizens with the new Reproductive Health Protection Act, forbidding the Governor from

79. Press Release, Office of Gov. Wes Moore, Governor Moore Signs Historic Reproductive Freedom Legislation, Protects Women’s Reproductive Rights in Maryland (May 26, 2023).

80. *Id.*

81. NICOLE NIXON, ET AL., A YEAR SINCE DOBBS, THESE ARE THE MANY WAYS STATES ARE PROTECTING ABORTION RIGHTS, NPR (June 23, 2023, 9:48 AM), <https://www.npr.org/2023/06/23/1183646356/dobbs-roe-abortion-protections-illinois-maryland-michigan-colorado-minnesota>.

82. Reproductive Health Protection Act, 2023 Md. Laws ch. 247.

83. *Id.*

84. H.B. 242, 67th Leg., Reg. Sess. (Idaho 2023) (codified at IDAHO CODE § 18-623 (2023)).

85. MD. CODE ANN., HEALTH-GEN § 20-103(a) (2022).

86. MD. CODE ANN., HEALTH-GEN § 20-103(c)(ii) (2021).

87. IDAHO CODE § 18-623(4) (2023).

88. See *infra* Section I.B for a description of the “effects doctrine.”

surrendering the Maryland resident for extradition to Idaho.⁸⁹ Two states are now engaged in a tug-of-war: Idaho demanding extradition, Maryland refusing, and the Maryland citizen remains free at home but threatened with imprisonment were she to ever set foot in a state that does not shield this extradition.⁹⁰ What happens? Who wins?⁹¹

This Part will lay the foundation for why Maryland's shield law wins by first discussing the history and tradition of states not recognizing each other's laws and how today's interstate comity issues connect to those of the past.⁹² It will also discuss legal theories which may justify extraterritorial abortion,⁹³ followed by the theories which justify shield laws.⁹⁴

A. *The "History and Tradition" of Interstate Comity Does Little to Clarify Constitutional Ambiguity on Extraterritorial Abortion Bans*

Answering the question of whether the extraterritorial anti-abortion law or the shield law will win requires looking at what happens when state laws conflict.⁹⁵ The U.S. Constitution demands, to a certain degree, that states give effect to each other's laws through the Full Faith and Credit Clause,⁹⁶ the Extradition Clause,⁹⁷ and the Privileges and Immunities Clause of Article IV.⁹⁸ Unfortunately, as this Comment will later discuss, existing constitutional paradigms of interstate cooperation fail to provide completely unambiguous answers to the question of extraterritorial abortion

89. Reproductive Health Protection Act, 2023 Md. Laws ch. 247.

90. See Alejandra L. Caraballo et al., *Extradition in Post-Roe America*, 26 CUNY L. REV. 1, 45–51 (2023) (describing the practical experience of those who are arrested and potentially extradited out-of-state for abortion-related crimes).

91. For the purpose of discussing the general constitutional travel rights issues imperiled for both adults and minors, see *supra* notes 32–34 and accompanying text, this Comment will not discuss the questions of juvenile rights that would otherwise be necessary for a complete analysis of IDAHO CODE § 18-623(4), rather, this Comment will focus on constitutional issues surrounding the general right to travel.

92. See *infra* Section I.A.

93. See *infra* Section I.B.

94. See *infra* Section I.B.

95. See *infra* Section I.A.

96. See U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.").

97. See U.S. CONST. art. IV, § 2, cl. 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.").

98. See 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."). See also *supra* Part II for a discussion of the corollary Privileges and Immunity Clause in the Fourteenth Amendment and its connection to the "badges and incidents of slavery" as implicated by the Thirteenth Amendment.

enforcement.⁹⁹ Therefore, the general principles of comity, including the historical and traditional methods for resolving conflicts between co-sovereign entities, may still be relevant as states settle these hot button issues in the face of ambiguous constitutional guidance.

The Maryland Extradition Manual alludes to these gaps in constitutionally mandated cooperation, listing three types of cases where Maryland may be asked to aid a foreign state by extraditing a fugitive and further describes their respective constitutional obligations.¹⁰⁰ The first is “fugitives from justice,” which concerns those who commit crimes in one state and flee to another.¹⁰¹ These persons are subject to the Extradition Clause of the U.S. Constitution, and therefore, Maryland is obligated to comply.¹⁰² As applied to extraterritorial abortion enforcement, if an Idahoan got an abortion in Idaho and then fled to Maryland, the Constitution would require Maryland to return her to Idaho at request.¹⁰³ The manual lists two other classes: those who involuntarily left the demanding state¹⁰⁴ and those who “committ[ed] crimes against the laws of the demanding state by acts done outside of that state.”¹⁰⁵ The text referring to these two other classes is accompanied by a note saying: “The extradition . . . is pursuant only to the Uniform Act and is wholly dependent for its effectiveness on *comity* between the states. The U.S. Constitution and the federal statutes *do not put any obligation on states* to extradite individuals other than ‘fugitives from justice.’”¹⁰⁶ That last class—those who committed crimes *outside* of the demanding state—would apply to the targets of the above hypothetical conflict between Maryland and Idaho.¹⁰⁷ To understand why Maryland views some forms of interstate cooperation as optional requires an understanding of comity doctrine and the history behind it.¹⁰⁸

99. See *infra* Section I.B. for an overview of the ambiguity in current conflict-of-law precedent which may support the enforcement of extraterritorial abortion bans. See *infra* Section I.C for a discussion of ambiguities in the Privileges and Immunities Clause and the Extradition Clause which may support abortion shield laws.

100. MARYLAND EXTRADITION MANUAL 5 (2023).

101. *Id.*

102. *Id.* (citing U.S. CONST. art. IV, § 2).

103. See *supra* notes 84–87 and accompanying text for the original hypothetical.

104. E.g., someone is kidnapped and brought across state lines.

105. MARYLAND EXTRADITION MANUAL 5 (2023) (cleaned up).

106. *Id.* at 5–6 (emphasis added). The readers should note that the “Uniform Act” refers to various sections of the Maryland Code outlined on page 63 of the Maryland Extradition Manual.

107. See *supra* notes 84–87 and accompanying text.

108. See *infra* Section I.A.2.

1. Comity Doctrine Demonstrates That States Do Not Always Need to Give Effect to Other States' Laws

Since much of this Comment's assertions ride upon this notion of "comity," it is necessary to understand its meaning.¹⁰⁹ Black's Law Dictionary defines it as "[a] principle or practice among political entities (as countries, states, or courts of different jurisdictions), whereby legislative, executive, and judicial acts are mutually recognized."¹¹⁰ It is thus a doctrine of politics and equity as much as it is a doctrine of law.¹¹¹ Though often described in the context of international law, comity also plays an essential role in subnational state relations, being vital to a state's ability to exercise its own autonomy, balancing asserting authority, and granting deference where another state's sovereignty is invoked.¹¹² In the gaps between the clauses in Article IV of the Constitution, the decision of a state to "extend comity to another state is entirely voluntary and within the forum state's discretion. Comity is *not* given out of duty or as a rule of law."¹¹³ Although not always required, comity is frequently prudent—were each state to have the license to regulate activity beyond its territory, it would be a *de facto* license for other states to do the same—thereby giving each state the authority to overthrow the policies of others and depriving all of their sovereign authority within a federalist system.¹¹⁴ Additionally, when state sovereignties are in conflict, the consequences may be dire for those who are caught in the middle.¹¹⁵

2. The Models of Interstate Comity Available at the Founding Do Not Provide Adequate Analogies in "History and Tradition"

At the nation's founding, there were three different approaches that had been used to resolve conflicts of laws, all of which applied the law based on the court and the place of injury.¹¹⁶ The first was the "English feudal approach," which would have courts applying their own jurisdictional laws exclusively.¹¹⁷ Under this approach, English courts would simply apply English law and consider anything occurring outside of England to be outside

109. See *Comity*, BLACK'S LAW DICTIONARY (11th ed. 2019).

110. *Id.*

111. FINKELMAN, *supra* note 56, at 4 (1981).

112. Julia Halloran McLaughlin, *DOMA and the Constitutional Coming Out of Same-Sex Marriage*, 24 WIS. J.L. GENDER & SOC'Y 145, 149 (2009).

113. 81A C.J.S. States § 61 (emphasis added).

114. *Id.*

115. See *supra* note 90 and accompanying text.

116. Joseph William Singer, *Conflict of Abortion Laws*, 16 NE. U. L. REV. 2, 47–48 (forthcoming 2024).

117. *Id.* at 22–23.

of its jurisdiction to adjudicate altogether.¹¹⁸ Professor William Singer characterizes this as “feudal” in nature because it was a relic of the feudal system that constrained power solely to geographic territory.¹¹⁹ He argues that were this feudal approach applied to extraterritorial abortion enforcement, a state would have no authority to adjudicate abortions that occurred in other states.¹²⁰ However, despite its resemblance to Justice Kavanaugh’s vision of abortion travel rights, this absolutist, territory-based approach, rooted in feudalism, is wildly out of step with the last two-hundred years of American comity jurisprudence which, early in the nation’s history, had rejected English territorial approaches.¹²¹

The second was the “medieval statist” approach, which would distinguish between the statutes of “things” and the statutes of “persons.”¹²² Under this approach, land and contracts would be enforced territorially, while personal statuses like “marriage, legitimacy, majority, capacity, and nationality” created in one territory would have universal force wherever the person traveled.¹²³ Had American constitutionalism progressed in a “medieval statist” direction, Singer speculates that “the status of a pregnant person as a ‘mother’ might be created by a Missouri ‘personal statute’ that follows her to Illinois and might govern her rights and obligations as a mother and her capacity to assent to an abortion procedure.”¹²⁴

However, over time, the “Dutch comity approach,” based on Dutch scholar Ulrich Huber’s writings, became favored by early American courts.¹²⁵ This approach holds that one state’s laws should have no direct force on another, but rather, that the rights acquired in one jurisdiction should “retain their force everywhere so far as they do not cause prejudice to the power or rights of [a sovereign] or its subjects.”¹²⁶ For instance, wills, contracts, and marriages should retain effect universally, yet there are two notable exceptions: (1) those that are inherently invalid under natural law (such as incestuous marriages), or (2) if the parties went to the other state for the purpose of *evading* the forum’s regulatory laws, such as a minor traveling abroad to get married.¹²⁷ Were the “Dutch comity approach” applied to

118. *Id.* at 22.

119. *Id.* at 23.

120. *Id.* at 23–24.

121. *Id.* at 24; see also *supra* Section I.B for an overview of more contemporary conflict-of-law cases.

122. Singer, *supra* note 116, at 24.

123. *Id.*

124. *Id.* at 25–26.

125. *Id.* at 26–27.

126. *Id.* (alteration in original) (quoting ULRICH HUBER, *De Conflictu Legum Diversarum in Diversis Imperiis*, in *DE JURE CIVITATIS PART III* (2d ed. 1684)).

