
NOTES

THE FEDERALISM ARMS RACE OVER ABORTION

Catherine Caine MacCarthy*

ABSTRACT

In the wake of Dobbs v. Jackson Women's Health Organization and the formal reversal of Roe v. Wade, abortion has become illegal in about one-third of the United States. While pro-abortion states are making efforts to protect abortion access within their borders, anti-abortion states are doing the opposite. Despite the realities of federalism and state sovereignty that routinely permit Californians to gamble in Nevada, or Texans to purchase marijuana in Arizona, or Nebraskans to enter surrogacy agreements in Colorado, anti-abortion states are attempting to target abortions beyond their borders. Missouri legislators have proposed bills punishing anyone who obtains or helps someone obtain an abortion out of state. Cities in Texas have declared themselves "sanctuary cities for the unborn," banning abortion regardless of where the abortion occurs. Other cities in Texas have passed ordinances targeting highways to stop people from driving an abortion seeker out of state. Idaho passed an "abortion trafficking" law that bans minors from traveling out of state for an abortion without parental consent. Despite the increasing availability of mifepristone and misoprostol by mail, many abortion bans prohibit all forms of abortion, including medication abortion, forcing abortion seekers to travel to a proabortion state. Thus, a new kind of federalism arms race over abortion has begun.

This Note argues the efforts to punish residents for obtaining medication abortions out of state are unconstitutional because the right to travel includes a right to travel for medication abortion. Beginning with the development of the fundamental right to interstate travel, this Note argues the Supreme Court

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resoundingly rejected interstate abortion bans in Bigelow v. Virginia. This holding remains true even after Roe's reversal. Existing legal scholarship and proposals, as well as other constitutional arguments, support this analysis. Alternatively, this Note argues the Privileges and Immunities Clause and Commerce Clause similarly protect a right to travel for medication abortion.

CONTENTS

INTRODUCTION	2254
I. THE ROAD TO INTERSTATE ABORTION TRAVEL.....	2258
A. <i>Developing a Right to Interstate Travel</i>	2258
B. <i>Interstate Abortion Travel Protected:</i> <i>Doe v. Bolton and Bigelow v. Virginia</i>	2259
C. <i>The Aftermath of Dobbs v. Jackson Women’s</i> <i>Health Organization</i>	2260
D. <i>Medication Abortion and Abortion Travel</i>	2262
II. EXISTING SCHOLARSHIP	2267
A. <i>Scholars Who Believe Interstate Abortion</i> <i>Bans Unconstitutionally Infringe on the Right To Travel</i>	2267
B. <i>Scholars Who Believe Interstate Abortion Bans</i> <i>Are Constitutional</i>	2268
C. <i>Scholars Who Believe the Answer Is Complicated</i> <i>and Unanswered</i>	2270
III. THE PROBLEM WITH <i>BIGELOW</i>	2270
A. <i>Bigelow’s Holding Is Contested</i>	2271
B. <i>Bigelow Did Not Consider Medication</i> <i>Abortion or Telehealth</i>	2272
C. <i>Shield Laws Enacted Since Dobbs Are Inadequate</i>	2275
IV. PROTECTING THE RIGHT TO TRAVEL FOR MEDICATION ABORTION .	2277
A. <i>Using Bigelow</i>	2277
B. <i>Alternatives to Bigelow</i>	2280
1. Privileges and Immunities Clause	2280
2. Commerce Clause.....	2282
C. <i>Counterarguments</i>	2283
CONCLUSION.....	2284

INTRODUCTION

In the United States, travel has always been essential to access abortion. The conservative notion that women can obtain abortions at any clinic, or on any street corner, whenever they please¹ has always been, and continues to be, a fiction. Before the Supreme Court's landmark decision in *Roe v. Wade*,² a majority of states criminalized abortion.³ Some people who could not obtain an abortion in their home state ventured outside the United States, if they had the means to do so, to seek care in Mexico, Japan, Sweden, and the United Kingdom.⁴ Others travelled to another state: around 40% of all legal abortions in 1972 were performed outside of the pregnant person's⁵ state of residence.⁶ Class and geography defined one's access to reproductive healthcare, leading individuals to "chas[e] abortion rights across . . . state line[s]."⁷ This kind of "abortion travel" was so common that it developed its own infrastructure:

¹ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 916-17 (1992) (Stevens, J., concurring in part and dissenting in part) (describing regulations restricting abortion practice found constitutional, such as written informed consent, recordkeeping and reporting requirements, pathology reports, and licensing and qualification provisions).

² 410 U.S. 113, 154 (1973) ("We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation.").

³ Lisa M. Kelly, *Abortion Travel and the Limits of Choice*, 12 FIU L. REV. 27, 27 (2016) ("In the years prior to *Roe v. Wade*, at a time when a majority of states criminalized abortion, most laws targeted the providers of abortions or abortifacient drugs, rather than the women obtaining them.").

⁴ *Id.*

⁵ This Note uses gender-neutral language to refer to those seeking or obtaining an abortion to encapsulate all gender identities. However, gender-specific terms are occasionally used when statistics specifically refer to women or to otherwise capture important intersections between gender and abortion care.

⁶ 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, 453 (1992) [hereinafter Kreimer, *Choice of Law*].

⁷ Kelly, *supra* note 3, at 31 (quoting Linda Greenhouse, *Chasing Abortion Rights Across the State Line*, N.Y. TIMES (Nov. 24, 2016), <https://www.nytimes.com/2016/11/24/opinion/chasing-abortion-rights-across-the-state-line.html>). This Note specifically examines abortion travel, which inevitably highlights those with the means and resources to travel. Importantly however, it cannot be ignored that many abortion seekers did not have that privilege pre-*Roe*, and do not have that privilege now. See *id.* at 28 (describing Jane Collective, which provided safe but clandestine abortion care in 1970s); Jane Recker, *When Abortion Was Illegal, Chicago Women Turned to the Jane Collective*, SMITHSONIAN MAG. (June 14, 2022), <https://www.smithsonianmag.com/smart-news/abortion-jane-collective-chicago-180980244/> [<https://perma.cc/D9FM-JLDY>] (recounting how group of Chicago activists provided more than 11,000 abortions in Chicago before Illinois legalized abortion); Greenhouse, *supra* ("[M]ost women who get abortions today are low-income, defined as less than twice the federal poverty level, a trend that is accelerating as middle-class women avoid unplanned pregnancy by availing themselves of reliable, long-lasting (and expensive) birth control methods.").

counseling and referral networks quickly formed to assist tens of thousands of people traveling out of state to access abortion services.⁸

But anti-abortion states were undeterred, and quickly set their sights on disrupting these referral networks. Some states began to prosecute doctors, travel agents, and even newspaper editors who provided information for out-of-state abortions.⁹ For example, one Virginia statute prohibited all publications encouraging abortions or advertising where abortion services were available.¹⁰ With no abortion services available in their home states, and without information on where to access abortion services out of state, abortion seekers were left largely at the mercy of their state governments. Although well-connected and wealthy women would always know who to talk to and where to go, low-income women were essentially trapped.

Enter *Bigelow v. Virginia*.¹¹ A newspaper running a weekly advertisement referring people to an abortion provider in New York City challenged Virginia's statute prohibiting such publications.¹² Partly concerned that Virginia's law infringed on residents' right to travel to New York, the Supreme Court struck down the statute, stating a "State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State" and Virginia's "interest in regulating what Virginians may *hear* or *read* about the New York services . . . was entitled to little, if any, weight."¹³ And so this particular battle in the war over abortion seemed to be over: anti-abortion states, despite their efforts, could not prevent their residents from getting an abortion in another state. State efforts would have to be limited to restricting abortion care in their own states. The issue was seemingly so well settled it did not come up in the fifty years since.

Bigelow and interstate abortion travel, however, might now be on the chopping block. In March 2021, a Missouri legislator introduced a bill that would apply the state's abortion laws to out-of-state abortions performed on Missouri citizens.¹⁴ Subsequently, in March 2022, a different Missouri

⁸ See Kreimer, *Choice of Law*, *supra* note 6, at 454-55 (citing ARLENE CARMEN & HOWARD MOODY, ABORTION COUNSELING AND SOCIAL CHANGE, FROM ILLEGAL ACT TO MEDICAL PRACTICE 88 (1973)) (describing Clergy Consultation Service on Abortion, which referred nearly 60,000 women per year in 1970).

⁹ *Id.* at 456-57 ("In the early 1970s, the United States witnessed numerous state efforts to disrupt referral networks.").

¹⁰ *Bigelow v. Virginia*, 421 U.S. 809, 811 (1975) ("An advertisement carried in appellant's newspaper led to his conviction for a violation of a Virginia statute that made it a misdemeanor, by the sale or circulation of any publication, to encourage or prompt the procuring of an abortion.").

¹¹ *Id.* at 809.

¹² See *id.* at 811-13.

¹³ *Id.* at 824, 827-29 (emphasis added).

¹⁴ David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. 1, 23-24 (2023) [hereinafter Cohen et al., *New Abortion Battleground*].

legislator, inspired by S.B.8 in Texas,¹⁵ proposed an amendment to a different bill creating civil liability for anyone assisting a Missouri resident in obtaining an abortion out of state.¹⁶ Cities in Texas have declared themselves “[s]anctuary cities for the [u]nborn” to ban city residents from getting abortions, with many ordinances applying the ban “regardless of where the abortion is or will be performed.”¹⁷ Several Texas have also started targeting *highways* by passing ordinances to stop people from driving an abortion seeker out of state.¹⁸ Alabama’s Republican Attorney General has said he believes he has the right to prosecute people who assist women in Alabama in leaving the state to obtain an abortion because it amounts to a criminal conspiracy.¹⁹ And most significantly, Idaho passed a law in April 2023 that “bans minors from traveling out of state for abortions without parental consent,” creating a new felony called “abortion trafficking.”²⁰ Evidently, as many scholars have predicted, “the

¹⁵ See *infra* note 157.

¹⁶ Cohen et al., *New Abortion Battleground*, *supra* note 14, at 24.

