

## Out of Bounds?: Abortion, Choice of Law, and a Modest Role for Congress

by  
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### Abstract

*This invited contribution to a symposium on the multiple intersections of family law and constitutional law grapples with the emerging problems of jurisdictional competition and choice of law in the wake of Dobbs v. Jackson Women’s Health Organization—as abortion-hostile states seek to impose restrictions beyond their borders and welcoming states seek to become havens for abortion patients, regardless of their domicile. Grounded in a conflict-of-laws perspective, the essay lays out the interstate abortion chaos invited by Dobbs and the threat to our federal system that it presents, given Congress’s failure to codify a national right to abortion in the Women’s Health Protection Act or other proposals. The essay then examines the promise, shortcomings, and uncertainties of relevant provisions of the U.S. Constitution as potential solutions to the problems. With no magic constitutional bullet available, new tools are needed to address this looming “war between the states.” The essay proceeds to propose one, borrowing a model from family law’s existing toolkit, specifically, the Parental Kidnapping Prevention Act (PKPA).*

*Enacted under Congress’s power to implement the Full Faith and Credit Clause, the PKPA’s intervention is modest, and it walks the fine line that that clause requires—recognizing each*

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*state's sovereignty while commanding respect for other states' prerogatives, aspiring to achieve national unity and harmony. Accordingly, the PKPA does not address the merits of an underlying child custody controversy or impose substantive custody-law requirements on the states. Instead, it allocates authority over child custody matters among the states and then ensures respect elsewhere for such authority lawfully exercised.*

*The recent enactment of the Respect for Marriage Act bodes well for this approach in a Congress that must bridge sharp divisions in order to legislate at all. It too allocates authority and ensures respect elsewhere, without codifying a right to celebrate same-sex and interracial marriages throughout the country.*

*Of course, how to allocate authority over abortion presents vexing challenges. What concessions would be worth making to have the certain knowledge that abortion-friendly states really are safe havens? Even if Congress cannot codify reproductive rights, can a majority of the House and at least 60 members of the Senate fulfill their responsibility under the Full Faith and Credit Clause so that the "laboratory of the states" can survive as a single nation?*

## Introduction

Abortion law is, of course, family law. Laws governing abortion regulate motherhood, fatherhood, family size, and gender roles. Whether and to what extent the U.S. Constitution protects access to abortion present critical questions at the intersection of family law and constitutional law, the focus of this symposium. Usually, these questions center on the issue that the Supreme Court controversially resolved in *Dobbs v. Jackson Women's Health Organization*,<sup>1</sup> when it repudiated fifty years of precedent to rule that the Fourteenth Amendment does not protect abortion.<sup>2</sup> *Dobbs*, however, invites additional problems that intertwine family law with constitutional law.

In rejecting the limited constitutional right to abortion that *Roe v. Wade*<sup>3</sup> and subsequent cases had recognized, the *Dobbs* majority wrote as if a single and simple post-*Roe* scenario would follow: abortion regulation would return to the "laboratory of

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<sup>1</sup> 142 S. Ct. 2228 (2022).

<sup>2</sup> *Id.* at 2242.

<sup>3</sup> 410 U.S. 113 (1973).

the States,”<sup>4</sup> with some enacting tight restrictions and others taking a more permissive approach.<sup>5</sup> This “patchwork” scenario would resemble one familiar in family law of the past, namely how the U.S. map looked before the rise of no-fault dissolution, when the common practice of migratory divorce took unhappy spouses in strict states to more hospitable fora in search of relief.<sup>6</sup> More recently, “destination weddings” for LGBTQ couples before nationwide marriage equality often rested on the variation in state requirements.<sup>7</sup> At bottom, this idea of a laboratory suggests that variation might yield benefits, with experimentation among the states helping to identify the best approaches.

Yet even before the release of the official opinion in *Dobbs*, evidence of a more complicated and chaotic outcome regarding abortion emerged.<sup>8</sup> Not content with overturning *Roe*, anti-abortion state legislators had begun to reach beyond their own borders to target abortions that their residents obtain even in states where the procedure remains legal. In response, legislators trying to allow abortion access for traveling patients began exploring ways to protect local providers and their facilities from extraterritorial intrusions. Add to these maneuvers the fact that surgical abortion is not the only option for terminating a pregnancy, with

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<sup>4</sup> *Cruzan v. Dir.*, Missouri. Dept. of Health, 497 U.S. 261, 292 (1990) (O’Connor, J., concurring) (internal quotation marks omitted).

<sup>5</sup> *Dobbs*, 142 S. Ct. at 2257 (assuming that voters in different states will have different views of abortion).

<sup>6</sup> See, e.g., Michael J. Higdon, *If You Grant It, They Will Come: The History and Enduring Legal Legacy of Migratory Divorce*, 2022 UTAH L. REV. 295; Thomas Reed Powell, *And Repent at Leisure: An Inquiry into the Unhappy Lot of Those Whom Nevada Hath Joined Together and North Carolina Hath Put Asunder*, 58 HARV. L. REV. 930 (1945).

<sup>7</sup> See, e.g., ANDREW KOPPELMAN, *SAME SEX, DIFFERENT STATES: WHEN SAME-SEX MARRIAGES CROSS STATE LINES* (2006); Susan Frelich Appleton, *Domicile and Inequality by Design: The Case of Destination Weddings*, 2013 MICH. ST. L. REV. 1449.

<sup>8</sup> Almost three months before the Court released its decision, a leaked draft of the majority opinion was widely circulated. See Josh Gerstein & Alexander Ward, *Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion Shows*, POLITICO (May 3, 2022, 2:14 PM), <https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473>.

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abortion pills and telemedicine now affording more geographic flexibility than in-clinic procedures.<sup>9</sup>

These moves not only undermine the variation and experimentation promised by the laboratory idea; they also invite fundamental challenges to our federal system. For example, with the appropriate legislative infrastructure, one state's residents might successfully sue for damages out-of-staters who assist a resident of the first state to obtain an abortion in a jurisdiction where the procedure is legally protected. The second state might refuse to recognize and enforce the first state's judgment. In the meantime, the defendant in the first suit might seek damages against the plaintiff in the first suit for initiating a case against one who provides or seeks abortion care. In turn, the first state might refuse to recognize or enforce the resulting judgment from the second state. Although these illustrations center on civil causes of action, conflicts might also grow out of criminal proceedings. Either way, this is not how states in our federal system are supposed to behave. Putting aside the now repudiated individual right to abortion, what will this aggressive pursuit of "states' rights" mean for our enduring aspirations for national unity and harmony?<sup>10</sup> As a practical matter, how might we halt this coming train wreck?

Certainly, some of the *Dobbs* Justices foresaw the possibility of such problems. The dissent by Justices Breyer, Sotomayor, and Kagan sounds the alarm about "interstate conflicts,"<sup>11</sup> while Justice Kavanaugh's concurrence offers unsupported reassurance

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<sup>9</sup> See, e.g., Emily Bazelon, *Risking Everything to Offer Abortions Across State Lines*, N.Y. TIMES (Oct. 4, 2022), <https://www.nytimes.com/2022/10/04/magazine/abortion-interstate-travel-post-ro.html?searchResultPosition=3>. See also David S. Cohen, Greer Donley, & Rachel Rebouché, *Abortion Pills*, 76 STAN. L. REV. \_\_\_\_ (forthcoming 2024), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4335735](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4335735) (Feb. 1, 2023 draft).

<sup>10</sup> See, e.g., *Milwaukee Cnty. v. M.E. White Co.*, 296 U.S. 268, 276-77 (1935) ("The very purpose of the full-faith and credit clause was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation. . . ."). But see Bryan Tannehill, *Taney Court II: How the Supreme Court Is About to Destroy Federalism*, NEW REPUBLIC (Jan. 11, 2023), [https://newrepublic.com/article/169938/supreme-court-destroy-federalism?utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=suboffer&utm\\_term=1\\_13&utm\\_content=](https://newrepublic.com/article/169938/supreme-court-destroy-federalism?utm_source=newsletter&utm_medium=email&utm_campaign=suboffer&utm_term=1_13&utm_content=)

<sup>11</sup> *Dobbs*, 142 S. Ct. at 2337 (joint dissent).

that, at least in his view, “the constitutional right to interstate travel” moots such concerns.<sup>12</sup> And these Justices were not the first to identify the problem. Decades before *Dobbs*, scholars had hypothesized and analyzed such scenarios, reaching conflicting conclusions about the validity of state efforts to regulate abortions beyond their borders.<sup>13</sup>

The problem of such interstate competition stands out as so vexing, first, because most observers see it as so unprecedented.<sup>14</sup> Both in and out of family law, extraterritorial laws, especially criminal prohibitions, are extremely rare. Despite variations in state laws on gambling, surrogacy arrangements, and marijuana use, to cite a few examples, we are usually governed (and expect to be governed) by the regime in which we undertake a particular activity. In other words, we legitimately feel free to gamble when we visit Las Vegas, even if we cannot legally do so at home. As a result, much about the constitutional limits on a state’s ability to reach beyond its borders remains untested. The same is true for the innovative steps that welcoming states are taking.

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<sup>12</sup> *Dobbs*, 142 S. Ct. at 2309 (Kavanaugh, J., concurring) (“In my view, [a State may not bar a resident of that State from traveling to another to obtain an abortion] based on the constitutional right to interstate travel.”).

<sup>13</sup> E.g., Susan Frelich Appleton, *Gender, Abortion, and Travel After Roe’s End*, 51 ST. LOUIS U. L.J. 655 (2007); Lea Brilmayer, *Interstate Preemption: The Right to Travel, the Right to Life, and the Right to Die*, 91 MICH. L. REV. 873 (1993); Richard H. Fallon, Jr., *If Roe Were Overruled: Abortion and the Constitution in a Post-Roe World*, 51 ST. LOUIS U. L.J. 611 (2007); Seth F. Kreimer, *The Law of Choice and Choice of Law: Abortion, the Right to Travel, and Extraterritorial Regulation in American Federalism*, 67 N.Y.U. L. REV. 451 (1992); Donald H. Regan, *Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865 (1987); Mark D. Rosen, “Hard” or “Soft” Pluralism?: Positive, Normative, and Institutional Considerations of States’ Extraterritorial Powers, 51 ST. LOUIS U. L.J. 713 (2007). For more recent engagement in anticipation of *Dobbs* and in its immediate aftermath, see David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. 1 (2023); B. Jessie Hill, *The Geography of Abortion Rights*, 109 GEO. L.J. 1081 (2021); Joseph William Singer, *Conflict of Abortion Laws* (unpublished manuscript on file with author).

<sup>14</sup> Several observers, however, see parallels centered on the moral dissent over slavery before the Civil War. E.g., Kreimer, *supra* note 13, at 464-68.

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Second, the issues posed arise from the “dismal swamp” of conflict of laws.<sup>15</sup> Whose law applies to an abortion connected to more than one state, for example, when a provider in a welcoming state terminates the pregnancy of a patient who has traveled there from a hostile state? The choice of law process and its outcome are notoriously indeterminate despite familiar gestures toward the values of “certainty, predictability, and uniformity.”<sup>16</sup> Although many provisions of the U.S. Constitution might well limit choice of law here, precedents interpreting these provisions yield uncertain results. Even if such precedents offered clearer guidance, however, *Dobbs* itself shows how swiftly the Court might overturn past constitutional opinions and move forward with an entirely new approach.

This essay brings to this symposium on the multiple intersections of family law and constitutional law the emerging problems of jurisdictional competition and choice of law in interstate abortion situations. Given my earlier work, I make no effort to camouflage my commitments to reproductive freedom and justice. Yet, those commitments do not animate this essay; here, my aim is to explain to family lawyers the basis of the interstate abortion chaos invited by *Dobbs*, to highlight the threat to our federal system that this chaos presents, to show why we need a new tool to resolve it, and to propose one—borrowing a model from family law’s existing toolkit, specifically, the Parental Kidnapping Prevention Act (PKPA).<sup>17</sup> Indeed, the recent enactment of the Respect for Marriage Act reinforces the value of using this model.<sup>18</sup>

Part I, which includes a choice of law primer, shows why we cannot predict with certainty which state’s law would apply in an interstate abortion situation, thereby indicating why attorneys say that no state can fully eliminate risks for providers in permis-

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<sup>15</sup> The phrase comes from the famous description by William Prosser: “The realm of the conflict of laws is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon. The ordinary court, or lawyer, is quite lost when engulfed and entangled in it.” William L. Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953).

<sup>16</sup> E.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(f) (1971) (outlining factors relevant to the choice of the applicable rule of law).

<sup>17</sup> 28 U.S.C. § 1738A.

