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PRO-CHOICE (OF LAW): EXTRATERRITORIAL APPLICATION OF STATE LAW USING ABORTION AS A CASE STUDY

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I. INTRODUCTION

Madison Underwood was scheduled to receive a life-saving abortion at a clinic in Tennessee when her doctor told her the procedure had been canceled.[1] The Supreme Court had overturned the constitutional right to abortion a few days prior.[2] Although Underwood's abortion was still legal in Tennessee, her doctor felt performing the procedure was too risky with the law changing so quickly.[3]

Underwood learned a few weeks earlier that her fetus had a condition that would make it impossible to survive outside the womb, and if she tried to carry to term, she could die.[4] Her doctor recommended she go to Georgia, where abortion would remain legal a short while longer.[5] Underwood and her family could not afford the travel expenses so they set up a GoFundMe and raised the roughly $5,000 they needed.[6] When her doctor told her they canceled her abortion, Underwood remembers thinking: "[T]hey're just going to let me die?"[7]

Underwood's story is not an uncommon one—a 2017 study found that one in five pregnant people[8] in the United States had to travel fifty miles or more

1. *See* Neelam Bohra, *'They're Just Going to Let Me Die?' One Woman's Abortion Odyssey*, N.Y. TIMES (Aug. 1, 2022), https://www.nytimes.com/2022/08/01/us/abortion-journey-crossing-states.html (explaining that the doctor wanted to perform the procedure but could not due to legal concerns).

2. *Id.*; Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (holding that states have the right to decide whether to outlaw abortion).

3. Bohra, *supra* note 1.

4. *See id.* (discussing the emotional toll on Underwood from being denied an abortion she did not want but needed to save her life).

5. *See id.* (discussing the difficulties Underwood and her doctors faced to find a way to terminate Underwood's dangerous pregnancy out-of-state).

6. *See id.* (discussing the costs of travel, such as gas and lodging).

7. *Id.*

8. This Comment will use the term "pregnant people" to refer to those who have the biological ability to become pregnant. This term is gender neutral and recognizes that there are individuals with the ability to get pregnant who do not identify as women, such as trans men and nonbinary individuals. For a more thorough discussion, *see* AC Facci, *Why We Use Inclusive Language to Talk About Abortion*, ACLU (June 29, 2022), https://www.aclu.org/news/reproductive-freedom/why-we-use-inclusive-language-to-talk-about-abortion.

to obtain an abortion.[9] Pro-abortion[10] advocates expect the number of pregnant people seeking out-of-state abortions to rise following the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*.[11] *Dobbs* addressed a Mississippi law that bars most abortions after fifteen weeks; in the opinion, the Court held that the question of abortion's legality should be left to individual states to decide.[12] Since *Dobbs* was decided, seventeen states have enacted total or partial abortion bans, and eleven more states have made unsuccessful attempts to ban or restrict abortion access.[13]

In some states where abortion has been banned, such as Missouri and Texas, lawmakers have already proposed abortion travel bans to prevent residents of their states from seeking abortions beyond their borders.[14] Missouri's two proposed bills impose penalties on several actions, for example: traveling to access abortion out of state under certain

9. *See* Jonathan Bearak et al., *Disparities and Change Over Time in Distance Women Would Need to Travel to Have an Abortion in the USA: A Spatial Analysis*, 2 THE LANCET PUB. HEALTH e493, e495 (2017) (highlighting that people seek abortion out-of-state because their home state has very few or no abortion clinics).

10. This Comment will use the term "pro-abortion" in place of "pro-choice" to reference general beliefs in support of abortion. Using the term "pro-abortion" aims to destigmatize abortion and highlight how many pregnant people do not have a "choice" because of the lack of access to reproductive healthcare. *See generally What's Wrong With Choice?: Why We Need to go Beyond Choice Language When We're Talking About Abortion*, PLANNED PARENTHOOD ADVOC. FUND OF MASS. (Feb. 10, 2021, 6:37 PM), https://www.plannedparenthoodaction.org/planned-parenthood-advocacy-fund-massachusetts-inc/blog/whats-wrong-with-choice-why-we-need-to-go-beyond-choice-language-when-were-talking-about-abortion.

11. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2284 (2022) (overturning *Roe v. Wade*, 410 U.S. 113 (1973)) (holding that states have the right to decide whether to outlaw abortion rather than the courts). *See generally After Roe Fell: Abortion Laws by State*, CTR. FOR REPROD. RTS., https://reproductiverights.org/maps/abortion-laws-by-state/ (last visited Dec. 23, 2022) [hereinafter *CRR: Abortion Laws by State*] (estimating that almost half of the states are likely to ban abortion, causing states to "divide into abortion deserts" which will cause millions of people to travel to receive legal abortion care).

12. *Id.* at 2284.

13. *See* Megan Messerly, *Abortion Laws by State*, POLITICO (June 24, 2022, 11:58 AM), https://www.politico.com/news/2022/06/24/abortion-laws-by-state-roe-v-wade-00037695 (tracking abortion bans in all fifty states and Washington, D.C.).

14. *See* S.B. 603, 101st Gen. Assemb., 1st Reg. Sess. (Mo. 2021); H.B. 1677 amend. 4311H02.14H § (2)(1)–(9), 101st Gen. Assemb., 2nd Reg. Sess. (Mo. 2022); *see also* Caroline Kitchener, *Antiabortion Lawmakers Want to Block Patients from Crossing State Lines*, WASH. POST (June 30, 2022), https://www.washingtonpost.com/politics/2022/06/29/abortion-state-lines/ (discussing efforts by Missouri, Texas, Arkansas, and South Dakota lawmakers to prevent their citizens and residents from traveling to other states to have abortions).

circumstances, hosting websites that contain information about obtaining abortions, providing insurance for a Missourian to have an abortion, and more.[15] Experts believe that more states will follow, prompting debate amongst legal scholars about the constitutionality of such bans.[16]

This Comment argues that post-*Dobbs*, the Supreme Court may allow state abortion travel bans to stand because *Dobbs* elevated the protection of fetal life to a compelling state interest. Part II discusses the history of Commerce Clause jurisprudence related to regulation of out-of-state conduct, and the history of Article IV and the Fourteenth Amendment's Privileges & Immunities Clauses as they relate to interstate travel.[17] Part III applies case law to the proposed Missouri abortion travel bans and argues the Supreme Court could allow a state's abortion travel ban to stand.[18] Part IV offers policy recommendations to states where abortion will remain legal, such as refusing to participate in another state's abortion-related prosecutions and giving protections to abortion providers.[19] Part V concludes by reiterating that the *Dobbs* holding elevated a state's interest in protecting fetal life to "compelling," meaning the Court could uphold abortion travel bans as valid.[20]

15. *See* Mo. S.B. 603 § (A)(188.50)(1)–(4); *see also* Mo. H.B. 1677 amend. 4311H02.14H § (2)(1)–(9) (prohibiting obtaining, seeking, or aiding and abetting an abortion under various circumstances, such as giving instructions over the internet about obtaining abortions).

16. *See, e.g.*, Melody Schreiber, *U.S. States Could Ban People from Traveling for Abortions, Experts Warn*, THE GUARDIAN (May 3, 2022), https://www.theguardian.com/world/2022/may/03/us-abortions-travel-wave-of-restrictions (discussing where and how state legislatures are planning to propose abortion travel ban legislation).

17. *See infra* Part II (discussing the history of the Dormant Commerce Clause, Article IV, and the Fourteenth Amendment's Privileges and Immunities provisions as they relate to extraterritorial state laws).

18. *See infra* Part III (arguing that state abortion travel bans could likely withstand Dormant Commerce Clause and Article IV/Fourteenth Amendment Privileges & Immunities scrutiny).

19. *See infra* Part IV (recommending that states protecting abortion access should also implement protections for those providing, obtaining, and assisting in abortions in their states).

20. *See infra* Part V (concluding that under the current Supreme Court, state abortion travel bans could likely stand).