127. *Id.* at 27–28.

interstate abortion, it would mean that a pregnant person traveling out-of-state to obtain an abortion would indeed be deliberately acting to evade their domicile state's laws.¹²⁸ However, the examples used by Huber—wills, contracts, and marriages—are notably not criminal penalties for conduct that occurs entirely out of state, leaving an ambiguous outcome.¹²⁹

While these historical approaches at first glance seem irrelevant to contemporary abortion law conflicts, the Court in *Dobbs* based its reasoning on “history and tradition,” which included reaching back into early American history.¹³⁰ In the post-*Dobbs* era, unprecedented conflicts of interstate law may necessitate a return to these historic and traditional approaches for resolution. However, all of these old models of comity developed outside of the American system of federalism, where the fundamental rights of superseding national citizenship are invoked, making them ill-suited for the issue of extraterritorial abortion enforcement.¹³¹ Thus, the right to travel with its own unique history and tradition wrapped up in the pre- and post-Civil War era, is a better paradigm for untangling these comity disputes.¹³²

B. Extraterritorial Abortion Enforcement May Have Legal Justification

A potential justification for extraterritorial abortion enforcement is a principle called the “effects doctrine,”¹³³ which has emerged from the application of conflict-of-law principles to criminal prosecutions in cases where elements of a crime occur outside of the forum state if they are intended to, and do, cause harm within the state.¹³⁴ A prosecutor may cite a state's fetal personhood laws¹³⁵ to claim that a woman who obtains an out-of-state abortion kills a person who is legally recognized as a resident of the state, whom the state has a police power interest to protect.

The “effects doctrine,” for the purposes of criminal prosecution, was the result of the Supreme Court's holding in *Strassheim v. Daily*,¹³⁶ where the Court upheld a conviction of an Illinois resident who was indicted in Michigan for bribery and fraud after misrepresenting facts about secondhand

128. *Id.* at 29–30.

129. *Id.* at 30.

130. See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2235–36 (2022) (analyzing the role of abortion in the nation's “history and tradition”).

131. See *supra* Section II.B.

132. See *supra* Part II.

133. David S. Cohen et al., *The New Abortion Battleground*, 123 COLUM. L. REV. 1, 31–32 (2023).

134. *People v. Betts*, 103 P.3d 883, 887 (Cal. 2005).

135. See Ga. H.B. 481 § 2(3)-(4) (eds. n.3 at GA. CODE ANN. § 1-2-1 (2022)) (defining “unborn children” at any stage of development as a “class of living, distinct persons” deserving full legal protection).

136. 221 U.S. 280 (1911).

machinery he sold in Michigan.¹³⁷ The Supreme Court did not deem it necessary for a defendant to do *every* act necessary to complete the crime within the prosecuting state.¹³⁸ The Court determined that if someone commits an act outside of a state's jurisdiction, but did so with the intent to cause harm within their domiciled state, the state may punish them as if they were physically present at the time of the harm.¹³⁹

A similar conclusion was reached in *Skiriotos v. Florida*,¹⁴⁰ where the Supreme Court upheld Florida's application of a statute that criminalized sponge fishing for activity that occurred entirely out of its territorial waters.¹⁴¹ The Court reasoned that the federal government has inherent extraterritorial power over activities that occur by its citizens abroad or on the high seas.¹⁴² The Court believed that, except for the rights delegated to the national government, Florida retained all other rights of a sovereign entity, including regulating its citizens' conduct on the high seas.¹⁴³

Some commentators, such as Seth Kreimer, believe that *Skiriotos* should be understood to only apply to crimes within no other territorial jurisdiction.¹⁴⁴ However, Professor Mark Rosen notes that sister states can be comparable to foreign countries; therefore, a state recognized as a co-sovereign by the Constitution may have the authority to regulate the behavior of its citizens abroad just as the United States does.¹⁴⁵ He writes that "*Skiriotos* supports the conclusion that states enjoy such a presumptive power of extraterritorial regulation over their citizens."¹⁴⁶

The California Supreme Court in 2005 used the reasoning of *Strassheim* to uphold a conviction of a man who was convicted for sexually assaulting two of his newlywed wife's granddaughters, aged nine and eleven, while on a series of road trips outside of California.¹⁴⁷ The court considered that conduct relating to criminal activity frequently is not confined to the borders of a single state, and concluded that a state might exercise extraterritorial

137. *Id.* at 281.

138. *Id.* at 285.

139. *Id.* at 284–85.

140. 313 U.S. 69 (1941).

141. *Id.* at 76.

142. *Id.* at 73–74.

143. *Id.* at 77.

144. Seth F. Kreimer, "But Whoever Treasures Freedom . . .": *The Right to Travel and Extraterritorial Abortions*, 91 MICH. L. REV. 907, 925 (1993).

145. Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. PA. L. REV. 855, 869 (2002).

146. *Id.*

147. *People v. Betts*, 103 P.3d 883 (Cal. 2005).

jurisdiction over “criminal acts that take place outside of the state if the results of the crime are intended to, and do, cause harm within the state.”¹⁴⁸

A prosecutor can use this reasoning to argue for extraterritoriality in abortion cases, even without an explicit statute. If a state considers a fetus as a distinct human life,¹⁴⁹ then anyone who participates in destroying this life, from the pregnant patient who seeks an abortion to anyone who works at an out-of-state clinic or even anyone who helps a patient travel to the clinic, would be potentially liable for the harm caused to that life.¹⁵⁰

Professor Mark Rosen believes that this application would be consistent with constitutional principles, arguing that “‘travel-evasion’ . . . gives citizens the power to choose which state’s laws are to govern them on an issue-by-issue basis, [and] can cripple the ability of states to accomplish constitutional objectives.”¹⁵¹ He offers an example of a state that imposes a legal requirement for motorcyclists to wear helmets to protect their citizen’s health, and the state’s budget may be thwarted if its citizen is injured in a sister state without helmet laws.¹⁵²

Enforceability of extraterritorial anti-abortion policies is so challenging because the precedent-setting cases deal with issues of much smaller controversy. *Strassheim v. Daily* deals with bribery and fraud¹⁵³ and *Skiriotes v. Florida* deals with illegal sponge fishing,¹⁵⁴ both of which are significantly less politically contentious between the states as compared to abortion. This is, in part, why this Comment argues that the pre-Civil War comity crisis is the best precedent to examine controversies of such magnitude.¹⁵⁵ Nonetheless, even if one solely relies on the current body of case law, there may be sufficient justification for a court to uphold an extraterritorial enforcement action based on Professor Rosen’s theory of “travel evasion.”¹⁵⁶ Therefore, a better defense is to invoke larger constitutional liberties of

148. *Id.* at 887.

149. Ga. H.B. 481 § 2(3)-(4) (codified at GA. CODE ANN. § 1-2-1 (2022)).

150. Cohen et al., *supra* note 133, at 31.

151. Rosen, *supra* note 145, at 856–57; cf. William Van Alstyne, *Closing the Circle of Constitutional Review from Griswold v. Connecticut to Roe v. Wade: An Outline of a Decision Merely Overruling Roe*, 1989 DUKE L. J. 1677, 1684 n.27 (1989) (using an analogy of a parent who temporarily removes a child to a neighboring state to take advantage of more permissive child abuse laws as an explanation of why states have an interest in regulating the out-of-state conduct of its citizens).

152. Rosen, *supra* note 151, at 858. *But see* Lea Brilmayer, *Interstate Preemption: The Right to Travel, the Right to Life, and the Right to Die*, 91 MICH. L. REV. 887–88 (1993) (noting that a party’s domicile typically governs family law matters, while healthcare regulation is primarily based on territorial jurisdiction and balancing between the two, states would likely perceive a stronger interest in regulating abortions going on within the state).

153. 221 U.S. 280, 281 (1911).

154. 313 U.S. 69, 76 (1941).

155. *See generally infra* Part II.

156. Mark D. Rosen, *supra* note 145.

United States citizens, such as the right to travel.¹⁵⁷ Although this right-to-travel theory was bolstered by Justice Kavanaugh's concurrence in *Dobbs*,¹⁵⁸ the constitutionality of these extraterritorial anti-abortion laws is still being tested; therefore, in the meantime, states that wish to protect abortion within their borders need some defense against the real consequences of these laws to their citizens and visitors. One way that states have chosen to do this is to gum up the procedural machinery of out-of-state enforcement efforts.¹⁵⁹

C. There Is Wiggle Room in the "Full Faith and Credit" and "Extradition" Clauses that Provides Legal Justification for Abortion Shield Laws

Maryland is not the only state to attempt to enact laws that shield abortion travelers from other states' extraterritorial laws: California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Vermont, Washington, and the District of Columbia have all enacted some form of interstate shield policy, either through legislation or executive order that, to some degree, blocks anti-abortion enforcement from out of state.¹⁶⁰

Broadly speaking, there are nine features of abortion shield laws: (1) prohibiting nonfugitive extradition, (2) protecting interstate witnesses, (3) prohibiting the expenditure of state resources on another state's investigation, (4) limiting adverse professional licensing consequences, (5) protecting medical malpractice, (6) prohibiting disclosure of patients' confidential information, (7) blocking out-of-state judgments, including seizing assets within the protecting state, (8) allowing for the filing of lawsuits to claw back any damages for which an abortion provider would be liable in another state, and (9) applying protections for telehealth regardless of the patient's location.¹⁶¹

157. See *infra* Section II.D.

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

159. See *infra* Section II.C.

160. See *After Roe Fell: Abortion Laws by State*, CTR. FOR REPROD. RTS., <https://reproductiverights.org/maps/abortion-laws-by-state/> (last visited Apr. 13, 2024). To see the states with abortion shield laws currently in effect, on the left side of the map, under "Filter Map by Abortion Laws," select "Abortion Protections," then select the dropdown menu "Abortion Protections in Effect," and finally check the box "Interstate Shield," the map will update to only show states with shield laws in place. *Id.* For links to specific abortion shield statutes and executive orders, select a state from the map and select "Read More" from the left menu. *Id.*

161. Cohen et al., *supra* note 39.

1. *The “Penal” and “Public Policy” Exceptions to the Full Faith and Credit Clause Cover Many Scenarios That Abortion Shield Laws Hope to Negate*

The Constitution seems to quite clearly oppose laws that deny “Full Faith and Credit” to other states’ “public acts, records, and judicial proceedings.”¹⁶² Likewise, the Constitution makes a point to explicitly mandate that states extradite fugitives to a demanding state.¹⁶³ Yet abortion shield laws attempt to do exactly that; denying out-of-state extraditions, blocking out-of-state judgments, and refusing to issue subpoenas to out-of-state proceedings¹⁶⁴ all seem to be blatantly ignoring and repudiating the “public acts, records, and judicial proceedings” of a fellow state, not giving due “Full Faith and Credit” to them.¹⁶⁵ During the committee hearings for the Maryland Reproductive Health Protection Act, the Maryland Catholic Conference criticized the bill precisely for this reason, offering in written testimony: “This bill will set a dangerous precedent by running afoul of the Full Faith and Credit Clause . . . [o]ther States may respond in kind and ignore the laws of Maryland.”¹⁶⁶ The purpose of the clause is to ensure states are no longer “free to ignore rights and obligations created under the laws or established by the judicial proceedings of the others.”¹⁶⁷ If so, is the Maryland Catholic Conference’s criticism of Maryland’s shield law correct?¹⁶⁸

There is case law that may provide an exception to these clauses and allow states to enact these shielding laws. The first is *Huntingdon v. Attrill*,¹⁶⁹ though having nothing to do with abortion, this case provides some groundwork for justifying exceptions to the Full Faith and Credit Clause when a state is asked to carry out the penal laws of another state.¹⁷⁰ In *Huntingdon*, Collis Huntingdon, a New York resident, sued the Equitable Gaslight Company of Baltimore along with Henry Attrill, his wife, and three daughters, all of whom were Canadian shareholders of the Maryland-based

162. U.S. CONST. art. IV, § 1.

163. U.S. Const. art. IV, § 2 cl. 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.”).

164. Reproductive Health Protection Act, 2023 Md. Laws ch. 247.

165. U.S. CONST. art. IV, § 1.

166. *Reproductive Health Protection Act: Hearing on S.B. 859 Before the H. Judiciary Comm.*, 2023 Leg., 445th Sess. (Md. 2023) (written statement by the Md. Cath. Conf.), https://mgaleg.maryland.gov/cmte_testimony/2023/jud/1JtsEBw-pnN4nBSAERwHJqG2FJ11UvqfC.pdf [hereinafter Md. Cath. Conf. Testimony].