<sup>18</sup> Respect for Marriage Act, Pub. L. No. 117-228, 136 Stat. 2305 (2022). See *infra* notes 206-08 and accompanying text.

sive states when they serve traveling patients.<sup>19</sup> Part II reveals the looming clash—using as illustrations existing and proposed legislation, both civil and criminal—from hostile states ready to reach beyond their borders and from welcoming jurisdictions attempting to provide safe abortion havens. Part III explores relevant constitutional provisions, finding many promising arguments for limits on state authority but nothing sufficiently certain to avoid prolonged testing in court, including the U.S. Supreme Court. Part IV explains how the PKPA, enacted by Congress under its power to implement the Full Faith and Credit Clause, provides a useful model for a federal legislative fix. Despite significant hurdles en route to enactment, Part IV concludes that such legislation provides the most pragmatic response to the serious hazards that interstate abortion conflicts pose to our federal system. The Conclusion shows how the newly enacted Respect for Marriage Act illustrates the recommended approach.

## I. The Choice of Law Landscape: A Brief Tour of the Dismal Swamp

As the *Dobbs* dissenters pointed out, “the majority’s ruling today invites a host of questions about interstate conflicts.”<sup>20</sup> This section offers an introductory glimpse of the modern choice of law process to show why the prospect of extraterritorial and conflicting abortion regulation presents questions without definitive answers, raising issues that have become a vital aspect of the post-*Dobbs* conversation.

Despite the common intuition that the law of the place of conduct governs the conduct’s legality—so that an abortion performed in a state that allows it cannot be penalized in another state—the prospect of extraterritorial and conflicting regulation looms large because territoriality is no longer the predominant approach to choice of law. The mid-twentieth century witnessed

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<sup>19</sup> See Selena Simmons-Duffin, *Doctors Who Want to Defy Abortion Laws Say It’s Too Risky*, NPR (Nov. 23, 2022), <https://www.npr.org/sections/health-shots/2022/11/23/1137756183/doctors-who-want-to-defy-abortion-laws-say-its-too-risky>.

<sup>20</sup> *Dobbs*, 142 S. Ct. 2228, 2337 (joint dissent).

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the advent of “governmental interest analysis,”<sup>21</sup> which reshaped the choice of law process even in several jurisdictions that purported to reject this theory.<sup>22</sup>

Drastically simplified, governmental interest analysis and its offshoots focus on the purpose of a law that might apply in a multistate case. If the purpose of the state’s law would be advanced by its application, the state has an interest. This inquiry might well reveal that only one state has an interest in applying its law so the would-be conflict is a “false” one that can rationally and easily be decided by applying the interested state’s law. In cases in which more than one state has an interest to advance by the application of its own law, producing a “true” conflict, theorists have offered various interventions, but more often than not—as a practical matter—the forum will apply its own law, so the site of the litigation will be determinative.<sup>23</sup>

Laws can have a variety of purposes, as textbook choice of law cases illustrate. Sometimes a law seeks to regulate conduct, so that the state where the conduct occurs has an interest in the application of its law, for example, roadway speed limits.<sup>24</sup> In these situations, interest analysis is consistent with the traditional territorial approach. Sometimes a law’s purpose entails protec-

<sup>21</sup> See generally Herma Hill Kay, *A Defense of Currie’s Governmental Interest Analysis*, 215 RECUEIL DES COURS 32 (1989); Kermit Roosevelt III, *Brainerd Currie’s Contribution to Choice of Law: Looking Back, Looking Forward*, 65 MERCER L. REV. 501 (2014).

<sup>22</sup> Only a couple of states follow classic interest analysis propounded by Brainerd Currie. See John F. Coyle, William S. Dodge & Aaron D. Simowitz, *Choice of Law in the American Courts in 2021: Thirty-Fifth Annual Survey* 5 (2022), <https://ssrn.com/abstract=4022722> or <http://dx.doi.org/10.2139/ssrn.4022722> (listing only California and the District of Columbia in torts cases). However, other modern approaches, including the most widely used approach of the *Restatement (Second)*, incorporate the considerations of state policies that Currie identified as crucial. See RESTATEMENT (SECOND), *supra* note 16, §6(2)(b) & (c); Roosevelt, *supra* note 21, at 514-15.

<sup>23</sup> For early sketches of this process, see Brainerd Currie, *Married Women’s Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227 (1958), reprinted in BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 77 (1963); Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171 (1959), reprinted in BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 177 (1963).

<sup>24</sup> See Brainerd Currie, *On the Displacement of the Law of the Forum*, 58 COLUM. L. REV. 964, 1012 (1958), reprinted in *SELECTED ESSAYS*, *supra* note 23, at 3, 58.

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tion of an individual or entity, such as a vulnerable person or a charitable organization; if the person is domiciled in the state with the protective law or the organization's principal place of business is there, then that state has an interest in applying its protection in a multistate dispute.<sup>25</sup> Sometimes laws have procedural purposes in that they are designed to manage litigation and adjudication, giving the forum an interest in the application of such laws.<sup>26</sup>

These modern approaches to choice of law have developed in the context of civil litigation within the United States. Indeed, conventional wisdom places criminal matters outside choice of law analysis. Oft-cited support for this conclusion comes from an old case about trade in enslaved persons: "The Courts of no country execute the penal laws of another."<sup>27</sup> In addition, the state as complaining party and vicinage clauses<sup>28</sup> both underscore the local characteristics of a criminal prosecution.

Nonetheless, this understanding of criminal law might well reflect the very same territorial assumptions that interest analysis and its kin have displaced in civil cases. And immunizing criminal adjudication from choice of law is neither inevitable nor universal. First, an approach more consistent with interest analysis appears in the jurisdictional provision of the Model Penal Code, § 1.03, which provides that one can be convicted under a local law for an offense committed in another state, so long as the local law "expressly prohibits conduct outside the State, when the conduct bears a reasonable relation to a legitimate interest of this State and the actor knows or should know that his conduct is

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<sup>25</sup> *E.g.*, *Schultz v. Boy Scouts of America, Inc.*, 480 N.E.2d 679 (N.Y. 1985).

<sup>26</sup> *E.g.*, 2138747 *Ontario, Inc. v. Samsung C & T Corp.*, 103 N.E.3d 774 (N.Y. 2018).

<sup>27</sup> *The Antelope*, 23 U.S. 66 (1825).

<sup>28</sup> U.S. CONST. amend. VI. *See, e.g.*, Kreimer, *supra* note 13, at 466. *Cf.* Steven A. Engel, *The Public's Vicinage Right: A Constitutional Argument*, 75 N.Y.U. L. REV. 1658, 1663 (2000) ("The First Congress framed the Sixth Amendment's Vicinage Clause to protect the defendant's right to a fair trial, yet it did so against the longstanding presumption that the community had its own right to adjudicate crimes committed within the district. This original understanding suggests a constitutional dimension to the public's right that should be recognized by current law.").

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likely to affect that interest.”<sup>29</sup> Second, when we broaden the lens to consider criminal cases playing out on the international stage, we find reasoning that resembles interest analysis, albeit presented in a different vocabulary, with terms like “extraterritoriality” and “effects.”<sup>30</sup> Accordingly, under appropriate circumstances, American courts have applied American criminal law even though the prohibited conduct occurred abroad.<sup>31</sup>

## II. Action in the States

This Part offers a condensed overview of moves by states seeking to apply their anti-abortion laws beyond their borders and by states welcoming abortion patients from other states. The overview is designed not to reach any definitive conclusion about whether any of these measures would survive constitutional or other challenges; rather, its purpose is to provide evidence of a looming “war between the states,” with its threats to our federal system.

### A. *Hostile States*

A wide range of legislative moves, enacted and proposed, aim to thwart traveling patients’ efforts to terminate pregnancies even where abortions are legal. Most specify civil remedies, but we should not assume that criminal statutes are off the table. Some statutes target assistance in the patient’s home state, but others clearly implicate conduct in the destination or abortion state. This section sorts examples to surface the range of possibilities and the questions that they raise.

Let’s begin with a statute that Missouri enacted in 2005 and that its state supreme court upheld in 2007, albeit with limiting constructions, in a constitutional challenge by abortion providers. The provision, § 188.250 of the Missouri Statutes, reads as follows:

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<sup>29</sup> MODEL PENAL CODE § 1.03(1)(f) (1962).

<sup>30</sup> See, e.g., *RJR Nabisco, Inc. v. Eur. Cmty.*, 579 U.S. 325, 335 (2016) (“extraterritoriality”); *S.E.C. v. Berger*, 322 F.3d 187, 192-93 (2d Cir. 2003) (“effects”) (criticized in *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247 (2010)).

<sup>31</sup> See, e.g., *RJR Nabisco*, 579 U.S. at 340; *United States v. Yunis*, 681 F. Supp. 896 (D.D.C. 1988).

1. No person shall intentionally cause, aid, or assist a minor to obtain an abortion without the [parental] consent or consents required by section 188.028.
2. A person who violates subsection 1 of this section shall be civilly liable to the minor and to the person or persons required to give the consent or consents under section 188.028. . . .
3. It shall not be a defense to a claim brought under this section that the abortion was performed or induced pursuant to consent to the abortion given in a manner that is otherwise lawful in the state or place where the abortion was performed or induced. . . .<sup>32</sup>

Although it does not explicitly mention travel, subsection 3 clearly implies it. The statute's enactment was prompted by the practice of Missouri minors finding their way to Illinois, which at the relevant time did not require parental involvement or a judicial bypass as a prerequisite for abortion.<sup>33</sup>

The abortion providers sued on their own behalf and on behalf of their patients, asserting violations of their rights to free speech under the U.S. and Missouri Constitutions as well as violations of the federal Constitution's Commerce Clause, Due Process Clause, and protection for a right to travel.<sup>34</sup> Under the court's analysis, the statute withstands constitutional challenge so long as it is read not to include "core protected speech,"<sup>35</sup> such as abortion counseling and advice, or conduct that occurs "wholly outside Missouri."<sup>36</sup> Within those limits, just what the statute covers is not entirely clear because the statute does not identify

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<sup>32</sup> MO. REV. STAT. § 188.250 (West 2007).

<sup>33</sup> *Id.* (describing the procedure for Missouri minors to obtain abortions). Illinois had an earlier parental notification requirement, 750 ILL. COMP. STAT. 70, which a court enjoined. *See Zbaraz v. Hartigan*, 763 F.2d 1532 (7th Cir. 1985). It finally went into effect many years later. *Hope Clinic for Women, Ltd. v. Flores*, 991 N.E.2d 745 (Ill. 2013). In between, Missouri minors often traveled to Illinois to obtain abortions. *See Bill Raack, Bill Would Punish Those Who Help Minors Get Abortions*, ST. LOUIS PUB. RADIO, NPR (Mar. 7, 2003, 12:23PM), <https://news.stlpublicradio.org/delete1/2003-03-07/bill-would-punish-those-who-help-minors-get-abortions>. Illinois repealed its parental notification requirement in 2022. 750 ILL. COMP. STAT. § 70/30 (2022).

<sup>34</sup> *Planned Parenthood of Kansas v. Nixon*, 220 S.W.3d 732 (Mo. 2007) (en banc).

<sup>35</sup> *Id.* at 741.

<sup>36</sup> *Id.* at 736–37.

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any “connecting factors.”<sup>37</sup> Presumably, the minor must be domiciled in Missouri, although the statute does not say so explicitly. Perhaps it would suffice, however, if a parent bringing suit is domiciled in Missouri—or simply that the aid is rendered in Missouri regardless of the actors’ ties to the state.

Despite these ambiguities, the court does make clear that the statute cannot apply to a person in Missouri who informs a minor about Illinois’s absence of a parental consent requirement (protected speech). Nor can it apply to one who picks up a Missouri minor in Illinois after she arrives there by Metrolink (a rapid transit system with stops in both Missouri and Illinois) and drives her to an abortion clinic or to medical personnel who provide services in Illinois (conduct wholly outside Missouri). It might, however, apply to one who drives the minor from Missouri to Illinois, which entails some conduct in Missouri along with some in Illinois.<sup>38</sup>

Texas’s notorious SB8,<sup>39</sup> which went to the Supreme Court several times in the run-up to the resolution of *Dobbs*,<sup>40</sup> also targets those who assist others in obtaining abortions along with abortion providers, while explicitly exempting the abortion patient.<sup>41</sup> Like the Missouri statute, this “heartbeat law”<sup>42</sup> provides for civil, not criminal, liability—but it effectively halted the performance of almost all abortions in Texas.<sup>43</sup> In seeking to avoid pre-enforcement judicial review, the statute places enforcement in the hands of private citizens bounty-hunter style, authorizing a claim for \$10,000 to anyone who is not “an officer or employee of

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<sup>37</sup> This term, used in choice of law, refers to facts linking a dispute with a particular jurisdiction, say, the place where an injury occurred or the domicile of a party.

<sup>38</sup> *But see infra* note 160 and accompanying text (noting the argument that transportation itself constitutes interstate commerce within Congress’s regulatory domain).