II. BACKGROUND

A. Commerce Clause

The Commerce Clause is one of the chief legal instruments by which state laws with out-of-state effects are regulated.[21] The Commerce Clause gives Congress the authority to "regulate Commerce . . . among the several States."[22] The Supreme Court has interpreted this as putting limits on the states through the Dormant Commerce Clause, which prohibits states from enacting legislation that significantly burdens out-of-state commerce in favor of in-state commerce.[23]

There are two Dormant Commerce Clause tests to determine the constitutionality of a state law affecting out-of-state commerce. The first is exacting scrutiny, which is used when a state law is facially discriminatory or clearly intentionally discriminatory against interstate commerce.[24] This test says a discriminatory state law is invalid unless it furthers a legitimate purpose, there are no non-discriminatory alternatives, and the law only incidentally discriminates against out-of-state commerce.[25] The extraterritoriality principle, a subsection of the exacting scrutiny test, prohibits states from trying to regulate conduct occurring wholly outside their borders.[26] The second test is the *Pike* balancing test, which courts use when a state law is facially neutral but has discriminatory effects.[27] This test weighs the local benefit of the law against the burden it imposes on interstate

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21. *See e.g.*, Hughes v. *Oklahoma*, 441 U.S. 322, 326, and n. 2 (1979) ("The Commerce Clause is one of the most prolific sources of national power and an equally prolific source of conflict with legislation of the state." (quoting H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 534–35 (1949)).

22. U.S. CONST. art. I, § 8, cl. 3.

23. *See, e.g.*, Gibbons v. Ogden, 22 U.S. 1, 75–77 (1824) (holding that Congress has the power to regulate interstate commerce, not states).

24. *See, e.g.*, Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 353 (1977) (finding that even though the statute was not facially discriminatory, its purpose was obviously discriminatory and exacting scrutiny was appropriate).

25. *Id.* at 353; *see also Hughes*, 441 U.S. at 336 (holding that states must show that facially or effectively discriminatory laws serve a legitimate state purpose that cannot be achieved through non-discriminatory means).

26. *See* Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986) (holding that a state statute violates the dormant Commerce Clause if the statute directly regulates commerce occurring wholly outside the state's borders).

27. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 146 (1970) (holding an Arizona law invalid because it overly burdened interstate commerce compared to the local benefit the law achieved).

commerce.[28]

The Dormant Commerce Clause's prohibition on overburdening interstate commerce with state regulation has two exceptions: (1) the market participant exception and (2) the congressional approval exception.[29] The market participant exception says that a state may give preference to in-state commerce if it is acting as a market participant, rather than a market regulator.[30] A state is acting as a market regulator when it imposes downstream restrictions on commercial activity, but a state is a market participant when it imposes limitations on the immediate transaction or choosing its own trading partners.[31] The congressional approval exception states that Congress may pass legislation that permits a state action that otherwise impermissibly discriminates against interstate commerce, effectively shielding it from Commerce Clause scrutiny.[32]

Though the Commerce Clause limits only state laws and regulations concerning commerce, "commerce" has been defined to include many controversial activities that involve the sale of goods and services, such as gambling, marijuana regulations, and assisted suicide.[33] Courts have also upheld abortion as commerce.[34] For example, in *United States v. Gregg*, the Third Circuit held that protestors could not block the entrances to abortion clinics because doing so would interfere with the commercial transaction of

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28. *See id.* at 142 (creating the *Pike* balancing test).

29. *See, e.g.*, Reeves, Inc. v. Stake, 447 U.S. 429, 440 (1980) (holding that under the market participant exception, when a state acts as a market participant, it may discriminate in favor of its own citizens)*; see also* Ne. Bancorp, Inc. v. Bd. of Governors of Fed. Rsrv. Sys., 472 U.S. 159, 174 (1985) (holding that Congress can authorize discriminatory state actions to protect states against Commerce Clause scrutiny).

30. *See, e.g.*, *Reeves, Inc.*, 447 U.S. at 440 (holding a South Dakota law favoring in-state contractors was valid because the state was acting as a market participant).

31. *See, e.g.*, S.-Cent. Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 95–96 (1984) (holding that Alaska's statute imposed downstream conditions on the timber market, making it a market regulator, but if it had merely been deciding who to trade with, it would have been a market participant).

32. *See, e.g.*, *Ne. Bancorp, Inc.*, 472 U.S. at 174 (holding that Congress authorized the state statutes at issue, making them invulnerable to Commerce Clause scrutiny).

33. *See* Seth F. Kreimer, *Lines in the Sand: The Importance of Borders in American Federalism*, 150 U. PA. L. REV. 973, 955 (2001-2002) [hereinafter "Kreimer, *Lines in the Sand"]* (discussing the Court's history of applying Commerce Clause jurisprudence to moral regulations involving the sale of goods or services); *see, e.g.*, Edwards v. California, 314 U.S. 160, 172 (1941) (holding that the transportation of people is commerce).

34. *See generally* United States v. Gregg, 226 F.3d 253, 262 (3d Cir. 2000); United States v. Hart, 212 F.3d 1067, 1074 (8th Cir. 2000) (holding the Freedom of Access to Clinic Entrances Act is a valid exercise of commerce power).

a potential abortion.[35]

Courts have also historically considered abortion to be a commercial activity,[36] in part because there are many costs associated with it—especially when someone must travel for the procedure.[37] When pregnant people must travel to other states to terminate a pregnancy, not only are there associated medical bills but travel costs, such as lodging and food.[38] Recall that when Madison Underwood and her family had to travel from Tennessee to Georgia for her abortion, the four hour trip cost them about $5,000 for the procedure, a hotel room for Underwood's recovery, food, and gas.[39]

In the leading case on extraterritorial regulation on Dormant Commerce Clause limits,[40] *Baldwin v. G.A.F. Seeling, Inc.*, the Court struck down a New York state regulation that aimed to prevent a milk seller in New York City from buying cheaper milk in Vermont.[41] The Court held that the regulation would burden commerce between the states by controlling the prices at which New York sellers could buy milk in Vermont.[42]

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35. *See Gregg*, 226 F.3d at 262.

36. *See* KEVIN J. HICKEY & WHITNEY K. NOVAK, CONGRESSTIONAL AUTHORITY TO REGULATE ABORTION, CONGRESSIONAL RESEARCH SERVICE 3 (July 8, 2022), available at https://crsreports.congress.gov/product/pdf/LSB/LSB10787 (stating that while the Supreme Court has not held on the matter, lower courts and a few of the circuit courts have held that reproductive healthcare services are a commercial activity).

37. *See id.* (explaining that courts have "recognized that reproductive health clinics engage in interstate commerce by purchasing, using, and dispensing goods that have traveled in interstate commerce, owning and leasing office space, employing staff, and generating income."); Michelle Long et al., *Employer Coverage of Travel Costs for Out-of-State Abortion*, KAISER FAM. FOUND. (May 16, 2022), https://www.kff.org/policy-watch/employer-coverage-travel-costs-out-of-state-abortion/ (discussing many large employers introducing health insurance coverage for costs associated with out-of-state abortions post-*Roe*, including travel expenses).

38. *See* Attia, *How Much Does It Cost to Get an Abortion?*, PLANNED PARENTHOOD (June 29, 2020), https://www.plannedparenthood.org/learn/ask-experts/how-much-does-it-cost-to-get-an-abortion (discussing various factors that make up the cost of abortion, including health insurance, the type of abortion, and how far along the pregnancy is); *see also* Bohra, *supra* note 1 (describing expenses Madison Underwood paid to have an abortion out of state, including driving, hotel rooms, and food).

39. Bohra, *supra* note 1.

40. *See* Seth F. Kreimer, *The Law of Choice and Choice of Law: Abortion, the Right to Travel, and Extra Territorial Regulation in American Federalism*, 67 N.Y.U. L. REV. 451, 492 (1992) [hereinafter Kreimer, *The Law of Choice*] (discussing the significance of *Baldwin* as the modern standard of Dormant Commerce Clause jurisprudence on extraterritorial commercial regulations).

41. Baldwin v. G.A.F. Seeling, Inc., 294 U.S. 511, 519 (1935).

42. *Id.* at 524 (holding that the New York law was invalid because it sought to protect New York milk farmers from competitive prices from Vermont milk farmers).

In another significant case, *Healy v. Beer Institute*, the Court invalidated a regulation that would control the rates at which Connecticut beer brewers and distributors could sell beer in surrounding states.[43] The Court said that the Commerce Clause prohibits the application of state law to commerce that takes place completely outside the regulating state's borders, regardless of whether the commerce has effects within the regulating state.[44] The original intention for the Commerce Clause was to protect against irregular legislation resulting from the unequal application of one state's regulations into another state's jurisdiction.[45]

B. Equal Treatment and Privileges Under the Law

Article IV's Privileges and Immunities Clause and the Fourteenth Amendment's Privileges and Immunities Clause address the Founders' concern with preserving U.S. citizens' and residents' federal rights more directly than the Commerce Clause.[46]

1. Article IV Privileges and Immunities Clause: Employment/Fundamental Rights

Article IV's Privileges and Immunities Clause declares that when a resident of one state visits another state, that state must treat them like a resident with respect to fundamental rights.[47] The Court interpreted the clause to include a right to interstate travel[48] and courts have affirmed that right for almost two centuries.[49] One of the earliest cases that uses this interpretation was in *Corfield v. Coryell* in 1823, in which Justice Washington stated Article IV's Privileges and Immunities Clause included

43. Healy v. Beer Inst., 491 U.S. 324, 325 (1989).

44. *Id.* at 336–37.