167. *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 439 (1943).

168. Md. Cath. Conf. Testimony *supra* note 166.

169. 146 U.S. 657 (1892).

170. *Id.* at 666.

utility company.¹⁷¹ Huntingdon alleged that in 1886 he had recovered \$100,240 from Attrill in a New York suit, which had not yet been satisfied.¹⁷² Attrill was the incorporator and director of the Rockaway Beach Improvement Company in New York, which had borrowed money from Huntingdon to be repaid on demand.¹⁷³ While serving as director, Attrill had fraudulently signed a certificate stating that the whole of the corporation's capital stock had been paid.¹⁷⁴ According to New York law, this fraudulent action made Attrill individually liable for all the company's debts incurred during his directorship.¹⁷⁵ About a month after the dissolution of the corporation, in an attempt to delay his creditors' forthcoming suits, Attrill purchased a large amount of stock in the Equitable Gaslight Company of Baltimore, which was transferred to his name as well as his wife and three daughters.¹⁷⁶ Huntingdon alleged that unless the stock transfers were set aside and annulled by the Circuit Court of Baltimore City, his rights would be deprived as a creditor under the New York statute.¹⁷⁷

In part, the U.S. Supreme Court granted certiorari to answer the question of whether Maryland's refusal to enforce a New York judgment violated the Constitution's Full Faith and Credit Clause.¹⁷⁸ The Court concluded that the primary thrust of the New York statute was not punitive in nature, and therefore, the Full Faith and Credit Clause *should* apply to the Maryland Court.¹⁷⁹ Although the decision did not, in this particular instance, uphold an exception to Full Faith and Credit, it did establish a *penal exception* principle that may be relied upon by states seeking to protect abortion rights: "Crimes and offences against the laws of any State can only be defined, prosecuted and pardoned by the sovereign authority of that State; and the authorities, legislative, executive, or judicial, of other States take no action with regard to them, except by way of extradition . . ." ¹⁸⁰ In applying *Huntingdon's* penal exception logic to extra-territorial abortion enforcement, Maryland would not owe Full Faith and Credit to criminal laws like Idaho's "abortion

171. *Id.* at 660.

172. *Id.*

173. *Id.* at 660–61.

174. *Id.*

175. *Id.* at 661.

176. *Id.* at 662.

177. *Id.*

178. *Id.* at 666.

179. *Id.* at 674.

180. *Id.* at 669.

trafficking” law,¹⁸¹ however, this logic would *not* apply to laws which create a private cause of action like Texas’s S.B. 8.¹⁸²

To cover civil proceedings, Maryland may look towards a second area of wiggle room within Full Faith and Credit: the *public policy* exception, which, given abortion’s nature as a “rancorous national controversy” may be a fruitful defense.¹⁸³ *Pacific Employers Insurance Co. v. Industrial Accident Commission*¹⁸⁴ and *Nevada v. Hall*¹⁸⁵ lay the groundwork for this exception, holding that the Full Faith and Credit Clause will not require states in choice-of-law matters to apply other states’ laws if those laws violate a legitimate public policy interest.¹⁸⁶

A major limitation to the *public policy* exception comes from the 1998 case *Baker v. General Motors*.¹⁸⁷ In *Baker*, the Court clarified that cases like *Hall* and *Pacific Employers* only apply in choice-of-law cases—when a court is asked to use out-of-state laws in its own proceedings.¹⁸⁸ This is different from recognizing an out-of-state court’s judgment; judgments, even hostile judgments, *must* be honored in full faith and credit by other states.¹⁸⁹ The Court cited *Fauntleroy v. Lum*,¹⁹⁰ which held that a judgment of a Missouri court was entitled to full faith and credit in Mississippi, even if the Missouri judgment rested on a misapprehension of Mississippi law. According to the *Baker* Court, the “Full Faith and Credit Clause does not compel ‘a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.’”¹⁹¹ However, “[r]egarding judgements . . . the full faith and credit obligation is *exact*ing . . . judgement of the rendering State gains *nationwide force*.”¹⁹² This reasoning seems to be a deathblow for many provisions of abortion shield laws. While the Maryland Reproductive Health Protection Act is

181. H.B. 242, 67th Leg., Reg. Sess. (Idaho 2023) (codified at IDAHO CODE § 18-623 (2023)).

182. S.B. 8, 86th Gen. Assemb., Reg. Sess. (Tex. 2021) (codified as amended at TEX. HEALTH & SAFETY CODE ANN. §§ 171.201–212 (West 2022)); *see also* *Huntington*, 146 U.S. at 667–68 (clarifying that although statutes giving a private cause action are often described as “penal in their nature,” these are, in fact, “remedial laws;” these laws differ from true penal laws which impose punishment for wrongdoing against the State and are governed by “the executive of the State” who “has the power to pardon”).

183. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2279 (2022).

184. 306 U.S. 493, 501 (1939).

185. 440 U.S. 410 (1979) (overruled on other grounds by *Franchise Tax Board of California v. Hyatt*, 139 S. Ct. 1485 (2019)).

186. *Id.* at 422.

187. 522 U.S. 222 (1998).

188. *Id.* at 233–34.

189. *Id.*

190. 210 U.S. 230 (1908).

191. *Baker*, 522 U.S. at 232 (quoting *Pacific Employers Ins. Co. v. Indus. Accident Comm’n*, 306 U.S. 493, 501 (1939)).

192. *Id.* at 233 (emphasis added).

skillful in avoiding use of the word “judgment” anywhere within its text,¹⁹³ just because a Maryland judge does not require a person to give testimony or produce evidence in a case certainly does not prevent an unfavorable final judgment from being rendered in the demanding state.¹⁹⁴ So does this limitation to the *public policy* exception render Maryland law unconstitutional?

According to Professor Roberta Lea Brilmayer, not necessarily: Full Faith and Credit only specifically references to *judicial proceedings*, and that “judicial” has a special meaning in accordance with Article III of the Constitution¹⁹⁵ She argues that anti-abortion bills with private enforcement clauses, such as S.B. 8,¹⁹⁶ may indeed result in proceedings, but they are not actually *judicial* proceedings because the statute does not require the civil enforcer to have suffered any “concrete harm” from the abortion in question.¹⁹⁷ “Concrete harm” is constitutionally necessary for standing, and thus needed for a proceeding to qualify as a “case or controversy” under Article III; therefore, according to Professor Brilmayer: “In making these disputes peculiar enough to escape the threat of federal court injunction, the Texas legislature had to make them so unlike ordinary cases that they no longer qualify for federal guarantees of interstate enforcement.”¹⁹⁸ This narrow articulation of Full Faith and Credit, only binding final judgements that have had the opportunity to undergo judicial review, would also exempt other legal procedures that are ancillary to judicial proceedings, but similarly do not undergo judicial review before issuance, such as subpoenas issued by attorneys—a key component of extraterritorial anti-abortion laws with civil enforcement provisions.¹⁹⁹

193. See generally Reproductive Health Protection Act, 2023 Md. Laws ch. 247.

194. See MD. CODE ANN., CTS. & JUD. PROC. § 9-402(a)(2)(II) (requiring the issuer of a foreign subpoena to certify that “no portion of the subpoena is intended or anticipated to further any investigation or proceeding related to legally protected health care . . .”).

195. Roberta Lea Brilmayer, *Abortion, Full Faith and Credit, and the “Judicial Power” Under Article III* (2023) (unpublished), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4352225 (differentiating between judicial proceedings which meet Article III’s definition of “case or controversy,” and therefore *do* require Full Faith and Credit, from advisory opinions that do not require an actual case to arise on the issue, and therefore *do not* bind other states); see also *id.* at 46 (arguing that the term “judicial” was put into Article III precisely to address the concerns of those who feared uncontrolled growth of the judiciary).

196. S.B. 8, 86th Gen. Assemb., Reg. Sess. (Tex. 2021) (codified as amended at TEX. HEALTH & SAFETY CODE ANN. §§ 171.201–212 (West 2022)).

197. Brilmayer, *supra* note 195, at 50.

198. *Id.* at 51.

199. See Haley Amster, *Abortion, Blocking Laws, and the Full Faith and Credit Clause*, 76 STAN. L. REV. ONLINE 110, 115–16 (2024) (highlighting precedent which exempts legal process, such as subpoenas, from the Full Faith and Credit as they are not final judgements and often do not undergo judicial review (citing *Hyatt v. California Franchise Tax Board*, 962 N.Y.S.2d 282 (N.Y. App. Div. 2013))).

2. *While the Extradition Clause Requires the Return of Interstate Fugitives, Governors Can Exercise Discretion When the Alleged Crime Is Committed Outside the Demanding State*

The Extradition Clause has three prime cases that have evaluated its limits. The first, *Kentucky v. Dennison*,²⁰⁰ applies an older-style comity doctrine to the Extradition Clause.²⁰¹ In this 1861 antebellum case, Kentucky filed a motion for extradition with the Governor of Ohio to turn over a fugitive that the court had deemed helped an enslaved person escape to freedom.²⁰² The Court ruled that though the Extradition Clause of the Constitution obligated the Governor to extradite, “there is no power delegated to the General Government . . . to use any coercive means to compel him.”²⁰³

Dennison, was eventually overturned in 1987 by *Puerto Rico v. Branstad*.²⁰⁴ In *Branstad*, Ronald Calder struck two people with his automobile in San Juan, Puerto Rico.²⁰⁵ After being charged with first-degree murder, arrested, arraigned, and released on bail, he fled the territory and returned home to his family in Iowa.²⁰⁶ The Governor of Puerto Rico requested extradition from the Governor of Iowa.²⁰⁷ However, the Governor of Iowa did not deem the Puerto Rican charges reasonable and denied the extradition unless Puerto Rico reduced the charges.²⁰⁸ The Court held that commands of the Extradition Clause are mandatory and afford no discretion to the executive officers or courts of the asylum state.²⁰⁹

A third case, *Hyatt v. People ex rel. Corkran*,²¹⁰ establishes a theory that abortion shielding laws can find some room to block extraterritorial enforcement. In *Hyatt*, the Court held that whether the person demanded was a fugitive from the justice of the state is an issue of fact, and the Governor is thus entitled to demand that evidence be presented before authorizing the extradition.²¹¹ This means that states may *only* demand extradition for individuals who are actual fugitives *from* the state and had “an actual

200. 65 U.S. 66 (1861).

201. *See supra* Section I.A.