<sup>39</sup> TEX. HEALTH & SAFETY CODE ANN. § 171.204 (WEST 2021).

<sup>40</sup> *Whole Woman’s Health v. Jackson*, 141 S. Ct. 2494 (2021); *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522 (2021); *Whole Woman’s Health v. Jackson*, 142 S. Ct. 701 (2022).

<sup>41</sup> TEX. HEALTH & SAFETY CODE ANN. § 171.206 (WEST 2021).

<sup>42</sup> TEX. HEALTH & SAFETY CODE ANN. § 171.204 (entitled “Determination of Presence of *Fetal Heartbeat Required*; Record”) (emphasis added).

<sup>43</sup> Kari White et al., *Initial Impacts of Texas’ Senate Bill 8 on Abortions in Texas and at Out-of-State Facilities*, TEXAS POLICY EVALUATION PROJECT—THE UNIVERSITY OF TEXAS AT AUSTIN, Oct. 2021, at 1.

a state or local governmental entity in this state.”<sup>44</sup> The statute includes only one specific reference to connections with Texas: It applies only to abortions performed by “physicians,” who are defined as those licensed to practice in Texas.<sup>45</sup> As an early plaintiff, a disbarred attorney in home confinement in Arkansas, pled: “Senate Bill 8 confers a private right of action upon ‘any person,’ without limitation as to residency or citizenship in the State of Texas, status as a felon, condition of ‘official detention,’ disbarment from the practice of law, public disgrace, difficulties getting due process, etc.”<sup>46</sup> Similarly, SB8 does not say whether the abortion or the aid must occur in Texas or what connections the patient or aider must have with the state.

We can find some guidance, however, because Texas has a presumption against extraterritoriality. According to the Texas Supreme Court, it “start[s] with the principle that a statute will not be given extraterritorial effect by implication but only when such intent is clear.”<sup>47</sup> So, absent revisions to SB8 that refer expressly to out-of-state abortions or out-of-state assistance, such elements must occur in Texas.<sup>48</sup> Even then, whether Texas must

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<sup>44</sup> TEX. HEALTH & SAFETY CODE ANN. § 171.208 (West 2021). *See, e.g.*, Aimee Picchi, *Texas Abortion Ban Turns Citizens into “Bounty Hunters,”* CBS NEWS (Sept. 3, 2021, 7:22 AM), <https://www.cbsnews.com/news/texas-abortion-law-bounty-hunters-citizens/>.

<sup>45</sup> TEX. HEALTH & SAFETY CODE ANN. §§ 171.201(4) & 171.204 (West 2021).

<sup>46</sup> Vivia Chen, *Meet the Quirky Plaintiffs Suing Under the Texas Abortion Law*, VIVIA CHEN UNFILTERED BLOOMBERG LAW (Oct. 5, 2021, 10:31 AM), <https://news.bloomberglaw.com/business-and-practice/meet-the-quirky-plaintiffs-suing-under-the-texas-heartbeat-act> (quoting the complaint of Oscar Stille, a plaintiff described in the article).

<sup>47</sup> *Coca-Cola Co. v. Harmar Bottling Co.*, 218 S.W.3d 671, 682 (Tex. 2006) (as quoted in William S. Dodge, *Presumptions Against Extraterritoriality in State Law*, 53 U.C. DAVIS L. REV. 1389, 1450 (2020)). Missouri also follows a presumption against extraterritoriality in civil cases. *See Tuttle v. Dobbs Tire & Auto Ctrs.*, 590 S.W.3d 307, 311 (Mo. 2019) (“[T]his Court applies the long-standing presumption that Missouri statutes, absent express text to the contrary, apply only within the boundaries of this state and have no extraterritorial effect.”). Nonetheless, the language of Mo. REV. STAT. § 188.250(3) (West 2007) arguably rebuts the presumption. *See supra* note 32 and accompanying text.

<sup>48</sup> Thus, the statute should not be applicable even to Texas physicians who perform abortions out of state. Assistance provided in Texas for an out-of-state abortion, however, would be covered.

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be the domicile of the plaintiff and/or the patient remains an open question.

Such explicit references to activities in other states appear in two proposed anti-abortion measures in Missouri. First, Representative Mary Elizabeth Coleman introduced amendments to existing restrictions that would use the SB8 model (enforcement via civil suits for statutory damages and attorneys' fees against providers and aiders, but not the patient), expressly to cover abortions performed on Missouri residents anywhere.<sup>49</sup> Representative Coleman stated that she seeks to stop the frequent travel of Missourians to nearby Illinois to terminate their pregnancies.<sup>50</sup>

Second, Representative Andrew Koenig offered legislation specifying the multistate situations in which Missouri abortion restrictions would apply, to wit, when the covered conduct occurs (1) in Missouri, (2) partly in Missouri and partly elsewhere, (3) out of state when particular conditions obtain, and (4) anywhere in the world if it is related to genocide.<sup>51</sup> The second category lists a non-exclusive series of examples, including the use or expected use in Missouri of one dose of a multi-dose medication regimen, as well as out-of-state abortions when counseling,<sup>52</sup> payment, or advertising<sup>53</sup> occurs in Missouri. The third category requires one of the following conditions:

- (a) The conduct of a person or entity creates a substantial connection with this state;

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<sup>49</sup> H.B. 1854, 101st Gen. Assemb., 2d Reg. Sess. (Mo. 2022).

<sup>50</sup> Sarah Fentem, *Missouri Lawmaker Wants to Make It a Crime to Help People Get Abortions out of State*, ST. LOUIS PUB. RADIO NPR (Mar. 11, 2022, 6:21 PM), <https://news.stlpublicradio.org/health-science-environment/2022-03-11/missouri-lawmaker-wants-to-make-it-a-crime-to-help-people-get-abortions-out-of-state>.

<sup>51</sup> S.B. 1202, 101st Gen. Assemb., 2d Reg. Sess. (Mo. 2022).

<sup>52</sup> The Missouri Supreme Court's analysis of MO. REV. STAT. § 188.250 (West 2007), however, deems such limits on counseling to violate the First Amendment. *See supra* note 35 and accompanying text.

<sup>53</sup> *But see* Bigelow v. Virginia, 421 U.S. 809 (1975) (holding that the state cannot use its interest in preventing its citizens from terminating pregnancies to ban advertising of out-of-state abortion services). *Cf.* Bernhard v. Harrah's Club, 546 P.2d 719 (Cal. 1976) (citing an out-of-state tavern's advertisements in California and the use of California's highways to travel there as bases to give California a regulatory interest in the tavern's practices in serving alcohol).

(b) A person or entity is incorporated or maintains his, her, or its principal place of residence or principal place of business within this state; or

(c) It involves a resident of this state, including an unborn child who is a resident of this state. An unborn child shall be considered a resident of this state when:

a. The mother of the child is a resident of this state at the time the abortion is, or would have been, performed or induced;

b. The mother of the child was a resident of this state around the time that the child may have been conceived;

c. The mother intends to give birth to the child within this state if the pregnancy is carried to term;

d. Sexual intercourse occurred within this state and the child may have been conceived by that act of intercourse;

e. The child is born alive within this state after an attempted abortion;

f. The mother of the child sought prenatal care, coverage, or services within this state during the pregnancy with the child; or

g. The mother of the child otherwise had a substantial connection with this state, other than mere physical presence, during the pregnancy with the child; . . .<sup>54</sup>

These proposals would complement Missouri legislation enacted in 2019, which requires local family planning agencies referring prospective abortion patients to abortion facilities in other states to provide the anti-abortion printed materials that the state produced (pre-*Dobbs*) for its required “informed consent” process.<sup>55</sup>

Civil measures like Texas’s SB8 and its imitators elsewhere<sup>56</sup> contrast with the classic abortion ban, which imposes criminal lia-

<sup>54</sup> S.B. 1202(3)(c), 101st Gen. Assemb., 2d Reg. Sess. (Mo. 2022).

<sup>55</sup> MO. ANN. STAT. § 188.033 (West 2019) (a criminal measure).

<sup>56</sup> For example, Idaho’s Fetal Heartbeat Preborn Child Protection Act criminalizes abortion and also authorizes a civil action for damages against medical professionals attempting or performing an illegal abortion. IDAHO CODE ANN. §§ 18-8805 & 18-8807 (West 2022). Plaintiffs must be the abortion patient or one of several listed family members. *Id.* § 18-8807.

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bility and treats abortion as a felony.<sup>57</sup> States have enacted new criminal anti-abortion statutes, which also exist in those states where *Dobbs* has “triggered” revitalization of pre-*Roe* prohibitions.<sup>58</sup> For such criminal laws, the jurisdictional provision of the Model Penal Code, § 1.03, offers parameters for possible extra-territorial applications.<sup>59</sup> As noted earlier, it provides that one can be convicted under a local law for an offense committed in another state, so long as the local law “expressly prohibits conduct outside the State, when the conduct bears a reasonable relation to a legitimate interest of this State and the actor knows or should know that his conduct is likely to affect that interest.”<sup>60</sup>

The express-prohibition requirement operates to make the default a presumption against extraterritoriality, which one study found to exist in twenty states.<sup>61</sup> Thus, a criminal anti-abortion statute meant to apply beyond the enacting jurisdiction’s borders must state explicitly that it covers abortions in other states when, for example, the patient is a citizen of the anti-abortion state. A state hostile to abortion would claim a legitimate interest in its pregnant citizens and their fetuses, and possibly even in fetuses conceived there, which the Missouri proposal above expressly covers.<sup>62</sup> For the final requirement, we can hypothesize scenarios in which the provider in a welcoming state knows or should know

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<sup>57</sup> The *Dobbs* majority includes two appendices offering many illustrations of this traditional criminal model. Appendix A “contains statutes criminalizing abortion at all stages of pregnancy in the States existing in 1868,” 142 S. Ct. at 2285, and Appendix B “contains statutes criminalizing abortion at all stages in each of the Territories that became States and in the District of Columbia,” *id.* at 2296-97.

<sup>58</sup> Elizabeth Nash & Isabel Guarnieri, *13 States Have Abortion Trigger Bans—Here’s What Happens When Roe Is Overturned*, GUTTMACHER INST. POL’Y ANALYSIS (June 6, 2022) (describing abortion criminal statutes that pre-date *Roe v. Wade* that become effective again after *Roe* is overruled). See, e.g., Attorney General of Missouri Eric Schmitt, Opinion Letter No. 22-2022 (June 24, 2022) (informing the Revisor of Statutes of the “Immediate Efficacy of Section 187.017, RS Mo” based on the Supreme Court’s overruling of cases recognizing constitutional protection for abortion).

<sup>59</sup> See *supra* note 29 and accompanying text.

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<sup>60</sup> See *supra* note 29 and accompanying text.

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<sup>61</sup> See Dodge, *supra* note 47, at 1403. It is not entirely clear whether the presumption operates only in civil cases or whether it extends to criminal laws as well.

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<sup>62</sup> See *supra* note 54 and accompanying text.

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at least where the patient resides, even if oblivious about the state of conception. These would constitute facts to be alleged and then established at trial. Further, general criminal provisions on accomplice liability and conspiracy likely make it unnecessary for the prohibiting state to enact any specific legislation aimed at providing aid or assistance along the lines of the civil provisions examined earlier.<sup>63</sup>

In the criminal domain, two additional possibilities merit consideration. First, although classic bans, and even modern restrictions like Texas's SB8,<sup>64</sup> exempt the abortion patient from liability, nothing but politics prevents a state from holding her responsible as well.<sup>65</sup> Donald Trump famously stated in his 2016 presidential campaign: "There has to be some sort of punishment [for the abortion patient]."<sup>66</sup> Yet, he quickly abandoned that position in favor of the well-worn trope that outlawing abortion protects women—portraying them as the victims of their own decisions.<sup>67</sup>

Nonetheless, the combination of current anti-abortion fervor, the perception of an anti-abortion Supreme Court, and the rise of medication abortions, with their potential for safe self-managed care, might well spark reforms that would remove the immunity that has historically shielded the patient. Some South American countries have allowed prosecution of the patient,<sup>68</sup>

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<sup>63</sup> MODEL PENAL CODE § 2.06 (1962) (liability for conduct of another; complicity); *id.* § 5.03 (criminal conspiracy). *See, e.g.,* MO. ANN. STAT. § 562.041 (West 2017) (responsibility for the conduct of another); MO. ANN. STAT. § 562.014 (West 2020) (conspiracy).

<sup>64</sup> TEX. HEALTH & SAFETY CODE ANN. § 171.206(b)(1) (2021).

<sup>65</sup> Samuel W. Buell, Note, *Criminal Abortion Revisited*, 66 N.Y.U. L. REV. 1774, 1778-79 (1991); *see also* Michelle Oberman, *Abortion Bans, Doctors, and the Criminalization of Patients*, 48 HASTINGS CTR. REP. 2, 5-6 (2018). *Cf.* David W. Chen, *A New Goal for Abortion Bills: Punish or Protect Doctors*, N.Y. TIMES (Feb. 16, 2023), <https://www.nytimes.com/2023/02/16/us/abortion-bills-doctors.html?searchResultPosition=1>.