45. *Compare Healy*, 491 U.S. at 336–37 (holding that an Indiana law did not violate the Commerce Clause because it applied equally to in-state and out-of-state commerce), *with* Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986) (holding that a state statute violates the Dormant Commerce Clause if it directly regulates commerce occurring wholly outside the state's borders).

46. *See* U.S. CONST. art. IV, § 2 (stating state citizens are entitled to all the privileges and immunities of the several states); *see also* U.S. CONST. amend. XIV, § 1 (prohibiting states from making or enforcing any laws that abridge the privileges or immunities of U.S. citizens).

47. *See* U.S. CONST. art. IV, § 2 (entitling state citizens to the privileges of the several states).

48. *See* Kreimer, *The Law of Choice*, *supra* note 40, at 500 (arguing that the case law on the right to travel is robust enough to cement it as a fundamental right).

49. *See id.* at 501 (discussing that the right to travel freely between states has been an accepted interpretation of Article IV P&I for almost two centuries).

the rights of the residents of one state to pass through or reside in any other state.[50]

In *Supreme Court of New Hampshire v. Piper*, the Court further clarified that under Article IV's Privilege and Immunities Clause, a state law that infringes on a fundamental right—including the right to enjoy life and liberty and pursue a livelihood—must have a legitimate purpose for that infringement and that the infringement is substantially related to the state's legitimate purpose.[51] In *Piper*, New Hampshire passed a law limiting bar licenses only to New Hampsire residents to incentivize lawyers to follow local laws and behave ethically.[52] However, the Court held that the right to conduct business in another state is a fundamental right, and since there was another, less burdensome, way for New Hampshire to achieve its goals, the law could not stand.[53]

2. Fourteenth Amendment Privileges and Immunities Clause

The right to travel was a significant prong in the United States' nineteenth century controversy over whether free Black people were citizens of the states in which they lived.[54] Many states were against granting citizenship to free Black people, and tried to prevent Black people from crossing their borders by restricting their interstate travel.[55] By the start of the Civil War, fifteen states prohibited the entry of any free Black person who was not

50. *See* Corfield v. Coryell, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) (holding New Jersey could not prevent non-residents from fishing in its waters because it would violate the Privileges & Immunities Clause ("P&I")).

51. *See* Sup. Ct. of N.H. v. Piper, 470 U.S. 274, 287 (1985) (holding that if a state can achieve its goals by less burdensome means, the infringement on Article IV's Privileges and Immunities Clause is not substantially related).

52. *Id.* at 285 (discussing the justifications New Hampshire gave for refusing to admit nonresidents to its bar).

53. *Id.* (finding that none of the justifications New Hampshire gave for its discriminatory law were sufficiently substantially related to the discriminatory state law at issue).

54. *See* Kreimer, *The Law of Choice*, *supra* note 40, at 501 (discussing the eighteenth and nineteenth-century attempts by states to restrict free Black people's interstate movements by denying them citizenship).

55. *See, e.g.*, ILL. CONST. of 1848, art. XIV, *reprinted in* Francis N. Thorpe, 2 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATE, TERRITORIES AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 1009 (1909) (requiring exclusion of "free persons of color").

already a resident.[56] States that blocked free Black people from traveling freely between states knew that the right to travel was given to American citizens under the Fourteenth Amendment's Privileges and Immunities Clause, and that extending that right to Black people would put them closer to recognition as U.S. citizens under the law.[57]

In *Crandall v. Nevada*, the Court adopted Justice Taney's interpretation of the Fourteenth Amendment's Privileges and Immunities Clause from his dissent in the *Passenger Cases*.[58] Taney's opinion stated that all Americans are citizens of one community and as such, they must have the right to "pass and repass" through the entire country "as freely as in our own states."[59]

In the nineteenth century, the right to travel as a privilege of U.S. citizenship was part of a larger discourse around granting citizenship to Black people living in the United States.[60] In 1857, the Court held in *Dred Scott v. Sandford* that anyone of African descent brought as a slave to the United States, along with all their descendants, were not considered a U.S. citizen and were therefore not entitled to constitutional protections.[61] The adoption of the Fourteenth Amendment rejected *Dred Scott* by granting citizenship and equal protection of law to all people born or naturalized in the United States, regardless of race.[62] The legislative history of the amendment demonstrates that contemporary observers understood that granting citizenship to Black people would include a right to travel freely

56. JOHN CADMAN HURD, LAW OF FREEDOM AND BONDAGE IN THE UNITED STATES 252 (Negro Univ. Press, 1968) (1858) (discussing state legislation relating to both free and enslaved Black people from the pre-Revolutionary War period to the Civil War).

57. *See, e.g.*, ON COM., REPORT ON FREE COLORED SEAMEN, H.R. Rep. No. 80, 27th Cong., 3d Sess. 2 (1843) (discussing a South Carolina statute limiting Black seamens' ability to disembark in state ports and the controversy over whether free Black people are citizens and had the right to travel).

58. *See* Crandall v. Nevada, 73 U.S. 35, 407 (1868) (citing Smith v. Turner, 48 U.S. 283, 492 (1849) [hereinafter *Passenger Cases*] (Taney, J., dissenting), where the Court invalidated a Nevada law that imposed a tax on rail passengers leaving the state).

59. *Id.* (holding that a state tax imposed on nonresidents entering the territory frustrated the right to travel, one of the fundamental privileges of national citizenship).

60. *See* Kreimer, *The Law of Choice*, *supra* note 40, at 501 (discussing the eighteenth and nineteenth-century attempts by states to restrict free Black people's interstate movements by denying them citizenship).

61. *See* Scott v. Sandford, 60 U.S. 393, 410 (1857) (holding that Scott, a Black man born enslaved in Virginia who attempted to buy his freedom, could not do so because he was not a U.S. citizen).

62. *See* U.S. CONST. amend. XIV, § 1.

between states.[63] This is most apparent in the statements of lawmakers who opposed the constitutional amendment. For example, Senator Edgar Cowan of Pennsylvania argued against the amendment because he wanted Pennsylvania to retain the right to expel Roma people from its borders, which would not be possible if the Fourteenth Amendment granted them citizenship.[64] In the *Slaughterhouse* cases, the Court reaffirmed that the Fourteenth Amendment's Privileges and Immunities Clause includes the right to travel.[65] The Court declined to list all the rights of federal citizenship and residency but affirmed the right to interstate travel.[66]

More recent case law has reaffirmed the right to travel as one of the privileges included with U.S. citizenship and residency.[67] In *Zobel v. Williams*, Justice Brennan referenced the "unquestioned historic recognition" of the right to travel.[68] In *Saenz v. Roe*, the Court held that California could not determine its residents' welfare benefits based on the amount of time they had resided in the state.[69] The law violated the right to travel found in the Fourteenth Amendment's Privileges and Immunities Clause by denying new residents of California equal treatment in the state.[70] Thus, courts have affirmed that the right to travel freely is one of the privileges and immunities of U.S. citizenship and residency for over a century.

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63. *See* Kreimer, *The Law of Choice*, *supra* note 40, at 502 (discussing that on all sides of the debate, commentators agreed that if Black people were U.S. citizens, they would have the right to freely travel between states).

64. *See* Cong. Globe, 29th Cong., 1st Sess. 2882, 2891 (1866) (reporting floor debate on the Fourteenth Amendment after Senator Howard introduced it).

65. *See* Slaughterhouse Cases, 83 U.S. 36, 100 (1872) (holding that the Fourteenth Amendment's P&I Clause is limited to rights spelled out in the Constitution).

66. *Id.* at 117 (citing the right of a citizen of one state to pass through or reside in another state for purposes of trade, agriculture, professional pursuits, or otherwise).

67. *See, e.g.*, Zobel v. Williams, 457 US. 55, 66–67 (1982) (holding an Alaska law that distributed the state's income derived from oil reserves to citizens based on the length of time residents lived in the state violated the Fourteenth Amendment's Privileges and Immunities Clause).

68. *Id.* at 67 (saying that the right to interstate travel is so established the Court need not even ascribe its source to any one particular provision of the Constitution).

69. *See* Saenz v. Roe, 526 U.S. 489, 505 (1999) (holding that California's residency requirement for welfare benefits was unconstitutional under the Fourteenth Amendment's P&I Clause because it attempted to inhibit the travel of needy people into the state).