202. *Dennison*, 65 U.S. at 83–84.

203. *Id.* at 109–10.

204. 483 U.S. 219 (1987).

205. *Id.* at 221.

206. *Id.* at 221–22.

207. *Id.*

208. *Id.*

209. *Id.* at 227.

210. 188 U.S. 691 (1903).

211. *Id.* at 706.

presence in and departure from the demanding State,” all other extraditions are based on comity between the states and are thus *permissive*.²¹²

The Full Faith and Credit and Extradition Clauses are fruitful places to challenge abortion shield laws; the *Hyatt* Court clearly stated that the Full Faith and Credit Clause is intended to be “exacting.”²¹³ However, through a combination of the *penal law exception*²¹⁴ and the *public policy exception*²¹⁵ to the Full Faith and Credit Clause, and exceptions for non-fugitives in the Extradition Clause, Maryland’s abortion shield law may narrowly survive such challenges. It is ironic that anti-abortion shield laws invoke state sovereignty at the expense of national unity then seek to defend their policy action with clauses created for the purpose of “transforming an aggregation of independent, sovereign States into a nation.”²¹⁶ Well, states with abortion shield laws can play at that game too.

II. ANALYSIS

This Part will examine how the framers of the Reconstruction Amendments, tasked with resolving similar comity issues,²¹⁷ hoped to reorient American identity towards a superseding citizenship, specifically to prevent vulnerable citizens from being at the mercy of states whose interests involved restricting their freedom of movement.²¹⁸ Next, this Part will return to today and discuss how this constitutionalism affects modern interstate abortion cases,²¹⁹ and as a result, why this constitutionalism means that Maryland’s Reproductive Health Protection Act should prevail in the interstate comity war.²²⁰

A. The Framers of the Reconstruction Amendments Dealt With Similar Comity Issues

The American Civil War was, in many ways, a notable example of enduring comity disputes.²²¹ The ratification of the Constitution did not

212. *Id.* See generally *Innes v. Tobin*, 240 U.S. 127 (1916); *Clipper v. State*, 295 Md. 303, 455 A.2d 973 (1983); *Utt v. State*, 293 Md. 271, 443 A.2d 582 (1982) (establishing that the extradition clause only applies to “fugitives from justice,” and therefore does not put any obligations on states to extradite others).

213. *Baker v. General Motors*, 522 U.S. 222, 233 (1998).

214. See *supra* notes 170–182 and accompanying text.

215. See *supra* notes 183–196 and accompanying text.

216. *Baker*, 522 U.S. at 234 (quoting *Sheerer v. Sheerer*, 334 U.S. 343, 355 (1948)).

217. See *infra* Section II.A.

218. See *supra* Section I.B.

219. See *supra* Section I.C.

220. See *supra* Section I.D.

221. See FINKELMAN, *supra* note 56, at 30 (describing how interstate comity disputes played a part in the lead-up to the American Civil War).

provide the security that slave states had been hoping for.²²² Although it implicitly recognized slavery, it did not oblige other states to recognize it.²²³ Northern and Southern states alike accused each other of violating interstate comity in the movement of free and enslaved persons across the borders.²²⁴

The 1860 *Lemmon Slave Case*²²⁵ was “the culmination of a long and intense conflict over the place of slavery within the legal framework of the Union.”²²⁶ Jonathan and Juliet Lemmon were moving with their eight slaves from Norfolk, Virginia, to resettle in Texas, both slaveholding states.²²⁷ Their itinerary required them to first travel to New York by steamship and then board a separate steamship to Texas.²²⁸ The ship to Texas would not leave until the morning, so the Lemmons booked a hotel room in New York for their eight slaves and a separate one for themselves.²²⁹ Alerted to their arrival, an activist with the Underground Railroad presented a petition for a writ of *habeas corpus* to emancipate the slaves, as they had set foot in a free state.²³⁰ The New York court held that the Lemmons could not demand that a free state uphold the property rights granted by a slaveholding state.²³¹ The South saw *Lemmon* as an unconstitutional hindrance to the right to travel; South Carolina even alludes to this perceived injustice in its declaration of secession.²³²

Southern outrage at cases like *Lemmon* was ironic, considering that they had used their own racist policy goals to restrict the right to travel for free Black Northerners within their borders even more than New York had done for enslavers.²³³ Professor Paul Finkelman illustrates this one-way hypocritical Southern understanding of states’ rights:

[S]ince the 1820s, South Carolina had successfully refused to allow northern free black sailors to enter its ports. Almost every other southern state with an ocean port passed a similar black seamen’s law. Under these laws, free black sailors were jailed while their ships were in southern ports and were only released when the ship

222. *Id.* at 30.

223. *Id.*

224. See *infra* notes 180–82 and accompanying text.

225. *Lemmon v. People*, 20 N.Y. 562 (1860).

226. FINKELMAN, *supra* note 56, at 310.

227. *Lemmon*, 20 N.Y. at 599–600.

228. *Id.* at 599.

229. *Id.* at 599–600.

230. *Id.*

231. *Id.* at 610.

232. See DECLARATION OF THE IMMEDIATE CAUSES WHICH INDUCE AND JUSTIFY THE SECESSION OF SOUTH CAROLINA FROM THE FEDERAL UNION (1861) (“In the State of New York even the right of transit for a slave has been denied by her tribunals . . .”).

233. Paul Finkelman, *States’ Rights, Southern Hypocrisy, and the Crisis of the Union*, 45 AKRON L. REV. 449, 474 (2012).

was about to sail, *if* the ship captain paid the jailer for feeding and housing these sailors. Although believing such laws violated the Commerce Clause, the Supremacy Clause, and the treaty power, Justice William Johnson, while riding circuit, refused to interfere with the enforcement of these laws. The southern states insisted that states' rights empowered them to arrest free black sailors (or any other free blacks) entering their jurisdiction. In the 1840s, Massachusetts sent commissioners to South Carolina and Louisiana to negotiate some accommodation for free black sailors from the North, but both states refused to meet with the commissioners and basically expelled them.²³⁴

The lack of freedom to travel was also starkly felt by legally emancipated Black Northerners, who were unlikely ever to return to the South where their new status could easily be jeopardized.²³⁵ In *Mitchell v. Wells*,²³⁶ Edward Wells, a Mississippi planter, traveled to Ohio to emancipate an enslaved woman named Nancy Wells, who was also his daughter.²³⁷ After Edward died, he bequeathed some of his property to Nancy from his estate, which she sought to recover in Mississippi after his death.²³⁸ The court in Mississippi refused to recognize her manumission in Ohio, claiming that it was the public policy of Mississippi to discourage the growth of a free black population and accused Ohio of violating interstate comity by “minister[ing] to emancipation and the abolition of our institution of slavery, by such unkind, disrespectful, lawless interference with our local rights.”²³⁹ Yet, in its accusation, Mississippi itself was refusing to extend comity to Ohio's recognition of Wells's freedom.²⁴⁰

This history demonstrates the profound consequences of a lack of comity between states: a severe reduction in freedom of movement, both as perceived by Southerners who wished to travel with those they enslaved, and even more starkly felt by free Black people in the North who risked imprisonment, enslavement, or re-enslavement were they ever to travel South.²⁴¹

B. The Post-Civil War Framers Were Concerned About Policies that Restricted the Right to Travel as Such Policies Were “Badges and

234. *Id.* at 473–74 (emphasis in original).

235. FINKELMAN, *supra* note 56, at 181.

236. *Mitchell v. Wells*, 37 Miss. 235 (1859) (enslaved party).

237. *Id.* at 250–51.

238. *Id.* at 235.

239. *Id.* at 262–63.

240. FINKELMAN, *supra* note 56, at 34.

241. *See supra* notes 235–240 and accompanying text.

*Incidents” of Slavery and Infringed Upon the Privileges of National
Citizenship*

The framers of the Reconstruction Amendments were by no means incrementalists; they had just gone through the Civil War, which offered a major doctrinal redefinition of American constitutionalism.²⁴² When considering the Amendment, Representative George Yeaman of Kentucky noted: “The perpetuity of slavery is not the issue. That issue was made up four years ago, and the case has been decided against the institution”²⁴³ Professor William Carter has characterized this to mean that at the time of the Thirteenth Amendment’s consideration, slavery was over as a practical matter: The framers had a larger purpose in mind.²⁴⁴ Carter notes that the difficulty in passing the Amendment was not due to its purpose of abolishing slavery, but instead because of the federal authority that it granted to guarantee the rights of the newly freed.²⁴⁵ Representative Robert Mallory of Kentucky outlined that his concern with the Amendment was federalization: “You do not intend . . . to leave [the freedmen] to the tender mercies of those states.”²⁴⁶

To understand the power that Congress believed the Thirteenth Amendment granted it, it is vital to examine the actions that they took under it. An early example is the Second Freedmen’s Bureau Bill, which was intended to be temporary, but had the purpose of enforcing the Thirteenth Amendment by “provid[ing] goods, services, and protection to freedmen and others to ease their transition from slavery to freedom or to prevent them from sliding back into a permanent state of destitution and dependence.”²⁴⁷ The post-War Congress deemed destitution and dependence as extensions of the institution of slavery itself, and thus fair for Congress to abolish via the power granted to them by the Thirteenth Amendment.²⁴⁸ The bill would have provided land, schools, military protection, and a special jurisdiction for

242. See Baher Azmy, *Unshackling the Thirteenth Amendment: Modern Slavery and a Reconstructed Civil Rights Agenda*, 71 *FORDHAM L. REV.* 981, 983 (2002) (“The enactors of the Thirteenth Amendment, radicalized by the Civil War, intended the Amendment to do far more than permanently emancipate four million men.”).

243. William M. Carter, *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 *HARV. C.R.-C.L. L. REV.* 17, 48 (2004) (quoting *Cong. Globe*, 38th Cong., 2d Sess. 170 (1865), reprinted in *THE RECONSTRUCTION AMENDMENTS’ DEBATES* 82 (Alfred Avins ed., 1967)).

244. *Id.*

245. *Id.* at 49.

246. Jacobus tenBroek, *Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment*, 39 *CAL. L. REV.* 171, 175 (1951).

247. Mark A. Graber, *The Second Freedmen’s Bureau Bill’s Constitution*, 93 *TEX. L. REV.* 1361, 1366 (2016).

248. *Id.* at 1366–67.

freedmen controversies to keep the matters of the newly freed citizens out of the hands of state courts.²⁴⁹

The Second Freedman's Bureau Bill was vetoed by President Andrew Johnson, and the attempt to override the veto in the Senate fell just short of the two-thirds requirement²⁵⁰ The revised bill, which passed, and eventually became the template for the Fourteenth Amendment itself, was the Civil Rights Act of 1866, which contained all the provisions of the Freedman's Bureau Bill except that "[n]o provision . . . authorizes government officials to provide goods and services to anyone."²⁵¹ Although the bill had to be significantly watered down to pass, the breadth of its original version is indicative of the framers' intent for the Thirteenth Amendment. It is telling that the same Congress that ratified the Amendment mere months prior, immediately attempted to enact far-sweeping social justice policy based on the belief that the Amendment had granted them the authority to eradicate slavery and its badges and incidents.²⁵²

One of the "badges and incidents" of slavery that the framers thought to be a legitimate target of the Thirteenth Amendment was the Black Codes: Massachusetts Senator Henry Wilson, abolitionist and sponsor of the Second Freedman's Bureau Bill, stated that "no black laws nor unfriendly legislation shall linger on the statute-book of any Commonwealth in America."²⁵³ One exceptionally common and unique feature of the Black Codes was an abrogation of the right to travel.²⁵⁴ Even in the postbellum era, the promises of cheap labor for rich landowners continued to motivate legal restrictions on Black travel, notably by creating sets of legal principles to tie newly freed Black Americans to the land:

The network consisted of lien laws for landlords, vagrancy laws, enticement laws (which made it a crime to lure workers from their jobs, even by offering them better wages and conditions), laws against "emigrant agents," who were more or less labor brokers, and even laws that made it a crime to quit work "fraudulently."²⁵⁵

Further, mob violence from groups like the Ku Klux Klan actively monitored and regulated the ability of Black people to leave their home

249. *Id.* at 1368.