¹⁷ Isaiah Mitchell, *From Waskom to Abilene: Behind the Movement of Sanctuary Cities for the Unborn*, TEXAN (Apr. 13, 2022), <https://thetexan.news/from-waskom-to-abilene-behind-the-movement-of-sanctuary-cities-for-the-unborn/> [<https://perma.cc/E3UF-TVWG>] (“Cisco, which passed its ordinance on October 12, was the first city to ban the abortion of any city resident, ‘regardless of where the abortion is or will be performed.’ Slaton passed an ordinance with the same provision.”). Abilene and San Angelo’s provisions passed with the same “regardless of where the abortion is or will be performed” language. See Erica Garner, *Abilene Becomes Texas’ Latest Sanctuary City for the Unborn*, BIG COUNTRY HOMEPAGE.COM (Nov. 9, 2022, 11:31 AM CST), <https://www.bigcountryhomepage.com/news/abilene-news/abilene-becomes-texas-latest-sanctuary-city-for-the-unborn/> [<https://perma.cc/E76PCF4K>] (“Abilene is now Texas’ latest Sanctuary City for the Unborn after voters passed an ordinance that makes abortion illegal locally.”); Matthew McDaniel, *San Angelo Voters OK Sanctuary City for the Unborn Abortion Ordinance*, GOSANANGELO (Nov. 9, 2022, 1:31 PM CT), <https://www.gosanangelo.com/story/news/politics/elections/2022/11/09/san-angelos-sanctuary-city-ordinance-takes-early-voting-lead/69632517007/> [<https://perma.cc/H7YF-7CAA>] (“Pro-life voters in San Angelo and Abilene celebrated a victory on Tuesday, as the ‘Sanctuary City for the Unborn’ ballot propositions passed in both towns.”).

¹⁸ Caroline Kitchener, *Highways Are the Next Antiabortion Target. One Texas Town Is Resisting.*, WASH. POST (Sept. 1, 2023, 6:00 AM), <https://www.washingtonpost.com/politics/2023/09/01/texas-abortion-highways/>.

¹⁹ Andy Rose, *Alabama Attorney General Says He Has Right To Prosecute People Who Facilitate Travel for Out-of-State Abortions*, CNN (Aug. 31, 2023, 7:39 AM), <https://www.cnn.com/2023/08/31/politics/alabama-attorney-general-abortion-prosecute/index.html> [<https://perma.cc/4M2V-HRPY>].

²⁰ Alanna Vagianos, *Idaho Passes Law To Restrict Interstate Travel for Abortion Care for Minors*, HUFFPOST (Apr. 5, 2023, 8:18 PM), https://www.huffpost.com/entry/idaho-law-restrict-interstate-travel-abortion-care_n_642aff1ae4b00c9517535cc3 [<https://perma.cc/GY7U-43Y4>].

interjurisdictional abortion wars are coming.”²¹ A sort of “federalism arms race” has begun.²²

The right to travel has conventionally been protected as a fundamental liberty under the U.S. Constitution.²³ Laws seeking to ban travel to a different state to, say, legally buy fireworks or gamble at a casino would appear obviously unconstitutional. Similarly, it may seem that laws seeking to ban interstate abortion travel run head-first into this fundamental right, and more specifically *Bigelow*, and warrant no concern. But in the abortion context, especially in the wake of *Dobbs v. Jackson Women’s Health Organization*²⁴ and the end of a constitutional right to abortion, *Bigelow* might not so easily dispose of the issue.

Specifically, “*Bigelow* is dated, relies on the now-overturned *Roe*, and concentrated on the First Amendment.”²⁵ Moreover, scholars have debated whether *Bigelow*’s language about extraterritorial application is mere dictum, and therefore not persuasive on the issue of interstate abortion bans.²⁶ To complicate matters further, *Bigelow* was decided prior to the advent of medication abortion,²⁷ which makes up the vast majority of abortions today.²⁸ Because of the nature of medication abortion—where one or both pills can be obtained in one state, taken in part or in whole in another state, and the pregnancy can end in yet another state—it is unclear how *Bigelow* applies to medication abortion, if at all.

This Note explores some of the constitutional issues implicated when individuals travel to another state to obtain medication abortion. Part I begins by discussing the development of the right to interstate travel and its eventual protection for interstate abortion travel in *Bigelow*. Part II analyzes the state of legal scholarship and existing arguments on the constitutionality of laws that specifically target interstate abortion travel. Part III discusses the questions *Bigelow* leaves unanswered and how cities and states are exploiting *Bigelow*’s

²¹ Cohen et al., *New Abortion Battleground*, *supra* note 14, at 3.

²² Carleen M. Zubrzycki, *The Abortion Interoperability Trap*, 132 YALE L.J.F. 197, 198 (2022).

²³ See *Kent v. Dulles*, 357 U.S. 116, 125-26 (1958) (“The right to travel is a part of the ‘liberty’ of which the citizen cannot be deprived without due process of law under the Fifth Amendment.”).

²⁴ 142 S. Ct. 2228, 2242 (2022).

²⁵ Cohen et al., *New Abortion Battleground*, *supra* note 14, at 28.

²⁶ See *id.* at 28-29.

²⁷ Abortion nomenclature matters. This Note uses the terms “medication abortion” to refer to abortions “primarily with medications, including mifepristone, misoprostol, and misoprostol alone,” and “procedural abortion” to refer to abortions “primarily with instrumentation, including uterine aspiration (manual or electric), dilation and curettage, dilation and evacuation, or dilation and extraction.” Ushma D. Upadhyay, Leah Coplon & Jessica M. Atrio, *Society of Family Planning Committee Statement: Abortion Nomenclature*, CONTRACEPTION, Oct., 2023, https://www.sciencedirect.com/science/article/pii/S0010782423001786?ref=pdf_download&fr=RR-2&rr=7f8e68e12c213338.

²⁸ See Cohen et al., *New Abortion Battleground*, *supra* note 14, at 29.

gaps to ban abortion beyond their borders post-*Dobbs*. Finally, Part IV concludes by offering possible solutions to address these legal puzzles.

This Note argues *Bigelow* can and does protect interstate travel for medication abortion. Alternatively, this Note suggests other solutions to protect this conduct without *Bigelow*, including arguments under the Privileges and Immunities Clause and the Commerce Clause.²⁹

I. THE ROAD TO INTERSTATE ABORTION TRAVEL

A. *Developing a Right to Interstate Travel*

“Interstate travel” is “travel from one State to another, and necessarily to use [of] the highways and other instrumentalities of interstate commerce in doing so.”³⁰ The right to interstate travel has long-standing roots in this country’s founding: the framers contemplated such a right even before the Constitution. In the Articles of Confederation, Article IV “explicitly protected the right of the people of each state to ‘free ingress and regress to and from any other State.’”³¹ And yet, restricting travel has “an invidious history . . . as a form of social control.”³² The Lovings in *Loving v. Virginia*³³ were specifically convicted under a provision of Virginia’s antimiscegenation statute that prohibited an interracial couple from leaving the state to get married to avoid criminal penalties in Virginia.³⁴ Antebellum Illinois imposed requirements on Black migrants and criminalized “the transportation of enslaved persons into Illinois to free them from bondage.”³⁵

²⁹ A word before proceeding: medication abortion is undoubtedly under attack, but it remains safe, effective, and legal as of this writing. The attacks on mifepristone are cause for genuine alarm, but exceptions exist even in many states with abortion bans. See David. S. Cohen, Professor, Drexel University, Thomas R. Kline School of Law (@dsc250), X (Sept. 8, 2023, 3:06 PM), <https://x.com/dsc250/status/1700224216065311211?s=20> (“Abortions under exceptions are underutilized and not transparent, but they are not non-existent. And that’s important—for providers, for patients, and for the public.”).

³⁰ Kathryn E. Wilhelm, *Freedom of Movement at a Standstill? Toward the Establishment of a Fundamental Right to Intrastate Travel*, 90 B.U. L. REV. 2461, 2464 (2010) (alteration in original) (citing *United States v. Guest*, 383 U.S. 745, 757 (1966)) (explaining history of right to interstate travel).

³¹ Seth F. Kreimer, “*But Whoever Treasures Freedom . . .*”: *The Right to Travel and Extraterritorial Abortions*, 91 MICH. L. REV. 907, 914 (1993) (quoting ARTICLES OF CONFEDERATION of 1777, art. IV) [hereinafter Kreimer, *The Right To Travel*].

³² Anthony Michael Kreis, *Prison Gates at the State Line*, HARV. L. REV. BLOG (Mar. 28, 2022), <https://harvardlawreview.org/blog/2022/03/prison-gates-at-the-state-line/> [https://perma.cc/FA9E-43KC].

³³ 388 U.S. 1 (1967). Notably, because Virginia’s prohibition on *intrastate* marriage itself was struck down, the Court did not reach the question of whether the Lovings’ *interstate* travel to Washington, D.C. and back to Virginia was also constitutionally protected. Kreis, *supra* note 32.

³⁴ Kreis, *supra* note 32.

³⁵ *Id.*

Despite this dark period of history, the Supreme Court recognized a right to interstate travel as early as 1849 in the *Passenger Cases*.³⁶ Justice Taney emphatically wrote, “[w]e are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States.”³⁷

By the early twentieth century, “the Court elevated the right to travel to a sacrosanct level in American jurisprudence: a fundamental right.”³⁸ The Court emphasized that all citizens have “the fundamental right, inherent in citizens of all free governments, peacefully to dwell within the limits of their respective states, to move at will from place to place therein, and to have free ingress thereto and egress therefrom.”³⁹ The Supreme Court has affirmed and reaffirmed this fundamental right in a myriad of cases since.⁴⁰ Most recently, Justice John Stevens defined the right to interstate travel by explaining its three components:

It protects 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.⁴¹

Because the right to interstate travel lacks an explicit textual basis in the Constitution, different cases have cited different constitutional provisions for its source.⁴² However, the very fact that the Supreme Court has unequivocally and resoundingly recognized a fundamental right to travel as far back as 1849—and the framers as far back as the Articles of Confederation—speaks precisely to its importance, endurance, and certainty.

B. *Interstate Abortion Travel Protected: Doe v. Bolton and Bigelow v.*

³⁶ See *Smith v. Turner* (The Passenger Cases), 48 U.S. (7 How.) 283, 572-73 (1849) (holding states may not tax ships based on number of passengers designated in particular category on board).

³⁷ *Id.* at 492 (Taney, J., dissenting).

³⁸ Wilhelm, *supra* note 30, at 2465.

³⁹ *United States v. Wheeler*, 254 U.S. 281, 293 (1920) (citing *Corfield v. Coryell*, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823)); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 70 (1872).

⁴⁰ See, e.g., *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 48-49 (1868) (holding statute imposing tax on passengers for exiting or traveling through state unconstitutional); *Kent v. Dulles*, 357 U.S. 116, 125 (1958) (“The right to travel is a part of the ‘liberty’ of which the citizen cannot be deprived without due process of law under the Fifth Amendment.”); *United States v. Guest*, 383 U.S. 745, 757 (1966) (holding right to interstate travel is fundamental to concept of federal union); *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969) (applying strict scrutiny to right to travel because state’s requirements of one-year waiting period for new residents to receive welfare benefits implicates “fundamental right of interstate movement”).

