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FEDERALISM AND THE RIGHT TO TRAVEL: MEDICAL AID IN DYING AND ABORTION

LESLIE FRANCIS * & JOHN FRANCIS **

U.S. federalism celebrates free movement among states and experimentation within state borders. The avalanche of abortion restrictions in the wake of the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*¹ includes proposals that threaten this celebration of movement. Emboldened by *Dobbs*, some states are pursuing legislative efforts that will stop or discourage their residents from seeking abortions in states where it is legal.² Other state efforts may indirectly impact movement for abortions. If these efforts succeed, they will impair a longstanding and core aspect of U.S. federalism: the federal right to move freely across state lines, whether to make temporary visits or to establish new residencies.

In his concurrence in *Dobbs*, Justice Kavanaugh averred that the decision with which he fully agreed did not constrict the right to travel for abortions. He wrote,

some of the other abortion-related legal questions raised by today's decision are not especially difficult as a constitutional matter. For example, may a State bar a resident of that State from traveling to another State to obtain an abortion? In my view, the answer is no based on the constitutional right to interstate travel.³

This claim was made without citation or further explanation of its reach.⁴ Apart from Justice Kavanaugh, only the *Dobbs* dissenters referred to movement as a right, either indirectly or directly, so whether a majority of the Court would agree

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1. 1142 S. Ct. 2228 (2022).

2. Caroline Kitchener & Devlin Barrett, *Antiabortion Lawmakers Want to Block Patients From Crossing State Lines*, WASH. POST (June 29, 2022), <https://www.washingtonpost.com/politics/2022/06/29/abortion-state-lines/>.

3. 142 S. Ct. at 2309.

4. *Id.*

with Justice Kavanaugh remains unknown.⁵ Also unknown is whether Justice Kavanaugh's assertion extends beyond direct prohibitions of abortion travel to state efforts to impede travel, such as prohibiting payment for out-of-state travel for an abortion.⁶

This article explores how rights to movement may limit state efforts to restrict abortions, either directly or indirectly. We use the language of "movement" to encompass short-term visits, longer-term residency changes, and the movement of goods or services across state lines. We prefer "movement" to "travel" or "tourism," as this language risks trivializing the seriousness of what might be at stake. However, since "travel" is the term used in many U.S. court decisions and other discussions concerning the right,⁷ we use that term as relevant to these. The centerpiece of our defense is the relationship between freedom of movement and what it is to be fully recognized as a person in a federal society. Our defense is nuanced; some interferences with interstate movement go to the very heart of what it is to be recognized as a person, whereas others may not.

We begin with a description of the multiple efforts to restrict abortion movement that are appearing in the wake of *Dobbs*.⁸ We then shift to another controversial health care intervention where direct movement restrictions have been recently challenged: medical aid in dying (MAID, sometimes called "physician assisted suicide").⁹ The comparison of MAID to abortion is especially apt because the Court in *Dobbs* relied on its earlier rejection in *Washington v. Glucksberg*¹⁰ of assisted suicide as a liberty protected under the Due Process Clause of the 14th Amendment.¹¹ Just as MAID, framed as assisted suicide, could not be seen as part of ordered liberty, Justice Alito wrote in *Dobbs*, so too had abortion been wrongly elevated to that status.¹² But there are also important disanalogies between MAID and abortion as rights. The petitioners in *Glucksberg* sought new constitutional recognition of MAID,¹³ whereas by the time of *Dobbs* abortion had nearly fifty years of recognition.¹⁴ And MAID

5. *Id.* at 2318 (Breyer, J. et. al., dissenting).

6. *Id.* at 2309 (Kavanaugh, J. concurring); Louis Jacobson, *Can States Punish Women for Traveling Out of State to Get an Abortion?*, POYNTER (July 6, 2022), <https://www.poynter.org/fact-checking/2022/can-states-punish-women-for-traveling-out-of-state-to-get-an-abortion/>.

7. *E.g.* Shapiro v. Thompson, 394 U.S. 618 (1969).

8. *See infra* Part I.

9. *See infra* Part III; *See also Medical Aid In Dying is Not Assisted Suicide, Suicide or Euthanasia*, COMPASSION & CHOICES, <https://www.compassionandchoices.org/about-us/medical-aid-dying-not-assisted-suicide/> (explaining MAID involves a physician writing a prescription for a terminally ill patient to use for a peaceful death when suffering becomes intolerable and that the term "physician assisted suicide" is disfavored because of its association with suicide more generally).

10. 521 U.S. 702 (1997).

11. 142 S. Ct. at 2242, 2247-48 (majority opinion).

12. *Id.* at 2242-43, 2247.

13. 521 U.S. at 708-09 (quoting *Compassion in Dying v. Washington*, 850 F. Supp. 1454, 1459 (W.D. Wash. 1994)).

14. 142 S. Ct. at 2348 (Breyer, J. et. al., dissenting).

involves only a single person, the patient facing death, whereas in the eyes of its opponents, abortion involves two inextricably related persons, the pregnant woman and the fetus she carries.¹⁵ Moreover, our comparison shifts the frame, because with MAID, the primary impediment to movement has been states limiting availability of MAID to their residents.¹⁶ Nonetheless there is much to be learned about abortion from arguments to overturn MAID residency restrictions. These arguments rest on the Privileges and Immunities Clause of Article IV, the Fourteenth Amendment, and the Dormant Commerce Clause.¹⁷ At least some restrictions on abortion, we conclude, affect interstate movement to the extent that they extinguish a central aspect of what it is to be a person in a federal system.

Our defense of movement as a protection for abortion is not meant to imply that it is a sufficient solution to the problems many women will face after *Dobbs*. Some newly enacted, or newly considered, abortion restrictions do not affect interstate movement at all. Some states prohibit all in-state abortions except in cases of medical emergency.¹⁸ Under these statutes, women who are very young or who have been raped would not be eligible for in-state abortions. Only the more fortunate may be able to travel elsewhere. Women who lack resources, have childcare responsibilities, are enmeshed in local social networks or family ties, or cannot take time off from work will face insurmountable barriers to travel.¹⁹ Girls or younger teenagers may be unable to travel on their own.²⁰ People who are undocumented may be unable to access forms of transportation requiring identification or may be fearful of encountering immigration enforcement during their journeys.²¹ Journeys may be especially challenging for people with disabilities.²² Moreover, distances will vary greatly. People who live in St. Louis, Missouri, will only have to cross the Mississippi River to get to East St. Louis, Illinois, but people who live in Houston, Texas, will have to drive twelve hours to the nearest open clinic providing abortions in New Mexico. The availability of movement will be little comfort to those who cannot use it, but it may serve as a safety valve for at least some. Frequent movement or the

15. *Glucksberg*, 521 U.S. at 708; *Dobbs*, 142 S. Ct. at 2239 (majority opinion).

16. *See infra* Part III.

17. U.S. Const. art. IV, § 2, cl. 1; U.S. Const. amend. XIV; U.S. Const. art. I, § 8, cl. 3.

18. *E.g.*, MO. REV. STAT. § 188.017(2) (2022).

19. *See generally* Lauren Rankin, *How to Get Help for Your Abortion: Inside the Abortion Mutual-Aid Network*, THE CUT (June 28, 2022), <https://www.thecut.com/article/find-abortion-practical-support-funds-travel-childcare.html>.

20. *See generally* Tracey Wilkinson et al., *A Major Problem for Minors: Post-Roe Access to Abortion*, STAT NEWS (June 26, 2022), <https://www.statnews.com/2022/06/26/a-major-problem-for-minors-post-roe-access-to-abortion/>.

21. *See generally* Sofia Ahmed, *Abortion Worries Heightened for Unauthorized Immigrants in the U.S.*, REUTERS (July 5, 2022), <https://www.reuters.com/world/us/abortion-worries-heightened-unauthorized-immigrants-us-2022-07-05/>.

22. *See generally* Liz Bowen, *The End of Roe v. Wade Will Be a Nightmare for Disabled Americans*, THE HASTINGS CENTER (June 24, 2022), <https://www.thehastingscenter.org/the-end-of-roe-v-wade-will-be-a-nightmare-for-disabled-americans/>.

unpopularity of movement restrictions may ultimately erode support for draconian abortion prohibitions.

I. CONSTRICTING ABORTION MOVEMENT

The moment the Court announced its decision in *Dobbs*, states objecting to abortion began considering a wide range of new abortion restrictions.²³ Many of these states already had abortion prohibitions on the books that had been in abeyance since *Roe* but never repealed.²⁴ Other states had “trigger bans” waiting to go into effect if *Roe* were to be overruled. Many prohibitions on in-state abortions do not apply directly to movement. In contrast, prohibitions on travel out-of-state for an abortion clearly would impact movement directly. Other prohibitions of conduct within the state may affect movement, although their scope may be unclear.

For example, Texas’s SB 8 explicitly bans payments for abortions without specifying whether the abortion must occur within the state of Texas.²⁵ Some states will deny licenses to health care providers who perform abortions, apparently without regard to where the abortion took place.²⁶ These statutes are not overtly extraterritorial: they do not assert the state’s interest in imposing its views about abortion on out-of-state activities. Instead, they rest on the state’s assertions about in-state interests, like the relationship between in-state residents and fetuses or the fitness of resident health care providers to practice within the state. However, extraterritorial proposals are also on the horizon,²⁷ such as making it a crime for a state resident to participate in an out-of-state abortion or making it a crime for an out-of-state provider to perform an out-of-state abortion. We postpone a brief discussion of extraterritoriality to the next section.²⁸

As of the summer of 2022, the situation about abortion travel was fluid. Because any effort at a comprehensive summary would quickly be outdated, this section provides only a snapshot of reports, proposals, and enacted statutes that illustrate a wide range of possibilities with implications for abortion movement.

23. *Abortion Ruling Prompts Variety of Reactions from States*, ASSOCIATED PRESS (Aug. 25, 2022), <https://apnews.com/article/2022-midterm-elections-abortion-health-sexual-abuse-by-clergy-constitutions-022d340cf968be3c28b03f1f96965f09>.

24. *E.g.*, Elizabeth Nash and Isabel Guarnieri, *13 States Have Abortion Trigger Bans— Here’s What Happens When Roe is Overturned*, GUTTMACHER INSTITUTE (June 6, 2022), <https://www.guttmacher.org/article/2022/06/13-states-have-abortion-trigger-bans-heres-what-happens-when-roe-overturned>.

25. TEX. HEALTH & SAFETY CODE ANN. § 171.208(a)(2) (West 2021).

26. *E.g.*, TENN. CODE ANN. § 39-15-211(b)(7) (2017).

27. *See* David S. Cohen et al., *The New Abortion Battleground*, 123 COLUM. L. REV. (forthcoming 2023) (providing a survey of these horizons).

28. *See infra* Part II.

A. Travel Bans

The most direct restriction on interstate movement for abortion under consideration would prohibit women from intentionally leaving their home state for abortions performed elsewhere. No state has yet enacted such a ban. However, reports have surfaced that conservative legal organizations may be drafting model travel bans.²⁹ These bans could make it a crime to leave the state with the intention of having an abortion. They could also criminalize aiding or abetting such travel or attempting such travel; the predicate crime would be abortion travel rather than the out of state abortion.

The most obvious way to enforce a ban on intentionally leaving the state for an abortion would be imposing criminal penalties on the woman herself. However, even recently enacted abortion bans explicitly shield the woman on whom an abortion is performed from criminal or even civil liability.³⁰ Statutes enacted before *Roe* but never repealed may lack these shields,³¹ although the ultimate fate of these laws remains unclear. Nonetheless, proposals have been made and bills have been filed that would include women among those to be punished for abortions. For example, a bill introduced in Idaho's lower house would have given prosecutors discretion to extend immunity from prosecution to women who cooperated with investigations or prosecutions.³²

Other possible targets for within state enforcement include physicians licensed in the state who make out-of-state abortion referrals, entities paying the costs of out-of-state abortions, such as employers or charities, and people who help women execute their plans to leave the state for abortion care. Statutory prohibitions on aiding and abetting abortion could encompass many in-state activities that help a woman leave the state for an abortion. Or states might establish separate offenses that cover payment or other help in arranging out-of-state abortions. In Mississippi, for example, any person who attempts to procure an abortion is guilty of a felony unless the attempt was by a physician to preserve the mother's life or where the pregnancy resulted from rape.³³ The predicate offense is procurement rather than the abortion itself, and the Mississippi abortion statute does not say whether the referenced abortion need occur within the state.³⁴ Nor does it define "procure,"³⁵ although inferences might be drawn from other criminal prohibitions. For example, procurement of

29. See generally Caroline Kitchener & Devlin Barrett, *Antiabortion Lawmakers Want to Block Patients From Crossing State Lines*, WASH. POST (June 29, 2022), <https://www.washingtonpost.com/politics/2022/06/29/abortion-state-lines/>.