250. *Id.* at 1367.

251. *Id.* at 1369.

252. *Id.* at 1402.

253. *Id.* at 1389 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 344, 112 (1865) (statement of Sen. Wilson)).

254. See Mitchell F. Crusto, *Enslaved Constitution: Obstructing the Freedom to Travel*, 70 U. PITT. L. REV. 233, 263 (2008) (detailing how Black Codes significantly restricted and limited the rights of Black travelers).

255. *Id.* at 270 n. 176 (quoting LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 383 (2005)).

states.²⁵⁶ These are the things that the Republicans who ratified the Thirteenth Amendment believed to be ancillary to slavery—restrictions upon travel, and thus within the purview of the Thirteenth Amendment to ban.²⁵⁷ The ability of someone to travel to another state to take advantage of favorable laws or social conditions to better their lives is precisely what the Black Codes forbade.²⁵⁸

The Amendment’s protections against involuntary servitude extended to the right to travel, which is imperiled in these conflict-of-law cases.²⁵⁹ The Court in *Jones v. Alfred H. Mayer Co.*²⁶⁰ held that Section 2 of the Thirteenth Amendment empowers Congress not only to outlaw slavery, but also its “badges and incidents.”²⁶¹ Though it is clear that Section 1, the clause that ended involuntary servitude,²⁶² is self-executing,²⁶³ to what extent the framers considered various things to be “incident” to the institution has been the subject of much scholarly debate.²⁶⁴

Constitutional scholars, such as Professor James Gray Pope, have argued that the “badges and incidents” analysis *also* belongs under Section 1—meaning that the Thirteenth Amendment itself outlaws the “badges and incidents of slavery,” and thus there is no need to wait for explicit congressional action.²⁶⁵ While these badges and incidents have historically only been applied to race-based classifications, it is worth noting that the close ties between the early feminist and abolition movements may connect the Thirteenth Amendment—along with its badges and incidents analysis—with all manner of caste-based oppression, not just slavery.²⁶⁶

Scholars have supposed that the “badges and incidents” have covered all manner of social equality issues, from coercion to a badge and incident.²⁶⁷

256. *Id.* at 271.

257. *See supra* text accompanying note 269.

258. *See* Crusto, *supra* note 254, at 263.

259. *See supra* text accompanying notes 84–91.

260. 392 U.S. 409 (1968).

261. *Id.* at 441–42.

262. U.S. CONST. amend. XIII, § 1.

263. *The Civil Rights Cases*, 109 U.S. 3, 20 (1883).

264. *See infra* Section II.D.

265. *See, e.g.*, James Gray Pope, *Section 1 of the Thirteenth Amendment and the Badges and Incidents of Slavery*, 65 UCLA L. REV. 426, 426 (2018).

266. *See, e.g.*, Alexander Tthesis, *Gender Discrimination and the Thirteenth Amendment*, 112 COLUM. L. REV. 1641, 1661–68 (2012) (linking the early abolitionist movement to the early suffrage movement by highlighting the widespread comparison between the conditions of women and the conditions of enslaved people by both abolitionists and suffragists before and after the ratification of the Thirteenth Amendment).

267. Pamela D. Bridgewater, *Reproductive Freedom as Civil Freedom: The Thirteenth Amendment’s Role in the Struggle for Reproductive Rights*, 3 J. GENDER RACE & JUST. 401, 409–10 (2000) (connecting abortion restrictions to the badges and incidents of slavery that forced enslaved women to reproduce in order to increase the financial standing of their enslavers).

However, Professor Jennifer Mason McAward has a more limited view, saying that there are two criteria to make something a badge or incident: First, it must mirror a historical incident of slavery, and second, the conduct must pose a risk of causing the renewed legal subjugation of the targeted class.²⁶⁸ McAward takes a more originalist approach and believes that a badges and incidents analysis should only consider race, color, or previous condition of servitude, borrowing language from the Fifteenth Amendment.²⁶⁹ She argues for this narrow reading because of the specific historical context of racialized chattel slavery that the Amendment intended to deal with.²⁷⁰ Under this reasoning, “badges and incidents” may never be applied to conditions such as sex trafficking and violence against women²⁷¹ unless they are premised upon a race-based classification. If sex trafficking and violence against women are a stretch for the Thirteenth Amendment, it would *especially* not extend to abortion rights.

McAward’s approach seems to be misaligned with the more expansive approach that our system of jurisprudence has traditionally used to deal with Civil Rights issues under the Fourteenth Amendment.²⁷² Though passed under identical circumstances to the Thirteenth, the Fourteenth Amendment has been used to uphold everything from gay marriage²⁷³ to gun rights.²⁷⁴ Why then deny the Thirteenth Amendment the same scope of rooting out systems of historical oppression? Surely, the framers of the Thirteenth Amendment would have expected the provision to put a kibosh on a system of involuntary servitude were it to rearise on the basis of something *other* than race—say, religion or ethnicity.²⁷⁵

Professor Nicholas Serafin has a more appropriate approach that characterizes badges and incidents as “signifiers of subordinate social status.”²⁷⁶ This allows for the Thirteenth Amendment to take its rightful place as a flagbearer for Civil Rights in general, a tool to push the law toward a

268. Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 U. PA. J. CONST. L. 561, 622 (2012).

269. U.S. CONST. amend. XV, § 1 (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”).

270. McAward, *supra* note 268, at 613–14.

271. See Kylee M. Petritsch, *A Thirteenth Amendment Approach to the Reauthorization of the Violence Against Women Act*, 1 MACKSEY J. 1 (2020) (describing violence against women as being a badge and incident).

272. See *supra* note 95 and accompanying text.

273. *Obergefell v. Hodges*, 576 U.S. 644, 633 (2015).

274. *District of Columbia v. Heller*, 554 U.S. 570, 616 (2008).

275. See McAward, *supra* note 268, at n.246 (implying that Senator Trumbull introduced the bill on the premises that it would apply to everyone, not just former slaves).

276. Nicholas Serafin, *Redefining the Badges of Slavery*, 56 U. RICH. L. REV. 1291, 1317 (2022).

more equitable future, not just a relic of a dark and troubled past.²⁷⁷ It recognizes that the purpose of the Amendment, originally crafted by radical Republicans and abolitionists, was to create a “radically new ‘Re-constructed’ constitutional system,” which can be a source of progress and liberation today.²⁷⁸

The right to travel is an inherent right of citizenship, which was understood at the time of the framing of the Thirteenth Amendment as being essential to United States citizenship.²⁷⁹ The 1867 case, *Crandall v. Nevada*,²⁸⁰ describes travel as an inherent right to citizens. In *Crandall*, the State of Nevada implemented a tax on all persons leaving the state.²⁸¹ The majority emphasized the importance of its decision to embed the inherent right to travel within the notion of national citizenship: “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.”²⁸²

The notion of national citizenship implies the right to interact directly with the national government on one’s own terms without the intervention of the state government.²⁸³ This is an essential aspect of liberty protected by the Fifth²⁸⁴ and Fourteenth Amendments²⁸⁵ and it means that a state may “neither tax nor penalize a citizen for exercising his right to leave one State and enter another.”²⁸⁶

277. See generally Michael Scimone, Comment, *More to Lose Than Your Chains: Realizing the Ideals of the Thirteenth Amendment*, 12 N.Y. CITY L. REV. 175 (2008) (arguing that the Thirteenth Amendment was passed under a regime where radical Republicans dominating Congress attempted to push expansive social change, and thus, applying an originalist, limited reading of the document does little justice to the framers’ more expansive vision); Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 438 (1989) (interpreting the Thirteenth Amendment in the broader context of employee autonomy and independence and arguing that it can be a tool for labor reform).

278. Brence D. Pernell, *The Thirteenth Amendment and Equal Educational Opportunity*, 39 YALE L. & POL’Y REV. 420, 523 (2021).

279. See *infra* notes 280–282.

280. 73 U.S. 35 (1867).

281. *Id.* at 37.

282. *Id.* at 49.

283. See *Slaughter-House Cases*, 83 U.S. 36, 79 (1872) (“It is said to be the right of the citizen of this great country . . . to come to the seat of government to assert any claim he may have . . . to transact any business he may have with it . . .”) (internal quotations omitted).

284. U.S. CONST. amend. V.

285. U.S. CONST. amend. XIV.

286. *Jones v. Helms*, 452 U.S. 412, 418–19 (1981); see *id.* (detailing two exceptions: (1) those convicted of a crime within a State and (2) those who commit a crime within a state and attempt to flee, and noting that none of these exceptions include crossing state lines to partake in a legal activity that is illegal in one’s home state).

C. The Privileges of National Citizenship is a Factor in Modern Abortion Cases

Only two cases decided after *Roe*, one national and one in Missouri, have addressed whether states can penalize out-of-state abortion conduct.²⁸⁷ The first is *Bigelow v. Virginia*,²⁸⁸ which explicitly tackled the issue of extraterritoriality regarding abortion access. In 1971, two years before *Roe* was decided, the Virginia Weekly newspaper published an advertisement for a New York abortion clinic to encourage Virginians to come to New York to terminate their unwanted pregnancies.²⁸⁹ The ad specifically referenced the fact that abortions are legal in New York and there are no residency requirements.²⁹⁰ Jeffery Bigelow, the director and managing editor of the newspaper, was charged with violating a Virginia statute that made it a misdemeanor to publish any material that encouraged or prompted the procuring of abortion or miscarriage.²⁹¹

The Court's decision in *Bigelow* was primarily decided on First Amendment grounds, clarifying that commercial speech is given the same constitutional protection as political speech.²⁹² The Court explicitly expressed concern about extraterritoriality, expressing that "advancing an interest in shielding its citizens from information about activities outside Virginia's borders, activities that Virginia's police powers do not reach . . . was entitled to little, if any, weight under the circumstances."²⁹³

Building off of *Bigelow* is *Planned Parenthood of Kansas v. Nixon*,²⁹⁴ which was decided by the Missouri Supreme Court and thus is only applicable to Missouri law.²⁹⁵ However, it does explicitly apply the reasoning of *Bigelow* to determine whether minors have the right to travel out of state to obtain an abortion.²⁹⁶ In *Nixon*, abortion providers challenged the constitutionality of a Missouri statute that created a civil cause of action against any person who intentionally caused, aided, or assisted a minor in obtaining an abortion without parental consent or a judicial bypass.²⁹⁷

The court held that a right to travel comprises three different components:

287. Cohen et al, *supra* note 133, at 27–28.

288. 421 U.S. 809 (1975).