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

⁴² Wilhelm, *supra* note 30, at 2466-69 (explaining opinions finding right to travel under Privileges and Immunities Clause of Article IV, Privileges or Immunities Clause of Fourteenth Amendment, Commerce Clause, Equal Protection Clause, Due Process Clauses, and concept of national citizenship implicit in structure of Constitution).

Virginia

Constitutional doctrine that developed contemporaneously with *Roe* established not only a constitutional right to abortion, but also a right to abortion travel. In *Roe*'s companion case, *Doe v. Bolton*,⁴³ the Supreme Court cited the Privileges and Immunities clause from Article IV as protection people who traveled to Georgia for abortion services. *Bolton* categorically held that Georgia could not prohibit in-state doctors from performing abortions for nonresidents.⁴⁴

Two years later, the Supreme Court explicitly addressed the right to interstate abortion travel in *Bigelow v. Virginia*.⁴⁵ Jeffrey Bigelow, then-editor of *The Virginia Weekly* at the University of Virginia, ran an advertisement for a New York City abortion-referral service.⁴⁶ Virginia passed a statute prohibiting any publication encouraging people to obtain an abortion and convicted Bigelow for running the advertisement.⁴⁷ Because abortion services were legal in New York, the Court wholesale rejected Virginia's attempt to control the conduct of Virginia citizens in New York:

The Virginia Legislature could not have regulated the advertiser's activity in New York, and obviously could not have proscribed the activity in that State. Neither could Virginia prevent its residents from traveling to New York to obtain those services, or, as the State conceded, prosecute them for going there. Virginia possessed no authority to regulate the services provided in New York⁴⁸

To the lay reader, the Court could not have been clearer: Virginia could not prevent its residents from obtaining abortion care in New York, full stop. But because the statute in question also involved a newspaper advertisement, part of the holding relied on finding that the statute infringed on the publisher's First Amendment rights.⁴⁹ Therefore, whether the holding of *Bigelow* is fundamentally about the right to interstate abortion travel, or the First Amendment right to free press, remains contested.

C. *The Aftermath of Dobbs v. Jackson Women's Health Organization*

Dobbs formally reversed *Roe v. Wade* and *Planned Parenthood v. Casey*,⁵⁰ holding that abortion is not a constitutionally protected right.⁵¹ Mississippi

⁴³ 410 U.S. 179, 200 (1973) (noting if Privileges and Immunities Clause did not protect nonresidents entering state for specific medical services, state could prevent nonresidents from obtaining any medical care while in state, which Court cannot accept).

⁴⁴ Kreimer, *Choice of Law*, *supra* note 6, at 459 (citing *Bolton*, 410 U.S. at 200).

⁴⁵ 421 U.S. 809, 824 (1975) (stating Virginia could not have prevented its citizens from traveling to New York to obtain abortion services).

⁴⁶ *See id.* at 811.

⁴⁷ *See id.*

⁴⁸ *Id.* at 822-24 (internal citations and footnote omitted).

⁴⁹ *See id.* at 825.

⁵⁰ 505 U.S. 833 (1992).

⁵¹ 142 S. Ct. 2228, 2242 (2022).

directly invited the court to revisit *Roe* and *Casey* by passing a fifteen-week abortion ban.⁵² In June 2022, the Supreme Court upheld the statute because “the Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision,” as the right to abortion was neither “deeply rooted in this Nation’s history and tradition” nor “implicit in the concept of ordered liberty.”⁵³ This decision paved the way for a return to the pre-*Roe* world, where each state could regulate and even ban abortion as they wished.⁵⁴ At the time of this writing, abortion is banned or mostly banned in seventeen states, and four states have had abortion bans blocked by the courts.⁵⁵ More states will likely follow, as roughly half of the states have or are expected to ban or severely restrict abortion without *Roe*.⁵⁶ Although “abortion deserts” were common before *Dobbs*, abortion seekers in these states are “expected to experience a 249-mile increase in travel distance.”⁵⁷ Indeed, sixty-six clinics closed in fifteen states within the first one-hundred days after *Dobbs*.⁵⁸ Consequently, interstate abortion travel has largely already become, and will continue to be, an essential component of a world without *Roe*. Similar to the years before *Roe*, these burdens will fall most heavily on poor people and people

⁵² See *id.* (“In defending this law, the State’s primary argument is that we should reconsider and overrule *Roe* and *Casey* and once again allow each State to regulate abortion as its citizens wish.”).

⁵³ *Id.* at 2242 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

⁵⁴ Deborah Machalow, *Screwed But Not Even Kissed: The Parade of Reproductive and Economic Horribles Likely To Follow Dobbs*, 26 J. GENDER RACE & JUST. 81, 89-90 (2023) (describing trigger laws banning abortion immediately after fall of *Roe*, increased mobilization for ballot measures, revised law enforcement priorities, and eruption of state-court litigation resulting in temporary restraining orders or temporary injunctions).

⁵⁵ Caroline Kitchener, Kevin Schaul, N. Kirkpatrick, Daniela Santamariña & Lauren Tierney, *States Where Abortion Is Legal, Banned or Under Threat*, WASH. POST (Aug. 23, 2023, 1:54 PM), <https://www.washingtonpost.com/politics/2022/06/24/abortion-state-laws-criminalization-roe/> (categorizing abortion as banned or mostly banned in Alabama, Arkansas, Georgia, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Missouri, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, West Virginia, and Wisconsin, and categorizing bans as blocked by courts in Iowa, Ohio, Utah, and Wyoming).

⁵⁶ *Six Months Post-Roe, 24 US States Have Banned Abortion or Are Likely To Do So: A Roundup*, GUTTMACHER INST. (Sept. 1, 2023), <https://www.guttmacher.org/2023/01/six-months-post-ro-24-us-states-have-banned-abortion-or-are-likely-do-so-roundup>.

⁵⁷ Cohen et al., *New Abortion Battleground*, *supra* note 14, at 11 (quoting Caitlin Myers, Rachel Jones & Ushma Upadhyay, *Predicted Changes in Abortion Access and Incidence in a Post-Roe World*, 100 CONTRACEPTION 367, 367 (2019)) (“[A 2019 study] found that ‘the average resident is expected to experience a 249-mile increase in travel distance, and the abortion rate is predicted to fall by 32.8%.’”).

⁵⁸ *Id.* (citing Marielle Kirstein, Joerg Dreweke, Rachel K. Jones & Jesse Philbin, *100 Days Post-Roe: At Least 66 Clinics Across 15 US States Have Stopped Offering Abortion Care*, GUTTMACHER INST. (Oct. 6, 2022), <https://www.guttmacher.org/2022/10/100-days-post-ro-least-66-clinics-across-15-us-states-have-stopped-offering-abortion-care> [<https://perma.cc/7RCZ-5ATY>]).

of color, the undocumented, institutionalized, hospitalized, disabled, and individuals on parole.⁵⁹

D. *Medication Abortion and Abortion Travel*

Medication abortion has significantly changed the abortion-care landscape. In 2000, the U.S. Food and Drug Administration (“FDA”) approved the use of medication to terminate pregnancies within the first ten weeks.⁶⁰ Medication abortion is administered in two pills. The first pill, mifepristone, blocks the hormone progesterone, which is necessary for a pregnancy to continue.⁶¹ The second pill, misoprostol, is typically taken twenty-four to forty-eight hours after mifepristone and causes contractions that help expel the pregnancy.⁶² As opposed to a procedural abortion, which must be performed in a clinical setting, the primary benefit of medication abortion is that it can be taken in one’s own home.⁶³ This kind of abortion has been found to be extraordinarily safe and effective, and has made up more than half of all abortions performed in the United States since 2020.⁶⁴

Over the past two years, two massive changes to telehealth have occurred which have increased abortion access. First, the FDA eased mifepristone dispensing requirements. Until December 2021, FDA regulations required pharmacies to distribute mifepristone in-person from a specially certified provider.⁶⁵ However, these restrictions changed during the COVID-19 pandemic, when the FDA removed the in-person dispensing requirement and

⁵⁹ *Id.* at 12 (citing DAVID S. COHEN & CAROLE JOFFE, OBSTACLE COURSE: THE EVERYDAY STRUGGLE TO GET AN ABORTION IN AMERICA 72-83 (2020)) (describing situations in which many people may struggle to leave home state to seek abortion besides financial concerns).

⁶⁰ *Medication Abortion*, GUTTMACHER INST. (Aug. 31, 2023), <https://www.guttmacher.org/state-policy/explore/medication-abortion> [https://perma.cc/SV54-2A7D] [hereinafter GUTTMACHER INST., *Medication Abortion*] (noting medication abortion is currently FDA approved for use within first ten weeks of pregnancy).

⁶¹ Greer Donley, *Medication Abortion Exceptionalism*, 107 CORNELL L. REV. 627, 633 (2022) (citing Irving M. Spitz & C.W. Bardin, *Mifepristone (RU 486) – A Modulator of Progestin and Glucocorticoid Action*, 329 NEW ENG. J. MED. 404, 405 (1993)) (describing how mifepristone thins lining of uterus and causes gestational sac surrounding embryo to detach and stop growing).

⁶² *Id.*

⁶³ GUTTMACHER INST., *Medication Abortion*, *supra* note 60.

⁶⁴ *Id.*; see also Donley, *supra* note 61, at 634 (explaining fatality rate from mifepristone is significantly lower than fatality rate from live birth); Rachel K. Jones, Elizabeth Nash, Lauren Cross, Jesse Philbin & Marielle Kirstein, *Medication Abortion Now Accounts for More Than Half of All US Abortions*, GUTTMACHER INST. (Dec. 1, 2022), <https://www.guttmacher.org/article/2022/02/medication-abortion-now-accounts-more-half-all-us-abortions> [https://perma.cc/SY84-QNW6] (describing research demonstrating medication abortion is safe and effective, even when provided via telehealth).