30. E.g., ALA. CODE § 26-23H-5 (2019); ARK. CODE ANN. § 5-61-404(c)(1) (2021).

31. See *Dobbs*, 142 S. Ct. at 2285-96 (providing a list of abortion prohibitions enacted before *Roe*, which typically applied to "any person").

32. H.R. 361, 65th Leg., 2d Reg. Sess. (Id. 2020).

33. MISS. CODE ANN. § 97-3-3(1) (2022).

34. MISS. CODE ANN. § 41-41-191(4) (2018).

35. MISS. CODE ANN. § 97-3-3 (2022).

a prostitute involves knowingly or intentionally paying for the services³⁶ without mention of whether the act of prostitution must occur within the state.

B. *Damage Remedies*

States have also created statutory damage remedies for helping people leave the state for an abortion. For example, Texas law provides for civil actions against anyone who knowingly engages in conduct that aids or abets an abortion, including paying the costs of the abortion—whether or not the alleged aider knows that an abortion would result from their conduct.³⁷ These actions may seek injunctive relief, statutory damages of at least \$10,000 per abortion, and costs and attorney’s fees.³⁸ Oklahoma law is to similar effect, although with an exception for common carriers unaware of the woman’s intention.³⁹ After Lyft’s CEO announced that the company would pay the travel costs of women leaving Texas or Oklahoma for abortions, a group of Texas legislators wrote the CEO threatening legislation that would prohibit corporations from doing business in Texas if they paid for abortions wherever they occur.⁴⁰ These threats illustrate only one of the many legal unknowns about company policies to pay for out-of-state abortions for their employees, including whether the payment information can be shielded from state law enforcement or other judicial proceedings under the HIPAA privacy rule⁴¹ or whether these state prohibitions are consistent with federal employee benefit law.⁴²

The Texas and Oklahoma, statutes were drafted to circumvent the state as an actor in enforcement and thus to avoid challenges under the Fourteenth Amendment.⁴³ They do not limit the cause of action to individuals directly affected by the abortion, or even to individuals residing in Texas.⁴⁴ Other states have adopted damage remedies that give a cause of action to people who are arguably immediately affected by the abortion, including the fetus or family members. Idaho’s civil enforcement provision, for example, allows the woman on whom the abortion was performed, fathers, grandparents, siblings, or aunts or uncles to sue for actual damages, statutory damages of at least \$20,000, and

36. MISS. CODE ANN. § 97-29-51(1)(a) (2022).

37. TEX. HEALTH & SAFETY CODE ANN. § 171.208(a)(2) (2021).

38. TEX. HEALTH & SAFETY CODE ANN. § 171.208(b)(1)-(3) (2021).

39. OKLA. STAT. ANN. tit. 63, § 1-745.39(A)-(B), (K)(3) (West 2022).

40. Letter from Texas Legislators to Logan Green, Lyft CEO (May 6, 2022), <https://briscoecain.com/wp-content/uploads/2022/05/Briscoe-Cain-Lyft-Letter-With-Signatures-5.5.2022.pdf>.

41. See 45 C.F.R. § 164.512 (2016) (permitting certain disclosures of protected health information for law enforcement purposes and other judicial proceedings).

42. The federal Employee Retirement Income Security Act (ERISA) preempts state regulation of employer-provided benefit plans such as health insurance. 29 U.S.C. § 1144(a). Plans of employers who self-insure are not “deemed” to be insurance for purposes of state regulation of insurance. 29 U.S.C. § 1144(b)(2)(B).

43. Brief for Petitioner for a Writ of Certiorari Before Judgment at 6-7, *Whole Women’s Health v. Jackson*, 142 S. Ct. 522 (2021) (No. 21-463).

44. TEX. HEALTH & SAFETY CODE ANN. § 171.208(a) (2021).

attorney's fees and costs.⁴⁵ Fathers committing rape or incest may not bring suit, but their qualifying relatives may.⁴⁶ Unlike in Texas,⁴⁷ in Idaho damages may be recovered by more than one claimant for the same abortion.⁴⁸ In support of these damage remedies, states may argue that even if the abortion occurs out of the state, the harm occurs within its borders. A father, for example, might argue that he is harmed by the loss of a genetically related fetus taken outside of the state for an abortion.

C. Licensure

License denials based on performance of abortions have also been adopted.⁴⁹ In Tennessee, licenses are to be denied to any health care professional who violates the state's abortion ban, regardless of whether the person has been charged with or convicted of the offense.⁵⁰ In Mississippi, a physician may be denied a license for procuring, attempting to procure, or aiding in an abortion that is not medically indicated.⁵¹ In North Dakota, a chiropractor may be denied a license for engaging in the practice of abortion.⁵² In Ohio, nurses are subject to discipline for performing or inducing an abortion.⁵³

These statutes do not specify whether the reference is only to abortions performed within the state.⁵⁴ But they arguably are aimed to prevent harm within the state—the licensure of a provider judged by the state to be unfit to practice—and they may deter movement into the state by providers who are concerned about the impact of these laws on their ability to obtain or retain licenses. So, for example, a student from Mississippi who went to medical school or completed a residency in a state where abortions were permitted, and whose training included abortion care, might worry that they would be denied a license if they seek to return to practice in their home state.

45. IDAHO CODE § 18-8807(1) (2022).

46. IDAHO CODE § 18-8807(3) (2022).

47. TEX. HEALTH & SAFETY CODE ANN. § 171.208(c) (2021).

48. IDAHO CODE § 18-8807 (2022).

49. TENN. CODE ANN. § 39-15-211(b)(7) (2017); MISS. CODE ANN. § 73-25-29(5) (2022); N.D. CENT. CODE § 43-06-15(1)(h) (2021); OHIO REV. CODE ANN. § 4723.28(B)(30) (LexisNexis 2021).

50. See TENN. CODE ANN. § 39-15-211(b)(7) (2017) (directing the applicable licensing board to revoke the license of any person licensed to practice a healthcare profession in the state who purposely performs an abortion on a woman carrying a viable unborn child).

51. MISS. CODE ANN. § 73-25-29(5) (2022).

52. N.D. CENT. CODE § 43-06-15(1)(h) (2021).

53. OHIO REV. CODE ANN. § 4723.28(B)(30) (LexisNexis 2021).

54. TENN. CODE ANN. § 39-15-211(b)(7) (2017); MISS. CODE ANN. § 73-25-29(5) (2022); N.D. CENT. CODE § 43-06-15(1)(h) (2021); OHIO REV. CODE ANN. § 4723.28(B)(30) (LexisNexis 2021).

D. Medication Abortion and Telehealth

Medication, now used for about half of all early abortions,⁵⁵ is approved by the Food and Drug Administration subject to a “Risk Evaluation and Mitigation Strategy” (REMS). The REMS requires providers to meet special qualifications to prescribe the medication for abortions.⁵⁶ The REMS does not require that the medication be dispensed in person; it may be prescribed through a telehealth visit and sent by mail.⁵⁷ As of January 2023, medication abortion can be sold in retail pharmacies meeting specified conditions.⁵⁸

Medication abortion may be facilitated by interstate movement of patients, providers, or medication. Movement of persons with constitutionally recognized rights to travel is our primary focus; interstate shipment of medication raises many additional legal issues that we mention briefly below but set aside here.⁵⁹ Restrictions on medication abortion or telehealth may affect the interstate movement of people in several different ways. Women might leave the state for a telehealth visit in a state where abortion is legal, have the visit, obtain the medication, and bring it back home. For example, a Missouri woman might drive just over the border into Illinois, be prescribed the medication in a telehealth visit with a provider licensed in Illinois, fill the prescription, and return home to complete the abortion. This strategy would not involve an Illinois physician in the unauthorized practice of medicine in Missouri; the patient is seen and treated in Illinois. Or, out-of-state providers with licenses in states with abortion bans might conduct telehealth visits with women who stay home and receive the medication by courier or by mail. This would not violate state telehealth licensing requirements unless the providers act without any required licensure.⁶⁰

In response to the availability of telemedicine and medication abortion, states have adopted a variety of strategies. Many states only permit physicians to prescribe medication abortions, although federal regulations do not require this.⁶¹

55. *The Availability and Use of Medication Abortion*, KAISER FAM. FOUND. (Apr. 6, 2022), <https://www.kff.org/womens-health-policy/fact-sheet/the-availability-and-use-of-medication-abortion/>.

56. *Mifeprex (mifepristone) Information*, U.S. FOOD & DRUG ADMIN. (Jan. 16, 2021), <https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/mifeprex-mifepristone-information>.

57. *Questions and Answers on Mifeprex*, U.S. FOOD & DRUG ADMIN. (Dec. 16, 2021), <https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/questions-and-answers-mifeprex>.

58. Pam Belluck, *Abortion Pills Can Now Be Offered at Retail Pharmacies, F.D.A. Says*, THE NEW YORK TIMES (Jan. 3, 2023), <https://www.nytimes.com/2023/01/03/health/abortion-pill-cvs-walgreens-pharmacies.html#:~:text=the%20main%20story-.Abortion%20Pills%20Can%20Now%20Be%20Offered%20at%20Retail%20Pharmacies%2C%20F.D.A.,rules%2C%20they%20can%20provide%20it>.

59. See *infra* Part IV. See also Cohen et al., *supra* note 32, at 3 (providing a fuller discussion of the new landscape of telemedicine abortion).

60. *The Appropriate Use of Telemedicine Technologies in the Practice of Medicine*, FED’N OF STATE MED. BDS. (April 2022), <https://www.fsmb.org/siteassets/advocacy/policies/fsmb-workgroup-on-telemedicineapril-2022-final.pdf>.

61. KAISER FAM. FOUND., *supra* note 60, at 5.

Some state laws require the initial dose of the medication to be taken in the physical presence of the prescribing physician,⁶² which could prohibit the woman from receiving the medication in the mail or out-of-state through a telehealth visit and taking it at home. Missouri has a proposed bill to create the offense of “trafficking abortion-inducing drugs,” which includes knowingly importing medication to be used for the purpose of inducing an abortion in violation of state law.⁶³ The offense would be a class B felony.⁶⁴ The bill would also prohibit the state board of pharmacy from issuing or renewing a nonresident pharmacy license to anyone who knowingly delivers any substance to be used for the purpose of inducing an abortion.⁶⁵ Missouri also enacted a statute that requires the health department to approve a patient “complication plan” before a physician prescribes or administers an FDA-approved medication abortion if the FDA-approved label includes a clinical study in which more than one percent of those administered a medication abortion required a follow-up surgical abortion.⁶⁶

Some states also ban any use of telehealth for abortions;⁶⁷ bans that apply regardless of the location of the provider. Some states enhance penalties for providers using telehealth for abortions without being licensed in the state. In South Dakota, it is a class 6 felony to prescribe medicine to induce an abortion without being licensed to practice in the state.⁶⁸

E. Evidence and Protections for Out of State Providers

A further set of issues regarding movement concerns evidence. States might try to gather proof that travel out-of-state was for an abortion or that an abortion actually occurred. Evidence might be gathered in-state, such as photographing the license plates of cars registered to women of reproductive age as they cross or re-cross the state border.⁶⁹ States may also want out-of-state evidence to prove in-state violations; for example, a prosecution for intentionally aiding or abetting transit out of the state for an abortion might seek information

62. *E.g.*, ARK. CODE ANN. § 20-16-603(b)(1) (2015).

63. S. 1178, 101st Gen. Assemb., 2d Reg. Sess. (Mo. 2022).

64. *Id.*

65. *Id.*

66. MO. REV. STAT. § 188.021(2) (2017).

67. *E.g.*, ARIZ. REV. STAT. ANN. § 36-3604 (2021).