<sup>66</sup> Matt Flegenheimer & Maggie Haberman, *Trump's Call on Abortions Rattles G.O.P.*, N.Y. TIMES, Mar. 31, 2016, at A1.

<sup>67</sup> *Id.*

<sup>68</sup> MICHELLE OBERMAN, *HER BODY, OUR LAWS: ON THE FRONT LINES OF THE ABORTION WAR, FROM EL SALVADOR TO OKLAHOMA* (2018). Oberman's study of the impact of El Salvador's abortion ban revealed that most patients prosecuted for illegal abortion were poor and actually had suffered late-term miscarriages. *Id.* at 54-63.

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and a post-*Dobbs* proposal in Louisiana suggests that this approach has begun to make inroads in the United States as well.<sup>69</sup> Without immunity, the patient might be a conspirator with<sup>70</sup> or accomplice of the provider or the principal actor (as in a case of self-managed medication abortion). And, of course, even immunity from an abortion crime does not necessarily stop prosecutions of vulnerable patients on charges of child abuse or other crimes.<sup>71</sup>

Second, mounting evidence has revealed “fetal personhood” laws as the next goal of the anti-abortion movement.<sup>72</sup> Such measures would obviate the need for abortion-specific prohibitions because abortion would simply become a variety of homicide. We might see the continuation of the traditional immunity accorded to the patient—or not. Provocative questions about self-defense and defense of another might well arise.<sup>73</sup>

Finally, as a general matter, to proceed under any of these approaches even in civil cases, the hostile state must have jurisdiction over the defendant. The traveling abortion patient who returns home or even had her domicile in the hostile state at the time of the out-of-state procedure would meet the standard

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<sup>69</sup> Blake Ellis & Melanie Hicken, *These Male Politicians Are Pushing for Women Who Receive Abortions to Be Punished with Prison Time*, CNN POLITICS INVESTIGATES (Sept. 21, 2022, 12:33 AM), <https://www.cnn.com/2022/09/20/politics/abortion-bans-murder-charges-invs/index.html>.

<sup>70</sup> MO. ANN. STAT. § 188.017 (West 2019); cf. Marcia McCormick & Chad Flanders, *McCormick and Flanders: Think Women Can't Be Prosecuted for Having an Abortion Here? Think Again*, ST. LOUIS TODAY (Jun. 28, 2022), [https://www.stltoday.com/opinion/columnists/mccormick-and-flanders-think-women-cant-be-prosecuted-for-having-an-abortion-here-think-again/article\\_2c0c8594-c7c9-5357-bb0f-be38cb7e5d00.html](https://www.stltoday.com/opinion/columnists/mccormick-and-flanders-think-women-cant-be-prosecuted-for-having-an-abortion-here-think-again/article_2c0c8594-c7c9-5357-bb0f-be38cb7e5d00.html) (highlighting the distinction in the Missouri statute that prevents the abortion patient from being prosecuted for a *conspiracy* to violate the abortion ban but does not prevent prosecution for having, attempting to have, or acting as an accomplice in the abortion).

<sup>71</sup> See, e.g., *State v. Patel*, 60 N.E.3d 1041 (Ind. Ct. App. 2016).

<sup>72</sup> Mary Ziegler, *The Next Step in the Anti-Abortion Playbook Is Becoming Clear*, N.Y. TIMES (Aug. 31, 2022), <https://www.nytimes.com/2022/08/31/opinion/abortion-fetal-personhood.html>

<sup>73</sup> See, e.g., EILEEN McDONAGH, *BREAKING THE ABORTION DEADLOCK: FROM CHOICE TO CONSENT* (1996) (arguing that women have a right to resist the bodily changes that the fetus causes and to obtain help from the state in stopping the intrusion).

tests.<sup>74</sup> The out-of-state provider could be served while transiently present in the hostile state<sup>75</sup> or jurisdiction could obtain if the provider undertakes activities in the hostile state related to the abortion that meet the “purposeful availment” test that the Supreme Court has articulated.<sup>76</sup> Even if hostile states cannot penalize abortion advertising,<sup>77</sup> for example, they might seek to use such activities for jurisdictional purposes.

### B. Welcoming States

Abortion-friendly states have not sat idly by in the face of anticipated outreach by hostile states. In fact, some, like California, have self-identified as havens for traveling abortion patients<sup>78</sup> and have undertaken action in pursuit of that goal, either legislatively or by executive order.<sup>79</sup> Indeed, to date, welcoming states have outpaced their hostile counterparts in developing law applicable to interstate abortion practices. One might infer that such legislation in welcoming states has served a prophylactic function, chilling plans in hostile states to reach beyond their borders. More likely, however, it is just a matter of time before hostile states get in on the act, making contests over state authority sure to come.

Welcoming states have developed a range of approaches. Some, for example, preventing the revocation of the provider’s license in the welcoming state,<sup>80</sup> safeguarding the provider’s in-

<sup>74</sup> The Supreme Court has recognized domicile as the paradigm basis for general jurisdiction, that is, jurisdiction over the defendant for any cause of action. *See Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014).

<sup>75</sup> *See Burnham v. Superior Ct.*, 495 U.S. 604, 610 (1990).

<sup>76</sup> *See Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1024 (2021) (stating the requirement for specific jurisdiction or jurisdiction arising out of activities in the forum state).

<sup>77</sup> *Bigelow v. Virginia*, 421 U.S. 809 (1975). *See supra* note 53.

<sup>78</sup> Abigail Tracy, “We Just Won’t Comply”: Inside California’s Push to Be the Ultimate Abortion Safe Haven State, *VANITY FAIR POLITICS* (Aug. 5, 2022), <https://www.vanityfair.com/news/2022/08/inside-californias-push-to-be-the-ultimate-abortion-haven-state>.

<sup>79</sup> *E.g.*, CAL. HEALTH & SAFETY CODE § 123467.5 (West 2022) (identifying as contrary to public policy the laws of other states that authorize persons to bring civil actions against abortion conduct).

<sup>80</sup> CAL. BUS. & PROF. CODE § 2253 (WEST 2022) (seeking to prevent the state medical board from suspending or revoking the license of a physician who is punished for performing an abortion in accordance with California law);

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surance from adverse action,<sup>81</sup> or prohibiting medical facilities from sharing patient or provider information,<sup>82</sup> seem well within the prerogatives of the enacting state. Similarly, for a welcoming state to specify that its own law will apply in a multistate abortion case litigated there<sup>83</sup> amounts to an unremarkable *lex fori* provision.<sup>84</sup>

Other measures, on their face, evoke more potential controversy and thus merit closer examination. In one illustration, California legislation carves out a public-policy exception to the full faith and credit usually required for another state's judgments and decrees in cases based on civil actions like those created by Texas's SB8.<sup>85</sup> At first blush, this measure stands at odds with precedents holding that the full faith and credit obligation does not permit a public-policy exception for another state's judg-

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MASS. GEN. LAWS ch. 112, § 5F1/2 (2022) (preventing the board of registration from taking adverse action against a physician with a civil or criminal charge or medical malpractice claim for performing reproductive health care services in another state that would be lawful in Massachusetts); N.Y. EDUC. LAW § 6531-b (McKinney 2022) (barring professional misconduct charges against New York healthcare practitioners who perform abortions on patients coming from states where abortion is illegal).

<sup>81</sup> N.Y. INS. LAW § 3436-a (McKinney 2022) (preventing insurance companies from refusing to contract with health care providers who perform abortion services that are legal in New York on an out-of-state patient).

<sup>82</sup> CAL. PENAL CODE §§ 629.51, 629.52 (West 2022) (banning law enforcement agencies from sharing information with other states regarding abortions lawfully performed in California); N.J. STAT. ANN. § 2A:84A-22.18 (West 2022) (prohibiting disclosure of confidential reproductive health care services).

<sup>83</sup> 735 ILL. COMP. STAT. § 40/28-15 (2022) (“[T]he laws of this State shall govern in any case or controversy heard in this State related to lawful health care activity [defined to include reproductive health care and gender-affirming health care]”; MASS. GEN. LAWS ch. 12, § 11/ ¾ (2022) (“[T]he laws of commonwealth shall govern in any case or controversy heard in the commonwealth related to reproductive health care services or gender-affirming health care services. . . .”).

<sup>84</sup> See, e.g., *Sexton v. Rider Truck Rental, Inc.*, 320 N.W.2d 843, 857 (Mich. 1982) (“[W]e hold that where Michigan residents or corporations doing business in Michigan are involved in accidents in another state and where they appear as plaintiffs and defendants in Michigan courts in a tort action, the courts will apply the *lex fori*, not the *lex loci delicti*.”).

<sup>85</sup> CAL. HEALTH & SAFETY CODE, § 123467.5 (West 2022).

ments,<sup>86</sup> but—as we shall see—the penal character of the damages might well save the California law.<sup>87</sup>

Given the Constitution's Extradition Clause,<sup>88</sup> measures in several jurisdictions that would explicitly prevent extradition to states that criminalize abortion<sup>89</sup> might initially raise some eyebrows. Nonetheless, that clause contemplates a perpetrator who flees from the state where he or she committed the crime and must be remanded there. If the "crime" is the abortion performed in the state that makes it legal, however, then the conventional understanding of extradition could not apply.<sup>90</sup> This conclusion certainly follows for the abortion provider but should also follow for the traveling patient unless something that she has done before leaving the hostile state is covered by its ban. Of course, if the patient's conduct is criminalized and she returns home after the abortion, no extradition is necessary. Further, if the patient uses the occasion of her abortion to move to the welcoming state, then the hostile state arguably would no longer have an "interest" in her, so its law might not apply for that reason. True, in order to trigger extradition obligations, the hostile state could assert an interest in an embryo or fetus conceived

<sup>86</sup> The casebook classics include *Fauntleroy v. Lum*, 210 U.S. 230 (1908), and *Yarborough v. Yarborough*, 290 U.S. 202 (1933).

<sup>87</sup> See *infra* notes 106-07.

<sup>88</sup> U.S. CONST. art. IV, § 2:

A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.

See 18 U.S.C. § 3182 (requiring cooperation of the state to which a fugitive has fled).

<sup>89</sup> E.g., N.Y. CRIM. PRO. LAW § 570.17 ("No demand for the extradition of a person charged with providing an abortion shall be recognized by the governor unless the executive authority of the demanding state shall allege in writing that the accused was present in the demanding state at the time of the commission of the alleged crime, and that thereafter he, she or they fled from that state."). As a general matter, some authorities give the governor discretion to decline extradition. See, e.g., Wilbur Larremore, *Interstate Crime and Interstate Extradition*, 12 HARV. L. REV. 532, 537 (1899) ("[T]he sovereign upon whom the demand is made can exercise discretion.").

<sup>90</sup> See Cohen et al., *supra* note 13, at 47; Kreimer, *supra* note 13, at 464-65 (explaining the original understanding).

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there or while the patient resided there, as one of Missouri’s proposed laws purports to do,<sup>91</sup> and take aim at the patient’s in-state travel with the intent to cross state lines for an abortion and relocation. Unless other constitutional considerations trump the extradition obligation, as examined below,<sup>92</sup> a welcoming state’s effort to decline extradition might well fail in this particular, narrow situation.

Several welcoming states have taken a page from Texas’s playbook with measures authorizing a civil cause of action against anyone who would initiate a civil or criminal action against an individual seeking or providing reproductive health care—in effect, a reverse bounty hunter provision.<sup>93</sup> Thus, we can envision dueling lawsuits, conflicting judgments, and escalating disorder in our federal system.

Perhaps the boldest and most practically valuable move is Massachusetts’s “telemedicine shield law,”<sup>94</sup> expressly designed to protect to the extent possible access to abortion medication—an especially crucial intervention, given the challenges of traveling out of state for many abortion patients. Unlike the laws of other welcoming states, this law specifies that reproductive

<sup>91</sup> See *supra* note 54 and accompanying text.

<sup>92</sup> See *infra* Part III.

<sup>93</sup> CAL. HEALTH & SAFETY CODE § 123469 (West 2022) (allowing one experiencing interference with protected reproductive rights to sue an offending state actor for \$25,000, in addition to actual damages and attorneys’ fees, or to bring an action under the Civil Code); CONN. GEN. STAT. ANN. 22-19, § 1 (2022) (stating that an individual with an adverse judgment entered for an action protected in the statute can “recover damages from any party that brought the action leading to that judgment or has sought to enforce that judgment,” with damages to include money damages in the amount of the judgment and attorney’s fees in defending the adverse action and in bringing the offensive action); D.C. Council B24-0808, 2022 Legis. (D.C. 2022) (amending Chapter 4A of Title 13 of the Official Code of D.C. to say: “A person claiming to be aggrieved by a violation of this section [stating the legality of use and provision of reproductive health care in D.C.] shall have a cause of action in any court of competent jurisdiction for such damages and such other remedies as may be appropriate” and giving individuals subjected to an adverse judgment because of performing acts listed in the statute a cause of action with statutory damages); 740 ILL. COMP. STAT. § 126/29–15 (2022) (allowing a damages action against any party that brought an action leading to a judgment for the exercise, provision, or assistance related to reproductive health care).