⁶⁵ Donley, *supra* note 61, at 630.

allowed mifepristone to be mailed to patients.⁶⁶ Second, pro-abortion states began enacting “shield laws” in mid-2022. Connecticut passed the first of these shield laws, followed quickly by California, Massachusetts, Delaware, New Jersey, New York, and Illinois, and the list continues to grow.⁶⁷ The objective of these blue states is to become “safe havens” for abortion care, shielding those who “obtain, perform, or facilitate abortions within their states from being prosecuted or sued elsewhere.”⁶⁸ Among the fifteen states that have currently passed shield laws, five specifically include telemedicine protections, meaning the state will “protect a *provider* licensed there who prescribed and mailed medication abortion pills, via telemedicine, to a patient in a state where abortion was banned – like Texas or Alabama.”⁶⁹ Prior to the advent of shield laws, abortion-pill services, like Aid Access, shipped medication, supplied by U.S.-based providers to pro-abortion states, but had to rely on international providers to supply medication for anti-abortion states, which often took several weeks longer to arrive.⁷⁰ Now, as a result of provider protection from shield laws, Aid Access relies entirely on U.S.-based providers and ships medication to all fifty states within two to five days.⁷¹

As a result, abortion seekers can quickly obtain a legal abortion via telehealth and take the medication from the comfort of their home, with one important caveat. Because shield laws primarily aim to protect *providers*,⁷² patients are

⁶⁶ Emily Bazelon, *How the Pandemic Changed Abortion Access*, N.Y. TIMES (Sept. 3, 2021), <https://www.nytimes.com/2021/08/19/briefing/abortion-afghanistan-masks.html>.

⁶⁷ David S. Cohen, Greer Donley & Rachel Rebouché, *Abortion Shield Laws*, NEW ENG. J. MED. EVIDENCE, Mar. 28, 2023, at 1 [hereinafter Cohen et al., *Abortion Shield Laws*] (analyzing two different ways in which states with abortion bans can potentially enforce said bans across state lines).

⁶⁸ Zubrzycki, *supra* note 22, at 199; Cohen et al., *Abortion Shield Laws*, *supra* note 67 at 2 (noting additional shield law rationale is to prohibit nonfugitive extradition and provide interstate witness protection). Some features of these shield laws include prohibiting nonfugitive extradition, interstate witness protection, prohibiting expenditure of state resources on another state’s investigation, limiting adverse professional licensing consequences, medical malpractice protections, prohibiting disclosure of patients’ confidential information, out-of-state judgments, clawback lawsuits, and caring for patients across state lines. Cohen et. al., *Abortion Shield Laws*, *supra* note 67 at 2-4.

⁶⁹ Rebecca Grant, *Group Using ‘Shield Laws’ To Provide Abortion Care in States That Ban It*, GUARDIAN (July 23, 2023, 7:00 AM) (emphasis added), <https://www.theguardian.com/world/2023/jul/23/shield-laws-provide-abortion-care-aid-access> [https://perma.cc/5EVP-32B7].

⁷⁰ Rachel M. Cohen, *The Abortion Provider That Republicans Are Struggling To Stop*, VOX (May 7, 2022, 7:30 AM), <https://www.vox.com/23056530/aid-access-abortion-roe-wade-pills-mifepristone> (discussing Aid Access service model and how company provides abortion care via internet and international pharmacies).

⁷¹ Grant, *supra* note 69.

⁷² Although beyond the scope of this Note, it is worth recognizing that another important provision of shield laws is their protection for those seeking gender-affirming care, as many states siphoning off abortion care are doing the same with gender-affirming care. See generally Annette Choi & Will Mullery, *19 States Have Laws Restricting Gender-affirming*

still at risk if medication abortion is not legal in the patient's state. For one thing, the abortion bans taking effect after *Dobbs* prohibit all forms of abortion, including medication abortion.⁷³ For another, eight states specifically require physician presence when medication abortion is dispensed, which means someone who takes abortion pills in Texas, regardless of where they obtained them, would be violating the law.⁷⁴ Although abortion bans have historically targeted providers, some scholars predict that new laws will target abortion seekers, or those who assist them,⁷⁵ because the rise of telehealth and self-managed abortions allow providers to dodge state penalties.⁷⁶ The Fifth Circuit's recent decision in *Alliance for Hippocratic Medicine v. FDA*⁷⁷ is one such example. The Fifth Circuit enjoined the FDA's 2021 ease of restrictions on mifepristone, finding the changes to be likely arbitrary and capricious. This ruling will only take effect if the Supreme Court agrees with the Fifth Circuit or refuses to hear the case. But if left standing, the ruling would not only reverse the 2021 changes, but also revert the regulatory framework *back to the pre-2016 regime*.

If this were to happen, mifepristone would only be approved through seven weeks of pregnancy, not ten; it could only be prescribed by physicians,

Care, *Some with the Possibility of a Felony Charge*, CNN (June 6, 2023, 3:10 PM), <https://www.cnn.com/2023/06/06/politics/states-banned-medical-transitioning-for-transgender-youth-dg/index.html> [https://perma.cc/4HB7-FQ7R].

⁷³ Pam Belluck, *Abortion Pills Take the Spotlight as States Impose Abortion Bans*, N.Y. TIMES (June 27, 2022), <https://www.nytimes.com/2022/06/26/health/abortion-medication-pills.html>; see also GUTTMACHER INST., *Medication Abortion*, *supra* note 60.

⁷⁴ See Cohen et al., *New Abortion Battleground*, *supra* note 14, at 17; David Leonhardt & Ian Prasad Philbrick, *The Next Abortion Fight: Mailing Pills*, N.Y. TIMES (July 28, 2022), <https://www.nytimes.com/2022/07/25/briefing/abortion-pills-mail-roe-v-wade.html>.

⁷⁵ Abortion seekers were also targeted before *Dobbs*. See LAURA HUSS, FARAH DIAZ-TELLO & GOLEEN SAMARI, IF/WHEN/HOW: LAWYERING FOR REPRODUCTIVE JUSTICE, SELF-CARE, CRIMINALIZED: AUGUST 2022 PRELIMINARY FINDINGS 2 (2022) (finding between 2000 and 2020, at least sixty-one people across twenty-six states were criminally investigated or arrested for terminating their pregnancy or helping someone else do so).

⁷⁶ Cohen et al., *New Abortion Battleground*, *supra* note 14, at 19 (citing Andrea Rowan, *Prosecuting Women for Self-Inducing Abortion: Counterproductive and Lacking Compassion*, 18 GUTTMACHER POL'Y REV. 70, 71 (2015)). In April 2022, Lizelle Herrera was charged with murder for self-inducing an abortion, though the charges were ultimately dropped. *Id.* at 20. In July 2023, Jessica Burgess pleaded guilty to providing an illegal abortion in Nebraska after buying pills online for her pregnant teen daughter. See Sanya Mansoor, *What Nebraska's Sentencing of a Teen Who Used Abortion Pills Might Mean in Post-Roe America*, TIME (July 26, 2023, 4:57 PM), <https://time.com/6298166/nebraska-abortion-pill-case-legal-experts/> [https://perma.cc/UVS2-J43P]. Mansoor posits that although many red states have banned abortion post-*Dobbs*, there haven't yet been many criminal prosecutions because (1) it is still relatively early; (2) self-managed abortions such as medication abortions are hard to detect; (3) elected prosecutors do not want to enforce abortion bans; and (4) providers are hesitant to break the law because performing illegal abortions could cost them their medical licenses. *Id.*

⁷⁷ No. 23-10362, 2023 WL 5266026 (5th Cir. Aug. 16, 2023).

excluding nurse practitioners, midwives, and physician assistants; and it would have to be picked up and taken in person at a clinic.⁷⁸ These changes would take reproductive healthcare back “to an era of outdated information and medical practice that belies what is best for patient health and hampers access to a safe and effective drug,”⁷⁹ increasing the need for abortion travel. Although the significance of medication abortion and telehealth in increasing access to abortion care cannot be overstated, the Fifth Circuit’s recent decision and weaknesses in shield laws highlight that medication abortion is not a panacea, and it does not eliminate the need for abortion travel for abortion seekers in many states.⁸⁰

Much like how the anti-abortion states in the 1970s were undeterred by the growing abortion assistance networks, today’s anti-abortion states are unsatisfied with the fall of *Roe* and are eager to end abortion travel. One example is Missouri, where approximately 10,000 residents travel out of state for abortion care each year.⁸¹ One bill introduced in March 2021 would apply state abortion restrictions to conduct occurring “[p]artially within and partially outside this state as well as conduct wholly outside the state” when certain conditions are met.⁸² An amendment introduced in March 2022 to another anti-abortion bill would have opened anyone who performed an abortion on a Missouri resident to civil liability, regardless of where the abortion had occurred.⁸³ In Texas, multiple cities have passed ordinances declaring themselves “sanctuary cities for the unborn,” with some banning city residents from obtaining abortions regardless of where they occur.⁸⁴ Other cities have made it illegal to transport an abortion seeker on roads within the city or county limits, “with the goal of blocking off the main arteries out of Texas and keeping pregnant women hemmed within the confines of their antiabortion state.”⁸⁵ In Alabama, the

⁷⁸ David S. Cohen, Greer Donley & Rachel Rebouché, *The 5th Circuit’s New Abortion Pill Ruling Targets Patients Directly*, SLATE (Aug. 17, 2023, 1:21 PM), <https://slate.com/news-and-politics/2023/08/abortion-pill-telemedicine-mail-status-fda-courts.html> [<https://perma.cc/4NLF-WDR8>].

⁷⁹ *Id.*

⁸⁰ See *infra* Part III.B (discussing challenges in seeking medication abortion by telehealth).

⁸¹ Cohen et al., *New Abortion Battleground*, *supra* note 14, at 23 (“Missouri . . . had almost no in-state abortions before *Dobbs* and roughly 10,000 of its residents traveling out of state to receive care each year . . .”).

⁸² *Id.* at 23-24 (citing S.B. 603, 101st Gen. Assemb., 1st Reg. Sess. § 188.550.1(2), (3)(a), (3)(c) (Mo. 2021)) (explaining restrictions apply when pregnant person resides in Missouri, pregnant person has substantial connection with Missouri, unborn child is resident of Missouri at time of conception, pregnant person intends to give birth in Missouri if carried to term, individual had sex in Missouri that may have conceived this pregnancy, or patient sought prenatal care in Missouri during pregnancy).

⁸³ *Id.* at 24. Although this amendment ultimately failed to make the final bill, the legislator vowed to continue this effort after *Dobbs*. *Id.*

⁸⁴ See *id.* at 24-25; sources cited *supra* note 17 (elucidating various aspects of sanctuary cities for unborn in Texas).

⁸⁵ Kitchener, *supra* note 18.