68. S.D. CODIFIED LAWS § 36-4-8 (2022).

69. Thor Beson, *The Danger of License Plate Readers in Post-Roe America*, WIRED (July 7, 2022), <https://www.wired.com/story/license-plate-reader-alpr-surveillance-abortion/?redirectURL=https://www.wired.com/story/license-plate-reader-alpr-surveillance-abortion/>.

that the abortion actually occurred.⁷⁰ Similarly, a license denial based on having performed abortions might require information about out-of-state activities.⁷¹

Anticipating such possibilities, states have enacted laws to protect their health care providers, people who travel to their state for abortions, and people who help those seeking an abortion. Connecticut acted first, enacting a statute that shields people in Connecticut from subpoenas issued by other states in proceedings related to legal health care in Connecticut.⁷² The Connecticut law also protects communications made to providers with respect to reproductive health services that are legal in Connecticut.⁷³ The statute provides a cause of action for anyone who has had a judgment entered against them for the provision of reproductive health services that are legal in Connecticut; recovery includes the amount of the judgment in the other state, and reasonable attorney's fees.⁷⁴ In another example, New York's "Fire Hate" act establishes a cause of action for damages for unlawful interference with the right to obtain abortion care protected under New York state law.⁷⁵

Despite these protections, people involved in out-of-state abortions might face risks if they travel to states where there are significant abortion restrictions. This possibility is not at all farfetched; some significant airline hubs are in anti-abortion states. For example, Delta has hubs in Salt Lake City, Utah, and Atlanta, Georgia;⁷⁶ the primary hub of American Airlines is in Dallas/Fort Worth, Texas.⁷⁷ Other anti-abortion states are major vacation destinations. For example, Florida is home to the tourist destination of Disneyworld and many second homes; Utah's famous powder draws skiers from all over the country. A vacation or just a stop-over in an abortion-restricting state might subject providers to personal jurisdiction in civil or criminal cases, or to the service of subpoenas that might be barred in their home states.

F. Residency Restrictions

On the other side, states protecting abortion rights may seek to restrict abortion care for non-residents to avoid being so overwhelmed by out-of-state patients that their own residents find it difficult to obtain care. Abortion providers may also be concerned about giving medication abortion to people from states

70. Safia Samee Ali, *Prosecutors in States Where Abortion is Now Illegal Could Begin Building Criminal Cases Against Providers*, NBC NEWS (June 24, 2022), <https://www.nbcnews.com/news/us-news/prosecutors-states-abortion-now-illegal-begin-prosecute-abortion-provi-rcna35268>.

71. E.g. TENN. CODE ANN. § 39-15-211(b)(7) (2018); MISS. CODE ANN. § 73-25-29(5) (2013); N.D. CENT. CODE § 43-06-15(1)(h) (2021).

72. 2022 Conn. Acts. 1-7 (Reg Sess.)

73. *Id.*

74. *Id.*

75. N.Y. CIV. RIGHTS LAW § 70-B (2022).

76. *Corporate Stats and Facts*, DELTA NEWS HUB (July 6, 2022), <https://news.delta.com/corporate-stats-and-facts>.

77. Linnea Ahlgren, *The American Airlines Hub Ecosystem: Why It Works*, SIMPLE FLYING, (Sept. 30, 2021), <https://simpleflying.com/american-hub-ecosystem/>.

where abortion is prohibited; at least one abortion provider has adopted a policy of refusing to provide abortion medication to residents of other states that prohibit abortion.⁷⁸

G. Extraterritorial Events

As of 2022, no state has explicitly proposed to criminalize actions occurring fully outside of their borders. However, significant extraterritoriality may be involved in some of the possibilities we have described, either directly or indirectly. Some state laws prohibiting abortions are silent about whether the state's prohibitions are limited to abortion procedures performed within the state. For example, Alabama prohibits any person from performing or attempting to perform an abortion⁷⁹ and defines abortion as the use or prescription of any substance or device with the intent to terminate a pregnancy.⁸⁰ This statute is silent about the location of the abortion in question, so it could be construed as including prohibitions of abortions performed on Alabama residents in other states, or even prohibitions of abortions, wherever performed.⁸¹ Other proposals we have discussed in this section involve in-state consequences for abortions occurring out-of-state, such as damage remedies asserted against out-of-state providers or license denials for procedures performed out-of-state.⁸² The state's arguments for these restrictions can be grounded in interests occurring within the state: the interest in protecting their residents against out-of-state harms, or in assuring their residents that in-state health care professionals have not engaged in activities that cast doubt on their fitness to practice within the state.⁸³ Nonetheless, these restrictions have significant extraterritorial aspects, so we turn to a brief explanation of why movement, not extraterritoriality, is our primary concern.

II. INTERLUDE: EXTRATERRITORIALITY

State police powers clearly apply to harms occurring within the state, but their extension to wholly extraterritorial events is highly controversial, even

78. Shaylee Ragar, *Planned Parenthood of Montana won't Offer Abortion Medication for Out-of-state Residents*, MONTANA PUBLIC RADIO (July 1, 2022), <https://www.mtpr.org/montana-news/2022-07-01/planned-parenthood-of-montana-wont-offer-abortion-medication-for-out-of-state-residents>.

79. ALA. CODE § 26-23H-4(a) (2022).

80. ALA. CODE § 26-23H-3 (2022). In contrast, Utah's definition of an abortion refers to procedures performed by physicians licensed in Utah or employed by the federal government and eligible for licensure in Utah, so would not include abortions performed out of state by providers who are not licensed in Utah. UTAH CODE ANN. § 76-7a-101(1), (8) (LexisNexis 2022).

81. See ALA. CODE § 26-23H-4(a) (2019) (it is unlawful to intentionally perform at attempt to perform an abortion except to prevent serious health risk to the unborn child's mother and in cases of medical emergency).

82. See *supra* notes 80-84.

83. See generally Caroline Kitchener & Devlin Barrett, *Antiabortion Lawmakers Want to Block Patients From Crossing State Lines*, WASH. POST (June 29, 2022), <https://www.washingtonpost.com/politics/2022/06/29/abortion-state-lines/>.

when there are ties to the state in the sense that their residents performed actions or were victims of others.⁸⁴ Efforts to assert extraterritorial jurisdiction raise deep questions of international law as well as domestic constitutional law. These questions include whether the state must have a relationship to the people, things, or events involved in the case and what the relationship must be. For abortion, a state might assert the desire to protect their residents from having abortions or being encouraged to have abortions, their resident fetuses from being aborted, their residents' relationships with fetuses being aborted, or their interest in not having health providers who have performed abortions practice within the state. At the furthest reaches of extraterritoriality, a state might claim that it has an interest in prohibiting abortions in other states within the federal union—or even anywhere in the world.

Even if a state asserts an interest in protecting one of its residents, it is unclear if the state could criminalize extraterritorial action that is legal where it occurs. Murder of a Texas resident in Massachusetts is a murder in Massachusetts, typically to be prosecuted under Massachusetts law.⁸⁵ To take a reproductive example, in Louisiana payment for the services of a gestational carrier beyond reimbursing expenses is a crime punishable by a fine of up to \$50,000 or up to ten years in jail,⁸⁶ but in California, agencies advertise payments for surrogates of up to \$75,000 plus expenses.⁸⁷ These arrangements are legal in California⁸⁸ and Louisiana residents may travel to California for these services without being prosecuted in Louisiana (although Louisiana courts would not enforce California surrogacy contracts).⁸⁹ Yet, there are examples of extraterritorial crimes, particularly internationally. For example, under U.S. federal law it is a crime for anyone who travels into the U.S., is a U.S. citizen, or is a U.S. lawful permanent resident to engage in illicit sexual conduct outside of the U.S., which includes commercial sex acts with minors or production of child pornography.⁹⁰ These prohibitions apply whether or not the conduct is legal in the jurisdiction where it occurs.⁹¹

84. For discussions of extraterritoriality, *see, e.g.*, William S. Dodge, *The New Presumption Against Extraterritoriality*, 133 HARV. L. REV. 1582 (2020); Austen Parrish, *Personal Jurisdiction: The Transnational Difference*, 59 V.A. J. OF INTL. L. 97 (2019); Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 NOTRE DAME L. REV. 1057 (2009); Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, U. PA. L. REV. 855 (2002).

85. MASS. GEN. LAWS ANN. ch. 212, § 6 (1978).

86. LA. STAT. ANN. § 14:286(E) (2016).

87. *See, e.g., Surrogate Compensation at West Coast Surrogacy*, WEST COAST SURROGACY (2022), <https://www.westcoastsurrogacy.com/become-a-surrogate-mother/surrogate-mother-compensation>.

88. CAL. FAM. CODE § 7962 (2019).

89. LA. STAT. ANN. § 9:2720(D) (2018).

90. 18 U.S.C. §§ 2423(c), (f) (1948).

91. *Id.*

Some commentators have argued that recognition of extraterritorial crimes either inter- or intra-nationally is necessary to prevent touristic circumvention of important state policies.⁹² For example, constitutional law theorist Mark Rosen has long argued that states ought to be able to criminalize extraterritorial conduct by their residents, even within the United States.⁹³ Rosen's argument is that "soft pluralism" that enables state residents to evade state restrictions by travel elsewhere limits the effective policy options available to states.⁹⁴ He contrasts this with "hard pluralism" that allows states to be effective in implementing their policy choices with respect to their residents.⁹⁵ Rosen's later writings acknowledge that hard pluralism comes at the cost of impeding interstate movement choices for residents.⁹⁶ His solution is for Congress to be able to overrule a state decision in favor of hard pluralism.⁹⁷ Thus striking the balance between soft and hard pluralism should be left to the political processes, at initially the state and then the federal level.⁹⁸

In the international context, Harvard law professor I. Glenn Cohen has discussed extraterritorial application of the home country's criminal law to reproductive tourism—what he calls "circumvention tourism"—and argued that under international law countries have the discretion to extend well-grounded criminal prohibitions to their citizens acting abroad.⁹⁹ As a normative matter, Cohen contends, whether to criminalize extraterritorially depends on whether the prohibition is aimed to prevent harm, whether the supposed victim in question is a resident of the home country, and whether the supposed victim is represented in home country governance decisions.¹⁰⁰ On Cohen's view, if abortion is seen as victim protection for a resident fetus, the case for extraterritorial prohibition would be strengthened.¹⁰¹ Cohen explicitly limits his view to international situations, where, he says, "the normative complications that arise when individual states within a nation take opposite views," do not arise.¹⁰² Indeed, the U.S. constitutional structure, by contrast, could suggest important reasons for suspicion about a state's ability to constrain what their residents do in other

92. *E.g.*, I. Glenn Cohen, *Circumvention Tourism*, 97 CORNELL L. REV. 1309,(2012) (arguing that states with domestic prohibitions should in many cases apply its proscriptions to the conduct of its citizens traveling abroad); Mark D. Rosen, *'Hard' or 'Soft' Pluralism?: Positive, Normative, and Institutional Considerations of States' Extraterritorial Powers*, 51 ST. LOUIS U. L. J. 713 (2007) (arguing that states should have the authority to criminalize conduct of their residents in other states).

93. Rosen, *supra* note 105. Rosen, *supra* note 114, at 713-59. Mark D. Rosen, *State Extraterritorial Powers Reconsidered*, 85 NOTRE DAME L. REV. 1133(2010).

94. Rosen, *supra* note 114, at 744-47

95. *Id.*

96. Mark D. Rosen, *Marijuana, State Extraterritoriality, and Congress*, 58 B.C. L. REV. 1013, 1016-17 (2017).

97. *Id.*

98. Rosen, *supra* note 115, at 1133-55.

99. Cohen, *supra* note 114, at 1317.

100. *Id.*

101. *Id.* at 1337-1338.