<sup>94</sup> See Bazelon, *supra* note 9 (discussing provision codified as MASS. GEN. LAW ch. 9A §1 (2022)). The law similarly protects gender-affirming care. See *id.*

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health care services, as well as those who provide and use them, are protected “regardless of the patient’s location” so long as the provider acts in Massachusetts.<sup>95</sup> Although the “shield” would likely prove ineffective in a forum in a hostile state with connections to the case, the Massachusetts law illustrates the potential for states, post-*Dobbs*, to push beyond traditional domains of authority,<sup>96</sup> setting up conflicts with other jurisdictions.

Still additional maneuvers in welcoming states include: a bar on criminalizing self-managed abortion care,<sup>97</sup> prohibitions on local law enforcement’s cooperation with law enforcement agencies in hostile states,<sup>98</sup> the unenforceability of foreign subpoenas in support of any claim interfering with reproductive rights,<sup>99</sup> the option of using a familial or state-provided address on patient forms,<sup>100</sup> and—through executive order—authorization of enforcement by the attorney general for civil actions brought by those claiming interference with abortion care.<sup>101</sup>

### III. Constitutional Constraints?

As states set the stage for interstate turmoil, they operate in the shadow of limits imposed by several provisions of the U.S. Constitution. Yet, these limits, important as they are, are unlikely to offer immediate relief. Either they have been interpreted too loosely to lay down sufficiently strict boundaries on state action to head off conflicts, or they have never been tested in a situation like the one at hand—so that litigation, ultimately including consideration by the Supreme Court, would be necessary for definitive answers about when a state, whether hostile or welcoming, has gone too far. Moreover, even if the precedents interpreting

<sup>95</sup> MASS. GEN. LAW ch. 9A § 1 (2022).

<sup>96</sup> See Bazelon, *supra* note 9.

<sup>97</sup> See 2022 Cal. Legis. Serv. 629 (West) (A.B. 2223).

<sup>98</sup> See *e.g.*, CAL. PENAL CODE §§ 629.51, 629.52 (West 2022); MASS. GEN. LAWS ch.147, § 63 (2022); N.J. STAT. ANN. 2A:84A-22.18 (West 2022).

<sup>99</sup> 775 ILL. COMP. STAT. 35/3.5 (2022).

<sup>100</sup> MASS. GEN. LAWS ch. 9A, § 2 (2022); N.Y. EXEC. LAW § 108 (McKinney 2022).

<sup>101</sup> Office of Governor Lujan Grisham, Exec. Order 2022-123, “Expanding Access to Reproductive Health Care Services (Aug 31, 2022), <https://www.governor.state.nm.us/wp-content/uploads/2022/08/Executive-Order-2022-123.pdf>.

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and applying these constitutional provisions left no room for doubt, we might legitimately wonder whether the Court that brought us *Dobbs* will respect such precedents.

The following catalogue and accompanying comments suggest the promise, shortcomings, and uncertainties of these potential limits on state action.

A. *The Full Faith and Credit Clause*

Article IV's Full Faith and Credit Clause<sup>102</sup> seeks to fuse fifty sovereign states into a unified nation. Put differently, it walks the fine line of recognizing each state's sovereignty while commanding respect for other states' authority, aspiring to achieve national unity and harmony.<sup>103</sup> As interpreted to date, however, this clause on its own cannot save us from interstate abortion chaos.

Regarding judgments and decrees from one state's court, other states must recognize them notwithstanding contrary public policies,<sup>104</sup> although precedents carve out exceptions for another state's "penalties," which fall outside full faith and credit altogether. In other words, recall: "The Courts of no country execute the penal law of another."<sup>105</sup> For example, because Texas's SB8 and its imitators impose statutory damages,<sup>106</sup> regardless of the plaintiff's proof of loss, one could argue that such damages constitute penalties, and California need not enforce such judgments.<sup>107</sup> Compelling reasoning supports these arguments,<sup>108</sup> but

<sup>102</sup> U.S. CONST. art. IV, § 1.

<sup>103</sup> See generally *Pac. Emp'rs Ins. Co. v. Indus. Accident Comm'n of Cal.*, 306 U.S. 493 (1939).

<sup>104</sup> E.g., *Fauntleroy v. Lum*, 210 U.S. 230 (1908); *Yarborough v. Yarborough*, 290 U.S. 202 (1933).

<sup>105</sup> *Huntington v. Attrill*, 146 U.S. 657, 666 (1892) (quoting *The Antelope*, 23 U.S. at 123).

<sup>106</sup> TEX. HEALTH & SAFETY CODE ANN. § 171.204 (WEST 2021).

<sup>107</sup> See R. Lea Brilmayer, *Article IV Full Faith and Credit and the Jurisprudence of Article III* (draft on file with author) (theorizing why the Full Faith and Credit Clause does not require other states to enforce damages awards obtained under Texas's SB8). Distinguishing those monetary awards that constitute penalties from those that do not has long bedeviled judges and scholars. See, e.g., *Loucks v. Standard Oil Co.*, 129 N.E. 198 (1918); *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265 (1888).

<sup>108</sup> See Brilmayer, *supra* note 107. Brilmayer presents other arguments for nonenforcement as well, including the absence of standing by would-be plain-



they have not been judicially tested, especially in the abortion-conflict arena. Indeed, given that the damages do not reflect a compensatory purpose or calculation, similar arguments might well also govern awards that arise from the civil cause of action that some welcoming states are creating to be used against anyone who interferes with efforts to seek or provide abortion care.<sup>109</sup> Finally, courts might also confront litigants' efforts to distinguish between recognition of a sister state's judgment and enforcement thereof, given precedents that leave room for a second forum to decline the latter without violating full faith and credit obligations.<sup>110</sup>

With respect to another state's laws, however, the Full Faith and Credit Clause's requirements are considerably more relaxed.<sup>111</sup> A state does not violate the respect it owes to a sister state if it applies its own law (instead of the sister state's law) so long as the forum state has "a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."<sup>112</sup> A

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tiffs in actions brought pursuant to Texas's SB8. *See id.* at \*44. *See also* Eleanor Klibanoff, *Texas State Court Throws Out Lawsuit Against Doctor Who Violated Abortion Law*, TEXAS TRIB. (Dec. 8, 2022), <https://www.texastribune.org/2022/12/08/texas-abortion-provider-lawsuit/> (reporting dismissal of suit under SB8 because of plaintiff's lack of standing).

<sup>109</sup> *See supra* note 93 and accompanying text.

<sup>110</sup> *See, e.g.,* Fall v. Eastin, 215 U.S. 1, 12 (1909); Baker v. General Motors Corp., 522 U.S. 222, 235 (1998); Adar v. Smith, 639 F.3d 146, 158 (5th Cir. 2011).

<sup>111</sup> Robert H. Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 17, 26-28 (1945).

<sup>112</sup> Allstate Ins. Co. v. Hague, 449 U.S. 302, 312-313 (1981) (plurality opinion). A dissenting opinion for three Justices states that they largely agree with this formulation. *Id.* at 332 (Powell, J., dissenting). They diverge on what can constitute the necessary "state interests," with the dissent taking a more demanding approach that would require not just contacts with the state, but the advancement of a state policy triggered by the state's contacts with the case. Neither opinion makes any distinction between a state's law as embodied in a statute versus a state's law as developed judicially; the constitutional limits are the same, as the Court's opinions demonstrate. *E.g.,* Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493, 501 (1939) (referring explicitly to statutes). In the context of statutory abortion restrictions that would apply extraterritorially, the disagreement between the plurality and dissent in *Allstate*, 449 U.S. 302, is irrelevant—because the restrictive state will assert a policy of protecting embryos, fetuses, and patients or at least those with ties to the state.

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hostile state can easily satisfy this modest precondition if the traveling abortion patient is domiciled there and, if she is not, then perhaps if the traveling patient's fetus was conceived there.<sup>113</sup> Likewise, a welcoming state can meet the test in a case in which its provider performs the abortion in that state—or is located there while providing care by telemedicine for a patient elsewhere.<sup>114</sup>

B. *The Privileges and Immunities Clause*

In another nationally unifying gesture, Article IV entitles the citizens of each state to “all the Privileges and Immunities of the Citizens in the several States.”<sup>115</sup> Precedents read the clause to apply only to those privileges and immunities “bearing on the vitality of the Nation as a single entity,”<sup>116</sup> but whatever the contours of this space, we know that access to healthcare, specifically abortion care, is covered. In *Doe v. Bolton*, the companion case to *Roe v. Wade*,<sup>117</sup> the Court invalidated as a violation of the Privileges and Immunities Clause a Georgia provision allowing only Georgia residents to have access to abortion there.<sup>118</sup> As the Court explained, “A contrary holding would mean that a State could limit to its own residents the general medical care available within its borders. This we could not approve.”<sup>119</sup>

Of course, *Dobbs* abrogates *Doe* to the extent that *Doe* recognized a right to abortion or relied on *Roe*'s recognition of such right.<sup>120</sup> Yet, the *Doe* Court's language about medical care seems sufficiently capacious to survive, given that the Court has never deemed medical care generally a constitutional right. In other words, abortion's demotion from constitutional right to political matter in *Dobbs* should have no effect on the status of other care and treatment which had never been recognized as a constitu-

<sup>113</sup> See *supra* notes 62-63 and accompanying text.

<sup>114</sup> See *supra* notes 94-96 and accompanying text.

<sup>115</sup> U.S. CONST. art. IV, § 2. See, e.g., *Toomer v. Witsell*, 334 U.S. 385, 395 (1948) (“This Clause was intended to fuse into one Nation a collection of independent, sovereign States.”) (internal quotation marks omitted).

<sup>116</sup> *Baldwin v. Montana Fish & Game Comm'n.*, 436 U.S. 371, 383 (1978). See *Supreme Ct. of New Hampshire v. Piper*, 470 U.S. 274 (1985).

<sup>117</sup> 410 U.S. 113 (1973).

<sup>118</sup> 410 U.S. 179, 200 (1973).

<sup>119</sup> *Id.*

<sup>120</sup> *Dobbs*, 142 S. Ct. at 2284.

tional right in the first place. Hence, *Doe*'s language about medical care should survive, with reinforcement from the right to travel, discussed below.<sup>121</sup> This conclusion gives a welcoming state a useful argument in that, by serving traveling patients from other states, it is simply doing what Article IV's Privileges and Immunities Clause requires it to do. An even more powerful version of this argument would apply to abortion facilities operated by the welcoming state (for example, at a state medical school) or would follow from a welcoming state's imposition of a legal duty on its providers to serve out-of-state patients.<sup>122</sup>

Again, the reasoning is compelling, although reliance on *Doe* gives pause, especially because of the *Dobbs* majority's willingness to abandon frequently reaffirmed precedent even while invoking much maligned case law from the past.<sup>123</sup> If states are inclined to fight, they will subject this inference from *Doe* to judicial testing through litigation. Indeed, the larger question posed—whether the equal treatment required by the Privileges and Immunities Clause validates a state's application of its own law to those in whom it might lack a governmental interest—has intrigued scholars for decades, in large part because of the absence of definitive judicial rulings.<sup>124</sup>

<sup>121</sup> See *infra* Part III.G.

<sup>122</sup> This is so because the Privileges and Immunities Clause prohibits *states* from discriminating against residents of other states. See also Singer, *supra* note 13.

<sup>123</sup> Compare *Dobbs*, 142 S. Ct. at 2284 (overruling *Roe v. Wade*, 410 U.S. 133 (1973), and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), despite past reaffirmances and their influence as precedent), with *Dobbs*, 142 S. Ct. at 2246 (relying on *Geduldig v. Aiello*, 417 U.S. 484 (1984), despite frequent criticisms and Congress's repudiation of its underlying premise that pregnancy-based discrimination is not sex-based discrimination). See 42 U.S.C. § 2000e(k) (Pregnancy Discrimination Act of 1978, amending Title VII's definition of sex discrimination); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 983 (1984) ("Criticizing *Geduldig* has since become a cottage industry.").

<sup>124</sup> E.g., Brainerd Currie & Herma Hill Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities*, 69 YALE L.J. 1323, 1349-58 (1960), reprinted in *SELECTED ESSAYS*, *supra* note 23, at 446, 475-86; John Hart Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173 (1981); Mark P. Gergen, *Equality and the Conflict of Laws*, 73 IOWA L. REV. 893 (1988); Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249 (1992).