Republican Attorney General has expressed his willingness to prosecute people who assist women in leaving Alabama to obtain an abortion as a criminal conspiracy.⁸⁶

Some may argue that a handful of bills, amendments, and local ordinances do not warrant a lot of concern. They might be written off as isolated, one-off pieces of a far-right agenda that hardly represent the mainstream anti-abortion movement. If these legislative efforts did not sound the alarm that interstate abortion travel is under attack, Idaho's just did.

In April 2023, Idaho became the first state to explicitly restrict some out-of-state abortion travel.⁸⁷ Idaho passed a law creating a new felony called "abortion trafficking," which carries up to five years in prison for any "adult who, with the intent to conceal an abortion from the parents or guardian of a pregnant, unemancipated minor, either procures an abortion . . . or obtains an abortion-inducing drug" for a minor.⁸⁸ Republican Governor Brad Little maintains the law does not limit interstate abortion travel for any adult because, on paper, it only prevents minors with no parental consent from being trafficked across state lines for an abortion.⁸⁹ But reality belies this assertion. Because Idaho bans abortion at all stages of pregnancy, most pregnant people are traveling to neighboring states such as Washington or Oregon.⁹⁰ Thus, the law effectively criminalizes assisting a minor with an out-of-state abortion, including "[g]iving them [minors] money, giving them a ride, helping them organize the visit to a doctor out of state—all of the activity that's required to help a young person leave the state."⁹¹ Although advocacy groups are currently challenging the constitutionality of this law⁹² it remains especially concerning because it could pave the way for future laws targeting people who assist *adults* with out-of-state abortions. "That is the way, historically, all abortion restrictions have begun: by first limiting young people's access, and then moving to adult access."⁹³

Evidently, cities and states "will not wait for the U.S. Supreme Court to give them permission to apply their laws extraterritorially . . . they will just do it."⁹⁴

⁸⁶ Rose, *supra* note 19.

⁸⁷ Aria Bendix, *Idaho Becomes One of the Most Extreme Anti-Abortion States with Law Restricting Travel for Abortions*, NBC NEWS (Apr. 6, 2023, 9:24 AM), <https://www.nbcnews.com/health/womens-health/idaho-most-extreme-anti-abortion-state-law-restricts-travel-rcna78225> [<https://perma.cc/DS3L-EFFX>].

⁸⁸ Vagianos, *supra* note 20.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Bendix, *supra* note 87.

⁹² See Rebecca Boone, *Idaho Sued over Law Making It a Crime To Help Minors Get Abortions Without Parental Consent*, AP NEWS (July 11, 2023, 6:23 PM), <https://apnews.com/article/idaho-abortion-lawsuit-travel-interstate-918bbc40befe2ea67f93e8490455cbbc> [<https://perma.cc/ZZ86-3SFM>].

⁹³ *Id.*

⁹⁴ Cohen et al., *New Abortion Battleground*, *supra* note 14, at 30.

II. EXISTING SCHOLARSHIP

Scholars who have commented on the constitutionality of abortion travel primarily fall into one of three groups: (1) scholars who believe interstate abortion bans are unconstitutional; (2) scholars who believe interstate abortions bans are constitutional; and (3) scholars who believe the answer is complicated and unanswered.

A. *Scholars Who Believe Interstate Abortion Bans Unconstitutionally Infringe on the Right To Travel*

Scholars who believe that laws targeting abortion travel are unconstitutional rely on the right to travel, conflict of laws, and the dormant commerce clause.⁹⁵ Professor Seth Kreimer has defended abortion travel extensively, making both originalist and normative arguments.⁹⁶ From an originalist perspective, Kreimer explains that these laws violate the right to travel: the framers “held a strong commitment to a legal system in which state sovereignty was limited to application within its own borders and to a conception of national citizenship that protected a strong right to travel to other states,” as evidenced in “the Commerce Clause, Article IV’s Privileges and Immunities Clause, and the Citizenship Clause of the Fourteenth Amendment.”⁹⁷ From a normative perspective, Kreimer argues:

The right to travel . . . underpins our sense of liberty. Being tied to a locale is the essence of serfdom. The right to travel allows us to widen our horizons by expanding the scope of our opportunities and insights. . . . The right to travel provides us with the ability to experiment with modes of living other than those sanctioned at home and to return with the potentially transformative knowledge we have gained.⁹⁸

Kreimer ultimately concludes that people “have the right to travel to any of the other states in order to follow their consciences, and they are entitled to do so within the frameworks of law and morality that those sister states provide.”⁹⁹

⁹⁵ *Id.* at 34.

⁹⁶ *Id.*

⁹⁷ *Id.* at 35 (citing Kreimer, *Choice of Law*, *supra* note 6, at 464-72).

⁹⁸ Kreimer, *The Right To Travel*, *supra* note 31, at 914-15 (footnotes omitted).

⁹⁹ Cohen et al., *New Abortion Battleground*, *supra* note 14, at 35 (citing Kreimer, *The Right To Travel*, *supra* note 31, at 938). Other scholars have argued that interstate bans are unconstitutional on different grounds than Kreimer. Professor Lea Brilmayer argues that conflict of laws principles suggest that the territorial state’s policy trumps the state of residence because pro-abortion states have a strong interest in regulating conduct within their state. *Id.* (citing Lea Brilmayer, *Interstate Preemption: The Right To Travel, the Right to Life, and the Right To Die*, 91 MICH. L. REV. 873, 884-90 (1993)). Professor Susan Lorde Martin argues the modern dormant commerce clause prohibits applying a state’s laws extraterritorially because this principle is the “bedrock of a federalist system.” *Id.* at 35-36 (citing Susan Lorde Martin, *The Extraterritoriality Doctrine of the Dormant Commerce Clause Is Not Dead*, 100 MARQ. L. REV. 497, 526 (2016)). Although these arguments are

Furthermore, Kreimer argues convincingly that *Bigelow*'s primary holding pertains to the right to travel.¹⁰⁰ First, he argues Virginia conceded in oral argument in *Bigelow* that "it could not regulate abortions performed in New York."¹⁰¹ Second, lower courts have treated *Bigelow* as a holding about the right to travel.¹⁰² Finally, Justice William Rehnquist distinguished *Bigelow* in a subsequent case from a restriction on advertising domestic gambling because "the underlying conduct that was the subject of the advertising restrictions [in *Bigelow*] was constitutionally protected and could not have been prohibited by the state."¹⁰³ Because the for-profit referral services at issue in *Bigelow* were not themselves constitutionally protected against regulation by New York, "[t]he only 'constitutional protection' which serves to distinguish *Bigelow* is the protection against extraterritorial regulation of conduct legal where it occurs."¹⁰⁴

B. *Scholars Who Believe Interstate Abortion Bans Are Constitutional*

By contrast, other scholars argue that nothing in the Constitution prohibits states from enforcing their laws, including abortion bans, out of state. Professor Mark Rosen has provided extensive analysis on this argument and *Bigelow*'s shortcomings specifically.¹⁰⁵ He argues the Supreme Court has never held that one state's efforts to prohibit its citizens from engaging in certain conduct in another state where that conduct is permitted implicates the right to travel.¹⁰⁶ Moreover, he argues interstate abortion bans do not implicate any component of Justice Stevens's recent affirmation of the right to travel in *Saenz*.¹⁰⁷ According

beyond the scope of this Note, that other scholars have found so many potential homes for the same right indicates how clearly our Constitution protects that right.

¹⁰⁰ Kreimer, *Choice of Law*, *supra* note 6, at 459 n.27 ("Characterizing the *Bigelow* principle as dictum is a dubious move.").

¹⁰¹ *Id.* at 460 n.27 (citing Transcript of Oral Argument at 29, *Bigelow v. Virginia*, 421 U.S. 809 (1975) (No. 73-1309) (statement of D. Patrick Lacy, Assistant Attorney General of Virginia)).

¹⁰² *Id.* (citing Fla. Dep't of Health & Rehab. Servs. v. Friends of Child., Inc., 653 F. Supp. 1221, 1227 (N.D. Fla. 1986) (interpreting state statute to avoid creating extraterritorial jurisdiction)).

¹⁰³ *Id.* (quoting *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 345 (1986)).

¹⁰⁴ *Id.*

¹⁰⁵ See Mark D. Rosen, "Hard" or "Soft" Pluralism?: Positive, Normative, and Institutional Considerations of States' Extraterritorial Powers, 51 ST. LOUIS U. L.J. 713, 714 (2007) [hereinafter Rosen, *Pluralism*] (noting states generally have power over citizens' out-of-state activities); Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. PA. L. REV. 855, 891-94 (2002) [hereinafter Rosen, *Heterogeneity*] (analyzing *Bigelow* in context of constitutionality of states extraterritoriality enforcing laws against their citizens).

¹⁰⁶ Rosen, *Pluralism*, *supra* note 105, at 736 ("[N]o Supreme Court case has held that State A's effort to bar its citizen from doing in State B what State B permits its own citizens to do implicates the right to travel.").

¹⁰⁷ *Saenz v. Roe*, 526 U.S. 489, 500 (1999) (holding right to travel includes (1) right to enter and leave another state, (2) right to be treated as welcome visitor, and (3) right to be

to Rosen, apparently interstate abortions bans do not trigger the first component—the right of a citizen of one state to enter and leave another state—because these laws do not actually prevent residents from leaving their home state.¹⁰⁸ And apparently they do not trigger the second component—the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily in another state—because that provision is merely Article IV’s Privileges and Immunities Clause in express words, and therefore applies only to the host state (the pro-abortion state in this case), not to a citizen’s home state.¹⁰⁹

Rosen is also a staunch critic of the proposition that *Bigelow* fundamentally pertains to the right to travel.¹¹⁰ Although he concedes *Bigelow* is the strongest argument to be made for a constitutional right to abortion travel—via a right to travel as a fundamental liberty under the Fourteenth Amendment’s Due Process Clause—he argues the relevant language is dictum.¹¹¹ First, Rosen argues the relevant proposition is irrelevant to the holding because “Virginia had attempted to control advertising in Virginia of New York abortion services, not to forbid Virginia residents from traveling to New York or to regulate the New York services.”¹¹² Second, he argues the proposition regarding the right to travel was not an “essential premise” in the Court’s argument that advertising is constitutionally protected. Rather, this language was instead part of an additional argument by the Court that the advertisement conveyed potentially valuable information to its audience.¹¹³

Rosen also responded directly to Kreimer’s arguments that *Bigelow* is fundamentally about the right to travel.¹¹⁴ He argues that (1) whether the state conceded at oral argument that it could not regulate abortions performed in New York is unrelated to the question of dicta; (2) how some lower courts have painstakingly tried to distinguish *Bigelow*’s holding from dicta is not instructive; and (3) the “constitutionally protected” conduct Justice Rehnquist alluded to

treated like other citizens if electing to permanently reside in new state); Rosen, *Heterogeneity*, *supra* note 105, at 894 n.162 (arguing *Saenz* only addressed disparate treatment between old and new citizens, rather than states’ rights to enforce laws on their citizens while out of state).