102. *Id.* at 1336.

states. Some states have indicated that they will welcome abortion-seekers from elsewhere, in which case the policies of a travel-restricting state would be at direct odds with the policies of the destination state—a reason why the extraterritorial reach of the home state would be questionable for U.S. federalism.¹⁰³ On the other hand, within-country extraterritoriality does not raise the same questions of national sovereignty that are raised by international extraterritoriality.¹⁰⁴

In contrast to Rosen and Cohen, Seth Kreimer has deployed the right to travel to criticize extraterritorial criminalization of abortion within the U.S. domestic context.¹⁰⁵ Kreimer argues that the right to travel has been fundamental throughout U.S. history, supporting liberty and the opportunity to enjoy the benefits of experimentation.¹⁰⁶ That people do not show passports when they cross state lines, Kreimer says, should be taken as a marker that people pass into other states as citizens poised to experience the privileges and immunities of their state of destination.¹⁰⁷ Nor does being a resident of one's own home state create a duty of allegiance to follow all the rules of that state when travelling to another state, even though it might create duties of fairness to the home state, such as the duty to pay state taxes on income from out-of-state activities.¹⁰⁸ On Kreimer's view, people do not leave their home state continually enshrouded by its prohibitions as they go.¹⁰⁹

Issues of extraterritoriality arise outside of criminal law as well. For example, a state resident might seek to use her state courts to enforce a contract entered into out of the state,¹¹⁰ or to sue for damages incurred outside of the state.¹¹¹ Here, the state's interest would be in protecting its residents from harm, even though the only connection that the harms have to the state is the residency of the victim. An example would be a state permitting a damages remedy against a health care provider for an abortion performed out-of-state. These kinds of suits raise complex problems of due process including whether the home state may

103. April Dembosky, *California Lawmakers Ramp Up Efforts to Become a Sanctuary State for Abortion Rights*, NPR (June 2, 2022), <https://www.npr.org/sections/health-shots/2022/06/02/1102317414/california-lawmakers-ramp-up-efforts-to-become-a-sanctuary-state-for-abortion-ri>.

104. *Compare* April Dembosky, *California Lawmakers Ramp Up Efforts to Become a Sanctuary State for Abortion Rights*, NPR (June 2, 2022), <https://www.npr.org/sections/health-shots/2022/06/02/1102317414/california-lawmakers-ramp-up-efforts-to-become-a-sanctuary-state-for-abortion-ri>, with Austen Parrish, *Personal Jurisdiction: The Transnational Difference*, 59 VA. J. INT'L L. 97 (2019).

105. Seth Kreimer, *'But Whoever Treasured Freedom': the Right to Travel and Extraterritorial Abortion*, 91 MICH. L. REV. 907 (1993).

106. *Id.* at 915-16.

107. *Id.* at 917.

108. *Id.* at 924-26.

109. *Id.* at 907-38.

110. *E.g.*, *Sec. Nat. Life Ins. Co. v. Washington*, 113 A.2d 749, 751 (D.C. 1955) (enforcing a resident's life insurance contract with a non-resident company).

111. *Rhoades v. Wright*, 622 P. 2D 343 (UT. 1980) (allowing suit in Utah against a resident of Wyoming for a death that occurred in Wyoming).

exercise jurisdiction over the non-state party or has sufficient connection to the things or events involved to adjudicate the controversy.

We are sympathetic to Kreimer's defense of the right to travel, but our goal in this article is not to develop a general doctrine of extraterritoriality. Instead, we think that beginning with extraterritoriality doctrine—itsself unclear¹¹²—starts the wrong way around, although it may ultimately be the jurisprudential strategy resorted to in the courts to resolve cases involving abortion-related movement across state lines and it will be brought into play if states take further steps of seeking to regulate extraterritorial activity. States may ultimately be locked in battles involving how far they can go to address what happens outside of their borders.¹¹³ But even before these battles are pitched, states may be able to do a great deal affecting what occurs within their borders, and asserting interests in what happens within their borders, without ever raising the specter of extraterritoriality.

Therefore, in this article our aim is to start with rights to movement and see how far an analysis of these rights can be taken to address state efforts to regulate what happens within their borders that affects movement that crosses state lines. The argument explored here will be that policies that restrict movement for a service legal elsewhere impinge on the fundamental right of movement protected under Article IV of the Constitution¹¹⁴ and must be narrowly tailored to further a compelling state interest. Leaving a fundamental right like the right to movement up to the political process—as Rosen would do—is equivalent to applying the rational basis test, far from assessing whether a restriction is narrowly tailored to a compelling state interest. Rejecting reproductive liberty as a fundamental right, as the Court did in *Dobbs*,¹¹⁵ does not imply rejecting rights that find their basis beyond the Due Process Clause such as the right to movement.

We begin with restrictions on interstate movement for another medical intervention: medical aid in dying (MAID). The analogy to abortion is especially apt because MAID is not protected as a fundamental right. Other constitutional grounds must be relied upon, therefore, if restrictions on movement with regard to MAID are to be scrutinized under more than the rational basis test.

112. It has recently been called “a ‘messy’ area of law.” JULIE ROSE O’SULLIVAN, *Extraterritorial Jurisdiction*, REFORMING CRIM. JUST. 230 (2017).

113. See Cohen et al., *supra* note 37, at 1, 5.

114. U.S. CONST. art. IV, § 2. This clause refers to privileges and immunities of “citizens.” *Id.* The Fourteenth Amendment privileges and immunities clause refers to “citizens,” too, after specifying that “all persons born or naturalized in the United States ... are citizens of the United States.” U.S. CONST. amend. XIV. The Due Process and Equal Protection clauses of the Fourteenth Amendment use the term “persons.” *Id.* We set aside here the very difficult set of questions about rights of non-citizens, including lawful permanent residents and others with very different forms of visa status.

115. *Dobbs v. Jackson Women’s Health Org.*, 142 S.Ct. 2228, 5 (U.S. June 24, 2021).

III. MOVEMENT, RESIDENCY, AND MEDICAL AID IN DYING

This section of the paper first describes the existing situation concerning MAID statutes, including residency requirements that restrict interstate movement for MAID.¹¹⁶ We then describe the legal challenge to Oregon's residency requirement brought by Dr. Gideonse, which settled with Oregon's agreement not to enforce the requirement.¹¹⁷ Two theories were stated in the complaint: that the residency requirement (1) violated the right to travel and (2) violated the Dormant Commerce Clause.¹¹⁸ We sketch out current Supreme Court jurisprudence on the first of these theories, explaining its implications first for the constitutionality of residency requirements for MAID and then for abortion restrictions affecting interstate movement.¹¹⁹ We save brief discussion of the Dormant Commerce Clause for the final section of this article.¹²⁰

A. Oregon and other states with MAID laws

In 1994, Oregon became the first state to adopt physician assisted MAID with a ballot initiative, the "Death with Dignity Act."¹²¹ The Act allows adults with decision making capacity who have been diagnosed with a terminal illness and are expected to die within six months to request a prescription for medication that could result in their death.¹²² Prescriptions under the Act must be reported to the Oregon Health Authority.¹²³ In 2021, 383 people were reported to have received prescriptions and 238 people were reported to have died from prescriptions, fewer than 1% of all deaths in the state.¹²⁴ The most common reported diagnoses were cancer, neurological illness such as amyotrophic lateral sclerosis, and heart disease.¹²⁵ Ninety-five percent of patients died at home, 95% had informed their family members, 98% were under hospice care, and 99% had health insurance.¹²⁶ Most were over 65, half had completed college, and 95% were white.¹²⁷ At least in Oregon, the data do not bear out concerns that people were pressed into seeking aid in dying because they were uninsured, lacked access to pain management, or came predominantly from disadvantaged groups

116. *See infra* notes 148-76.

117. *See infra* notes 177-86.

118. Complaint at 9-11, *Gideonse v. Brown*, No. 3:21-cv-01568 (D. Or. 2021).

119. *See infra* notes 196-213.

120. *See infra* Part V.

121. OR. REV. STAT. §§ 127.800-995 (1997).

122. OR. REV. STAT. § 127.805(1) (1997).

123. OR. REV. STAT. § 127.865 (1997).

124. CTR. FOR HEALTH STAT., OREGON HEALTH AUTH. OREGON DEATH WITH DIGNITY ACT: 2021 DATA SUMMARY 3 (2022).

125. *Id.*

126. *Id.* at 7.

127. *Id.* at 3. *See also* Luai Al Rabadi et al., *Trends in Medical Aid in Dying in Oregon and Washington*, JAMA NETWORK OPEN, Aug. 9, 2019, at 7 (of the 2558 patient deaths from lethal ingestion, most were male, older than 65 years, and non-Hispanic white).

Oregon has been joined by ballot initiatives in two states, Washington in 2008 and Colorado in 2016.¹²⁸ In the West, California, Hawaii, and New Mexico have enacted laws modeled on Oregon's.¹²⁹ In the East, statutes have been adopted by Vermont, Washington D.C., New Jersey, and Maine.¹³⁰ The Montana Supreme Court decided in 2009 that the state's Terminally Ill Act stated a policy of respect for patients' choices and shielded physicians from prosecution for homicide for aid in dying at patients' requests.¹³¹ This decision was based on statutory interpretation, not an interpretation of the state's constitution.¹³² Multiple unsuccessful legislative efforts have been mounted to change the Montana Terminally Ill Act in response to this decision; commentators suggest that the failure of these efforts may reflect public support for the option of MAID and libertarian views in this conservative state.¹³³

Legislation is frequently introduced in many states and has come close to passage in some.¹³⁴ In 2019, an aid-in-dying bill failed in the Maryland legislature after a 23-23 vote tie.¹³⁵ No states in the Middle West or South have accepted MAID.¹³⁶ Opposition to MAID legislation has been led by religious organizations, particularly the Catholic church and evangelical groups.¹³⁷ Even in states where MAID is legal, patients may not be able to receive it because their physicians are employed by health care organizations opposed to the practice. For example, Dr. Barbara Morris was fired by Centura Health, a Catholic hospital, for providing a terminally ill patient with MAID, even though she saw the patient entirely outside of her hospital practice.¹³⁸

128. WASH. REV. CODE ANN. §§ 70.245.010-220 (2008); COLO. REV. STAT. § 25-48-102 (2017).

129. CAL. HEALTH & SAFETY CODE §§ 443-443.22 (2015); HAW. REV. STAT. §327L (2019); N.M. STAT. ANN. § 24-7C-6 (2021).

130. VT. STAT. ANN. tit. 18, §§ 5281-5293 (2013); N.J. REV. STAT. § 26:1A (2022); ME. REV. STAT. ANN. tit. 22, § 2140 (2019).

131. *Baxter v. State*, 224 P.3d 1211,1222 (Mont. 2009).

132. James C. Nelson, *Aid in Dying in Montana Keynote Address: Some Personal Perspectives About Where We Are, Where We Are Going, and Whether the Courts Are Part of the Problem or the Solution*, 81 MONT. L. REV. 201, 204 (2020).

133. Shaylee Rager & Nick Mott, *The Politics of Death and Dying*, MONT. FREE PRESS (Apr. 28, 2022), <https://montanafreepress.org/2022/04/28/shared-state-the-politics-of-death-and-dying/>.

134. See Thaddeus Pope, *Legal History of Medical Aid in Dying: Physician Assisted Death in U.S. Courts and Legislatures*, 48 N.M. L. REV. 268, 275-76 (2018) (legal status of MAID has been in a state of rapid change across the country, as the rate and pace of legalization has been accelerating).

135. Bruce DePuyt, *Undimmed by Past Defeats, Advocates Renew Push for End-of-Life Options Bill*, MD. MATTERS (Feb. 4, 2022).

136. See *States Where Medical Aid in Dying is Authorized*, COMPASSION & CHOICES, <https://compassionandchoices.org/resource/states-or-territories-where-medical-aid-in-dying-is-authorized> (last visited Nov. 2, 2022).

137. *Religious Groups' Views on End-of-Life Issues*, PEW RSCH. CTR. (Nov. 21, 2013), <https://www.pewresearch.org/religion/2013/11/21/religious-groups-views-on-end-of-life-issues/>.

138. Dr. Morris brought a wrongful discharge suit against Centura. JoNel Aleccia, *Terminally Ill, He Wanted Aid-In-Dying. His Catholic Hospital Said No*, KAISER HEALTH NEWS (Jan. 29, 2020), <https://khn.org/news/when-aid-in-dying-is-legal-but-the-medicine-is-out-of-reach/>.

Oregon's law specifies that a patient must be a state resident to qualify for MAID.¹³⁹ Other state laws have followed this model. As in Oregon, some of these statutes do not define what it means to be a "resident" for purposes of MAID.¹⁴⁰ New Jersey's statute contains specific legislative findings that access to MAID is in the interests of the state's residents and necessary for their welfare, but the statute does not define residency.¹⁴¹ However, Colorado's statute specifies that to be a resident of the state for purposes of MAID, a person must have a Colorado driver's license or identification card, be registered to vote in Colorado, present evidence of owning property in Colorado, or have submitted a Colorado income tax return for the most recent tax year.¹⁴² These requirements might be very difficult to meet for someone who has been a resident of another state and wishes to seek MAID in Colorado after a diagnosis of a terminal illness. The Hawai'i statute states that the residency requirement may be met by, but is not limited to, the four forms of evidence described above.¹⁴³ Similarly, the District of Columbia compliance form requires the attending physician to certify that the patient is a D.C. resident based on, but not limited to, a variety of factors.¹⁴⁴ However, it still may be difficult for patients to meet residency requirements.