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C. *Freedom of Speech*

As discussed above, hostile states banning or penalizing abortion aid must steer clear of restricting counseling, which the First Amendment protects.<sup>125</sup> Yet, how this apparently straightforward principle will play out post-*Dobbs* depends on many questions without current answers, especially given the exceptional treatment of abortion in First Amendment jurisprudence.<sup>126</sup>

First, what will this principle that protects counseling mean when a provider in Massachusetts counsels a patient in a hostile state by telemedicine?<sup>127</sup> Testing through litigation is sure to come. Second, *Roe*-era precedent protects advertising in hostile states by abortion providers in welcoming states.<sup>128</sup> Whether the Court that overturned *Roe* might revisit this precedent as well remains to be seen.

In addition, line drawing is required on a number of different axes in the area of abortion speech. For example, notwithstanding First Amendment concerns, a number of state statutes criminalize promotion of travel for purposes of prostitution, although their language targets sales and offers of sales of travel services.<sup>129</sup> One can imagine similar restrictions on promoting abortion and abortion travel, raising questions about whether “promotion” overlaps with speech.<sup>130</sup> In a case with implications for these questions, the Supreme Court has recently agreed to

<sup>125</sup> See *supra* note 35 and accompanying text.

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<sup>126</sup> See Elizabeth Sepper, *Anti-Abortion Exceptionalism After Dobbs*, \_\_\_ J. L. MED. & ETHICS \_\_\_ (forthcoming 2023) (unpublished manuscript on file with the author) (describing how First Amendment doctrine has singled out abortion and abortion speech for unique legal treatment).

<sup>127</sup> See *supra* notes 94-96 and accompanying text. See, e.g., Melissa Gira Grant, *A Forgotten 1990s Law Could Make It Illegal to Discuss Abortion Online*, NEW REPUBLIC (Aug. 1, 2022), <https://newrepublic.com/article/167178/1990s-law-abortion-online-illegal-cda>.

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<sup>128</sup> *Bigelow v. Virginia*, 421 U.S. 809 (1975) (holding that a state cannot use its interest in preventing its citizens from terminating pregnancies to ban advertising of out-of-state abortion services).

<sup>129</sup> E.g., MO. REV. STAT. § 567.085; WASH. REV. STAT. § 9A.88.085.

<sup>130</sup> For some illustrations, see Michele Goodwin & Mary Ziegler, *The Next Anti-Abortion Tactic: Attacking the Spread of Information*, N.Y. TIMES (Dec. 3, 2022), <https://www.nytimes.com/2022/12/03/opinion/abortion-first-amendment-free-speech.html> (guest essay).

review a ruling by the U.S. Court of Appeals for the Ninth Circuit that a federal statute prohibiting the encouragement of illegal immigration for commercial advantage or gain is facially overbroad, in violation of the First Amendment.<sup>131</sup>

Also, well before *Dobbs*, the Supreme Court upheld bans on abortion counseling by health care providers receiving government funds.<sup>132</sup> Finally, according to the Supreme Court, the First Amendment limits a state's ability to require "crisis pregnancy centers" (and hence other organizations and facilities opposed to abortion) to inform consumers and potential consumers of the availability of abortion and related services elsewhere and at state expense.<sup>133</sup> These distinctions, which tilt in an anti-abortion direction, presumably continue to shape what hostile and welcoming states can do to advance their respective policies, bringing additional complexities to the analysis.

Finally, laws that seek to stop those who provide financial assistance to abortion patients implicate speech. In the campaign finance arena, the Court has held that limits on expenditures violate free speech.<sup>134</sup> Similarly, the Court has suggested that a state's expenditure of public funds has expressive qualities, for example, reflecting "a value judgment," such as a preference "for childbirth over abortion."<sup>135</sup> Reproductive justice advocates should develop and pursue the argument that those who "put their money where their mouth is" in support of abortion access have valid claims under the First Amendment.

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<sup>131</sup> *United States v. Hansen*, 25 F.4th 1103 (9th Cir. 2022), *cert. granted*, 143 S. Ct. 555 (2022).

<sup>132</sup> *Rust v. Sullivan*, 500 U.S. 173, 192-93 (1991) (affirming that government can allocate family planning funds in accord with its anti-abortion value judgments).

<sup>133</sup> *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2376 (2018). In addition, the First Amendment limits the state's ability to require unlicensed clinics to post notices that they are not licensed to provide medical services. *Id.* at 2378.

<sup>134</sup> *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010); *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765 (1978); *Buckley v. Valeo*, 424 U.S. 1 (1976); see Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663 (1997).

<sup>135</sup> *Harris v. McRae*, 448 U.S. 297, 314 (1980) (quoting *Maher v. Roe*, 432 U.S. 464, 474 (1977)).

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D. *Vicinage and Extradition*

As suggested earlier, the Constitution's treatment of vicinage and extradition presumes a concept of crime as a local phenomenon.<sup>136</sup> For abortion activities taking place in welcoming states, even on behalf of traveling patients, this understanding helps insulate the actors from interference by hostile states. The picture becomes less legible, however, to the extent that hostile states can invoke in-state activities leading up to the abortion and in-state effects, in the effort to impose restrictions on procedures in jurisdictions that allow them.<sup>137</sup> Finally, we might well see dueling assertions of authority, with no clear resolution until the Supreme Court decides, by states like Massachusetts that attempt to shield telemedicine and abortion pill prescriptions regardless of the patient's location, on the one hand, and the patient's hostile-state domicile, on the other.<sup>138</sup>

E. *Due Process*

The Supreme Court has interpreted the Due Process Clause of the Fourteenth Amendment<sup>139</sup> to impose limits on choice of law identical to those imposed by the Full Faith and Credit Clause of Article IV.<sup>140</sup> As demonstrated above, this standard does not demand much—only that a state must have significant contacts and/or interests in order for the state's law to apply in a given case.<sup>141</sup> A hostile state would argue that it meets this precondition if the traveling abortion patient is domiciled there and, if she is not, then perhaps if the traveling patient's fetus was conceived there or she was residing there then.<sup>142</sup> Likewise, a welcoming state would argue that it can meet the test when its provider acts in that state.

At one time a stricter test prevailed. In the early twentieth century, the Supreme Court read the Due Process Clause to require state courts to follow a territorial approach, so that, for ex-

<sup>136</sup> See *supra* notes 27-28, 88-91 and accompanying text.

<sup>137</sup> See *supra* notes 59-63 and accompanying text.

<sup>138</sup> See *supra* notes 94-96 and accompanying text.

<sup>139</sup> U.S. CONST. amend. XIV, § 1.

<sup>140</sup> U.S. CONST. art. IV, § 1.

<sup>141</sup> See *supra* notes 111-14 and accompanying text; *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981).

<sup>142</sup> See *supra* notes 62-63 and accompanying text.

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ample, the rules applicable to an insurance contract must be the law of the state where the contract was made.<sup>143</sup> Yet, the Court definitively abandoned that approach for the looser test that prevails today, opening the door for a state to concern itself with activities beyond its borders. Accordingly, we can envision many “true conflicts” whose resolution is likely to depend on the forum, which would be free to apply its own state’s law.

Fair notice is central to due process.<sup>144</sup> In fact, the civil cases suggest that a state must have contacts and/or interests to apply its own law, consistent with due process, in order to avoid unfair surprise.<sup>145</sup> In parallel fashion, the Model Penal Code section allowing a state to apply its criminal law to conduct that occurred elsewhere when the conduct has an impact in the legislating state insists that the statutory provision expressly provide for such extraterritorial application.<sup>146</sup> Such express language would rebut presumptions against extraterritoriality that many states follow<sup>147</sup> while also countering popular intuitions that one is free “when in Rome, to do as Romans.” Accordingly, hostile states attempting to reach conduct elsewhere must make explicit the reach of their statutes even though doing so alone will not necessarily protect such initiatives from constitutional challenge, given the other problems raised.

#### F. Interstate Commerce and Extraterritoriality

A statute’s explicit pronouncement of its application to out-of-state activities, required by due process, however, might well run afoul of limits imposed by the Supreme Court’s dormant Commerce Clause jurisprudence. The Constitution’s Article I,

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<sup>143</sup> See, e.g., *Home Life Ins. Co. v. Dodge*, 246 U.S. 357 (1918). Similarly, at one time the limits on a state’s ability to assert personal jurisdiction over a defendant was territorially bound. See *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877) (“no State can exercise direct jurisdiction and authority over persons or property without its territory”). Such limits have given way, however, to a due process analysis emphasizing fairness. See, e.g., *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); *Ford Motor Com. v. Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1024 (2021).

<sup>144</sup> See, e.g., *Wolff v. McDonnell*, 418 U.S. 539, 563-64 (1974); *Morrissey v. Brewer*, 408 U.S. 471, 486-87 (1972).

<sup>145</sup> See *Allstate Ins. Co.*, 449 U.S. at 327 (Stevens, J., concurring).

<sup>146</sup> MODEL PENAL CODE § 1.03(1)(f) (1962).

<sup>147</sup> See *supra* note 61 and accompanying text.

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section 8, gives Congress the authority “to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.”<sup>148</sup> In applying this language, the Supreme Court has announced an “extraterritoriality principle,”<sup>149</sup> which “precludes the application of a state statute to commerce that takes place wholly outside the state’s borders, whether or not the commerce has effects within the state.”<sup>150</sup> Similarly, precedent establishes that “a statute that directly controls commerce occurring outside the boundaries of a state exceeds the inherent limits of the enacting state’s authority and is invalid regardless of whether the state’s extraterritorial reach was intended by the legislature.”<sup>151</sup> Laws designed to regulate abortion in other states, with the necessary language providing express notice of the law’s reach, would seem to constitute precisely the sort of direct extraterritorial regulation that these precedents would bar.

Currently, the Court is considering a case in which a California law regulating in-state conduct will no doubt affect commercial activity in other states.<sup>152</sup> The law bars the sale of whole pork meat in California produced from animals confined in a manner inconsistent with requirements that California voters chose to impose.<sup>153</sup> In upholding the law, the U.S. Court of Appeals for the Ninth Circuit conceded that the dormant Commerce Clause doctrine has weakened in recent times, with some Justices questioning its continuing viability,<sup>154</sup> but the court asserted that it is not a “dead letter” and surely covers specific situations such as when a state law “directly regulates transactions that are con-

<sup>148</sup> U.S. CONST. art. I, § 8.

<sup>149</sup> An alternative view is that this principle exists independently of any particular constitutional provision. *E.g.*, Regan, *supra* note 13, at 1885 (“[T]he extraterritoriality principle is not to be located in any particular clause [but instead] . . . is one of those foundational principles of our federalism which we infer from the structure of the Constitution as a whole.”).

<sup>150</sup> *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989) (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 642–643, (1982) (plurality opinion)).

<sup>151</sup> *Healy*, 491 U.S. at 336.

<sup>152</sup> *Nat’l Pork Producers Council v. Ross*, 6 F.4th 1021 (9th Cir. 2021), *cert. granted*, 142 S. Ct. 1413 (2022).

<sup>153</sup> 6 F.4th at 1025.

<sup>154</sup> *Id.* at 1033 (citing *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 610, 618 (1997) (Thomas, J., dissenting)).



ducted entirely out of state.”<sup>155</sup> Such dicta would seem to make very vulnerable hostile states’ efforts to restrict abortions in welcoming states.

Even so, the Supreme Court will have an opportunity to reshape the doctrine of extraterritoriality in the pork producers case—leaving the bottom line uncertain. Indeed, although pork production and abortion might appear to present disconnected issues, both raise questions about clashing moral views and the limits of state authority.<sup>156</sup>

Further, even under existing law, scholars have advanced differing views, with some concluding that the Commerce Clause prohibits states from restricting their citizens’ out-of-state abortions<sup>157</sup> and others concluding that it does not.<sup>158</sup> One can also find support for a middle ground, namely, a conclusion that the hostile state cannot penalize the activities of the out-of-state provider but can take aim at its own citizen, the traveling patient, whose abortion-focused conduct begins at home.<sup>159</sup> Yet even this conclusion invites challenge, based on Supreme Court statements that “the transportation of persons across state lines . . . has long been recognized as a form of ‘commerce,’”<sup>160</sup> implying protection from state restrictions for those who provide transportation

<sup>155</sup> *Id.* at 1033.

<sup>156</sup> Without mentioning abortion but acknowledging that the proper treatment of animals raises moral questions, the oral arguments in the case “became a springboard . . . for the [J]ustices to explore how individual states might try to impose their moral views on their neighbors.” See Amy Howe, *California Law on Sale of Pork Raises Concerns About Interstate Moral Disputes in a “Balkanized” Nation*, SCOTUSBLOG (Oct. 11, 2022), <https://www.scotusblog.com/2022/10/california-law-on-sale-of-pork-raises-concerns-about-interstate-moral-disputes-in-a-balkanized-nation/>.