289. *Id.* at 812.

290. *Id.*

291. *Id.*

292. *Id.* at 825.

293. *Id.* at 827–28.

294. 220 S.W.3d 735 (Mo. 2007).

295. Cohen et al., *supra* note 133 39, at 28–30.

296. *Nixon*, S.W.3d at 742.

297. *Id.* at 735–36.

(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.”²⁹⁸

The *Nixon* court, applying *Bigelow*, stated that:

[I]t is beyond Missouri’s authority to regulate conduct that occurs wholly outside of Missouri, and [the statute] 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.²⁹⁹

The court held that the Missouri abortion restrictions were constitutional at the time, per the *undue burden* rule of *Casey*,³⁰⁰ yet refused to interpret the statute as applying to any conduct that occurs wholly outside Missouri.³⁰¹ However, the court held that the statute had the authority to regulate conduct that occurred at least partly in Missouri.³⁰² This holding does not clearly define “partly,” though it raises the question of whether the statute could hold an adult liable for merely transporting a minor to the Missouri border to obtain an abortion on the other side.³⁰³ That would effectively fit within the definition of “at least in part in Missouri,” but the court in *Nixon* does not give a clear answer.³⁰⁴

The privilege of a supervening citizenship to take advantage of favorable law was further bolstered in *Doe v. Bolton*,³⁰⁵ where the Court held that a state statute prohibiting abortions to out-of-state residents was a violation of the Privileges and Immunities Clause of the Constitution.³⁰⁶ Section 1 of the Fourteenth Amendment establishes United States citizenship as superior to state citizenship: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States”³⁰⁷ Therefore, the right to travel is a privilege of United States citizenship, which states are bound to respect by the Fourteenth Amendment.³⁰⁸

298. *Id.* at 744 (quoting *Saenz v. Roe*, 526 U.S. 489, 500 (1999)).

299. *Id.* at 742.

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

301. *Id.* at 745.

302. *Id.* at 743.

303. Cohen et al., *supra* note 133, at 28–30.

304. *Id.* at 28.

305. 410 U.S. 179 (1973).

306. *Id.* at 200.

307. U.S. CONST. amend. XIV § 1.

308. *See Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 510 (1939) (“The first sentence of the Amendment settled the old controversy . . . citizenship of the United States became primary and

In short, the question of abortion travel should have been solved by *Bigelow*,³⁰⁹ *Nixon*,³¹⁰ and *Bolton*.³¹¹ However, in the wake of *Dobbs* any precedent which relies, even in a small part, on the notion of a constitutional right to abortion may be subject to scrutiny and thus liable to be overturned.³¹² However, these cases leave enough room outside of their relationship to abortion to be instructive on the existence of a right to travel to take advantage of favorable laws in other states.³¹³ It is precisely this landscape of strongly protected federal rights to travel, supported by these cases, which the Maryland Reproductive Health Protection Act attempts to invoke.³¹⁴

D. The Reproductive Health Protection Act is a Constitutional Exercise of Resistance

This Section returns the analysis to Maryland and the Reproductive Health Protection Act.³¹⁵ On its surface, this Act seems to be yet another bullet in the interstate comity war over abortion—further endangering cooperation between the states and threatening national unity.³¹⁶ Regardless of whether the framers of this Maryland statute agreed or disagreed with *Dobbs*, the purpose of the law is well-aligned with Justice Alito’s self-professed goal of returning the issue of abortion to the states.³¹⁷ In fact, the Maryland General Assembly explicitly acknowledged that *Dobbs* had allowed the State to *expand* the scope of its abortion protections.³¹⁸

citizenship of a State secondary.”); *Edwards v. California*, 314 U.S. 160, 182 (1941) (characterizing the Fourteenth Amendment as “mak[ing] United States citizenship the dominant and paramount allegiance among us”).

309. 421 U.S. 809 (1975).

310. 220 S.W.3d 735 (Mo. 2007).

311. 421 U.S. 809 (1975).

312. 142 S. Ct. 2228 (2022)

313. *See supra* notes 106–119.

314. *See supra* Part III.D.

315. Reproductive Health Protection Act, 2023 Md. Laws ch. 247.

316. *See supra* notes 32–44 and accompanying text.

317. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct., 2228, 2284 (2022).

318. DEP’T LEGIS. SERVS., MD. GEN. ASSEMB., THE 90 DAY REPORT: A REVIEW OF THE 2023 LEGISLATIVE SESSION, at J-1 (Md. 2023) (“After *Dobbs*, Maryland is authorized to enact additional laws protecting access to abortion or enact restrictions on abortion access that were unconstitutional under *Roe* and *Casey*.”).

1. Maryland Has a Duty to Protect a Federal Right to Travel, Even in the Absence of Federal Legislation

Returning to the hypothetical dispute between Maryland and Idaho:³¹⁹ In the *Dobbs* era, Maryland is under no obligation to keep abortion legal³²⁰ any more than Idaho is obligated to protect it.³²¹ Likewise, Idaho's anti-abortion law and Maryland's abortion shield law are similar in that they both deny comity to the other.³²² Then why, as this Comment argues, would the Constitution affirm Maryland's rights but deny Idaho's?

The answer lies in how Idaho's law prevents Maryland from fulfilling its constitutional duties.³²³ Maryland is obligated to protect the national right to travel, a component of which is the right to be treated as a "welcome visitor rather than an unfriendly alien when temporarily present."³²⁴ Consider what compliance with extraterritorial anti-abortion laws might require of Maryland. First, the State could do nothing and allow abortion providers in the State to have their licenses suspended, practices jeopardized, and, in effect, cede Maryland's regulatory control over abortion to foreign states as fear of liability makes Maryland abortion practices unable to operate.³²⁵ A

319. See *supra* text accompanying notes 84–91 for the hypothetical dispute scenario.

320. In fact, Maryland does have legal restrictions on abortion. See MD. CODE ANN., HEALTH-GEN. § 20-103 (2021) (requiring parental notice, with some exceptions, for minors who seek abortions); MD. CODE ANN., HEALTH-GEN. § 20-209 (2021) (restricting abortion after fetal viability); MD. CODE ANN., HEALTH-GEN. § 20-214 (2021) (allowing medical providers to refuse to provide abortions); MD. CODE REGS. 10.12.01.10 (2024) (promulgating extra regulatory requirements that specifically target abortion providers); see also MD. CODE ANN., CTS. & JUD. PROC. § 11-802 (providing an exception within Maryland's abortion shield law whereby proceedings that are based on conduct that would be prohibited in Maryland are not protected).

321. See *Dobbs*, 142 S. Ct. at 2284 ("The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion.").

322. Compare IDAHO CODE § 18-623(3) (2023) ("It shall not be an affirmative defense to a prosecution . . . that the abortion provider or the abortion-inducing drug provider is located in another state."), with MD. CODE ANN., CTS. & JUD. PROC. § 9-402(a)(2)(ii) (2023) (requiring the requester of a subpoena to "include a sworn, written statement signed under penalty of perjury by the party seeking enforcement, or the party's counsel, that no portion of the subpoena is intended or anticipated to further any investigation or proceeding related to legally protected health care, unless the out-of-state proceeding is: (1) [b]ased in tort, contract, or statute; (2) [a] claim for which a similar or equivalent claim would exist in the State; and (3)(A) [b]rought by the patient who received legally protected health care, or the patient's legal representative; or (B) [b]ased on conduct that would be prohibited under the laws of this State.").

323. See U.S. CONST. amend. XIV § 1 ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . .").

324. *Saenz v. Roe*, 526 U.S. 489, 500 (1999).

325. See *supra* notes 39–41 and accompanying text; see also AM. COLL. NURSE-MIDWIVES, SENATE JUDICIAL PROCEEDINGS COMMITTEE, SB 859 – REPRODUCTIVE HEALTH PROTECTION ACT (2023); BD. OF PHYSICIANS, MD. DEP'T HEALTH, 2023 SESSION POSITION PAPER, SB 859 – REPRODUCTIVE HEALTH PROTECTION ACT (2023) (including position statements by organizations representing the Maryland healthcare industry supporting the Maryland Reproductive Health Protection Act, including healthcare professionals' fears about extraterritorial abortion enforcement).

second option would be for Maryland to make the conflicting laws consistent and ban abortion itself, which, given that current Maryland polling shows broad support for abortion rights,³²⁶ would be out-of-sync with *Dobbs* returning the issue of abortion to the people.³²⁷

The third option would be to set up a regulatory scheme where the available reproductive health services at a Maryland clinic would vary depending on the patient's state of origin or, in the alternative, ban out-of-state residents from obtaining an abortion altogether. While courts have permitted some distinction between in-state and out-of-state residents, for instance, where the reason is "substantial"³²⁸ or the impediment is minor,³²⁹ the Court in *Doe v. Bolton*,³³⁰ has largely declared that restricting access to healthcare service to only in-state residents is a Privileges and Immunities Clause violation.³³¹ The Court reasoned:

Just 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 A contrary holding would mean that a State

326. MILEAH KROMER, GOUCHER COLLEGE POLL 1 (2021) (surveying Marylanders on various statewide issues and revealing that eighty-eight percent want to keep abortion legal in some way, though they are more divided about the circumstances under which abortion should be legal).

327. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2228 (2022).

328. The Court has created a "substantiality" test that permits a state to discriminate against out-of-state residents if

(i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective. In deciding whether the discrimination bears a close or substantial relationship to the State's objective, the Court has considered the availability of less restrictive means.

Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 284–85 (1985); *see also Vlandis v. Kline*, 412 U.S. 441, 452–53 (1973) (granting states the right to give in-state residents preferential tuition rates at its colleges and universities). The Court has also considered whether a right is "'fundamental' to the promotion of interstate harmony," in making Privileges and Immunities determinations. *United Bldg. & Constr. Trades Council Camden Cnty. & Vicinity v. Mayor of Camden*, 465 U.S. 208, 218 (1984). Ironically, here, abortion-banning states would likely view Maryland banning out-of-state residents from getting abortions to be quite harmonious with the intent of their extraterritorial legislation. However, there is a substantial nexus between abortion clinic closures and access to reproductive healthcare in general, so restricting access to such rights would be antithetical to interstate harmony. *See Anna Kheyfets et al., Impact of Hostile Abortion Legislation on United States Maternal Mortality Crisis: A Call for Increased Abortion Education*, FRONTIERS PUB. HEALTH, Dec. 5, 2023, at 2 (describing the impact of abortion restrictions on the quality of routine obstetric care in certain geographic regions).

329. *See Daly v. Harris*, 215 F. Supp. 2d 1098, 1115 (D. Haw. 2002) (holding that a \$3.00 fee for out-of-state visitors to a waterpark does not constitute a "significant penalty" to the right to free movement).

330. 410 U.S. 179 (1973).