On a cautious view of federalism as experimentation, these restrictions could be justified as limiting harm as a state tries out a new policy. MAID was highly controversial from the beginning, with concerns about the need to protect the vulnerable, to respect different viewpoints, and to assure improved end of life care.¹⁴⁵ Early critics of Oregon's law found the residency requirement too lax to prevent Oregon from becoming a "magnet" for terminally ill patients who might come to Oregon detached from their regular health care providers and social networks.¹⁴⁶ However, concerns of abuse of vulnerable patients and a flood of

139. OR. REV. STAT. § 127.800(11) (1996).

140. *Id.*, See also CAL. HEALTH & SAFETY CODE § 443.1(p) (West 2022) (neglecting to define "resident" in the statute); ME. REV. STAT. ANN. tit. 22, § 2140(2)(K) (2019) (mentions resident in context of MAID but does not define the term); N.J. STAT. ANN. § 26:16-3 (West 2022) (notes that a qualified terminally ill patient is an adult who is a resident but does not define resident in the statute); N.M. STAT. ANN. § 24-7C-2(A) (2022) (defines the term "adult" as a resident who is eighteen years of age or older but does not define the term "resident"); VT. STAT. ANN. tit. 18, § 5281(8) (2013) (uses the term "resident" as a qualifier but does neglects to define the term in the statute); WASH. REV. CODE § 70.245.010(11) (2008) (defines a "qualified patient" as an adult who is a resident of the state of Washington but does not define the term "resident").

141. N.J. REV. STAT. § 26:16-2(d) (2019).

142. COLO. REV. STAT. § 25-48-102(14) (2017).

143. HAW. REV. STAT. §327L-13 (2022).

144. *Attending Physician's Compliance Form*, D.C. HEALTH (Mar. 14, 2018), <https://dchealth.dc.gov/sites/default/files/dc/sites/doh/publication/attachments/Attending%20Physician%27s%20Compliance%20Form.03.14.18.pdf> ("Factors demonstrating residency include, but are not limited to: 1) Possession of a District of Columbia driver's license; 2) Evidence that a person leases/owns property in the District of Columbia; or 3) Filing of District of Columbia tax return for the most recent tax year.").

145. See, e.g., Timothy E. Quill et al., *The Debate Over Physician-Assisted Suicide: Empirical Data and Convergent Views*, 128 ANNALS INTERNAL MED. 552, 552-58 (1998).

146. Ezekiel J. Emanuel, *Oregon's Physician Assisted Suicide Law Provisions and Problems*, 156 ARCHIVES INTERNAL MED. 824, 828 (1996).

inappropriate early deaths did not materialize. Instead, high profile stories of patients who moved to Oregon because they could not get MAID in their own state brought sympathy to the MAID movement. Brittany Maynard, a California woman with terminal brain cancer moved to Oregon for aid in dying and became a public advocate for implementing MAID in her home state of California and elsewhere.¹⁴⁷

B. Dr. Gideonse's Legal Challenge to Oregon's Residency Requirement

In 2021, Dr. Nicholas Gideonse, a physician at Oregon Health & Sciences University in Portland who turned down Washington state residents who sought his assistance in dying, challenged the constitutionality of Oregon's residency requirement.¹⁴⁸ Washington also permits MAID, so the states did not disagree about the acceptability of the practice.¹⁴⁹ Washington patients were not going to Oregon to evade their state's restrictions; rather, they were seeking care from a provider they wished to see at Oregon Health Sciences University, a major academic medical center that serves the Portland region, including patients just across the Columbia River in Vancouver, Washington.¹⁵⁰ However, Dr. Gideonse was not licensed to practice in Washington.¹⁵¹

The complaint was based on two different constitutional theories.¹⁵² One theory was that Oregon's different treatment of in-state and out-of-state residents for purposes of MAID violated the Privileges and Immunities Clause of Article IV of the U.S. Constitution.¹⁵³ The second theory was that, by restricting the right of out-of-staters to receive medical services that residents could receive, Oregon's law interfered with interstate commerce in violation of the dormant Commerce Clause doctrine that states may not unduly burden interstate commerce.¹⁵⁴ The lawsuit settled in March 2022, with the state agreeing not to enforce its residency requirement.¹⁵⁵ However, residency requirements in other state statutes¹⁵⁶ remain unchallenged.

147. Alex Dobuzinskis, *California Cancer Patient, 29, Moves to Oregon for Assisted Suicide*, REUTERS (Oct. 8, 2014), <https://www.reuters.com/article/us-usa-euthanasia-oregon/california-cancer-patient-29-moves-to-oregon-for-assisted-suicide-idUSKCN0HX24920141008>.

148. Trial Pleading at ¶ 2-4, *Gideonse v. Brown*, No. 3:21-cv-01568, 2021 WL 8650316 (Oct.28, 2021) (No. 3645).

149. The Washington Death with Dignity Act, (2009) Chap. 70.245, REV. C. WASH.

150. Trial Pleading, *supra* note 176 at ¶4, 16.

151. *Id.*

152. *Id.* at ¶30, 47

153. *Id.* at ¶ 30-44; *see* U.S. CONST. art. IV, § 2 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”).

154. *Gideonse v. Brown*, No. 3:21-cv-01568, 2021 WL 8650316 (D. Or. 2021) (complaint filed Oct. 28).

155. Deepa Shivaram, *Physician-Assisted Death in Oregon is No Longer Limited to Just State Residents*, NPR (Mar. 30, 2022), <https://www.npr.org/2022/03/30/1089647368/oregon-physician-assisted-death-state-residents>.

156. *E.g.*, COLO. REV. STAT. ANN. § 25-48-102(13) (2019); D.C. CODE § 21-182(2)(13) (2016); ME. REV. STAT. TIT 22. § 2140(2)(K) (2019); N.M. STAT. ANN. § 24-7C-2(A) (2021).

Because this case settled, it did not result in a holding about the permissibility of residency requirements for MAID.¹⁵⁷ Nor were the theories advanced on behalf of Dr. Gideonse developed in the complaint. In the remainder of this section, we describe current Supreme Court jurisprudence with respect to Dr. Gideonse's Privileges and Immunities Clause argument. We also analyze support for the conclusion that under present circumstances these residency requirements are unconstitutional. Our goal is to spell out these arguments to enable analysis of their implications for abortion movement. In Section V, we consider a potential dormant Commerce Clause analysis.¹⁵⁸

1. Privileges and Immunities, Equal Protection, and the right to travel

The first theory put forth in Dr. Gideonse's complaint is that under the Privileges and Immunities Clause of Article IV, states may not give differential treatment to in-state and out-of-state residents that infringes on the fundamental right to travel.¹⁵⁹ Importantly, Article IV concerns the privileges and immunities of citizens of a federal nation: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."¹⁶⁰ The Court has held that Article IV does not prohibit all differences between in-state and out-of-state residents. For example, states may differentiate between residents and non-residents for hunting license fees,¹⁶¹ charge differential tuition for attendance at state institutions of higher education so long as residency requirements are reasonable,¹⁶² and limit state benefits such as free public schools to state residents.¹⁶³ Other differences are impermissible; for example, a state may not preclude residents of another state from doing business in the state without valid, substantial, and closely related reasons independent of residency.¹⁶⁴ The analytic question is whether restriction of a medical service such as MAID to in-state residents falls on the permissible or impermissible side of the line.

Article IV is not the only privileges and immunities clause in the Constitution. Under the Fourteenth Amendment, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."¹⁶⁵ Soon after the Amendment's passage, the Court limited its privileges and immunities clause to the rights of federal citizenship.¹⁶⁶ The Amendment

157. Amelia Templeton, *What Oregon's Death with Dignity settlement means for terminally ill patients from out of state*, OPB, (March 31, 2022) <https://www.opb.org/article/2022/03/31/what-oregons-death-with-dignity-settlement-means-for-terminally-ill-patients-from-out-of-state/>.

158. *Infra* Part V.

159. *Gideonse*, 2021 WL at *35-40.

160. U.S. CONST. art. IV, §2.

161. *Baldwin*, 436 U.S. 371 at 388.

162. *Vlandis*, 412 U.S. at 445-46.

163. *Martinez v. Bynum*, 461 U.S. 321, 328-29 (1983).

164. *N.H. Sup. Ct. v. Piper*, 470 U.S. 274, 281, 288 (1985); *Toomer v. Witsell*, 334 U.S. 385, 396 (1948).

165. U.S. CONST. amend. XIV, § 1.

166. *Slaughter-House Cases*, 83 U.S. 36, 37 (1872).

thus has long been interpreted as not creating new rights of state citizenship for protection. However, state distinctions between residents and non-residents, along with distinctions between classes of residents such as recent and long-standing residents, may be challenged under the Equal Protection Clause of the Fourteenth Amendment.

The current controlling Supreme Court case about when state residency distinctions violate privileges and immunities or equal protection is *Saenz v. Roe*, decided in 1999. *Saenz* held that California could not impose a cap on the welfare benefits available to a family residing in the state for less than twelve months.¹⁶⁷ To support this one-year benefit cap, California argued that it would save the state budget about \$10.9 million.¹⁶⁸ California also argued that although its statute differentiated between new and long-term residents of the state, it did not interfere with the right to travel because it did not penalize people for moving to California by making them worse off than they would otherwise have been in their states of origin.¹⁶⁹

In analyzing the permissibility of the one-year cap, the Court characterized its earlier holdings about the right to travel as having three components: (1) the right of a citizen of one state to enter and leave another; (2) the right of a temporary visitor to be treated as welcomed rather than as “an unfriendly alien;”¹⁷⁰ and (3) the right of those electing permanent residency to be treated like other citizens of the state. It then considered how each of these components might be applied to the California one-year cap.¹⁷¹

2. *The right to come and go*

The first component, the right to come and go across state borders, was not put at issue by the California cap.¹⁷² The cap said nothing about whether people could, or could not, come and go from California.¹⁷³ Nor, like waiting periods for benefits, did it deter people from coming into California by making them worse off than they would have been at home.¹⁷⁴ Other than asserting the

167. See *Saenz v. Roe*, 526 U.S. 489 (1999) (holding that a state cannot impose a durational requirement of residency to receive benefits other receive and that a discriminatory classification is itself a penalty that violates the Fourteenth Amendment’s Privileges and Immunities Clause).

168. *Id.* at 497.

169. *Id.*

170. *Id.* at 500.

171. *Id.*

172. *Id.* at 501.

173. *Id.*

174. See CA Welf. & Inst. Code Ann § 11450.03(a) (West Supp.1999) (“ Notwithstanding the maximum aid payments specified in paragraph (1) of subdivision (a) of Section 11450, families that have resided in this state for less than 12 months shall be paid an amount calculated in accordance with paragraph (1) of subdivision (a) of Section 11450, not to exceed the maximum aid payment that would have been received by that family from the state of prior residence.”).

existence of the right to come and go as part of the right to travel, the *Saenz* Court did not further consider the right it might apply to the California cap.¹⁷⁵

Similarly, MAID residency requirements neither stop people at the border nor make them worse off than they would have been at home. However, if movement is a fundamental right of federal citizenship,¹⁷⁶ states would need to show more than a rational basis for preventing movement for MAID either into or out of the state. A state might claim that it wishes to protect its residents from leaving the state for MAID. But a state second-guessing its residents on paternalistic grounds would open the door to widespread paternalistic interference with interstate travel. This would surely be unconstitutional if the right to come and go across state borders is recognized as a fundamental right.

Arguments that preventing out-of-state movement is necessary to prevent or discourage MAID within the state are also unconvincing. Patients who receive and complete MAID outside of the state will not return to engage in or encourage MAID within the state; their only return will perhaps be for burial. Their example might encourage others, but this is unlikely to be sufficiently widespread to be compelling. The state might also assert interests in preventing its residents from bringing medication obtained for MAID back into the state, using it to complete MAID or diverting it to someone else. But in-state restrictions could be imposed on these activities that would be more narrowly tailored than restrictions on the movement itself.