<sup>157</sup> See Kreimer, *supra* note 13, at 488-97.

<sup>158</sup> See Regan, *supra* note 13, at 1906-13.

<sup>159</sup> We can infer this middle ground from the argument that “extraterritorial powers are not precluded by the Dormant Commerce Clause, so long as the regulations are not species of economic protectionism and are directed primarily to the state’s own citizens.” Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. PA. L. REV. 855, 964 (2002). In addition, several authorities would say the Commerce Clause prevents the hostile state from imposing its regulation on a provider acting in the welcoming state—and thus “wholly outside” the state attempting to regulate. See *supra* note 150 and accompanying text.

<sup>160</sup> *Camps Newfound*, 520 U.S. at 573.

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even in the hostile state for traveling patient. And if they receive protection, why not the same for their passengers, the traveling patients themselves?

Suffice it to say that the Commerce Clause and the principle of extraterritoriality present open questions. Accordingly, these constitutional limits fall short of providing a definitive resolution for conflicts between hostile and welcoming states.

G. *Right to Travel*

In *Dobbs*, Justice Kavanaugh assures us that, based on “the constitutional right to interstate travel,” a hostile state may not bar a citizen from traveling to a welcoming state for an abortion.<sup>161</sup> Although he cites no authority for this proposition, he is invoking an unenumerated right of national citizenship that the Court has found in the Privileges or Immunities Clause of the Fourteenth Amendment.<sup>162</sup> As a result, he could have cited *Saenz v. Roe*, in which a majority invoked this right to strike down a California regulation restricting welfare benefits for those who had recently moved to the state.<sup>163</sup> The *Saenz* majority’s opinion explained that the right to travel “embraces at least three different components,”<sup>164</sup> namely “the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.”<sup>165</sup>

Because “at least” leaves room for more, I would like to see explicit inclusion of a fourth component: “the right of a citizen of one State to leave it, enter another State, and return”—without penalty. This variation on the theme seems to be what Justice Kavanaugh has in mind because his language assumes protection for the portion of the patient’s travel that occurs even in the hos-

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<sup>161</sup> 142 S. Ct. at 2309 (Kavanaugh, J., concurring).

<sup>162</sup> U.S. CONST. amend. XIV, § 1.

<sup>163</sup> 526 U.S. 489 (1999).

<sup>164</sup> *Id.* at 500.

<sup>165</sup> *Id.*

tile state en route to the welcoming state and back again.<sup>166</sup> Justice Kavanaugh's position merits serious attention, given that he might provide the swing vote on this issue.<sup>167</sup>

Relying on the Fourteenth Amendment's Privileges or Immunities Clause here is not a sure bet, however. *Saenz* itself came as a surprise, given that many had read the *Slaughter House Cases*<sup>168</sup> to consign the Privileges or Immunities Clause to oblivion.<sup>169</sup> At the same time, Justice Thomas seemed to jump at the chance for a "do over" of Fourteenth Amendment jurisprudence, suggesting we might replace analysis based on substantive due process and equal protection with something new derived from the Privileges or Immunities Clause, once we ascertain its original meaning.<sup>170</sup> This view might have acquired additional followers in *Dobbs*, in which the majority rejects Fourteenth Amendment protection for abortion "regardless of whether we look to the Amendment's Due Process Clause or its Privileges or Immunities Clause."<sup>171</sup> As the footnote goes on to explain: "Some scholars and Justices have maintained that the Privileges or Immunities Clause is the provision of the Fourteenth Amendment that guarantees substantive rights."<sup>172</sup>

Yet, even under this new rubric, would the *Dobbs* Court recognize an expansive right to travel? And, given that the majority Justices make clear that their methodology entails determining whether a specific practice, "carefully described," is deeply

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<sup>166</sup> For commentary supporting such constitutional protection for intra-state travel, see Noah Smith-Drelich, *Travel Rights in a Culture War*, 101 TEX. L. REV. ONLINE 21 (2022).

<sup>167</sup> Justice Kavanaugh, one of five Justices joining in the opinion of the Court in *Dobbs*, filed a separate concurrence, 142 U.S. 2228, 2304 (Kavanaugh, J., concurring). Chief Justice Roberts concurred in the judgment only, and his opinion does not address a right to interstate travel. See *id.* at 2310 (Roberts, C.J., concurring).

<sup>168</sup> 83 U.S. 36 (1873).

<sup>169</sup> See *Saenz*, 526 U.S. at 511 (Rehnquist, C.J., dissenting); *id.* at 521 (Thomas, J., dissenting).

<sup>170</sup> *Id.* at 527-28.

<sup>171</sup> *Dobbs*, 142 S. Ct. at 2248 n.22.

<sup>172</sup> *Id.* See Marc Spindelman, *Dobbs' Sex Equality Troubles*, 56 FAM. L. Q. \_\_\_\_ (forthcoming 2023) (pp. 23-45 of Oct. 7, 2022 draft on file with the author) (exploring possible implications of footnote 22 in *Dobbs*).

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rooted in history and tradition,<sup>173</sup> perhaps the question should be whether the *Dobbs* Court would recognize a narrowly articulated right to travel for purposes of terminating a pregnancy. I fear not.

#### IV. A Modest Congressional Intervention

Those who have followed post-*Dobbs* developments know that soon after the Court's ruling Congress tried unsuccessfully to safeguard abortion nationally with the Women's Health Protection Act<sup>174</sup> and that President Biden has continued to call for this remedy.<sup>175</sup> Although I do not feel optimistic that such proposals will succeed any time soon, a more modest Congressional intervention, focused less on abortion itself and more on forestalling federal chaos, ought to have a better chance of passage. Even a sharply divided Congress that cannot agree on abortion should appreciate—and seek to avert—the challenge to our federal system that interstate abortion wars will bring, with jurisdictional competition, conflicting laws that specify explicitly overlapping applications, and dueling court decisions.

Congress intervened in this way before when it enacted the Parental Kidnapping Prevention Act (PKPA) in 1980 to allocate authority over child custody adjudications.<sup>176</sup> Until then, the availability of concurrent jurisdiction in multiple states, the indeterminacy of the best interests standard, and the modifiability of custody decrees meant that a disappointed litigant in one forum

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<sup>173</sup> In considering whether “liberty” includes a right to abortion, the *Dobbs* Court's analysis of history and tradition refers frequently to *Washington v. Glucksberg*, 521 U.S. 702 (1997). See, e.g., *Dobbs*, 142 U.S. at 2242. *Glucksberg* stated: “[W]e have required in substantive-due-process cases a ‘careful description’ of the asserted fundamental liberty interest.” 521 U.S. at 721. See *Dobbs*, 142 S. Ct. at 2246 (“And in conducting this inquiry [about history and tradition], we have engaged in a careful analysis of the history of the right at issue.”).

<sup>174</sup> H.R. 8296 passed the House but predictably failed in the Senate. No votes were taken on another effort to codify *Roe*, the Reproductive Freedom for All Act, S. 4688. Another proposal, H.R. 8297, the Ensuring Women's Right to Reproductive Freedom Act, would prohibit interference with interstate abortion services by anyone acting under color of state law.

<sup>175</sup> Alan Rappeport, *Biden Says Codifying Roe Will Be a Priority if Democrats Expand Majorities*, N.Y. TIMES, (Oct. 18, 2022) <https://www.nytimes.com/2022/10/18/us/politics/biden-abortion-midterms.html?searchResultPosition=1>.

<sup>176</sup> 28 U.S.C. § 1738A.

could take the child elsewhere in the hopes of obtaining a more favorable outcome.<sup>177</sup> One Supreme Court Justice described the legal situation as “a rule of seize and run.”<sup>178</sup>

Despite the longstanding view that family law belongs to the states,<sup>179</sup> Congress enacted the PKPA after hearings that emphasized, *inter alia*, the inadequacy of state laws to solve the problem and the economic and emotional costs of “child snatching.”<sup>180</sup> As a basis for the statute, Congress used its authority to implement the Full Faith and Credit Clause, which by itself—as judicially interpreted—had left uncertain what the command means for child custody determinations, given their modifiability.<sup>181</sup>

The PKPA avoids taking positions on the merits of how courts should decide custody cases; instead, it seeks to allocate authority among competing states and compel recognition and enforcement elsewhere when such jurisdictional requirements are satisfied. In particular, it prioritizes jurisdiction for the original custody case in the state with which the child has the most contacts (and hence the court has the most evidence),<sup>182</sup> it allows only one state at a time to exercise jurisdiction even when an adjudication concerns modification of an original decree,<sup>183</sup> and it demands full faith and credit for custody determinations that meet these standards.<sup>184</sup> Tempting as it might be, a second state

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<sup>177</sup> See generally Leonard G. Ratner, *Child Custody in a Federal System*, 62 MICH. L. REV. 795 (1964).

<sup>178</sup> *May v. Anderson*, 345 U.S. 528, 542 (1953) (Jackson, J., dissenting).

<sup>179</sup> Cf. *United States v. Windsor*, 570 U.S. 744, 766 (2013) (noting the traditional authority of states over marriage and, by implication, other matters of family law). See also *Ankenbrandt v. Richards*, 504 U.S. 689 (1992) (recounting the history and scope of the domestic relations exception to federal jurisdiction in diversity-of-citizenship cases).

<sup>180</sup> Parental Kidnapping Prevention Act of 1979: Joint Hearing before the Subcommittee on Criminal Justice of the Committee of the Judiciary and the Subcommittee on Child and Human Development of the Committee on Labor and Human Resources on S.105 (96th Cong. 1980).

<sup>181</sup> Compare, e.g., *Barber v. Barber*, 323 U.S. 77 (1944), with *People ex rel. Halvey v. Halvey*, 330 U.S. 610 (1947).

<sup>182</sup> 28 U.S.C. § 1738A (c)(2) (prioritizing initial jurisdiction in the child’s “home state”). See 28 U.S.C. § 1738A (b)(4) (defining “home state”).

<sup>183</sup> *Id.* § 1738A(d) & (f)

<sup>184</sup> *Id.* § 1738A (a).

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cannot consider the child's best interests while the first state still has continuing exclusive jurisdiction.<sup>185</sup>

Perhaps most significantly, it worked. We rarely hear about interstate "child snatching" today;<sup>186</sup> the PKPA and complementary state laws following the PKPA's approach<sup>187</sup> successfully addressed family law's crisis.<sup>188</sup>

Can we imagine something similar to address the interstate-abortion predicament and its threats, that is, a federal statute that identifies which state has authority to determine the legality of a abortion in given situations, with respect from other states to follow? As the PKPA illustrates, the Full Faith and Credit Clause affords a useful foundation for such Congressional action although the constitutional provision alone, as judicially interpreted, cannot solve the underlying problem. Other constitutional provisions could also serve as a basis for federal implementing legislation governing authority over interstate abortions, even if—standing on their own and as interpreted to date—these provisions cannot halt the competition among states. The Privileges or Immunities Clause of the Fourteenth Amendment, into which the Supreme Court has read a right to travel,<sup>189</sup> and the Commerce Clause stand out as especially promising possibilities.<sup>190</sup>

I am not the first to suggest that federal legislation based on the Constitution offers a way to proceed in such settings.<sup>191</sup> Indeed, the principal obstacle is neither Congress's basis for legislating nor its institutional competence but rather its far too frequent inability to act at all in this era of political division. Of

<sup>185</sup> See, e.g., *In re Baby Girl Clausen*, 502 N.W.2d 649 (Mich. 1993).

<sup>186</sup> Cf. Linda S. Hersha, Note, *Child Snatching: The Federal Response*, 33 SYRACUSE L. REV. 1103 (1982).

<sup>187</sup> E.g., Uniform Child Custody Jurisdiction and Enforcement Act (1997), <https://www.uniformlaws.org/committees/community-home?CommunityKey=4cc1b0be-d6c5-4bc2-b157-16b0baf2c56d>.

<sup>188</sup> Cf. Geoffrey C. Hazard, Jr., *May v. Anderson: Preamble to Family Law Chaos*, 45 VA. L. REV. 379 (1959) (describing the situation to which the PKPA responded).

<sup>189</sup> See *supra* notes 161-73 and accompanying text.

<sup>190</sup> See *supra* notes 148-60 and accompanying text.

<sup>191</sup> See Rosen, *supra* note 13, at 751-57 (arguing Congress's "institutional superiority" to the courts and examining various constitutional bases for Congressional action).

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course, the chances of successful enactment will depend in significant part on whether competing factions see the allocation of authority over interstate abortions as fair and evenhanded and how strongly federal legislators are committed to the idea of states as laboratories for experimenting with different approaches free from outreach by other states.

My starting point would be a territorial approach, looking to the state of the healthcare to determine its legality—consistent with our intuitions and the usual operation of criminal law. Assuming laws that inculcate or otherwise target the provider, that would be the state where the provider performs the procedure in cases of surgical abortion. This territorial approach would require patients in hostile states to travel to welcoming states.