70. *See id.* at 490 (holding that the right to travel includes the right to enter and leave another state, the right to be treated "as a welcome visitor" while present in another state, and the right for travelers electing to become permanent residents in a state to be treated like other state citizens).

C. Recent Developments in Extraterritorial Abortion Laws

In Justice Kavanaugh's concurring opinion in *Dobbs*, he said that a state may not prevent one of its residents from traveling to another state to obtain an abortion because of the constitutional right to interstate travel.[71] However, some states are already attempting to test the limits on the right to interstate travel.[72] Missouri's legislature has considered two bills to prevent residents from obtaining out-of-state abortions.[73] Despite the bills' failure to pass, state legislators from other states are keen to attempt similar legislation.[74]

The first Missouri abortion travel ban in 2021 attempted to prohibit abortions from occurring both in and outside the state.[75] The following year, Missouri's second bill allowed private citizens to bring civil action against anyone who performed, attempted, or "aided and abetted" an abortion on a Missouri resident, regardless of where that abortion was performed.[76] Missouri lawmakers took inspiration from Texas S.B. 8, a Texas law that took effect on September 1, 2021, which allows private citizens from anywhere in the country to bring a civil suit against anyone performing, attempting, or aiding an abortion in Texas.[77] The U.S. Supreme Court heard a challenge to Texas's S.B. 8 in 2021, holding that the plaintiffs could proceed with the lawsuit, but refusing to block the law from coming into

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71. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2309 (2022) (Kavanaugh, J., concurring) (saying overturning *Roe v. Wade* does not cast doubt on the constitutionality of interstate travel for purposes of having an abortion).

72. *See* Adam Liptak, *The Right to Travel in a Post-Roe World*, N.Y. TIMES (July 11, 2022), https://www.nytimes.com/2022/07/11/us/politics/the-right-to-travel-in-a-post-roe-world.html (using Missouri as an example of a state attempting to pass abortion travel bans).

73. *Id.*

74. *See id.* (stating that Mary Elizebeth Coleman, the state representative who proposed the more recent Missouri bill, said multiple state legislators from other states are keen to attempt similar legislation); Kitchener, *supra* note 14.

75. S.B. 603, 101st Gen. Ass., 1st Reg. Sess. (Mo. 2021) (prohibiting abortions taking place inside Missouri, partially inside ,and partially outside Missouri, and outside Missouri under certain circumstances, such as the person became pregnant when they were a Missouri resident and prohibiting advertising abortion on a website Missourians can access).

76. H.B. 1677 amend. 4311H02.14H § (2)(1)–(9), 101st Gen. Ass., 2nd Reg. Sess. (Mo. 2022) (allowing private citizens to bring a civil suit against anyone performing or attempting to perform or aiding in an abortion for a Missouri resident, regardless of whether the abortion was performed inside or outside Missouri).

77. Liptak, *supra* note 72; *see also* Tex. S.B. 8 § 171.208(A)(1)–(3) (allowing private citizens, even those who do not reside in Texas, to sue anyone providing or obtaining an abortion).

effect.[78]

Other state lawmakers and organizations have stated their intentions to propose legislation preventing interstate travel for abortions.[79] The Thomas More Law Center, a conservative legal organization, is preparing draft legislation inspired by Texas S.B. 8 to allow private citizens to sue anyone who helps a resident of a state that prohibits abortion to obtain an abortion across state lines.[80] The National Association of Christian Lawmakers is exploring similar legislation with Texas lawmakers.[81] Arkansas Senator Jason Rapert compared traveling across state lines to have an abortion to human trafficking and said the legislature may address the issue in an upcoming special session.[82]

For some state abortion providers, the prospect of state abortion travel bans had a chilling effect. In Montana, for example, Planned Parenthood said its clinics would start requiring proof of residency for pregnant people seeking abortion pills.[83] In Tennessee, Madison Underwood could not obtain her scheduled abortion, though it was still legal at the time, because doctors feared impending legal challenges.[84]

In July 2022, three Democratic Senators introduced federal legislation to protect a pregnant person's right to travel across state lines to have an abortion.[85] They argued that, under the Fourteenth Amendment, U.S. citizens and residents have the freedom to travel to different states and enjoy equal protection of the law.[86] Republican Senators blocked the bill.[87] On

78. *See* Whole Women's Health v. Jackson, 142 S. Ct. 522, 531, 535–39 (2021) (holding that the plaintiffs could not sue some of the defendants in part because states are generally protected from lawsuits under the Eleventh Amendment).

79. *See* Kitchener, *supra* note 14 (discussing generally that constitutional scholars expect state lawmakers to propose abortion travel bans).

80. *Id.* (explaining that conservative legal foundations plan to draft legislation for all states based on Texas legislation).

81. *Id.*

82. *Id.*

83. *See* Liptak, *supra* note 72.

84. *See* Bohra, *supra* note 1.

85. Trish Turner & Allison Pecorin, *Republicans Block Bill to Shield People Who Travel Out of State for Abortions*, ABC NEWS (July 14, 2022), https://abcnews.go.com/Politics/republicans-block-bill-shield-people-travel-state-abortions/story?id=86821057 (acknowledging New York Senator Kirsten Gillibrand; Nevada Senator Catherine Cortez Masto; and Washington Senator Patty Murray as the trio of Democractice Senators that introduced the Freedom to Travel for Health Care Act of 2022).

86. *Id.*

87. *Id.*

August 3, 2022, President Joe Biden signed an executive order calling for, among other things, the Secretary of Health and Human Services to consider ways to protect pregnant people crossing state lines to obtain abortions.[88]

III. ANALYSIS

A. State Abortion Travel Bans Could Withstand Dormant Commerce Clause Scrutiny if a State's Interest in Protecting Fetal Life Outweighs the Burdens the Bans Impose on Interstate Commerce

The Dormant Commerce Clause analysis asks whether: (1) the state is acting as a market participant or regulator, (2) Congress has approved the state action, and (3) the state action facially discriminates against out-of-state interests.[89] The answers to these questions determine which test should be applied to the state law in question.

1. Missouri is not Acting as a Market Participant and Cannot Use the Market Participant Exception

In *South-Central Timber*, the Court held that a state is acting as a market regulator when it imposes downstream restrictions on commercial activity.[90] A state is a market participant if it imposes limitations on the immediate transaction or chooses its own trading partners.[91] If a state is acting as a market participant, the Dormant Commerce Clause places no limitation on its activities.[92]

Under these terms, Missouri would likely be considered a market

88. *See* Peter Baker, *Biden Issues Executive Order on Abortion Access, Calling for More Study*, N.Y. TIMES (Aug. 3, 2022), https://www.nytimes.com/2022/08/03/us/politics/biden-abortion-executive-order.html (describing President Biden's Executive Order aimed at protecting to the right to abortion).

89. *See* Reeves, Inc. v. Stake, 447 U.S. 429, 436 (1980) (holding that a state acting as a market participant may favor its own citizens) (citing to Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 810 (1976)); *see also* Ne. Bancorp, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 472 U.S. 159, 174 (1985) (holding that Congress can authorize discriminatory state actions); Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (creating a test that balances the burdens a state statute places on interstate commerce with the local benefit the statute serves) (citing to Huron Cement Co. v. Detroit, 362 U.S. 440, 443 (1960)).

90. *See* S.-Cent. Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 95–96 (1984) (holding that if Alaska had merely been deciding who to trade with, it would have been a market participant).

91. *Id.*

92. *Id.*

regulator. With the two proposed abortion travel bans, Missouri was not buying or selling anything, operating its own proprietary enterprise, or subsidizing private businesses.[93] Instead, Missouri was attempting to prevent its residents from having abortions in states where abortion is legal. This would have a substantial regulatory effect outside its borders, such as preventing or penalizing all transactions relating to an out-of-state abortion, including travel, lodging, and health care transactions. This makes Missouri a regulator, not a participant.

2. There Has Been No Congressional Sanction of State Action Regarding Abortion Travel Bans

Since Missouri is a market regulator in this context, the next consideration is whether Congress sanctioned the discriminatory state action. If Congress has authorized a state action, it is protected against Dormant Commerce Clause scrutiny.[94] However, in *South-Central Timber*, the Court held that congressional approval of otherwise impermissible state actions must be objectively and unmistakably clear.[95]

Though the House of Representatives passed a bill protecting the right to travel to obtain an abortion, the Senate has not yet taken action and the bill is not likely to pass.[96] Congress has not definitively acted to protect or dismiss the right to travel to obtain an abortion. The unmistakably clear stamp of approval required to meet this exception is not present in the case of abortion travel bans.