331. *Id.* at 200 (invoking U.S. CONST. art. IV, § 2).

could limit to its own residents the general medical care available within its borders.³³²

While the main thrust of *Bolton* has been abrogated by *Dobbs*, the Court in *Dobbs* criticized *Bolton* in connection with *Roe*'s adoption of a gestational-age-based rule, making no mention of *Bolton*'s position on the right to travel.³³³ Even the original dissenters in both *Roe* and *Bolton* did not express any disagreement over the issue of travel.³³⁴ The Clause, in fact, imposes a duty on Maryland to ensure that out-of-state travelers "enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof."³³⁵

2. Maryland's Approach Invokes the Pre-Civil War Comity Cases

In effect, extraterritorial abortion laws trap Maryland (along with similarly situated states) in an unwinnable paradox: The state must either give up its ability to protect and regulate abortion,³³⁶ or it must authorize its own unconstitutional attack on abortion travelers.³³⁷ Maryland's only remaining option—taking inspiration from the comity crisis of the mid-nineteenth century—is to resist such incursions.³³⁸ Maryland resists through the Reproductive Health Protection Act by refusing to cooperate with out-of-state regimes that threaten what the state regards as a "central component of

332. *Id.* (internal citations omitted).

333. See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2255 n.40 (2022) (criticizing an interpretation of *Doe* that protects a broad right to obtain an abortion at any stage of pregnancy with physician certification); *id.* at 2311 (Roberts, C.J., concurring) (criticizing the viability framework that both *Doe* and *Roe* rely upon).

334. See *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 332 n.31 (1993) (Stevens J., dissenting) ("[U]nder the position espoused by [the *Roe*] dissenters, the diversity among the States in their regulation of abortion procedures would magnify the importance of unimpeded access to out-of-state facilities."). Note that the majority does not undermine Justice Stevens' point here. Instead, Justice Scalia merely states that private parties who physically block access to abortion clinics do not conspire to rob women of the right to interstate travel just because a substantial number of women at the clinic in question had arrived from out of state. *Id.* at 274 (majority opinion).

335. ARTICLES OF CONFEDERATION of 1781, art. IV, para. 1. Charles Pinckney, the drafter of the Privileges and Immunities Clause, wrote that it was "formed exactly upon the principles of the 4th article of the present Confederation." Charles Pinckney, Observations on the Plan of Government, Submitted to the Federal Convention in Philadelphia, in 3 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 112 (1911). The Court in *Piper* used this original construction of the clause in the Articles of Confederation to characterize that the intent of the clause was to bind the states to a "national economic union." *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 279–80, 279–80 n.7 (1985).

336. See *supra* notes 39–41 and accompanying text.

337. See *supra* notes 323–335 and accompanying text.

338. See *supra* Section II.A.

an individual's rights to liberty and equality."³³⁹ A similar strategy was employed in the *Lemmon Slave Case*, where New York denied comity to state laws that had the effect of extending the reach of its regime of slavery beyond New York's borders.³⁴⁰ Judge William Wright of the New York Court of Appeals wrote for the majority in *Lemmon* that the State's decision to refuse to permit slavery within its territory supersedes comity between the states; he wrote:

The State has declared, through her Legislature, that the *status* of African slavery shall not exist, and her laws transform the slave into a freeman the instant he is brought voluntarily upon her soil. Her will is that neither upon the principles of comity to strangers passing through her territory, nor in any other way, shall the relation of slave owner and slave be upheld or supported. . . . [T]he relation established and sustained only by the foreign municipal law shall terminate, and the persons before held as slaves shall stand upon her soil in their natural relations as men and as freemen.³⁴¹

In many ways, *Lemmon* is a companion case to *Dred Scott*,³⁴² with a similar fact pattern but a radically different outcome.³⁴³ The reaction to *Lemmon* in the South was quite similar to the reaction to *Dred Scott* in the North, with Georgia Governor Howell Cobb decrying it as “a denial of comity” and a “just cause for war.”³⁴⁴ How ironic, then, that Southern states did the exact same thing—using states' rights as a justification for imprisoning free Black sailors in their ports.³⁴⁵ According to Professor Finkelman, the antebellum South “insisted that the road to states' rights ran

339. Declaration of Rights – Right to Reproductive Freedom, 2023 Md. Laws ch. 244 (amendment to enshrine abortion rights in the Maryland Constitution, enactment subject to constitutional referendum in November 2024).

340. *Lemmon v. People*, 20 N.Y. 562 (1860). See *supra* notes 225–232 and accompanying text for the factual history of the *Lemmon Slave Case*.

341. *Lemmon*, 20 N.Y. at 630. In *Lemmon*, Judge Wright explicitly rejected a “statutist” comity approach, see *supra* notes 122–124 and accompanying text, basing his argument instead on the belief that New York had the power to determine a person's status within its borders and that one's status as property can only exist in a state whose laws allow it to exist. *Lemmon*, 20 N.Y. at 631 (“Men are not the subject of property by such law, nor by any law, except that of the State in which the *status* exists; not even by the Federal constitution . . .”) (emphasis in original). Applied to the question of modern abortion travelers, Justice Wright's logic would mean that states can block extraterritorial enforcement based on an “effects doctrine” principle—whereby a state's fetal personhood law may justify a prosecutor to punish abortion travelers based on a cross-state homicide charge—to terminate the status of an “unborn person” at the border of the state recognizing it. See *supra* notes 133–135 and accompanying text.

342. *Dred Scott v. Sandford*, 60 U.S. 393 (1856) (enslaved party).

343. See William H. Manz, “A Just Cause for War”: *New York's Dred Scott Decision*, N.Y. ST. B.J., November/December 2007, at 21 (comparing *Dred Scott* and *Lemmon*).

344. *Id.* at 10–11.

345. See Finkelman, *supra* note 234.

in only one direction. They denied that northerners had a right to assert *their* states' rights when it came to slavery."³⁴⁶

This dynamic is particularly pertinent to abortion travel, as both Idaho and Maryland³⁴⁷ have attempted to exercise their respective sovereignties through the denial of comity to each other.³⁴⁸ However, only Idaho's laws, in effect, cross Maryland's borders to impose an anti-abortion regime of which Maryland does not approve.³⁴⁹ In contrast, Maryland's law has no impact on Idahoan sovereign territory.³⁵⁰ Like *Lemmon* before it, Maryland's law attempts to nullify an extraterritorial incursion rather than attempting to impose one—declaring that any infringement on the right to reproductive freedom “shall not exist” within Maryland, just as the institution of slavery “shall not exist” within New York.³⁵¹

Readers that happen to be sympathetic to the pro-life movement may rightly take offense to a constitutional analogy that compares their stance on abortion to the role of enslavers while comparing the pro-choice movement to the role of abolitionists.³⁵² If one holds the position that “abortion destroys an ‘unborn human being’”³⁵³ and that, by extension, the “unborn” are a class human that has no legal status or protection under the law, it is entirely understandable that pro-life advocates see their movement as a reflection of nineteenth-century abolitionism and may draw inspiration from it.³⁵⁴ The comparison to this era is not made because of any relationship between

346. *Id.* at 473.

347. See *supra* text accompanying notes 84–91 for the hypothetical dispute scenario between Idaho and Maryland; no current conflict-of-laws cases exist.

348. See *supra* note 322.

349. See *supra* notes 323–331 and accompanying text.

350. Nothing in the Reproductive Health Protection Act explicitly references out-of-state conduct, and in fact, the extradition segment of the Act submits to federal authority if the demanding state is able to obtain a writ of mandamus from a federal court. Reproductive Health Protection Act, 2023 Md. Laws ch. 247 at 6. While the law indeed thwarts the stated purpose of the Idaho legislation in preventing interstate “abortion trafficking,” its application does not require any compliance from the state of Idaho and, therefore, does not itself interfere with Idahoan sovereignty like extraterritorial abortion laws do. See H.B. 242, 67th Leg., Reg. Sess. (ID. 2023) (codified at Idaho Code § 18-623 (West 2022)) (defining abortion trafficking). The reader should note that a separate analysis can be made regarding the juvenile rights implicated by H.B. 242. See *supra* note 91 for an explanation as to why an analysis of juvenile rights is omitted here.

351. *Lemmon v. People*, 20 N.Y. 562, 630 (1860).

352. See George S. Swan, *The Thirteenth Amendment Dimensions of Roe v. Wade*, 4 J. JUV. L. 1, 12–17 (1980) (arguing (1) that the protections of the Thirteenth Amendment should extend to the unborn, as their condition is analogous to the conditions of the antebellum slave, and (2) that abortion is a badge and incident of slavery because it severs the parent-child link, denies the full personhood of the unborn, and denies the constitutional right of due process and equal protection).

353. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2257 (2022) (quoting MISS. CODE ANN. § 41-41-191(4)(b) (2019)).

354. See, e.g., Lynn D. Wardle, *The Quandary of Pro-Life Free Speech: A Lesson from the Abolitionists*, 62 ALBANY L. REV. 853 (1999).

abortion and slavery, but rather because the consequences of the state-by-state approach brought about by *Dobbs* has manifested a comity crisis akin to the antebellum era.³⁵⁵ *Dobbs* can be characterized as a decision that is neither pro-choice nor pro-life, but pro-“states’ rights.”³⁵⁶ This characterization is true, but *states’ rights* here are used in the same manner as King Solomon’s sword³⁵⁷—dictating a compromise that, in consequence, manages to dissatisfy pro-choice and pro-life activists alike.³⁵⁸ If *Dobbs* is indeed about “states’ rights,” then history teaches that states’ rights are necessarily a two-way street.³⁵⁹ Maryland, like New York before it, has a right to decide that its interest in protecting abortion access within its borders supersedes its interest in participating in interstate cooperation.³⁶⁰

3. States Can, and Must, Use Sovereign Authority to Protect National Rights Even When the Federal Government Does Not

Readers may now observe a contradiction: This Comment, on one hand, justifies Maryland’s legislation in light of the *Lemmon Slave Case*, an example of “states’ rights” in action, while simultaneously invoking the Thirteenth Amendment—a document that attempts to solve the states’ rights issue through the imposition of *federal* authority, not *state* authority.³⁶¹ Congress has been silent on standardizing national abortion policy in the absence of *Roe*, and the language of the Thirteenth Amendment itself only grants *Congress* the “power to enforce this article by appropriate legislation.”³⁶² How, then, would the Thirteenth Amendment apply to Maryland legislation?

While there is no precedent for a state government seeking to enforce the Thirteenth Amendment, the Privileges and Immunities Clause *does* mandate that states protect the right to travel,³⁶³ and an abridgment of the

355. See *supra* Section II.A.

356. See *The Impact of the Supreme Court’s Dobbs Decision on Abortion Rights and Access Across the United States: Hearing Before the H. Comm. on Oversight & Reform*, 117th Cong. 46 (2022) (statement of Ralph Norman, Representative, South Carolina) (“The untruths that you all are putting out there . . . about doing away with abortion, the states decide it.”); see also *id.* at 56 (statement of Erin Morrow Hawley, Senior Counsel, Alliance Defending Freedom) (characterizing *Dobbs* as an exercise in “judicial humility”).

357. See 1 *Kings* 3:16–28 (resolving a famous child custody dispute).

358. See *supra* text accompanying notes 30–31.

359. See *supra* notes 345–346.

360. See *Lemmon v. People*, 20 N.Y. 562, 630–31 (1860) (justifying a state’s legitimate interest in rejecting interstate comity in service of the higher interest of ensuring the “total suppression of a social condition that violates the law of nature”).

361. See Graber, *supra* note 247, at 1368 (describing how Section 7 of the post-Thirteenth Amendment Freedmen’s Bureau strips Southern states of jurisdiction over Freedman matters).