For medication abortion, the optimal path would entail regulation by an abortion-friendly federal Food and Drug Administration and U.S. Postal Service, preempting more restrictive state laws.<sup>192</sup> Absent that, a territorial approach might appear at first

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<sup>192</sup> Disputes over medication abortion have proliferated. On one side, abortion opponents have filed suit to reverse the approval of the drugs used for medication abortions. Paul J. Weber, *Opponents File Lawsuit Targeting Medication Abortions*, AP NEWS (Nov. 18, 2022), <https://apnews.com/article/abortion-health-business-texas-lawsuits-71b8e54b97b016bf2cc0d9380d478991>. Abortion opponents are also invoking the federal Comstock Law, enacted in 1873, claiming it bans sending abortion medications through the U.S. Mail. See Ruth Marcus, *Will a 150-Year-Old Law Put the Abortion Pill in Peril?*, WASH. POST (Feb. 15, 2023), [https://www.washingtonpost.com/opinions/2023/02/15/comstock-laws-abortion-pill-access/\(opinion\)](https://www.washingtonpost.com/opinions/2023/02/15/comstock-laws-abortion-pill-access/(opinion)). On the other side, the manufacturer of mifepristone (the first medication in the two-dose abortion regimen) has filed suit, invoking federal preemption and the Supremacy Clause, to challenge state laws banning medication abortions. See Pam Belluck, *New Lawsuit Challenges State Bans on Abortion Pills*, N.Y. TIMES (Jan. 25, 2023), <https://www.nytimes.com/2023/01/25/health/abortion-pills-ban-genbiopro.html>. In addition, several abortion-friendly states have sued to eliminate restrictions on mifepristone. See Pam Belluck, *12 States Sue F.D.A., Seeking Removal of Special Restrictions on Abortion Pill*, N.Y. TIMES (Feb. 24, 2023), <https://www.nytimes.com/2023/02/24/health/abortion-pills-fda-lawsuit.html?searchResultPosition=2>. In the meantime, President Biden is pursuing means to increase access to medication abortion. See The White House, *FACT SHEET: President Biden to Sign Presidential Memorandum on Ensuring Safe Access to Medication Abortion* (Jan. 22, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/01/22/fact-sheet-president-biden-to-sign-presidential-memorandum-on-ensuring-safe-access-to-medication-abortion/>. An opinion for the U.S. Department of Justice concludes that, given their many legal uses, mifepristone and misopros-

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blush to require that the two-dose regimen be administered entirely in the welcoming state. This is so because under conventional criminal law doctrine, a (hostile) state can prosecute a crime when either the conduct or result occurs there.<sup>193</sup> Further, to the extent that tort law is relevant or simply provides analogies, the territorial approach to choice of law identifies the “place of wrong [as] . . . the state where the last event necessary to make an actor liable for an alleged tort takes place.”<sup>194</sup> Case law has interpreted this principle to refer to the place of injury.<sup>195</sup>

Yet, a closer look at how medication abortion works suggests room for additional flexibility, reducing the time that traveling patients might need to remain in the welcoming state. With this goal in mind, I would propose that the law of the state where the provider gives the patient the first dose of medication should control,<sup>196</sup> even if additional medication is to be taken later elsewhere. This apparent emendation derives from territorial tort principles focusing on the place where the force or substance “takes effect on the body.”<sup>197</sup> I would argue that that effect comes from the first dose, mifepristone, because it ends the preg-

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tol can be sent by mail, if the sender does not intend for them to be used illegally. Christopher H. Schroeder, Assistant Attorney General, Office of Legal Counsel, Application of the Comstock Act to the Mailing of Prescription Drugs That Can Be Used for Abortions (Dec. 23, 2022), <https://www.justice.gov/olc/opinion/file/1560596/download>.

<sup>193</sup> MODEL PENAL CODE § 1.03(1)(a) (1962).

<sup>194</sup> RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 377 (1934).

<sup>195</sup> *E.g.*, Alabama Great S. R.R. Co. v. Carroll, 11 So. 803 (Ala. 1892).

<sup>196</sup> Clinics in Kansas allow physicians to work with abortion patients by telemedicine, increasing the number of doctors available, but the patient must present in person at the clinic to receive the medication. Jonathan Shoreman, *Planned Parenthood Begins Telemedicine Abortions in Kansas Following Key Court Ruling*, K.C. STAR (Dec. 20, 2022), <https://www.kansascity.com/news/politics-government/article270235922.html>.

<sup>197</sup> The *Restatement (First) of Conflict of Laws*, often said to reflect a territorial approach, says that “[e]xcept in the case of harm by poison when a person sustains bodily harm, the place of wrong is the place where the harmful force takes effect upon the body,” while also recognizing a variation for cases of voluntarily taken poison, to wit: “When a person causes another voluntarily to take a deleterious substance which takes effect within the body, the place of wrong is where the deleterious substance takes effect and not where it is administered.” RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 377 (1) & (2) (1934). Of course, if the welcoming state’s law governs, there is no “place of wrong” because there is no “wrong.”



nancy,<sup>198</sup> while the second medication, misoprostol, which empties the uterus of the already-ended pregnancy, could be used back home by the patient who has returned to the hostile state.

Building from this territorial starting point, I would add that providing assistance anywhere so that an abortion patient can travel to a state where the abortion is legal should be controlled by the law of the state where the abortion takes place. This departure from a strictly territorial approach rests on inferences from cases decided under the Commerce Clause and the Privileges or Immunities Clause's right to travel, suggesting an expansive understanding of these provisions' reach.<sup>199</sup>

Much as I would like to press for more, including coverage along the lines of Massachusetts' "telemedicine shield law,"<sup>200</sup> I see little chance that Congress would go that far. Indeed, a Congress willing to take such action would have mooted the issue by enacting the Women's Health Protection Act, imposing a national standard.<sup>201</sup> In exchange for the concessions required by a territorial approach, however, welcoming states that make abortion legal would become safe havens, with providers and patients who travel there accorded the certainty they lack now.

Still, I acknowledge that such concessions are disturbing and even dangerous, given the enormous obstacles that travel to a welcoming state imposes on patients, especially those who are poor, have children in their care, endure intimate partner violence, and/or face repercussions for missing work. For these individuals, the leading, albeit risky, option entails early access to abortion medication through burgeoning underground networks<sup>202</sup> or global services like Aid Access,<sup>203</sup> notwithstanding

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<sup>198</sup> See KFF, *Women's Health Policy, The Availability and Use of Medication Abortion* (Jan. 4, 2023), <https://www.kff.org/womens-health-policy/fact-sheet/the-availability-and-use-of-medication-abortion/>.

<sup>199</sup> See *supra* notes 160 & 166 and accompanying text.

<sup>200</sup> See *supra* note 94 and accompanying text.

<sup>201</sup> See *supra* note 174 and accompanying text.

<sup>202</sup> See Aatish Bhatia, Claire Cain Miller & Margot Sanger-Katz, *A Surge of Overseas Abortion Pills Blunted the Effects of State Abortion Bans*, N.Y. TIMES, Nov. 2, 2022, <https://www.nytimes.com/2022/11/01/upshot/abortion-pills-mail-overseas.html?searchResultPosition=1>; Michele Munz, *Four Months After End of Roe: Mobile Clinics, Radio Ads for Home Abortions and Free Vasectomies*, ST. LOUIS POST-DISPATCH (Nov. 4, 2022), <https://www.stltoday.com/lifestyles/health-med-fit/health/four-months-after-end-of-roe-mobile-clinics->

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efforts to ban importation.<sup>204</sup> Yet, even so, many will be effectively “turned away,” with lifelong consequences.<sup>205</sup>

Significantly, my pragmatic, half-a-loaf approach might well not be the approach that Congress selects. Negotiating, drafting, and compromise will determine what emerges. The important point is for Congress to allocate authority to prevent turmoil among the states and state courts.

## Conclusion

For progressives, *Dobbs* ignited not only fears about abortion access but also concerns about the continuing protection for marriage equality. Progressives in Congress failed to enact substantive guarantees for abortion access because they lacked sufficient votes in the Senate to pass the Women’s Health Protection Act. For marriage equality, however, we saw a very different outcome: passage of the Respect for Marriage Act,<sup>206</sup> with bipartisan support, including twelve Republican Senators.<sup>207</sup>

Although both abortion and marriage equality have their fervent supporters and opponents, not everyone aligns on the

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radio-ads-for-home-abortions-and-free/article\_56533af5-323b-5a21-aaa6-061b3326e0a9c.html; Stephania Taladrid, *The Abortion Underground* NEW YORKER (Oct. 17, 2022) <https://www.newyorker.com/magazine/2022/10/17/the-post-roe-abortion-underground>.

<sup>203</sup> See Abigail R. A. Aiken, Jennifer E. Starling, James G. Scott & Rebecca Gomperts, *Requests for Self-managed Medication Abortion Provided Using Online Telemedicine in 30 US States Before and After the Dobbs v Jackson Women’s Health Organization Decision*, 328 JAMA 1768 (Nov. 1, 2022).

<sup>204</sup> See, e.g., Christopher Rowland, Laurie McGinley & Jacob Bogage, *Abortion Pills by Mail Pose Challenge for Officials in Red States*, WASH. POST (May 4, 2022), <https://www.washingtonpost.com/business/2022/05/04/abortion-pills-online-telemedicine/>.

<sup>205</sup> See DIANA GREENE FOSTER, *THE TURNAWAY STUDY: TEN YEARS, A THOUSAND WOMEN, AND THE CONSEQUENCES OF HAVING—OR BEING DENIED—AN ABORTION* (2021); see also Society of Family Planning, *#WeCount Report* (Oct. 28, 2022), [https://www.societyfp.org/wp-content/uploads/2022/10/SFPWeCountReport\\_AprtoAug2022\\_ReleaseOct2022-1.pdf](https://www.societyfp.org/wp-content/uploads/2022/10/SFPWeCountReport_AprtoAug2022_ReleaseOct2022-1.pdf) (presenting early data on impact of *Dobbs* on abortion rates).

<sup>206</sup> Pub. L. 117-228, 136 Stat. 2305 (2022).

<sup>207</sup> Amy B. Wang & Mariana Alfaro, *Senate Passes Bill to Protect Same-Sex, Interracial Marriage*, WASH. POST (Nov. 29, 2022), <https://www.washingtonpost.com/politics/2022/11/29/respect-for-marriage-act-senate-vote/>.

two issues. So we might attribute the apparently contrasting trajectories of the two post-*Dobbs* legislative efforts to different views on the merits—with marriage equality sparking less intense and intractable divisions than abortion.

Yet, these differences should not obscure another important distinction. The Women’s Health Protection Act would guarantee a right to abortion, while the Respect for Marriage Act—like the PKPA—less controversially allocates state authority and determines the consequences of the exercise of such authority in our federal system. Enacted under Congress’s power to implement the Full Faith and Credit Clause, the Respect for Marriage Act compels the federal government and other states to recognize a marriage that was valid in the state of celebration. As one Republican Senator stated in explaining his support, “[I]t’s better for Congress to clarify these issues than for federal judges to make these decisions.”<sup>208</sup> It is a path worth exploring for abortion as well.

*Dobbs* not only created a crisis in abortion access,<sup>209</sup> but it also triggered deeper disorder born of competing regulatory regimes that threaten the ability of the “laboratory of the states” to survive as a single nation. Even if our polarized Congress does not have the will to address the former problem,<sup>210</sup> it has the duty to resolve the latter. The Full Faith and Credit Clause, reinforced by other constitutional provisions, gives Congress the responsibility of protecting national unity and ensuring the mutual respect among states that the Constitution commands. The PKPA, now bolstered by passage of the Respect for Marriage Act, provides a template for modest legislative action to achieve this goal. We just need a majority of the House and at least sixty

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<sup>208</sup> See Michael Macagnone, *Senate Advances Same-sex Marriage Bill with New Provisions*, ROLL CALL (Nov. 16, 2022), <https://rollcall.com/2022/11/16/senate-to-vote-on-same-sex-marriage-bill-with-new-provisions/> (quoting Sen. Roy Blunt).

<sup>209</sup> See Elizabeth Nash & Peter Ephross, *Guttmacher Institute State Policy Trends 2022: In a Devastating Year, US Supreme Court’s Decision to Overturn Roe Leads to Bans, Confusion and Chaos* (Dec. 19, 2022), <https://www.guttmacher.org/2022/12/state-policy-trends-2022-devastating-year-us-supreme-courts-decision-overturn-roe-leads>.

<sup>210</sup> See Michael DeBonis & Rachel Roubein, *Senate Blocks Bill to Codify Right to Abortion*, WASH. POST (May 11, 2022), <https://www.washingtonpost.com/politics/2022/05/11/abortion-senate-vote/>.

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Senators to appreciate the importance of a working federal system.