3. Missouri's First Proposed Bill Should be Analyzed Using Exacting Scrutiny; Missouri's Second Proposed Bill Should be Weighed Using the Pike Test

Since Missouri would be considered a market regulator and there is no congressional stamp of approval for abortion travel bans like the ones Missouri proposed, the last question to determine which test to apply to the

93. *See id*. at 94–95 (listing examples of the "market-participant doctrine").

94. *See Ne. Bancorp, Inc*., 472 U.S. at 174 (holding that Congress can authorize discriminatory state actions to protect states against Commerce Clause scrutiny).

95. *See S-Cent. Timber Dev., Inc.*, 467 U.S. at 90 (discussing that the congressional approval doctrine is mandated by the policies behind the Dormant Commerce Clause, which is meant to prevent hostility amongst states and inconsistent regulatory regimes).

96. *See* Oriana Gonzalez, *House Passes Bill to Protect Interstate Travel for Abortions*, AXIOS (July 15, 2022), https://www.axios.com/2022/07/15/house-abortion-bill-roe-travel (discussing the various provisions in the House Bill, including prohibiting states from banning abortion pre-viability and from requiring pregnant people to have unnecessary in-person visits before obtaining an abortion).

state's proposed bills is: do the laws discriminate against out-of-state commerce facially or only in effect?[97] A law is considered facially discriminatory when it has overt language indicating a protectionist purpose, and a law is considered facially neutral when it regulates in-state and out-of-state commercial activity evenly.[98]

If a state law is facially discriminatory against interstate commerce, it is subject to exacting scrutiny,[99] which asks: (1) does the law further a legitimate local purpose? (2) are there non-discriminatory alternatives to achieve that purpose? (3) does the law only incidentally discriminate against out-of-state commerce?[100]

If a state law is not facially discriminatory, the question becomes whether the law reflects a protectionist purpose.[101] If the law does display protectionist intent, exacting scrutiny analysis is triggered.[102] But if the law does not hint at a protectionist purpose, the *Pike* balancing test is triggered.[103] The *Pike* balancing test is concerned with whether the burden a state law imposes on interstate commerce is outweighed by the state interest that the law serves.[104] If the burden outweighs the benefit, the law cannot stand; if the benefit outweighs the burden, the law is valid.[105]

It is possible the two proposed Missouri bills could face different levels of scrutiny because of the differences in their plain text. The first proposed bill explicitly prohibits out-of-state abortions of any kind, including those

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97. *See, e.g.*, Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 352 (finding that even if the statute was not facially discriminatory, its purpose was obviously discriminatory and therefore exacting scrutiny was appropriate).

98. *Id*. at 353.

99. *Id.* (holding that a state law directly burdening interstate commerce should face a more demanding scrutiny than one which only incidentally burdens interstate commerce).

100. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970); *see also Hunt*, 432 U.S. at 353 (holding that a law that displays a protectionist purpose is considered facially discriminatory and subject to exacting scrutiny).

101. *See Hunt*, 432 U.S. at 353; *see also* New Energy Co. of Ind. v. Limbach, 486 U.S. 269 (1988) (defining a measure as having a protectionist purpose when it is designed to benefit in-state economic interests at the expense of out-of-state economic interests).

102. *Id.*

103. *See Pike*, 397 U.S. at 142 ("If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.").

104. *Id.*

105. *Id.*

performed under certain circumstances in foreign countries.[106] This is facial discrimination because, according to the Court in *Hughes v. Oklahoma*, it would serve to block the flow of interstate commerce related to abortion travel at Missouri's borders.[107] This overt discrimination would prevent Missouri residents from purchasing services related to having an abortion and traveling to obtain one in another state.

The second proposed bill penalizes anyone who performs, attempts to perform, or "aids and abets" an abortion on a Missouri resident, regardless of where the abortion is performed.[108] The bill does not specifically reference out-of-state conduct, and it is written to apply to in-state and out-of-state offenders equally.[109] Many of the bill's provisions would have a negative effect on interstate commerce by preventing transactions between Missouri residents, insurance companies, and abortion providers outside Missouri. If the Court analyzed the second bill in this manner, it would likely apply the *Pike* balancing test rather than exacting scrutiny.[110]

i. Missouri's First Proposal Could Withstand Exacting Scrutiny Because Each of the Three Prongs is Met

a. The Court Would Likely Find Missouri Had a Legitimate Local Purpose Post-Dobbs

In *Dobbs*, the Court characterized the viability line drawn in *Roe* as arbitrary and questioned *Roe*'s holding that states could have a compelling interest in protecting prenatal life only after fetal viability.[111] With this in mind, in the post-*Dobbs* world in which states are free to ban abortions

106. *See* S.B. 603 § (A)(188.50)(1)–(4), 101st Gen. Ass., 1st Reg. Sess. (Mo. 2021) (prohibiting abortions occurring inside Missouri, partially inside and partially outside the state, outside the state under certain circumstances like if the pregnant person is a Missouri resident when the child was conceived or the abortion was performed, and anywhere in the world if it's related to genocide).

107. *See* Hughes v. Oklahoma, 441 U.S. 322, 337 (1979) (holding that such facial discrimination could be a fatal defect in and of itself because of the "evil" of economic protectionism).

108. *See* H.B. 1677 amend. 4311H02.14H § (2)(1)–(9), 101st Gen. Ass., 2nd Reg. Sess. (Mo. 2022).

109. *Id.*

110. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (using a balancing test to analyze an Arizona law because it was not facially discriminatory).

111. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2258 (2022) (overturning *Roe v. Wade*, 410 U.S. 113 (1973)) (discussing the philosophical question of when a fetus is entitled to legal protection and concluding that, given the lack of a clear answer, states should be allowed to decide themselves).

within their borders, the Court would find that Missouri's interest in prohibiting abortion serves a legitimate local purpose.[112]

Since there is a legitimate local purpose, the next questions concern the degree to which interstate commerce is burdened, and whether Missouri could prove there is no reasonable alternative to achieve that local purpose.[113]

b. Depending on How Missouri Defines its Interest, the Court May Accept that There are No Non-Discriminatory Alternatives

Whether there are non-discriminatory alternatives to the travel ban bills will depend on how Missouri's interest is defined. If the state's goal is decreasing the number of residents having abortions, there are plausible alternatives that could achieve this goal without enacting a law that burdens interstate commerce in such a substantial manner.[114] Missouri could increase its sexual education initiatives and make contraceptives and birth control widely accessible, or it could put policies in place to drastically reduce the cost of being a parent, both of which are proven methods of decreasing abortions.[115]

However, if Missouri's interest is to completely prevent residents from obtaining abortions, which the state is likely to argue,[116] it is not as clear what non-discriminatory alternatives would achieve the same purpose. If abortion is totally banned in Missouri, and Missouri wants to completely prohibit its residents from having abortions, the Court may consider an abortion travel ban to be the simplest and least burdensome way to achieve that purpose.

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112. *Id.* at 2228 (holding states can decide individually to prohibit abortion).

113. *See Pike*, 397 U.S. at 142 (holding if there is a legitimate local purpose to a discriminatory state law, the benefit of the law should be weighed against its burden on interstate commerce); *see also Hunt*, 432 U.S. at 353 (holding a state with a discriminatory state law must show there is no alternate way to achieve its legitimate local purpose).

114. *See, e.g.*, Michael Nedelman, *Abortion Restrictions Don't Lower Rates, Report Says*, CNN (Mar. 21, 2018), https://www.cnn.com/2018/03/21/health/abortion-restriction-laws/index.html.

115. *See id.* (discussing the ineffectiveness of abortion bans on lowering abortion rates, and alternatives which studies have proven are effective).

116. *See* Caroline Kitchener, *The New Face of the Antiabortion Movement is a Young Mom of 6 Who Listens to Lizzo*, WASH. POST (Dec. 29, 2021), https://www.washingtonpost.com/lifestyle/2022/01/21/rep-coleman-abortion-ban-missouri/ (quoting Missouri State Rep. Mary Elizabeth Coleman, the lawmaker who proposed the bill, saying the bill's purpose is to protect "the unborn" in Missouri).

c. Missouri's First Proposal Would Significantly Burden Interstate Commerce

Though the first Missouri bill classified an abortion as occurring partially in-state, the bill would still pose a significant burden on interstate commerce. If an abortion is considered to partially occur in-state, when a Missouri resident sends payment in Missouri for an abortion-related expense out-of-state, such as payment for transportation or lodging out-of-state, that would likely prohibit a significant number of out-of-state abortions. If out-of-state abortions are considered interstate commerce,[117] it follows that this ban on out-of-state abortions is a significant—not merely incidental—burden on interstate commerce.