3. *The right to be a welcomed visitor*

The second component of the right to movement—what might be called the right to welcome—is protected by the understanding of the Privileges and Immunities Clause of Article IV¹⁷⁷ that states may not treat visitors from other states as though they do not have the rights of federal citizens. According to the Court, this prohibition on states treating citizens of other states as effective aliens was an explicit part of the transition from the Articles of Confederation to the U.S. as a federal union.¹⁷⁸ But California’s one-year ceiling on benefits, in the judgment of the Court, did not treat visitors as aliens; it instead treated new residents differently from longstanding residents.¹⁷⁹

However, a restriction on MAID to state residents might reasonably be viewed as violating the right to welcome, because it explicitly bars visitors from enjoying a service that is otherwise available in the state. Apt analogies would be state regulations limiting emergency services or physician visits to in-state

175. *Saenz v. Roe*, 526 U.S. 489, 498-506 (1999).

176. E.g., *U.S. v. Guest*, 383 U.S. 745, 757-59 (1966) (discussing that travel is fundamental for federal citizenship).

177. U.S. CONST., art. IV § 2 (“The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”).

178. *Saenz v. Roe*, 526 U.S. 489, 501 (1999).

179. *Id.* at 502-05.

residents. If movement is a fundamental right of federal citizenship, the jurisprudential question would then be whether such restrictions can pass strict scrutiny. Arguably, when MAID was an entirely novel experiment in U.S. states, states might have had strong reasons for accepting the practice cautiously, reasons that would not apply to medical care generally. However, today, when experience does not bear out concerns about exploitation and abuse in states that have accepted MAID, this argument loses force. It also seems implausible that a state like Oregon would need to limit MAID to its own residents to ensure that the service remains available to them, as MAID is requested infrequently.

4. *Different treatment of newly-arrived and long-standing residents*

The third component of the right to travel was the one implicated by the California cap because, according to the *Saenz* Court, it treated some new residents differently from long-standing ones, and even some new residents differently from other new residents.¹⁸⁰ This violates the 14th Amendment Privileges and Immunities Clause requirement: the right to travel permits all U.S. citizens to move to other states, establish residency, and be treated on the same terms as other residents of the state.¹⁸¹ Assuming that this right is accepted, incursions on it require justification. The Court then examined whether California had a sufficient reason for treating some newly-arrived residents differently from long-term residents.¹⁸² Any justification in terms of deterring migration the Court dismissed outright as discriminatory.¹⁸³ Moreover, California's stated reason—to protect its budget—could not be justified by a discriminatory means.¹⁸⁴ While California could have protected its budget by small reductions across the board, it could not do so by discriminating among equally eligible citizens.¹⁸⁵ However, residency requirements for MAID would not implicate this third component, because they treat all state residents the same. The problem with the MAID residency requirements is thus their impact on the right to welcome, rather than on the right to come and go or the right to establish residency and be treated as other residents of the state.

Justice Thomas's dissent criticized the majority's interpretation of the Privileges and Immunities Clause of the 14th Amendment.¹⁸⁶ His view, which he argued was supported by the original meaning of the Clause, was that "privileges" referred only to the rights of all citizens of the U.S.¹⁸⁷ Thus, California could not deprive new residents of the rights of U.S. citizens, but it

180. *Saenz*, 526 U.S. 502-505 (1999).

181. *Id.* at 503.

182. *Id.* at 505.

183. *Id.* at 506.

184. *Id.*

185. *Id.* at 506-07.

186. *Id.* at 521 (Thomas, J., dissenting)

187. *Id.* at 521-24, 527.

was not required to treat new and old residents the same.¹⁸⁸ The right to public benefits is not a fundamental right of all citizens, so, Justice Thomas concluded, California's differential treatment of its residents was not unconstitutional. Given that the present jurisprudential view that MAID is not a fundamental right and that states may reasonably differentiate between MAID and withholding or withdrawing treatment,¹⁸⁹ Justice Thomas's reasoning would imply that states may limit MAID to their residents. It would not, however, impact movement as a right of federal citizenship protected under Article IV.

In sum, in 1999 even conservative justices agreed that states may not prohibit their residents from visiting another state for a service offered at their destination. A state opposed to MAID could not, therefore, bar a resident traveling elsewhere for MAID. Conservatives also agreed that state decisions to exclude visitors from services that were readily available to residents implicated the right to welcome. On this position, imposing a residency requirement for MAID would be subject to strict scrutiny, rather than the rational basis test, and would likely fail. However, two conservative justices argued that the right to travel and the right to establish residency are different questions and durational requirements could be a rational means to establish the latter.¹⁹⁰

IV. MAID AND STATE RESTRICTIONS ON INTERSTATE MOVEMENT FOR ABORTION

In this section, we consider the implications of our discussion of MAID and the right to movement for the state proposals we have outlined regarding abortion and movement.

A. *Restricting Movement Out of State for an Abortion*

The conclusion we drew from the application of *Saenz* to MAID is that it would be an unconstitutional restriction of the first component of the right to travel—the right to come and go—for the state of destination to bar someone from coming into the state for a service readily available to residents and for the state of departure to bar someone from leaving for the service. We reached this conclusion based on the assertion of the right to come and go as a fundamental right protected from state incursion under the Privileges and Immunities Clause of Article IV and the examination of whether the restriction on leaving or coming could be sufficiently supported by a state interest. Potential state interests surfaced in our analysis included the interest in protecting the resident from traveling for the service, the interests of the state in assuring that MAID does not occur within its borders, or the interest of the state in assuring that medication

188. *Id.*

189. *Washington v. Glucksberg*, 527 U.S. 702 (1997); *Vacco v. Quill*, 521 U.S. 793 (1997).

190 *Id.* at 517 (Rehnquist, J. dissenting) (claiming that durational requirements can be permissibly used to establish 'bona fide residence').

for MAID is not brought back into the state and diverted. We concluded that it would be an unconstitutional interference with the right to movement to prohibit residents from going elsewhere for a service the resident state believes would be bad for them.

Abortion after *Dobbs*, like MAID, is not recognized as a fundamental constitutional right. So the fundamental right to be invoked would need to be travel, not the abortion itself. As with MAID, the departure would be to a state where abortion is legal, so the state would not be preventing its residents from going elsewhere to engage in activities that are illegal where they occur. Indeed, in a case that arose before *Roe*, the Court held that a state could not prohibit advertising within its borders of abortion services legal in another state.¹⁹¹ Remaining interests that might be asserted by the state would be interests in protecting a vulnerable individual—the fetus—from being transported out-of-state to be harmed, or the interests in preventing abortion within the state by preventing the out-of-state movement.

States seeking to prohibit out-of-state movement for abortions might argue that abortion is fundamentally different from MAID because the state has an interest in protecting the fetus. On this view, the state's interference would be analogous to a state barring a resident from taking someone out-of-state to become the victim of murder. But the analogy does not hold if the destination state does not view abortion as murder. Rather, the analogy would be to the state's prohibiting departure to engage in conduct that is not judged to be murder by the destination state but is judged to be murder by the state of residency. The home state could argue in reply that in deciding on permissible movement, it may privilege its views about what constitutes murder over the views of the destination state.

This view of state interests rejects movement among jurisdictions with different moral views as a pragmatic compromise for recognizing moral pluralism among the states.¹⁹² Instead, it holds that states may make and enforce choices about movement at least for their own residents, an application to movement of the hard pluralism defended by Rosen.¹⁹³ States could then decide whether movement for the mother prevails over protections for the fetus. The most radical version of this position would be that states can privilege fetuses over women as entities having rights; on this view, states could even weigh fetal rights to life over maternal rights to life and prohibit abortions that are necessary to save the woman's life. No state has yet gone this far. However, there are state laws that ban all abortions, including those resulting from the rape of a young

192. Guido Pennings, *Reproductive Tourism as Moral Pluralism in Motion*, 28 J. MED. ETHICS 337, 337-41 (2002).

193. Mark D. Rosen, *'Hard' or 'Soft' Pluralism? Positive, Normative, and Institutional Considerations of States' Extraterritorial Powers*, St. Louis Univ. L. J. 713, 716-731 (2007).

child, unless there is an immediate threat to life.¹⁹⁴ And, in July 2022, the Idaho Republican Party adopted an official plank that rejects the mother's life as an exception to abortion bans.¹⁹⁵ A somewhat less radical version of this position would be that states may weigh fundamental rights differently, putting the right to life over the right of interstate movement.

Passages in Justice Alito's majority opinion hint that decisions about the relative importance of the subjects of constitutional rights belong to the states. For example, the opinion asserts that states may impose restrictions on medical procedures that affect only one sex, without bringing equal protection scrutiny into play.¹⁹⁶ Simply asserting that these restrictions are abortion-related despite their congruence with biological sex¹⁹⁷ risks erasing women as subjects for equal protection scrutiny. This risk is especially noteworthy, as Justice Alito does not explain how the assertion would apply to other distinctions such as those between residents and non-residents or those involving the age of the pregnant woman.¹⁹⁸ In another example, historical abortion restrictions are characterized as, "spurred by a sincere belief that abortion kills a human being . . . [o]ne may disagree with this belief (and our decision is not based on any view about when a state should regard prenatal life as having rights or legally cognizable interests . . .)"¹⁹⁹ This passage suggests that the status of the fetus and or the status of the woman are matters of genuine disagreement for the states to resolve. Moreover, "[o]rdered liberty sets limits and defines the boundary between competing interests . . . the people of the various states may evaluate these interests differently"²⁰⁰—a passage that could suggest that the relative weights of either the rights holders or the rights are up to the states to determine. And most tellingly, "[t]he contending sides also make conflicting arguments about the status of the fetus. This Court has neither the authority nor the expertise to adjudicate these disputes, and the *Casey* plurality's speculations and weighing of the relative importance of the fetus and mother represent a departure from the 'original constitutional proposition' that 'courts do not substitute their social and economic beliefs for the judgment of legislative bodies.'"²⁰¹ Women, Justice Alito also says, have the right to vote and may seek recognition of reproductive rights through the legislative process.²⁰² On this analysis, it would seem that Justice Alito's view is that as long as women are part of the process that results

194. MO. REV. STAT. § 188.017(2) (2022).

195. Kelcie Moseley-Morris, *No Exception for Life of Mother Included in Idaho GOP's Abortion Platform Language*, IDAHO CAP. SUN (July 16, 2022), <https://idahocapitalsun.com/2022/07/16/no-exception-for-life-of-motherincluded-in-idaho-gops-abortion-platform-language/>.

196. *Id.* at 2246 (asserting that the goal of preventing abortion does not constitute discrimination against women).

197. *Id.* at 2236-36. (citing *Geduldig v. Aiello*, 417 U.S. 484, 496 (1974)).

198. S.B. 1 § 12(6)(B) Gen. Assemb., 1d Spec. Sess., (Ind. 2022).

199. *Dobbs*, 142 S.Ct. at 2256.

200. *Id.* at 2257.

201. *Id.* at 2277.

202. *Id.*

in laws that do not consider them at all, they have been sufficiently recognized as subjects.

The majority's response to Chief Justice Roberts' concurrence reveals the extent it is willing to leave judgments about the status of rights holders and the weight of rights, to the states. The majority directs its response to two points it attributes to this concurrence. The first point attributed to the Chief Justice is that viability can be rejected as the line where the state's interest in protecting potential life becomes compelling while the fundamental right to reproductive liberty recognized in *Casey* is maintained. The second attributed point is that the Court should decide a case on narrow rather than more sweeping grounds.²⁰³ The majority also accuses the Chief Justice of adopting a novel and constitutionally unjustified "reasonable opportunity" rule, under which women should at least have a chance to decide whether to continue a pregnancy.²⁰⁴ But this response ignores a basic point in the Chief Justice's decision to concur only in the result: that the Court should not overrule the woman's right to choose to terminate her pregnancy.²⁰⁵ "Reasonable opportunity" is offered as one way to reject viability as the line when fetal rights become compelling, not as a new test for weighing the permissibility of abortions.²⁰⁶ Criticizing this supposed balancing test as a rule of the Court, or any other suggested new test for weighing the rights of the woman and the rights of the fetus, is not sufficient for rejecting continued recognition of the woman and her rights—unless the solution to difficult balancing problems is simply to eliminate one of the rights holders or one of the rights altogether.