¹⁰⁸ Rosen, *Pluralism*, *supra* note 105, at 737 (arguing state is not preventing citizens from leaving by regulating their actions in destination state).

¹⁰⁹ *Id.* Rosen correctly argues the third component—the right of travelers who choose to become permanent residents of another state to be treated like other citizens of that state—has no application to interstate abortion bans because abortion seekers typically have no intention of making the pro-abortion state their permanent home. See Kreimer, *Choice of Law*, *supra* note 6, at 453.

¹¹⁰ Rosen, *Heterogeneity*, *supra* note 105, at 969.

¹¹¹ *Id.* at 891.

¹¹² *Id.* at 969.

¹¹³ *Id.* (arguing premise of extraterritorial regulating authority not central to Court’s decision in *Bigelow* because argument First Amendment protection applies to advertisements was sufficient to make Court’s point).

¹¹⁴ *Id.* at 969-71.

was not the extraterritoriality principle, but more likely abortion.¹¹⁵ This line of reasoning suggests that, especially now that *Roe* has been overruled, states may have the power to impose their abortion bans on their residents who travel out of state.¹¹⁶

C. *Scholars Who Believe the Answer Is Complicated and Unanswered*

Finally, a third group of scholars believes that neither *Bigelow* nor any other Supreme Court precedent fully answers whether state attempts to enforce their abortion bans beyond their borders are constitutional. Professor Richard Fallon argued in 2007—well before *Dobbs*, but recently enough where the fall of *Roe* was on the horizon—that it is very much a live question of whether a state’s interest in preserving fetal life is significant enough to justify regulating abortions outside the state’s borders.¹¹⁷

III. THE PROBLEM WITH *BIGELOW*

The consequences of overturning *Roe* for interstate abortion travel are stark. Currently, less than half of women of reproductive age live in an abortion-protective state.¹¹⁸ Some in the anti-abortion movement, such as the president of Students for Life and the executive director of Idaho Chooses Life, have

¹¹⁵ *Id.* at 970-71 (“Advertising regulations concerning abortion, a constitutionally protected activity, are treated differently from advertising limitations on gambling, which is not constitutionally protected.”). Even if *Bigelow*’s language about the right to travel is part of the holding, however, Rosen argues that holding—that states lack extraterritorial regulatory authority—has been significantly narrowed by subsequent case law. Rosen, *Heterogeneity*, *supra* note 105, at 894. Rosen also argues that the same language from *Posadas*—which Kreimer used to support his arguments—explicitly limited *Bigelow*. *Id.* at 895. When the Court said Virginia’s advertising regulations in *Bigelow* were unconstitutional because the “underlying conduct that was the subject of the advertising restrictions was constitutionally protected,” Rosen argues the Court was talking about abortion. Rosen, *Pluralism*, *supra* note 105, at 725 n.61. According to Rosen, State A consequently has a “presumptive power” to restrict advertisements for out-of-state activities that State A can ban. *Id.*

¹¹⁶ Cohen et al., *New Abortion Battleground*, *supra* note 14, at 37. A few other scholars agree with Rosen that states have an interest in controlling their citizens’ conduct regardless of where they are because there is no constitutional right to evade one’s home state’s criminal law by traveling to another state. *See, e.g.*, 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, 1908-12 (1987); William W. Van Alstyne, *Closing the Circle of Constitutional Review from Griswold v. Connecticut to Roe v. Wade: An Outline of a Decision Merely Overruling Roe*, 1989 DUKE L.J. 1677, 1684-85; Joseph W. Dellapenna, *Abortion Across State Lines*, 2008 BYU L. REV. 1651, 1694. But as Part IV.A explains, the notion of “evading” the criminal laws of one’s home state is actually a good thing: it is the promise of federalism.

¹¹⁷ Cohen et al., *New Abortion Battleground*, *supra* note 14, at 37 (citing Richard H. Fallon Jr., *If Roe Were Overruled: Abortion and the Constitution in a Post-Roe World*, 51 ST. LOUIS U. L.J. 611, 613 (2007)).

¹¹⁸ Machalow, *supra* note 54, at 83 (citation omitted) (finding 26.5 million women of reproductive age living in twenty states and D.C. have protected abortion access).

explicitly advocated for the end of abortion travel.¹¹⁹ Although Justice Samuel Alito hollowly swore in the majority opinion in *Dobbs* that “[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion,”¹²⁰ Justice Clarence Thomas’s concurrence said the quiet part out loud: “In future cases, we should reconsider all of this Court’s substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*.”¹²¹ Justice Brett Kavanaugh’s concurrence did little to ameliorate these concerns. Without any further analysis or exploration, he plainly stated that the questions raised in this Note are “not especially difficult”; in his view, a state could obviously not “bar” one of its residents from traveling to another state to obtain an abortion “based on the constitutional right to interstate travel.”¹²² Significantly, Justice Kavanaugh failed to cite *Bigelow* or any other authority for such a proposition.¹²³ Given all of the state efforts targeting interstate abortion travel, it’s hardly clear the answer to this constitutional dilemma is as obvious as Justices Kavanaugh and Alito make it seem.¹²⁴ Their bald assertions are cold comfort. If it were really that simple, and this nebulous right to travel so easily disposed of the issue, cities and states would not be mounting all of these attacks on interstate abortion travel in the first place. They are likely taking advantage of the Court’s conservative composition and the anti-abortion movement’s momentum after *Dobbs* precisely to put these previously well-settled issues back on the chopping block.

A. *Bigelow’s Holding Is Contested*

Bigelow may not dispositively answer whether a state can ban interstate abortion travel. *Bigelow* unequivocally stated that a “State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to

¹¹⁹ Ximena Bustillo, *Who and What Is Behind Abortion Ban Trigger Law Bills? Two Groups Laid the Groundwork*, NPR (July 8, 2022, 5:01 AM), <https://www.npr.org/2022/07/08/1110299496/trigger-laws-13-states-two-groups-laid-groundwork> [<https://perma.cc/PK52-BG93>] (describing model legislation drafted by Americans United for Life and National Right to Life Committee and their adoption by state legislatures); Caroline Kitchener, *Roe’s Gone. Now Antiabortion Lawmakers Want More*, WASH. POST (June 25, 2022, 7:52 PM), <https://www.washingtonpost.com/politics/2022/06/25/roe-antiabortion-lawmakers-restrictions-state-legislatures/> (citing Kristan Hawkins, President of Students for Life, saying, “I think we can say, ‘Look, if you travel out of state for an abortion, that abortionist can be held liable’”); Bendix, *supra* note 87 (citing David Ripley, Executive Director of Idaho Chooses Life, as arguing that assisting minors with procuring abortions across state lines “is clearly within the authority of the state of Idaho to criminalize and discourage”).

¹²⁰ *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2277-78 (2022).

¹²¹ *Id.* at 2301 (Thomas, J., concurring).

¹²² *Id.* at 2309 (Kavanaugh, J., concurring).

¹²³ *Id.*

¹²⁴ See *supra* text accompanying notes 81-93 (discussing efforts in Missouri and Texas to punish residents for abortions regardless of where abortion is performed, and abortion trafficking laws in Idaho).

that State.”¹²⁵ However, Professor David S. Cohen explained the concerns with *Bigelow* succinctly:

Bigelow is dated, relies in part on the now-overturned *Roe*, and concentrated on the First Amendment. The current U.S. Supreme Court, now that it has eviscerated *Roe*, could revisit *Bigelow*’s anti-extraterritoriality principle. Moreover, scholars have argued for decades about whether *Bigelow*’s statements against extraterritorial application are mere dicta.¹²⁶

Put simply, the Court has never squarely addressed whether states can bar their residents from traveling to a different state to obtain an abortion or punish out-of-state physicians who perform that procedure.¹²⁷ Despite Kavanaugh’s assurance that the answer was no, the “anti-abortion court . . . might find enough wiggle room in the past cases to say it’s not unconstitutional because states are allowed to have extraterritorial effect of their laws.”¹²⁸

Furthermore, “*Bigelow* has been criticized as being out of step with modern thinking in conflict of laws, which tends to recognize residence rather than territoriality as the primary determinant of legal obligation.”¹²⁹ This is concerning because as Part I described, “travel is a key part of the contemporary abortion landscape.”¹³⁰ If people cannot access abortion services in their home state or by traveling to another state, the result is a kind of “personal abortion law that women carry with them upon leaving their home states.”¹³¹

B. *Bigelow Did Not Consider Medication Abortion or Telehealth*

Moreover, even if *Bigelow* is fundamentally about the right to interstate abortion travel, it is not clear how, if at all, *Bigelow*’s holding applies to medication abortion. Because medication abortion had not been approved by the FDA and was not widely popular at the time *Bigelow* was decided, one could envision a Supreme Court, with a particularly fervent obsession with originalism, finding that *Bigelow* does not apply to medication abortion.¹³² First, medication abortion raises unique concerns that procedural abortions do not,

¹²⁵ *Bigelow v. Virginia*, 421 U.S. 809, 824 (1975).

¹²⁶ Cohen et al., *New Abortion Battleground*, *supra* note 14, at 29 (footnotes omitted).

¹²⁷ Mark Joseph Stern, *How Red States Plan To Reach Beyond Their Borders and Outlaw Abortion in America*, SLATE (Apr. 13, 2022, 4:44 PM), <https://slate.com/news-and-politics/2022/04/abortion-bans-out-of-state-missouri-texas-oklahoma.html> [<https://perma.cc/9C2Q-92XA>].

¹²⁸ Machalow, *supra* note 54, at 99 (quoting Kathryn Rubino, *Red States Aren’t Going To Be Satisfied with Overturning Roe. Next Up: Travel Bans*, ABOVE THE LAW (May 4, 2022, 11:16 AM), <https://abovethelaw.com/2022/05/red-states-arent-going-to-be-satisfied-with-overturning-roe-next-up-travel-bans/> [<https://perma.cc/VG2L-M7W9>]).

¹²⁹ Kreimer, *Choice of Law*, *supra* note 6, at 460.

¹³⁰ Kelly, *supra* note 3, at 33.

¹³¹ Kreimer, *The Right To Travel*, *supra* note 31, at 924.