362. U.S. CONST. amend. XIII, § 2.

363. See *supra* notes 331–335 and accompanying text.

right to travel is itself a badge and incident of slavery.³⁶⁴ While extraterritorial abortion laws may not physically trap pregnant residents within the borders of a state, they do establish a category of otherwise lawful interstate activity³⁶⁵ and subsequently prevent a class of residents—those who are pregnant or capable of becoming pregnant—from fully exercising their right to travel to engage in such activity, a privilege inherent in their national citizenship.³⁶⁶ Likewise, Southern laws in the nineteenth century created legal, social, and economic barriers to prevent Black Americans from exercising their right to travel—an issue that was of particular concern to the framers of the Thirteenth Amendment.³⁶⁷

Extraterritorial abortion bans are, on their face, unconstitutional. As Professor Lawrence Tribe explains:

[M]ay [a state], in essence saddle its citizens, while traveling in other states, with its *entire* legal system or with large chunks of it, so that those citizens or anyone who helped those citizens to travel to some state *B* would become subject to criminal prosecution upon returning home . . . for example, to take a riverboat gambling cruise there, . . . or to engage in consensual, intimate activity that is legal in state *B* but not state *A*? The answer would seem to be a resounding no. In our federal structure, state jurisdiction is territorially defined in such a way that people may vote with their feet No state may enclose its citizens in a legal cage that keeps them subject to the state's rules of primary conduct . . . 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.³⁶⁸

But what should a state do when faced with the threat of such an unconstitutional attack upon its borders? Should it wait for Congress to step in and enact some form of national legislation to standardize abortion laws across the nation?³⁶⁹ Or should it take responsibility and pass preventative measures to resist and protect the rights of its citizens, healthcare industry,

364. See *supra* Section II.B.

365. See Paul S. Berman, et al., *Conflicts of Law and the Abortion War Between the States*, 172 U. PA. L. REV. 1, 42–57 (2024), for an overview of a Dormant Commerce Clause analysis of extraterritorial abortion laws.

366. See *supra* Section II.C.

367. See *supra* Section II.B.

368. Laurence H. Tribe, *Saenz Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—Or Reveal the Structure of the Present?*, 113 HAR. L. REV. 110, 151–52 (1999).

369. There have been efforts on both sides of the abortion debate to standardize abortion law across the states, but with radically different visions and little sign of compromise soon. Compare Women's Health Protection Act of 2023, S. 701, 118th Cong. (2023) (protecting abortion rights nationally), with S. 4840, 117th Cong. (2021–2022) (criminally banning abortions after the gestational age of 15 weeks or more).

and visitors alike?³⁷⁰ Through the Reproductive Health Protection Act, Maryland invokes this responsibility to preserve the national right to travel and to resist the imposition of badges and incidents of slavery—even while the national government does nothing³⁷¹—by nullifying laws that attempt to interfere with this right: Such action is within the scope of Maryland’s duty to the Union.³⁷²

Texas v. White,³⁷³ an opinion authored just after the Civil War—a war that put the issue of what it means to be a union at its forefront³⁷⁴—offers some wisdom. In deciding the issue of Texas’s statehood after open rebellion,³⁷⁵ the Court lays out precisely what statehood entails: “When, therefore, Texas became one of the United States, she entered into an indissoluble relation. *All the obligations* of perpetual union, and all the guaranties [sic] of republican government in the Union, attached at once to the State.”³⁷⁶

The establishment of a perpetual union began at the founding: The Declaration of Independence was ratified by the “good people of these Colonies.”³⁷⁷ Hence, according to historian Kenneth Stampp, the Union both predates the states and “call[s] the states into being.”³⁷⁸ Abraham Lincoln, in his first inaugural address, demonstrated that the preeminence of the Union emerges not from the Reconstruction Era, but from the history and tradition of the nation itself:

The Union is much older than the Constitution. It was formed in fact, by the Articles of Association in 1774. It was matured and continued by the Declaration of Independence in 1776. It was further matured . . . and engaged that it should be perpetual, by the Articles of Confederation of 1778. And finally, in 1787, one of the declared objects for ordaining and establishing the Constitution, was “*to form a more perfect Union*.”³⁷⁹

The Fourteenth Amendment is both “affirmative and declaratory” as to the issue of protecting the rights of national citizenship.³⁸⁰ The Thirteenth Amendment likewise intended to protect citizens from the “badges and

370. See *supra* notes 39–41 and accompanying text.

371. See *supra* note 369 and accompanying text.

372. See *supra* notes 363–364.

373. 74 U.S. 700 (1868).

374. Cass R. Sunstein, *Constitutionalism and Secession*, 58 U. Chi. L. Rev. 633 n.109 (1991).

375. *Texas v. White*, 74 U.S. 700, 707 (1868).

376. *Id.* at 726 (emphasis added).

377. THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776).

378. Kenneth M. Stampp, *The Concept of Perpetual Union*, 65 J. AM. HIST. 5, 6 (1978).

379. *Id.* at 6–7 (emphasis in original) (quoting Abraham Lincoln, President of the United States, First Inaugural Address (Mar. 4, 1861)).

380. *United States v. Wong Kim Ark*, 169 U.S. 649, 688 (1898).

incidents” of oppression, which include a state infringing upon said national citizen’s right to travel.³⁸¹ Thus, these “obligations of perpetual union”³⁸² include the obligation to preserve the “privileges and immunities” of this superseding national citizenship.³⁸³ In Maryland, those privileges include the right to access reproductive health care, including abortion.³⁸⁴ Maryland’s obligations to the Union include treating residents from other states as “a welcome visitor,” not for the sake of respecting the rights of citizens of a sister state, but for the sake of respecting the rights of citizens of the United States.³⁸⁵ This duty to the citizens of the Union is precisely what Maryland invokes by shielding interstate abortion travelers, and precisely what the framers of the Reconstruction Amendments hoped their constitutionalism would achieve.³⁸⁶

CONCLUSION

With the Reproductive Health Protection Act, Maryland has gone from observer to participant in the interstate abortion conflict, refusing to extend Full Faith and Credit to other states’ laws that threaten its healthcare providers, residents, and visitors with civil and criminal prosecution.³⁸⁷ The issue of extraterritorial abortion enforcement has increased tension between the states, threatening to escalate into a crisis of interstate comity, with states on both sides attempting to use their sovereign authority to nullify the policy of the other.³⁸⁸ Despite the Roberts Court’s devotion to rulings in line with “history and tradition,”³⁸⁹ the comity doctrine available when Article IV³⁹⁰ was first conceived fails to offer anything but ambiguous guidance on this issue.³⁹¹ Likewise, states on both sides of the debate may readily point to conflicting contemporary doctrine to defend their actions.³⁹² On one hand, states which classify fetuses as “natural person[s]”³⁹³ may readily justify extraterritorial prosecutions on the basis of the “effects doctrine,” claiming

381. *See supra* Section II.B.

382. *Texas v. White*, 74 U.S. 700, 726 (1868).

383. *See Toomer v. Witsell*, 334 U.S. 385, 395 (1948) (“The primary purpose of [the Privileges and Immunities] clause, like the clauses between which it is located—those relating to full faith and credit and to interstate extradition of fugitives from justice—was to help fuse into one Nation a collective of independent, sovereign States.”).

384. MD. CODE ANN., HEALTH & GEN. §§ 20-207–24; 20-103.

385. *See supra* text accompanying note 298.

386. *See supra* Section I.A.

387. *See supra* notes 82–83 and accompanying text.

388. *See supra* Part I.

389. *See supra* note 52.

390. U.S. CONST. art. IV.

391. *See supra* Section I.A.

392. *See supra* Sections I.B–C.

393. GA. CODE ANN. § 1-2-1 (2022)).

that the state has just as much an interest in preventing the out-of-state destruction of its unborn residents as that of any other human being.³⁹⁴ On the other hand, states which have shield laws in place can point to exceptions within the Full Faith and Credit and Extradition clauses which may allow them to obstruct extraterritorial encroachment on their domestic abortion policy.³⁹⁵

Perhaps this stalemate is the kind of equilibrium that *Dobbs* intended; after all, the issue of abortion has indeed been returned to the “people and their elected representatives” who are now empowered to fiercely defend their respective side of the debate to the fullest extent of the law.³⁹⁶ However, this is a cold comfort to those looking to exercise their constitutional right to move through the nation as a free citizen of the union.³⁹⁷ Under this regime, abortion travelers, providers, and their benefactors may be safe from civil and criminal consequences while within the borders of states with shield laws but may have outstanding warrants and judgements threatening their liberty if they ever dare to leave.³⁹⁸

It is this particular combination of challenges: the legal restrictions on the right to travel out of anti-abortion states, the possibility of people being trapped within shielding states, and the resulting breakdown of interstate comity, that make the “history and tradition” of the pre- and post-Civil War era particularly instructive.³⁹⁹ The framers of the Reconstruction Amendments were responding to a legal landscape where similar comity disputes were rampant and where Americans were unable to freely travel across state lines to take advantage of favorable laws that could better their lives.⁴⁰⁰ In fact, these framers deemed policies that threaten legal, economic, and social confinement, even in the absence of literal servitude, to be “badges and incidents” of slavery and thus within the scope of their amendments to completely eradicate.⁴⁰¹ The framers envisioned a radical regime where Americans’ national citizenship would supersede their state citizenship, and where the states would thus have a duty to protect the “privileges and immunities” of this superseding status.⁴⁰² A fundamental right inherent within the privileges of superseding national citizenship is the right to travel, including the right to travel to get an abortion.⁴⁰³

394. *See supra* Section I.B.

395. *See supra* Section I.C.

396. *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228, 2259 (2022).

397. *See supra* note 90 and accompanying text.

398. *Id.*

399. *See supra* Part II.

400. *See supra* Section II.A.

401. *See supra* Section II.B.

402. *See supra* Section II.B.

403. *See supra* Section II.C.

Before the Civil War, cases like the *Lemmon Slave Case* demonstrated that abolitionist states had denied comity to slave states in order to protect fundamental rights.⁴⁰⁴ It is this very “history and tradition” which Maryland invokes by passing the Reproductive Health Protection Act.⁴⁰⁵ Complying with extraterritorial abortion laws would require Maryland to forfeit its own right, granted by *Dobbs*, to legislate on abortion.⁴⁰⁶ Therefore, in order to preserve its sovereignty, while simultaneously fulfilling its constitutional duty to defend the right to travel, Maryland joins into the burgeoning interstate comity crisis.⁴⁰⁷ *Dobbs* may have eliminated the constitutional right to obtain an abortion, but it did not eliminate this essential component of liberty so deeply woven into the fabric of the Constitution and its blood-soaked history.⁴⁰⁸ Even in the absence of much-needed federal policy on abortion, if Maryland wants to defend abortion travelers, the actions taken by this legislation are necessary acts of resistance.⁴⁰⁹ It is through efforts like these that the Constitution can live up to the post-Civil War framers’ radical vision, and can continue to protect the rights of citizens to this day.⁴¹⁰

404. *See supra* notes 225–232 and accompanying text.

405. *See supra* Section II.D.

406. *See supra* notes 324–327 and accompanying text.

407. *See supra* Section II.D.

408. *See supra* Part II.

409. *See supra* Section II.D.

410. *See supra* Section II.B.