Another argument the state of residency might offer to support restrictions on travel is that people returning from out-of-state abortions will encourage abortions within the state. But, as with MAID, there are more direct ways to address the disfavored practice within the state than prohibiting travel for the service elsewhere.

Prohibitions on aiding and abetting travel out-of-state might present a more difficult problem.²⁰⁷ On the one hand, if the predicate conduct—travel for a legal abortion out-of-state—cannot be directly criminalized, the derivative conduct, aiding and abetting the (non-existent) crime, also cannot be criminal. Other statutes might try to address the aid indirectly, however. Examples might include new crimes such as abortion transit, abortion funding, or abortion procurement along the lines of the Missouri proposal to prohibit abortion trafficking. These are not direct prohibitions on travel by the woman, although they could make it harder for her to travel. The more indirect the burden is on the abortion travel

203. *Id.* at 2272.

204. *Id.* at 2272, 75.

205. *Id.* at 2310 (Roberts, CJ., concurring).

206. *Dobbs v. Jackson Women's Health Org.*, No. 19–1392, 72, 75 (June 24, 2022).

207. TEX. HEALTH & SAFETY CODE ANN. § 171.208(2) (2021) (authorizing broad authority among the public to bring action against anyone who performs, aids, or abets in an abortion).

itself, the more likely the strategy will survive constitutional scrutiny under Article IV. Strategies by anti-abortion states to deter travel by imposing economic penalties on those who support it—most likely charities, businesses paying for out-of-state abortions for their employees, or health care professionals who help patients arrange abortions—may be the most difficult to challenge by relying on the right to travel. Economic and political impacts on the state may be all that can be accomplished by responses to these strategies; Eli Lilly, for example, has made clear that if the stringent Indiana abortion ban goes into effect it will pursue expansion plans outside of its home state.²⁰⁸

B. *Damage Remedies*

Damage remedies against someone who helps with an abortion also indirectly discourage movement. The availability of these lawsuits might be such a significant deterrent that out-of-state abortions are practically impossible for women to obtain. Analyzing the permissibility of such suits requires distinguishing between causes of action brought against residents of the state for facilitating the out-of-state abortion—the woman herself, people who help her leave, or people who pay for the service—and causes of action brought against out-of-state actors for actions legally performed out of the state. The state has direct connections with the actions performed in state to help the woman leave the state; the state also has in-state interests in the fetus and in familial relationships.²⁰⁹ Arguably, the state could assert such interests against in-state activities. However, if a state could authorize its residents to sue in its state courts for actions legal in another state, and specifically insulated from liability where they occur, the implications for federalism would be significant.

C. *Residency Requirements for Abortions*

As we pointed out above, residency requirements for abortion are infrequent.²¹⁰ Moreover, in *Doe v. Bolton*, decided at the same time as *Roe*, the Court struck down a residency requirement for abortion; the reasoning depended on the right to travel rather than the abortion right itself.²¹¹ A state, the *Bolton* Court said, could not limit a generally available medical service to its own residents.²¹² In contrast to imposing residency requirements post-*Dobbs*, some

208. Lauren Vella, “Major pharmaceutical company looks to expand out of Indiana following abortion ban,” *The Hill* (Aug. 6, 2022), <https://thehill.com/policy/healthcare/3590886-major-pharmaceutical-company-looks-to-expand-out-of-indiana-following-abortion-ban/>.

209. *Supra* note 232.

210. *See supra* Part I.

211. *Doe v. Bolton*, 410 U.S. 179, 200-01 (1973).

212. *Id.* at 200.

states appear poised to welcome non-residents seeking abortions.²¹³ As with residency requirements for MAID, residency requirements for abortion would implicate the right to welcome. They would, therefore, need to be justified by a sufficient state interest. It does seem possible that destination states might have interests in the case of abortion that are not present in the case of MAID: ensuring that the service they regard as essential is available to their own residents. States might assert this interest if they are overwhelmed by floods of patients from elsewhere, as appears to be occurring after *Dobbs* in some states. However, it would be an empirical question whether the situation for in-state residents is so dire that the only way to protect them is to limit abortions to residents. This seems unlikely since the destination state could pursue other means to ensure availability of abortions to their residents along with visitors. States adopting residency requirements because they wish to limit abortions also have a more direct way to achieve their goals: prohibiting at least some abortions, for residents and non-residents alike.

D. Refusing or Revoking Licensure for Activities Elsewhere

A state can refuse a medical license to a healthcare provider for at least some actions occurring elsewhere. This possibility is part of the justification for the National Practitioner Data Bank, which contains reports of certain adverse actions against providers and is available to be checked before the issuance of a license.²¹⁴ The licensure question raised by abortion would be whether performing an out of state abortion, legal in the state where it was performed, can be grounds for denial of a license based on a state's opposition to abortion. Such licensure denials would raise several legal questions regarding whether performing abortions out-of-state qualifies as an acceptable reason for a license denial. It is a violation of due process for a state to arbitrarily deny a professional license; states must have at least a substantial reason for adverse actions.²¹⁵

As one such reason, the state might argue that denying a license to a provider who performed abortions in another state is needed for the state to enforce its own prohibitions on in-state abortions. This justification is weak, however. The state can enforce its abortion prohibition directly on providers within the jurisdiction and there is no apparent reason to believe that providers' prior conduct out-of-state will make this enforcement more difficult. It also

213. See, e.g. April Dembosky, *California Lawmakers Ramp Up Efforts to Become a Sanctuary State for Abortion Rights*, NPR (June 2, 2022, 5:01 AM), <https://www.npr.org/sections/health-shots/2022/06/02/1102317414/california-lawmakers-ramp-up-efforts-to-become-a-sanctuary-state-for-abortion-ri>.

214. Licensing agencies are not required to query the data base, although they are permitted to do so. They are also mandatory reporters of formal disciplinary action. U.S. DEP'T HEALTH & HUM.SERVS., NPDB Guidebook (Oct. 2018), <https://www.npdb.hrsa.gov/resources/aboutGuidebooks.jsp>.

215. N.H. Sup. Ct. v. Piper, 470 U.S. 274, 279-88 (1985).

seems unlikely that a state could reason that having provided abortions is linked to the possibility of providing substandard care to patients.

The most plausible reasoning behind the licensure denial is that the state regards having participated in legal abortion care as a mark of moral turpitude that makes someone unfit to practice a health care profession within the state. However, denying a license based on moral turpitude, unrelated to patient safety, has become increasingly criticized.²¹⁶ Allowing states to impose their own views of moral turpitude as part of licensure could have wide-ranging implications for medical education and practice.²¹⁷ State residents who receive their training in jurisdictions where abortion is legal, or who practice for a few years in jurisdictions where it is legal, might participate in care that their home state regards as morally wrong and thus be unable to return home to practice. Such restrictive licensing practices may become a particular disadvantage for a state such as Mississippi, which has significant shortages of health care providers and only graduates 165 new physicians per year at its state medical school.²¹⁸ In addition, to avoid running afoul of the right recognized in *Saenz* for new residents and old residents to be treated the same, the state would need to be careful that it does not apply different moral turpitude requirements to new residents and longer standing residents.²¹⁹

V. MAID AND THE DORMANT COMMERCE CLAUSE

The second theory advanced on behalf of Dr. Gideonse was that the Oregon residency requirement had a substantially burdensome effect on interstate commerce in medical services and thus violated the Dormant Commerce Clause.²²⁰ The Dormant Commerce Clause argument deploys the Commerce Clause against state residency requirements and other state actions affecting interstate movement.

216. E.g., Nadia N. Sawicki, *Character, Competence, and the Principles of Medical Discipline*, 13 J. HEALTH CARE L. & POL'Y 285, 285-87 (2010) (stating that disciplinary action taken by medical licensure boards disproportionately focuses on character-related misconduct bearing only tangential relation to clinical quality rather than other actions). The moral turpitude justification, would not necessarily be confined to abortion, but could be a broad warrant for a state to impose deeply contested standards on their professionals. *Id.*

217. See Nick Sibilla, *BARRED FROM WORKING 2* (2020) <https://ij.org/wp-content/uploads/2020/08/Barred-from-Working-August-2020-Update.pdf>.

218. Gary Pettus, *A Class Apart: Medical School Breaks Admissions Record*, UNIV. MISS. MED. CTR. NEWS STORIES (Sept. 17, 2018), https://www.umc.edu/news/News_Articles/2018/09/A%20class%20apart%20Medical%20school%20breaks%20admissions%20record.html.

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

220. Complaint at 10-11, *Gideonse v. Brown*, No. 3:21-cv-01568 (D. Or. 2021).

A. Dormant Commerce Clause

The Supreme Court has interpreted Congress's power to regulate commerce as having negative implications for the states' authority over commerce.²²¹ Although states are not precluded from regulations that affect commerce—Congress and the states share authority—states may not unduly interfere with commercial activities occurring in other states.²²² A Supreme Court decision from 1970—over fifty years ago—affirms the permissibility of state actions promoting interests within the state with indirect effects on activities elsewhere, so long as the effects on interstate commerce are “incidental” and the out-of-state burden is not excessive in relation to the in-state interests served.²²³

In October 2022, the Supreme Court heard oral argument in a case that tests the continuing viability and scope of this *Pike* decision.²²⁴ In 2018, California voters approved Proposition 12, an amendment to the Farm Animal Cruelty Act, which among other provisions, forbids the sale of pork within the state with knowledge that the hogs were confined in a cruel manner, wherever the confinement occurred.²²⁵ Pork producers claim that Proposition 12 is unconstitutional because of the burdens it imposes on out-of-state pork production.²²⁶ How the Court will decide this case is unknown as of this publication, although speculation is extensive.

There are potential analogies to be drawn between Proposition 12 and state regulations that would impose burdens on out-of-state abortion activities. States with abortion-related legal doctrines might argue that they have strong interests in protecting their residents, especially resident fetal life. Out-of-state actors, like pork producers outside of California, might argue that they are heavily burdened by the state regulations. However, disanalogies exist, too: states might argue that their interests in protecting their residents from abortion are different or stronger than state interests in protecting animal welfare. States might also argue that the burdens are less; out-of-state practitioners can still practice medicine, even though those medical professionals will be unable to move to practice in the restrictive state or may need to refuse to treat patients from the restrictive state unless they are willing to risk paying damages.

The most recent Supreme Court decision directly involving the Dormant Commerce Clause is *Tennessee Wine and Spirits Retailers Association v. Thomas*.²²⁷ The *Thomas* decision assessed the constitutionality of a residency

221. Brief for Professor Lea Brilmayer as Amici Curiae Supporting Neither Party at 2, *Nat'l Pork Producers Council v. Ross*, 142 S.Ct. 1413 (2022) (No. 21-468).

222. *Id.*

223. *Id.* at 5 (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

224. *Nat'l Pork Producers Council v. Ross*, 6 F.4th 1021 (9th Cir. 2021), *cert. granted*, 142 S.Ct. 1413 (2022) (No. 21-468).

225. CAL. HEALTH & SAFETY CODE § 25990(b) (2008) (amended 2018).

226. *Ross*, 6 F.4th at 1025.

227. 139 S.Ct. 2449 (2019).

duration requirement for a state license to sell liquor.²²⁸ Tennessee stipulated that applicants for licenses to operate retail liquor stores must have resided in the state for at least the two preceding years, that applicants for license renewal must have resided in the state for ten consecutive years, and that no corporation could obtain a license unless all of its stockholders were residents.²²⁹ In striking down the requirements as violating the Dormant Commerce Clause, Justice Alito wrote for a 7-2 majority that regulations discriminating against non-resident economic actors must be narrowly tailored to a legitimate legislative purpose.²³⁰ Justice Alito stated that Tennessee's requirement could not meet this test because it "blatantly favors the State's residents and has little relationship to public health and safety."²³¹

An important aspect of Justice Alito's argument was its confirmation that the Commerce Clause restricts state protectionism. The two dissenters would have rejected this direct understanding of the Commerce Clause, holding instead that, at a minimum, the grant of authority to Congress to regulate interstate commerce would permit Congress to authorize the states to enact regulations such as the licensing restrictions chosen by Tennessee.²³² Congress, moreover, had given the states "wide latitude" to regulate alcohol sales.²³³ However, this line of argument would not save either state MAID restrictions or state abortion restrictions from the Dormant Commerce Clause, because Congress had not acted on the topic.