The Court in *Hughes* reasoned that a statute discriminated substantially against interstate commerce on its face because it overtly blocked the flow of interstate commerce at the State's borders.[118] The Court held that facial discrimination of this nature would not render the statute invalid in itself, but that the statute should be subjected to exacting scrutiny.[119] Much like the statute at issue in *Hughes*, Missouri's proposed bills overtly discriminate against interstate commerce by stopping the flow of interstate abortion travel commerce at its own borders.[120] Assuming the Court applies the minimum standard of exacting scrutiny to a proposal like Missouri's—rather than outright rejecting such facial discrimination[121]—the proposal would likely survive. The Court would likely analyze the two other factors of exacting scrutiny—legitimate local purpose and lack of non-discriminatory

117. *See* Kreimer, *Lines in the Sand*, *supra* note 33, at 995 (discussing how abortion and other regulations have been considered commercial activity by the Court in the past).

118. *See* Hughes v. Oklahoma, 441 U.S. 322, 337 (1979) (striking down the Oklahoma statute because the state's interest to maintain an "ecological balance" of minnows in state waters was too discriminatory since there were "equally effective nondiscriminatory conservation measures [] available.").

119. *Id.* (holding that such facial discrimination could be a fatal defect in and of itself because of the "evil" of economic protectionism, but that alone is not enough to automatically invalidate a discriminatory statute).

120. *Compare Hughes*, 441 U.S. at 323 (holding that a statute forbidding transportation of minnows outside the state for sale overtly blocked the flow of commerce at the state's border and thus violated the Commerce Clause), *with* S.B. 603, 101st Gen. Assemb., 1st Reg. Sess. (Mo. 2021), *and* H.B. 1677 amend. 4311H02.14H § (2)(1)–(9), 101st Gen. Assemb., 2nd Reg. Sess. (Mo. 2022) (prohibiting Missouri residents from traveling to another state to receive reproductive healthcare, among other things).

121. *See Hughes*, 441 U.S. at 337 (discussing that although legislation overtly blocking interstate commerce may itself be enough to invalidate it, exacting scrutiny is the minimum applicable standard).

alternatives[122]—and find that the state did have a legitimate interest and no other alternatives for achieving their goal.

d. Under the Extraterritoriality Principle, Missouri's First Proposed Bill Would Face Exacting Scrutiny but Could Withstand it

The extraterritoriality principle, which was chiefly developed in *Brown-Forman Distillers*, *Healy*, and *Baldwin*,[123] prohibits applying state law to commerce that takes place entirely outside that state's borders, even if the commerce has effects within the state.[124] In *Brown-Forman*, Justice Marshall concluded that when states violate the extraterritoriality principle, it is intentional discrimination worthy of exacting scrutiny.[125]

The provision in Missouri's first bill that prohibits abortions occurring entirely outside Missouri would likely be seen as attempting to regulate wholly out-of-state conduct and would therefore be analyzed using exacting scrutiny. Thus, the result would be the same as the exacting scrutiny analysis above: that Missouri did have a legitimate interest in preventing out-of-state abortions, and there were no other effective options for achieving their goal.

ii. Missouri's Second Proposed Bill Could Survive the Pike Balancing Test Because the Court Might Find that Missouri's Benefit Outweighs the Burden on Interstate Commerce

If the Court considers Missouri's interest in preventing residents from having abortions as a legitimate state interest that only incidentally burdens

122. *Id.* (citing legitimate local purpose and absence of non-discriminatory alternatives as the prongs of exacting scrutiny).

123. *See* Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 578 (1986) (holding a state statute was invalid because it directly regulated interstate commerce and had effects on commerce occurring wholly outside the state); Healy v. Beer Inst., 491 U.S. 324, 342 (1989) (holding that the Commerce Clause prohibits the application of state law to commerce that takes place completely outside the regulating state's borders, regardless of whether the commerce has effects within the regulating state); *see also* Baldwin v. G.A.F. Seeling, Inc., 294 U.S. 511, 527 (1935) (invalidating a New York regulation that set the prices at which New York milk sellers could purchase milk in Vermont).

124. *See Brown-Forman Distillers*, 476 U.S. at 582–83 (holding that New York could not project its laws onto another state by controlling the prices set by in-state liquor distillers for out-of-state sales).

125. *Id.* at 583 (holding the New York statute at issue discriminated against interstate commerce on its face because it regulated commerce occurring wholly outside New York).

interstate commerce, it will apply the *Pike* balancing test.[126]

In *Pike*, the Court held that in order to overturn a law that only incidentally affects interstate commerce, the burden imposed on commerce must be clearly excessive compared to the local benefit the regulating state receives from the regulation.[127] Depending on how Missouri's interest is defined, the State could have success in arguing that its interest outweighs the burden posed on interstate commerce. If Missouri's interest is in protecting the lives of potential residents by preventing fetuses from being aborted, the Court could find that the burden on interstate commerce is justifiable. At any rate, the Court is not likely to consider the burden imposed on interstate commerce to be *clearly* excessive in relation to the benefit Missouri gains, as the *Pike* balancing test requires.[128]

B. State Abortion Travel Bans Would Not Likely Violate Article IV's Privileges and Immunities Clause or Fourteenth Amendment's Privileges and Immunities Because the Court Elevated Protection of Fetal Life to a Compelling State Interest in Dobbs

1. It is Unclear if Missouri's Proposed Bills Violate Article IV's Privileges and Immunities Clause Because the Court May Have Elevated Protecting Fetal Life Above Certain Fundamental Rights

According to Article IV's Privileges and Immunities Clause, if a state is discriminating against a resident of another state, and the discrimination concerns a fundamental right, the state must show a substantial reason for the discrimination, and the degree of differential treatment must be closely related to the state's substantial reason.[129]

In *Piper*, the Court said that if there was another, less burdensome way for a state to achieve its goals, a law infringing on a fundamental right could not

126. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (holding that a facially neutral state law with discriminatory effects can stand if the state's interest in the law outweighs the burden the law imposes on interstate commerce).

127. *Id.* at 142 (discussing that although the criteria for the balancing test had been stated in various ways, it is generally that the burden imposed on interstate commerce by a state law must be clearly excessive in relation to the local benefit).

128. *Id.* at 145 (holding that an Arizona law was unconstitutional because the state's interest the law served was only incidental compared to the clearly excessive burden the law placed on interstate commerce).

129. *See* U.S. CONST. art. IV, § 2 (stating state citizens are entitled to all the privileges and immunities of the several states); *see also* Sup. Ct. of N.H. v. Piper, 470 U.S. 274, 287 (1985) (holding that if a state can achieve its goals by less discriminatory means, a law that infringes on fundamental rights is invalid).

stand.[130] Applied to the Missouri proposed bills, the Court is likely to hold the same: that if there are less burdensome means to achieve Missouri's goals, a significant infringement on the constitutional right to travel is invalid.

If Missouri's goal is to prevent residents from seeking and having abortions in and out of state, it could enact some proven abortion prevention initiatives to achieve this without enacting a law that would infringe on residents' right to travel and enjoy the privileges and immunities of other states. These initiatives could include expanding sexual education, increasing the availability of contraceptives, and creating policies to reduce the cost of being a parent.[131]

However, this analysis is significantly more complicated post-*Dobbs*. In *Dobbs*, the Court interpreted states' interests differently.[132] Missouri could argue that its interest in protecting fetal life is compelling enough that the infringement on the right to travel should be tolerated. Under *Dobbs*, the Court may hold that Missouri lawmakers and voters should be allowed to make that evaluation for themselves.[133] It is not yet clear how much weight the Court will give to the states' interest in protecting fetuses over fundamental rights such as the right to travel.

2. Missouri's Proposed Bills Could Also Withstand the Fourteenth Amendment's Privileges and Immunities Clause Scrutiny Because the Court May Have Elevated Protecting Fetal Life to a Compelling State Interest in Dobbs

The Supreme Court has consistently held that the Fourteenth Amendment's Privileges and Immunities Clause includes a right to interstate travel, because Americans are all part of one nation, and every American should therefore have the right to visit another state and have the same privileges of the residents of that state.[134] The Court has also held that this

130. *See Piper*, 470 U.S. at 287.

131. *See* Nedelman, *supra* note 114 (discussing the ineffectiveness of abortion bans on lowering abortion rates and alternatives which studies have proven are effective).

132. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2236 (2022).