¹³² See GUTTMACHER INST., *Medication Abortion*, *supra* note 60 (describing how mifepristone was approved by FDA in 2000 but only began making up more than half of all U.S. abortions in 2020).

namely, where the unlawful act occurs: one or both pills could be obtained in one state, taken in another state in part or in whole, and the pregnancy could end in yet another state.¹³³ Consequently, states may argue that a patient who takes mifepristone in the pro-abortion state, but misoprostol in an anti-abortion state where it is illegal, can be punished because they “had an abortion in the state where it is banned.”¹³⁴ Second, the rise of telehealth during the COVID-19 pandemic, which fortunately loosened telehealth restrictions on mifepristone, compounds these questions. Even before *Dobbs*, with the in-person dispensing requirement removed, remote abortion care was not available in every state. “Virtual providers could not operate in the nineteen states that had banned telemedicine for abortion or required in-person dispensation of abortion medication. Beyond the fourteen states that ban all abortion before ten weeks of pregnancy, an additional eight states require physician presence when medication abortion is dispensed.”¹³⁵

Although the rise of telehealth has significantly increased access to medication abortion, that access has largely only affected states where abortion is already legal. For example, many providers will not mail medication to anti-abortion states for fear of liability.¹³⁶ Generally, the standard for telehealth “is that the care occurs where the patient is located.”¹³⁷ Anti-abortion states could use this to their advantage to argue the medication abortion occurred in their state, “where the patient was located for the telehealth consultation, received the pills by mail, or consumed them—even though the provider was in a state that permits telehealth for abortion.”¹³⁸ Even Abortion on Demand, the first large-scale telehealth service run by a U.S.-based provider, requires verification that

¹³³ *Id.* (discussing impact of abortion bans and how they impact medication abortion).

¹³⁴ Cohen et al., *Abortion Shield Laws*, *supra* note 67, at 1 (analyzing two different ways in which states with abortion bans can potentially enforce bans across state lines).

¹³⁵ Cohen et al., *New Abortion Battleground*, *supra* note 14, at 16-17.

¹³⁶ See, e.g., *We’re Here for you—Before, During, and After Treatment*, HEY JANE, <https://www.heyjane.co/how-it-works-b> [<https://perma.cc/MN57-M34X>] (last visited Nov. 10, 2023) (shipping only to patients in California, Colorado, Connecticut, Illinois, New Jersey, New Mexico, New York, or Washington); *FAQs*, ABORTION ON DEMAND, <https://abortionondemand.org/faq/#map> [<https://perma.cc/8Y6L-HM2D>] (last visited Nov. 10, 2023) (shipping to only twenty states and cautioning patients, “[n]o, you do not have to be a resident of the state you select but you do need to be there for your appointment . . . We do not provide care outside of the specific states we are licensed to practice.”); *Abortion Pills Discreetly Delivered to Your Door*, CARAFEM, <https://carafem.org/at-home-abortion-pills/> [<https://perma.cc/F6C8-MVCC>] (last visited Nov. 9, 2023) (shipping only to patients in limited number of states).

¹³⁷ David S. Cohen, Greer Donley & Rachel Rebouché, *Abortion Pills*, 76 STAN. L. REV. (forthcoming 2024) (manuscript at 26), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4335735 [hereinafter Cohen et al., *Abortion Pills*].

¹³⁸ *Id.*

the patient is in a teleabortion state by tracking IP addresses.¹³⁹ If the IP address does not match the patient's stated address, the patient must provide an in-state identification.¹⁴⁰ Because mailing the medication internationally can take up to three weeks, and medication abortion is only recommended within the first ten weeks of pregnancy, this option will be too little, too late for many abortion seekers.¹⁴¹ Moreover, some patients do not feel comfortable seeking medication from unofficial abortion pill suppliers operating through unregulated online pharmacies, with no interaction with a licensed physician.¹⁴² Thus, some individuals' only option is to travel to a nearby state within the first ten weeks of their pregnancy to complete the telehealth appointment and obtain the pills.

In this scenario, the patient could theoretically be in four different locations while completing the abortion: (1) "Where the patient interacts with the medical professional and receives the pills." (2) "Where the patient ingests the mifepristone. This could be in the medical office, or it could be later when the patient returns home." (3) "Where the patient ingests the misoprostol. This usually occurs twenty-four hours after the mifepristone is taken." (4) "Where the patient expels the products of conception."¹⁴³ Because abortion is statutorily defined, anti-abortion states can define abortion to have occurred at any one of these points.¹⁴⁴ This uncertainty is detrimental for healthcare because it "breeds confusion and chills care."¹⁴⁵ Consequently, some clinics have advised patients to consume both pills in the pro-abortion state, while others will not provide pills to out-of-state patients at all.¹⁴⁶ Not only could this result in inconsistent provider policies and shift liability to patients, but it's simply bad healthcare. The patient will often have to take the medication alone, in a pharmacy or doctor's office they have never been to, and expel the contents of their uterus on their drive home or in a gas station bathroom. For many people, experiencing an abortion is already an emotional and difficult decision. These disconcerting

¹³⁹ Cohen et al., *New Abortion Battleground*, *supra* note 14, at 16-17 (noting Abortion on Demand, large domestic abortion e-services provider, requires location access and tracking to ensure company does not violate state abortion bans).

¹⁴⁰ *Id.* (noting back-up systems designed to detect people whose claimed location does not correspond with their IP address).

¹⁴¹ *Id.* at 20 (discussing FDA limitations on use of medication abortions beyond ten weeks of pregnancy and how, despite lack of approval, it may continue beyond ten weeks).

¹⁴² Grant, *supra* note 69.

¹⁴³ Cohen et al., *Abortion Pills*, *supra* note 137, at 26.

¹⁴⁴ *Id.* at 27 (describing North Dakota's statute as defining location of medication abortion "when the drug is prescribed, in the case of a prescription, or when the drug is administered directly to the woman by the physician"). As of this writing, no state has defined an abortion to occur where either mifepristone or misoprostol is ingested, or where the products of conception are expelled. *Id.*

¹⁴⁵ *Id.* at 28.

¹⁴⁶ Cohen et al., *New Abortion Battleground*, *supra* note 14, at 51 (describing some providers considering asking patients to sign waivers explicitly stating, "I have been advised to take this medication in [the abortion-supportive state]").

circumstances created by the state only make that experience more alienating, stigmatizing, and unsafe.

C. *Shield Laws Enacted Since Dobbs Are Inadequate*

Although shield laws are a novel and significant development to aid abortion providers, helpers, and seekers after *Dobbs*, they do not provide complete protection. First, current shield laws do not protect providers in states without shield laws. The impact of this gap is two-fold: not only may a provider in Texas face legal consequences for providing abortion medication, but a provider in, for example, Connecticut, may also face legal consequences once they set foot in Texas.¹⁴⁷ This may be the beginning of a disturbing reality where providers could be arrested or sued upon visiting family, going for a drive, or catching a connecting flight in an anti-abortion state. Similarly, “abortion seekers and helpers who return to an antiabortion state after an abortion enjoy few protections from shield laws.”¹⁴⁸ Second, because these shield laws remain thus far unchallenged, any part or all of these shield laws may be challenged and eventually struck down by the courts if found unconstitutional.¹⁴⁹ Third, each shield law is different, creating a “web of protections that depends on the state where the abortion took place. Shield laws vary with respect to . . . which types of providers are protected, whether abortion helpers and seekers are covered, which type of care is shielded, and more.”¹⁵⁰ Again, these uncertainties inevitably chill abortion care.

A fourth concern is that these laws, while potentially helpful in thwarting the efforts of anti-abortion states, raise a potent federalism problem: “[E]ach of these interventions would strike at the heart of basic, fundamental principles of law in the United States federalist system—interstate comity and cooperation.”¹⁵¹ This is an unprecedented departure from well-settled principles of federalism, where states cooperate with each other’s prosecutions, investigations, extradition, and information sharing. As Cohen questions, “if Illinois refuses to extradite an abortion provider to Kentucky, will Kentucky retaliate and refuse to extradite a gun dealer to Illinois?”¹⁵² This is not to discourage states from adopting shield laws or to minimize their significance. Rather, this is a tempered observation that pro-abortion states and policymakers should proceed with caution. These

¹⁴⁷ Grant, *supra* note 69 (explaining how Dr. Rebecca Prine, who provides medication abortion to all fifty states through Aid Access, is “definitely not taking any vacations in Texas” because of potential legal repercussions).

¹⁴⁸ Cohen et al., *Abortion Shield Laws*, *supra* note 67, at 4 (discussing limitation of shield laws in that they do not prevent retribution or retaliatory prosecution by anti-abortion jurisdictions).

¹⁴⁹ *Id.* (noting shield laws are untested in court and may potentially be struck down).

¹⁵⁰ *Id.* (discussing nuance and interplay between shield laws and how non-attorneys and even attorneys may find it difficult to offer guidance for potential beneficiaries).

¹⁵¹ Cohen et al., *New Abortion Battleground*, *supra* note 14, at 44.

¹⁵² *Id.* at 52 (arguing abortion shield laws will reduce cooperation among states and may lead to retaliation through refusal to extradite for other crimes).

shield laws may be desirable in the short-term, limited context of abortion. They may, however, begin a concerning kind of “federalism arms race” and disrupt the very bedrock of American government.¹⁵³ This is a substantial cost to bear for laws that ultimately do not fully protect abortion seekers or helpers who stay in, or return to, their anti-abortion state if a law there targets their conduct.¹⁵⁴

Finally, many shield laws do not adequately protect patient medical records. Carleen Zubrzycki demonstrates the medical record loopholes succinctly:

[I]magine that Jane Doe, a resident of Missouri, gets an abortion in Connecticut. She then returns home to Missouri, where, under a pending bill, it would be unlawful for any person to perform or induce . . . an abortion on a resident or citizen of Missouri . . . regardless of where the abortion is or will be performed. . . . [E]ven if the new Connecticut law would prevent Jane Doe’s Connecticut abortion providers from giving her medical records to prosecutors or litigants in her home state, those prosecutors or litigants could circumvent this protection by subpoenaing *any other provider with access to her abortion records*.¹⁵⁵

Notably, many of these shield laws came about not after *Dobbs*, but after Texas enacted the “Texas Heartbeat Act,” also commonly referred to as S.B.8.¹⁵⁶ In brief, S.B.8 provides a civil statutory scheme deputizing private citizens to sue abortion seekers and rendering liable anyone who aids or abets an abortion after a fetal heartbeat is detected.¹⁵⁷ Although S.B.8 and similar laws do not explicitly mention out-of-state abortions, they very well may apply to abortion seekers leaving their home state.¹⁵⁸ These laws and their copycats are not only undoubtedly dangerous for the existence of legal abortions in the United States, but also for other reasons someone might travel to another state. Kreimer cautioned about these dangers well before the fall of *Roe*:

¹⁵³ Zubrzycki, *supra* note 22, at 198 (“Post-*Dobbs*, states are now jockeying to prohibit or protect abortion within their borders and to define the playing field for interstate abortions. For example, some anti-abortion activists and legislators seek not only to eliminate abortions within their states, but also to prevent residents from traveling to get abortions where they are legal and to penalize those in other states who facilitate such out-of-state abortions.”).