B. *Residency Requirements and State Protectionism*

If the Dormant Commerce Clause restricts state protectionism in this way, residency requirements for MAID would need to be narrowly tailored in support of a legitimate legislative purpose. One purpose that the state might advance for a residency requirement would be protecting vulnerable non-residents who are detached from their primary care providers and usual support systems. But as described above, current data do not suggest the need for this protection.²³⁴ Nor does it seem likely that a residency requirement is needed to protect the state from an influx of patients seeking MAID. Similar points would apply to abortion residency requirements. Although states opposed to abortion might claim that they have stronger health and safety reasons for protecting non-residents from

228. *Id.* at 2456-57.

229. *Id.*

230. *Id.* at 2457, 2461.

231. An additional issue in the case, not relevant to our discussion here, is whether the requirements were nonetheless permissible under the Twenty-First Amendment repeal of prohibition. *Id.* at 2457.

232. *Id.* at 2480-82 (Gorsuch, J., dissenting).

233. *Id.* at 2477-78 (citing 27 U.S.C. § 122).

234. *See supra* Part IV.

abortions, it is hard to see how these reasons are stronger than the reasons they would have for restricting abortions generally for everyone.

C. *Prohibiting Importation of Medication Abortion*

In the current abortion landscape, a particularly important issue is whether the Dormant Commerce Clause restricts the variety of state laws affecting medication abortion.²³⁵ Medication abortion, first approved in the U.S. in 2000, is now approved for abortions up to 10 weeks of pregnancy. It is now the method used for just over half of all abortions performed in the U.S.²³⁶

Laws prohibiting abortions within the state before ten weeks of pregnancy, or laws prohibiting any use of medication for abortion within the state, do not in our judgment raise Dormant Commerce Clause issues. These laws neither involve state protectionism nor interfere with the channels of interstate commerce. Their constitutionality would need to be addressed on other grounds. These grounds might include federal preemption: whether it is permissible for a state to prohibit the sale of a drug that has been authorized for marketing by the FDA, or to impose limits on its sale that have explicitly been rejected by the FDA.²³⁷

On the other hand, laws prohibiting the shipment into the state of an otherwise legal product could implicate the Dormant Commerce Clause. The problem would not be state favoritism of its own businesses or residents. Nor would it be the problem of affecting out-of-state transactions that might be raised by a prohibition on women going out-of-state for a medication abortion and completing the process before her return. Instead, it would be the direct prohibition of the movement of a legal product in interstate commerce in the absence of any federal action permitting the prohibition. In this, it would be unlike state prohibitions on the importation of medical marijuana, as marijuana remains illegal under federal law.²³⁸ It would also be unlike state restrictions on alcoholic beverages, to the extent that these restrictions have been explicitly authorized by Congress.²³⁹ If the Dormant Commerce Clause applies to restrict states from banning the movement of legal goods in interstate commerce, in the absence of any Congressional action to the contrary, bans on importing medication abortion would be unconstitutional.

235. See Cohen et al., *supra* note 37, at 47-48.

236. Kaiser Family Foundation, “The Availability and Use of Medication Abortion” (April 6, 2022), <https://www.kff.org/womens-health-policy/fact-sheet/the-availability-and-use-of-medication-abortion/>.

237. Patricia J. Zettler, Annamarie Beckmeyer, Beatrice L. Brown, and Ameet Sarpatwari, *Mifepristone, Preemption and Public Health Federalism*, forthcoming in *Journal of Law and the Biosciences*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4267498.

238. Alice Mead, *Legal and Regulatory Issues Governing Cannabis and Cannabis-Derived Products in the United States*, 10 *FRONTIERS PLANT SCI.* 1, 3-4 (2019).

239. *Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, 139 S.Ct. 2449, 2461 (2019).

VI. SUMMARY

To summarize. The right to come and go and the right to be welcomed are fundamental privileges and immunities of federal citizenship under Article IV of the U.S. Constitution.²⁴⁰ State laws prohibiting MAID or abortion travel or limiting services to their own residents violate Article IV unless they are narrowly tailored to a compelling state interest. If states cannot criminalize out-of-state travel with the intention to have an abortion, they also cannot criminalize aiding and abetting what is not criminal. However, they may try to impose other penalties on actions that are disfavored, such as license denials, damage remedies, or other economic penalties.²⁴¹ These state actions might be constitutionally suspect as unduly burdening a woman's right to travel, although the case here is less clear than for direct prohibitions of the travel itself. These state actions also have significant deleterious consequences for what it is to recognize other states within a federal union. These state actions also might be violations of the Dormant Commerce Clause to the extent that they unduly burden activities outside of the state. Laws prohibiting the shipment of abortion medication across state lines might also be barred by the Dormant Commerce Clause. Legal resolution of these questions may depend on the extent to which the Court is willing to let states increasingly become self-determined moral silos. Political resolution may come, too, if people and business gradually move away from jurisdictions perceived as increasingly insulated.

VII. CODA: MOVEMENT AND BEING RECOGNIZED AS A CITIZEN

From the beginning, the U.S. Constitution made some basic choices about processes for determining legal status as a citizen. Decisions about who could enter the country, what were the requirements for citizenship, or how foreign relations were to be conducted were left explicitly to the federal government.²⁴² States were not entitled to set their own requirements for citizenship; instead, the “[c]itizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”²⁴³ Within sixty years of the Constitution's adoption, this provision was interpreted to mean that citizens may come and go across state borders without being taxed.²⁴⁴ States may, with compelling reason, take action to protect the health or safety of their respective citizens.²⁴⁵ Free movement is central to the foundation of a federal union.

240. U.S. CONST. art. IV; *see also* Saenz v. Roe, 526 U.S. 489, 500 (1999).

241. *See generally* Megan Messerly & Alice M. Ollstein, *Abortion Bans and Penalties Would Vary Widely by State*, POLITICO (May 6, 2022) <https://www.politico.com/news/2022/05/06/potential-abortion-bans-and-penalties-by-state-00030572>.

242. U.S. CONST. art. I, § 8.

243. U.S. CONST. art. IV, § 2.

244. *Smith v. Turner*, 48 U.S. 283, 407 (1849).

245. *Thomas*, 139 S.Ct. at 2472.

In 1857, the Supreme Court denied an essential aspect of this right of movement for slaves on the ground that they were not considered U.S. citizens.²⁴⁶ Dred Scott, a slave who had been taken from Missouri to the free state of Illinois and then returned to Missouri, sued for his freedom in federal court.²⁴⁷ The question asked by the Court was,

[c]an a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guaranteed [sic] by that instrument to the citizen?²⁴⁸

The Court answered this question with a “no”²⁴⁹ that resounds today. Dred Scott’s contention that he had become a citizen of the United States by being recognized as free in the state of Illinois could not stand, according to the Court.²⁵⁰ As such, he was not entitled to bring suit in federal court for the recognition of his freedom. Although Illinois could give state law rights to Dred Scott, it could not give him the rights of federal citizenship.²⁵¹ Once the Constitution was adopted, states could not “clothe” people with federal rights that they could take from state-to-state.²⁵²

The Fourteenth Amendment overruled the *Dred Scott* decision in 1868.²⁵³ But it did not take the Court long to hold that the impact of the Amendment was quite limited. In 1872, the Court held that the “Privileges and Immunities” clause of the Amendment only prohibited states from depriving people of aspects of federal—not state—citizenship.²⁵⁴ And in 1883, over a vehement dissent of Justice Harlan, the Court held that the 14th Amendment did not confer upon Congress the general authority to prohibit discrimination on the basis of race or former condition of servitude.²⁵⁵

The Court’s 2022 decision in *Dobbs* has revived questions of the meaning of federal citizenship although it never says so explicitly. In *Dobbs*, the Court examines whether the “abortion right” is recognized in constitutional text.²⁵⁶ Justice Alito’s opinion views abortion as a novel right, a new liberty

246. *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

247. *Id.* at 397-98.

248. *Id.* at 403.

249. *Id.* at 394.

250. *Id.* at 393-94.

251. *Id.*

252. *Id.* at 406-407.

253. U.S. CONST. amend. XIV, § 1.

254. *Slaughter-House Cases*, 83 U.S. 36, 80 (1872).

255. *Civil Rights Cases*, 109 U.S. 3, 9-11 (1883).

256. *Id.* at 2244.

unrecognized across U.S. history.²⁵⁷ Whatever might be made of Justice Alito's history—and it is already the subject of substantial criticism—it is noteworthy that his majority opinion does not consider what the absence of this liberty might mean for women and the significance of removal of a right that has been recognized for nearly fifty years. For the Court, the significance of the removal of the right is analyzed in terms of whether it is reasonable to think that women will continue to need to rely on it once they realize that it no longer exists.²⁵⁸ The Court makes light of these reliance interests, seeing them as easily answered once women become used to no longer having abortions readily available.²⁵⁹ But as we suggested earlier,²⁶⁰ it may also signify much more: a decision that whether women are to be the subject of rights at all is now up to the states.

The Court's decision in *Dred Scott* was virtually ignored for the first three-quarters of the twentieth century. Ironically, the decision has become a linchpin of Justice Thomas's recent opinions about citizenship, including his concurrence in *Dobbs*.²⁶¹ According to Justice Thomas, the error of *Dred Scott* was that the "Court invoked a species of substantive due process to announce that Congress was powerless to emancipate slaves brought into the federal territories."²⁶² For Justice Thomas, due process refers only to processes, not to the content of what is protected. In the view he expressed in *Dobbs*, the substantive due process error made by the Court in *Dred Scott* was the assumption that "citizenship" did not entail equality before the law; if free blacks were citizens, they were equal and should have been able to bring suit in federal court.²⁶³ The import of the Citizenship Clause of the 14th Amendment, for Justice Thomas, was then to confer equality on emancipated former slaves; his originalism, he now believes, commits him to the view that it is the original understanding of citizenship that prohibits racial discrimination by the federal government.²⁶⁴ Similarly, Justice Thomas cited *Dred Scott* to support the Court's 2022 holding that the Second Amendment protects an individual right to carry a handgun outside of the home for self-defense.²⁶⁵ Justice Taney reasoned that Blacks could not be citizens because if they were citizens they could carry guns, an unacceptable threat in his view—but reasoning that in Justice Thomas's view revealed the connection between citizenship and the right to carry.²⁶⁶ In several other recent references to

257. *Id.* at 2248-49.

258. *Id.* at 2276-77.

259. *Id.*

260. *Supra* notes 236-244.

261. *Id.* at 2300, 2304 (Thomas, J., concurring).

262. *Id.* at 2303.

263. *Id.* at 2300 (citing *United States v. Madero*, 142 S.Ct. 1539, 1547 (Thomas, J., concurring)).

264. *Id.*

265. *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S.Ct. 2111, 2150-2151 (2022).

266. *Id.* Other citations to the *Dred Scott* decision have excoriated it. Justice Kagan calls it "deplorable" in condemning the Court's decision cutting back the Voting Rights Act. *Brnovich v. Democratic National Committee*, 141 S.Ct. 2321, 2352 (2021) (Kagan, J., dissenting). Justice Gorsuch

Dred Scott, the substantive due process error has been interpreted to be reliance on the right to property to reject the Missouri Compromise prohibition of slavery in territories north of a specified point in the Louisiana Purchase.²⁶⁷

Ironically, it is arguable that the majority opinion in *Dobbs* conceals a similar error. By stating that decisions about whose rights matter more—the women’s or the fetus’s—or which rights matter more—the right to life or rights to liberty—are to be left up to political processes in the states, the Court has itself assumed where rights to determine basic features of citizenship reside. Whether many of the proposed state laws to restrict abortions within their borders will withstand constitutional challenges will ultimately depend on the implications of the Court’s decision in *Dobbs* about who counts. In our view, who counts at all should be settled federally for a single nation. A critical aspect of counting is movement: the ability to come and go, or to leave one state more permanently for another. Justice Kavanaugh’s concurrence was right on at least this point: the right to travel should continue unscathed after *Dobbs*.

calls it a “grotesque error” in citing it as an example of a case that should not be respected under the doctrine of stare decisis in dissenting from a decision allowing successive prosecutions by state and federal authorities. *Gamble v. United States*, 139 S.Ct. 1960, 2005 (2019) (Gorsuch, J., dissenting).

267. *Obergefell v. Hodges*, 576 U.S. 644, 695 (2015) (Roberts, C.J., dissenting); *Johnson v. U.S.*, 576 U.S. 591, 613 (2015) (Thomas, J., concurring).