133. *Id.* at 2257 (discussing that while voters in some states may want abortion rights more extensive than *Roe* provided, voters in other states may want to ban abortion).

134. *See* Passenger Cases, 48 U.S. 283, 492 (1849) (Taney, J., dissenting) (discussing that all Americans have the right to pass freely through states they do not live in); *see also* Slaughterhouse Cases, 83 U.S. 36, 37 (1872) (holding that the Fourteenth Amendment's Privileges and Immunities Clause is limited to rights spelled out in the Constitution); Dunn v. Blumstein, 405 U.S. 330, 338 (1971) (holding that the right to

right to interstate travel cannot be substantially infringed upon without a compelling state interest.[135] Before *Dobbs*, the protection of fetal life would not have been compelling enough to justify an infringement on the right to travel,[136] and Missouri's proposed bills could not have been upheld under these precedents.

However, in the rejection of *Roe*'s holding that a state does not have a compelling interest in protecting fetal life before viability, the Court in *Dobbs* seems to have elevated a state's interest in protecting pre-viability fetal life to a compelling interest.[137] The *Dobbs* dissenters argue that classifying a state's interest in protecting fetal life as invalid pre-viability and valid post-viability allows a balance between the pregnant person's liberty interest and the state's interest in protecting fetal life, making the case that pregnancy and parenthood are burdensome and difficult, particularly on low-income individuals.[138] However, the majority rejected this argument, calling the viability line arbitrary, and holding that nothing in the Constitution authorizes the Court to make such distinctions.[139]

Both of Missouri's proposed bills contain language to suggest that they would prohibit a pregnant person from traveling outside of the state to have an abortion where it is legal.[140] The first proposal would prohibit abortions occurring outside or partially outside of Missouri, and the second proposal would prohibit many activities related to abortion regardless of where they

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travel is fundamental); Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (holding the right to travel cannot be infringed without a compelling governmental interest).

135. *See Shapiro*, 394 U.S. at 634 (holding the right to travel cannot be infringed without a compelling reason).

136. *See* Planned Parenthood v. Casey, 505 U.S. 833, 860 (1992) (holding that a state's interest in preventing pre-viability abortions is not compelling enough to infringe on a fundamental right); *see also* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2242, 2257 (2022) (discussing *Roe* and *Casey*, both of which said a state's interest in protecting pre-viability fetal life was invalid and a state's interest in protecting post-viability fetal life was valid).

137. *See Dobbs*, 142 S. Ct. at 2238 (holding that the viability line from *Roe* is arbitrary and that a state may decide at which point it grants legal protections to a fetus).

138. *Id.* at 2317 (Breyer, Sotomayor, and Kagan, JJ., dissenting) (arguing that the viability line is the best way to strike a balance between a pregnant person's liberty interest and the state's interest in protecting fetal life).

139. *Id.* at 2261.

140. *See* S.B. 603, 101st Gen. Ass., 1st Reg. Sess. (Mo. 2021) (prohibiting abortions occurring outside Missouri, as well as those occurring partially inside or partially outside Missouri); *see also* H.B. 1677 amend. 4311H02.14H § (2)(1)–(9), 101st Gen. Assemb., 2nd Reg. Sess. (Mo. 2022) (allowing private citizens to bring a civil suit against anyone performing or attempting to perform or aid in an abortion for a Missouri resident, regardless of whether the abortion was performed inside or outside Missouri).

occurred.[141]

In *Coryell*, *Crandall*, and *Shapiro*, the Court interpreted that the Fourteenth Amendment's Privileges and Immunities Clause includes a right to travel. In *Coryell,* the Court held that U.S. citizens are entitled to pass through or to reside in another state for trade, agriculture, professional pursuits, or otherwise.[142] In *Crandall,* the Court quoted Justice Taney's dissent in the *Passenger Cases*, which said U.S. citizenship and residency included the right to pass through other states freely.[143] In *Shapiro*, the Court further clarified that the right to travel was so fundamental it could not be infringed upon without a compelling government interest.[144]

Though the current Court is likely to characterize a state's interest in protecting pre-viability fetal life as compelling, it is also worth re-examining the historic purpose of the right to travel and how it could inform the Court's holding in a case involving a law like the one proposed in Missouri.[145] The Fourteenth Amendment's Privileges and Immunities Clause has always been interpreted as being of crucial importance to the United States' national unity.[146] As Justice Taney wrote in the *Passenger Cases*, the Court views the American people as a community that must be able to move freely from state to state.[147] If states were allowed to subject their residents to their own civil and criminal punishments no matter where they went in the country, it would leave them inescapably bound to those laws so long as they remained a resident of that state.[148] This would seem to greatly frustrate the Privileges and Immunities Clause's purpose as interpreted by the Court—to fuse the

141. *See* Mo. S.B. 603 §(A)(188.50)(1)–(4); *see also* Mo. H.B. 1677 amend. 4311H02.14H § (2)(1)-(9).

142. *See* Corfield v. Coryell, 6 F. Cas. 546, 552 (E.D. Pa. 1823) (holding a New Jersey regulation forbidding non-residents from gathering oysters was constitutional because gathering oysters is not a privilege or immunity of U.S. citizenship/residency).

143. *See* Crandall v. Nevada, 73 U.S. 35, 48–49 (1868) (quoting Justice Taney's views laid out in *Passenger Cases*).

144. *See* Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (holding the right to travel cannot be infringed without a compelling reason).

145. *See generally* S.B. 603, 101st Gen. Ass., 1st Reg. Sess. (Mo. 2021) (prohibiting pregnant people from traveling outside Missouri to have an abortion).

146. *See* Kreimer, *Lines in the Sand*, *supra* note 33, at 1007 (explaining that the Court's interpretation of the right to travel underscores the important of freedom and opportunity so fundamental to American culture and history).

147. *See Passenger Cases*, 48 U.S. 283, 492 (1849) (Taney, J., dissenting) (characterizing the right to interstate travel as an unquestioned fundamental right shared by all American citizens).

148. *Id.* at 427 (explaining the constitutional limitations on state police power).

states into one collective nation and avoid interstate friction.[149]

If states could impose their laws on their residents no matter where those residents are, then the state of Missouri could ban its residents from going to Illinois, where abortion remains legal post-*Dobbs*,[150] to obtain an abortion. Before *Dobbs*, Missouri did not have a compelling enough interest in protecting pre-viability fetal life to infringe on a fundamental right so substantially,[151] but the *Dobbs* holding's elevation of this state interest to compelling makes this problematic.[152]

IV. POLICY RECOMMENDATION

A. Pro-Abortion States Should Pass Legislation Protecting Medical Professionals Providing Abortions Within Their Borders

States in which abortion remains legal should pass legislation to shield medical professionals providing abortions in their state from liability in other states via laws like the ones proposed in Missouri. Some states have already done this.[153]

In June 2022, California Governor Gavin Newsom signed a bill into law that protects the state's abortion providers from anti-abortion states that attempt to enact legislation like Missouri's.[154] In the press release following the bill's signing, Newsom specifically cited Missouri's proposed bills as examples of the kind of legislation the California bill is aimed at

149. *Id.* at 492.

150. *Id.* (referring to Illinois law that will continue to permit abortions until the point of viability).

151. *See* Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (holding the right to travel cannot be infringed without a compelling reason); *see also* Planned Parenthood v. Casey, 505 U.S. 833, 871 (1992) (holding that a state's interest in preventing pre-viability abortions is not compelling enough to infringe on a fundamental right).

152. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2237 (2022) (holding that a state has a legitimate interest in protecting fetal life both pre- and post-viability).

153. *See, e.g.*, *In Response to Supreme Court Decision, Governor Gavin Newsom Signs Legislation to Protect Women and Providers in California from Abortion Bans by Other States*, OFFICE OF GOVERNOR GAVIN NEWSOM, https://www.gov.ca.gov/2022/06/24/in-response-to-supreme-court-decision-governor-newsom-signs-legislation-to-protect-women-and-providers-in-california-from-abortion-bans-by-other-states/ (last visited Aug. 3, 2022) [hereinafter *In Response to Supreme Court Decision*].

154. *Id.*; *see also* S.B. 603, 101st Gen. Assemb., 1st Reg. Sess. (Mo. 2021); Mo. H.B. 1677 amend. 4311H02.14H § (2)(1)–(9) (prohibiting obtaining, seeking, or aiding and abetting an abortion under various circumstances, such as giving instructions over the internet about obtaining abortions).

counteracting.[155] New York also passed a law protecting abortion providers from being sued, arrested, or extradited to other states, and preventing insurers from suing New York healthcare providers who provide reproductive health services virtually.[156]

B. Pro-Abortion States Should Protect Non-Residents Who Obtain or Aid and Abet Abortions Within Their Borders by Refusing to Cooperate with Abortion Prosecutions and Protecting Medical Records

The aforementioned bill from California also aims to protect pregnant people who get abortions in California by refusing to enforce another state's civil judgment related to obtaining an abortion.[157] Connecticut enacted a law to protect non-residents obtaining abortions in the state from being charged under the more restrictive laws of other states by prohibiting a non-resident patient's medical records from being disclosed.[158] Washington state also passed legislation that protects the right to obtain an abortion even for non-residents.[159]

C. Pro-Abortion States Should Form Regional Coalitions to Defend Against Anti-Choice States in the Region

Every state that wants to protect the right to an abortion within its own borders should develop protections for individuals receiving and individuals providing abortions in their state. States wishing to support and protect abortion access should also find ways to work together. A good example of this type of cooperation comes from the coalition formed by California, Oregon, and Washington.

The governors of these states issued a declaration of a Multi-State

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155. *In Response to Supreme Court Decision*, *supra* note 155 (stating that the California legislation is in response to state legislatures like Missouri's that are attempting to stop pregnant people from seeking abortions in states like California).

156. *See* Marina Villeneuve, *New York State to Protect Abortion Providers Under New Laws*, ABC NEWS (June 14, 2022), https://abcnews.go.com/Health/wireStory/york-state-protect-abortion-providers-laws-85370099 (discussing provisions in the New York law to protect abortion access).

157. *See* A.B. No. 1666, 2022 Reg. Sess. (N.Y. 2022) (protecting those who receive abortions in California from civil liability).

158. *See* H.R. No. 5414, 2022 Reg. Sess., Pub. Act No. 22-19 (Conn. 2021) (enacting various abortion protections, including modifying the state's extradition laws to limit another state's ability to extradite a non-Connecticut resident who obtained an abortion in Connecticut).

159. *See* H.B. 1851 amend. E. § 1(5), 67th Leg. (Wash. 2022) (protecting the right to access abortion care in Washington regardless of residence).

Commitment to Reproductive Freedom.[160] Specifically, California, Oregon, and Washington committed to defending against anti-choice states targeting individuals who receive, or aid others to receive, an abortion within their borders.[161] They will also protect those receiving abortions in their states by refusing to cooperate with out-of-state investigations, inquiries, and arrests related to obtaining abortions.[162] The states will also refuse extradition of individuals for criminal prosecution related to abortion.[163]

Other regions should follow their lead. For example, Illinois and Minnesota have not only kept abortion legal, but have expanded abortion access since *Roe* was overturned.[164] They are likely to start receiving more patients seeking abortions from surrounding states that have banned or restricted the procedure, or where the state of the law is so uncertain providers have stopped offering abortion care, including states like: Wisconsin, Iowa, Missouri, Tennessee, Kentucky, Indiana, Ohio.[165] Both Minnesota's and Illinois's governors have separately declared their intentions to protect those traveling to their states to obtain an abortion, but there has not yet been a formal declaration of cooperation between the two of them.[166] New York, New Jersey, Vermont, and Connecticut are similarly well-positioned to form a coalition to defend non-residents receiving

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160. *See West Coast States Launch New Multi-State Commitment to Reproductive Freedom, Standing United on Protecting Abortion Access*, OFFICE OF GOVERNOR GAVIN NEWSOM, https://www.gov.ca.gov/2022/06/24/west-coast-states-launch-new-multi-state-commitment-to-reproductive-freedom-standing-united-on-protecting-abortion-access/ (last visited Sept. 8, 2022).

161. *See id.* (outlining the ways in which California, Oregon, and Washington are united in defending reproductive healthcare).

162. *Id.*

163. *Id.* (committing to defend abortion providers, promote greater access to abortion, and defend against misinformation surrounding reproductive healthcare).

164. *See CRR: Abortion Laws by State*, *supra* note 11 (maintaining a glossary of where abortion has been banned, partially banned, protected, or expanded since *Roe* was overturned).

165. *Id.*

166. *See* Peter Diamond, *Gov. Walz Signs Executive Order Protecting Out-of-State Abortion Seekers*, MPLS. ST. PAUL MAG. (June 28, 2022), https://mspmag.com/arts-and-culture/gov-walz-executive-order-abortion/ (detailing an executive order the Minnesota governor signed to protect non-residents obtaining abortions in Minnesota); *see also* Evelyn Holmes et. al, *Gov. Pritzker Calls for Special Session of General Assembly After Supreme Court Abortion Ruling*, ABC 7 CHI. (June 24, 2022), https://abc7chicago.com/supreme-court-roe-v-wade-illinois-abortion-law-overturned-decision/11992751/ (discussing the Illinois' governor's intention to make Illinois an abortion safe haven by setting aside travel funds for non-residents).

abortions in their states.[167]

It is heartening to see how many states have already taken action to defend abortion access post-*Dobbs*. However, states that restrict, completely ban, or do not protect abortion, significantly outnumber states in which abortion is still legal.[168] It is crucial that states trying to preserve abortion access do everything they can to ensure the right to have an abortion is protected in their states, and that non-residents who travel to these states to obtain reproductive healthcare will not face prosecution.

V. CONCLUSION

In the wake of the overturning of *Roe v. Wade*, some anti-abortion lawmakers are likely to feel emboldened to go beyond banning abortion in their own states and attempt to ban their residents from traveling out of state to have one.[169] After the Court perhaps elevated a state's interest in preserving fetal life to "compelling" in *Dobbs*, it is likely that the Court will allow such bans to stand under the Commerce Clause, and both Article IV and the Fourteenth Amendment's Privileges and Immunities Clauses.[170]

Missouri's first proposal could likely withstand exacting scrutiny under the Dormant Commerce Clause because the Court has determined protecting fetal life to be a legitimate purpose, and it is unclear what the non-discriminatory alternatives to achieve that purpose would be, so overt discrimination against interstate commerce could be overcome.[171] Missouri's second proposal could survive the *Pike* balancing test because the Court may find the local benefit the state gets from such an abortion travel ban would outweigh the impact it could have on interstate commerce.[172]

Article IV and the Fourteenth Amendment's Privileges and Immunities

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167. *See CRR: Abortion Laws by State*, *supra* note 11 (showing that New York, New Jersey, Vermont, and Connecticut have all expanded abortion access following *Roe*'s overturning).

168. *See* Simmone Shah, *What Abortion Safe Haven States Can Do*, TIME (June 27, 2022), https://time.com/6191581/abortion-safe-haven-states/ (stating that sixteen states and Washington, D.C. plan to keep abortion legal, while the rest of the states have either restricted it in some way or neglected to codify its protection under state law).

169. *See* Messerly, *supra* note 13.

170. *See* U.S. CONST. art. I, § 8, cl. 3; U.S. CONST. art. IV, § 2; U.S. CONST. amend. XIV, § 1.

171. *See* Hughes v. Oklahoma, 441 U.S. 322, 336 (1979) (holding that states must show that facially or effectively discriminatory laws serve a legitimate local purpose that cannot be achieved through non-discriminatory means).

172. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (creating the balancing test that weighs local benefit of a state law against the burden on interstate commerce).

Clauses cannot be relied upon to invalidate a state abortion travel ban. The proposed abortion travel bans would likely be constitutional under Article IV's Privileges and Immunities Clause because *Dobbs* overturned *Roe*'s viability framework and may have elevated the protection of fetal life to a compelling state interest,[173] making the Court more likely to uphold a substantial infringement on an individual's right to travel. Similarly, under the Fourteenth Amendment's Privileges and Immunities Clause, abortion travel bans may be allowed to stand because the Court in *Dobbs* said a state should be allowed to choose which interest is more important: protecting fetal life or preserving a pregnant person's right to travel to another state for an abortion.[174]

Given this landscape, it is crucial that states where abortion remains legal put protections in place for non-residents traveling to have abortions and in-state abortion providers. Pro-abortion states can refuse to participate in other states' investigations into out-of-state abortion seekers and band together to protect abortion access in their regions. Under a law like either of Missouri's two proposed bills, even insurance and abortion providers performing legal services in their state of practice could be prosecuted for aiding a resident of another state with an abortion. Pro-abortion states should prepare for the worst now by getting procedures in place to shield these groups from legal liability or prosecution.

173. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2238 (2022) (holding that the pre-viability/post-liability distinction regarding legal protections for fetuses is arbitrary).

174. *Cf. id.* at 2279 (holding that a state may decide at which point the interest in a fetal life outweighs fundamental rights).