¹⁵⁴ Cohen et al., *New Abortion Battleground*, *supra* note 14, at 45, 50-51 (“[T]his change has ripple effects for interstate licensure compacts and model laws on telehealth. And, more significantly, abortion-supportive states could not protect their providers from consequences in the anti-abortion state, which would view the provider’s actions as a violation of the state’s abortion laws as well as its licensing laws. Though their home state’s shield law may protect them when in their state, any travel outside the state may be high risk.”).

¹⁵⁵ Zubrzycki, *supra* note 22, at 200-01 (footnote omitted).

¹⁵⁶ *See id.* at 203 (stating some recently enacted statutes are seeking to impose liability on out-of-state actors who help with abortions even if statutes do not expressly address extraterritorial abortions, like civil statute in Oklahoma).

¹⁵⁷ *Id.* (citing TEX. HEALTH & SAFETY CODE § 171.208(a)(1) (2021)).

¹⁵⁸ *See id.* (explaining how statutes may apply to abortions performed by any physicians licensed in anti-abortion state, including dual licensed doctors practicing in other states).

In the absence of constitutional constraint, not only may Pennsylvania prosecute its citizens for obtaining abortions in New Jersey, but New Jersey might punish its residents for hiring surrogate mothers in Pennsylvania. Georgia could punish its residents for traveling to Missouri to engage in consensual sexual practices, while Missouri might interfere with its citizens' efforts to take advantage of a right to die in Minnesota. California could prosecute its citizens for harassing women at abortion clinics in Utah, and Utah in turn could press charges against Utah residents for smoking marijuana in Alaska, or drinking alcohol and reading pornography in Nevada.¹⁵⁹

In a world without *Roe*, these hypotheticals are far from hyperbolic or alarmist; they are increasingly real.

IV. PROTECTING THE RIGHT TO TRAVEL FOR MEDICATION ABORTION

The right to travel strikes at the core of what it means to be American. "American liberty entails mobility; our ability to pull up stakes and move on stands at the core of our self-image. . . . Founded by immigrants, expanded by migration, nurtured by movement, rights of mobility have been a staple of American liberty."¹⁶⁰ The Court has had every opportunity, as it grows increasingly conservative and textualist, to abandon a right to travel altogether—a right almost completely untethered from constitutional text. Instead, the Court has doubled down on the right to travel's existence.¹⁶¹ The right to travel therefore encompasses a right to travel for medication abortion because *Bigelow* and other constitutional provisions demand it.

A. Using *Bigelow*

This Note argues that the best reading of *Bigelow* is that the right to interstate abortion travel is a fundamental right protected under the due process clause, which necessarily includes a right to travel for medication abortion.

Our history and understanding of federalism at the founding and throughout the colonial era support this analysis. The very notion of American federalism squarely contradicts the idea that states could punish their citizens for conduct protected in the state where it occurs.¹⁶² At the time the Fourteenth Amendment was ratified, a state's sovereignty was limited to its own borders: "[T]hey established a supervening national citizenship which guaranteed the right to

¹⁵⁹ Kreimer, *Choice of Law*, *supra* note 6, at 462 (footnotes omitted).

¹⁶⁰ Seth F. Kreimer, *Lines in the Sand: The Importance of Borders in American Federalism*, 150 U. PA. L. REV. 973, 998 (2002) [hereinafter Kreimer, *Borders in American Federalism*].

¹⁶¹ See *Saenz v. Roe*, 526 U.S. 489, 501 (1999) ("The right of 'free ingress and regress to and from' neighboring States, which was expressly mentioned in the text of the Articles of Confederation, may simply have been 'conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created.'" (footnote omitted)).

¹⁶² Kreimer, *Choice of Law*, *supra* note 6, at 462.

travel and to take advantage of the legal entitlements of neighboring jurisdictions.”¹⁶³ Even if the Supreme Court were to gut “its protection of extra-textual constitutional liberties under the due process clause”—as Justice Thomas suggested in his concurrence in *Dobbs*¹⁶⁴—a right to travel would still exist, because “that withdrawal does not vitiate the obligations national citizenship imposes on the states.”¹⁶⁵ In other words, as Kreimer put it:

American citizens may be subject to different moral agendas in different locations. This is the essence of American federalism. But federalism does not entail a moral Balkanization, in which competing moral agendas seek without restraint to conquer foreign territories; it should not be a system in which citizens carry home-state law with them as they travel, like escaped prisoners dragging a ball and chain.¹⁶⁶

Second, even Rosen admits that the difference between his position and Kreimer’s regarding *Bigelow*’s fundamental holding is “semantic.”¹⁶⁷ Although scholars and jurists may disagree as to the relative weight dicta carry, it is a fundamental tenet of constitutional adjudication that dicta are nevertheless persuasive.¹⁶⁸ Even if the language in *Bigelow* about the right to travel is not strictly necessary to the holding, and therefore not necessarily binding in future cases, it is hardly persuasive to insist that the reverse of the proposition is true: despite *Bigelow*’s “categorical claim,” there is in fact no such thing as a right to interstate abortion travel, and that states may freely enforce their abortion bans extraterritorially. This principle is even more important with less recent cases, like *Bigelow* from nearly fifty years ago, where scholars can evidently debate which parts of the opinion the Justices really “meant” and which parts were merely superfluous, for decades. Such an approach cannot inform whether a fundamental right in fact exists, or whether that part of the opinion can be entirely disregarded, as if it were never written.

Additionally, reality belies Rosen’s contention that *Bigelow* cannot be understood to pertain to the right to travel, because to understand it as such would overturn longstanding Supreme Court precedent “without so much as

¹⁶³ *Id.*

¹⁶⁴ *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2301-02 (2022) (Thomas, J., concurring) (“[I]n future cases, we should reconsider all of this Court’s substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*.”).

¹⁶⁵ Kreimer, *Choice of Law*, *supra* note 6, at 463.

¹⁶⁶ *Id.*

¹⁶⁷ Rosen, *Pluralism*, *supra* note 105, at 724 n.58 (contending distinction between discarding dicta and narrowing earlier holding is insubstantial).

¹⁶⁸ See *Cohens v. Virginia*, 19 U.S. 264, 399 (1821) (“It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.”). Relatedly, Justice Thurgood Marshall also touched on extraterritoriality in *Cohens*, writing it is “clear, that a State legislature, the State of Maryland, for example, cannot punish those who, in another State, conceal a felony committed in Maryland.” *Id.* at 428.

even mentioning those cases.”¹⁶⁹ The Supreme Court just did exactly that in *Dobbs*. The majority opinion unequivocally renders several other longstanding substantive due process rights vulnerable.¹⁷⁰ As the dissent pointedly notes:

The lone rationale for what the majority does today is that the right to elect an abortion is not “deeply rooted in history”: Not until *Roe*, the majority argues, did people think abortion fell within the Constitution’s guarantee of liberty. The same could be said, though, of most of the rights the majority claims it is not tampering with. . . . So one of two things must be true. Either the majority does not really believe in its own reasoning. Or if it does, all rights that have no history stretching back to the mid-19th century are insecure. Either the mass of the majority’s opinion is hypocrisy, or additional constitutional rights are under threat. It is one or the other.¹⁷¹

Evidently, reading a case as having one particular holding that conflicts with precedent is no obstacle to that reading.

Third, Rosen’s argument that states enforcing abortion bans extraterritorially does not implicate the right to travel, because the state is not prohibiting its residents from traveling to another state per se, also fails. Rosen plainly asserts that whether a state can enforce its abortion bans extraterritorially “is obviously a quite different issue from whether Virginia can deny its own citizens access to services in New York.”¹⁷² But if you live in Missouri and you want to travel to Illinois to obtain a medication abortion, but you will be punished (either criminally or civilly) upon your return to Missouri, in all likelihood, you are not going to go to Illinois. Sure, you may travel to Illinois for leisure, for work, to visit family, or for a myriad of other reasons. But if your sole purpose in traveling there is to pick up or obtain a medication abortion legally in that state, your right to travel is significantly burdened, if not virtually banned, if you must risk criminal or civil liability for that particular travel. The result is no right to travel at all: “If our bodies can move among states, but our freedom of action is tied to our place of origin, then the ‘right to travel’ becomes a hollow shell.”¹⁷³ Put

¹⁶⁹ Rosen, *Pluralism*, *supra* note 105, at 724.

¹⁷⁰ See Robert L. Tsai, *What Rights Could Unravel Next*, POLITICO (May 3, 2022, 12:52 PM), <https://www.politico.com/news/magazine/2022/05/03/supreme-court-abortion-draft-other-precedents-00029625> [<https://perma.cc/2SNS-5EQK>] (contending Justice Alito’s textualist and traditionalist approach seemingly eliminates other rights not explicitly mentioned in Constitution, including birth control and same-sex marriage).

¹⁷¹ *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2319 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting) (citation omitted).

¹⁷² Rosen, *Heterogeneity*, *supra* note 105, at 894.

¹⁷³ Kreimer, *Borders in American Federalism*, *supra* note 160, at 1007; see also Laurence H. Tribe, *The Supreme Court, 1998 Term—Comment: Saenz Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—Or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110, 152 (1999) (“If each state could decide for itself, possibly with some measure of congressional authorization, how much of its legal system its citizens would have to carry around on their backs while seeking to take advantage of the legal environments of other states, then the right to choose which state to enter for any purpose

differently, imagine State A passes a blanket travel ban prohibiting travel to State B. Absent a physical barrier between the two states, how else would a state enforce that law if not by imposing civil or criminal liability upon the traveler's return? There is no meaningful distinction between this example and Missouri's bills or Idaho's abortion trafficking law. The result is effectively a travel ban. It begs the question: If these laws do not implicate the right to travel, what does?

Finally, although it might be argued that even if *Bigelow* protects abortion travel, it does not protect medication abortions, that argument is not persuasive. Medication abortion is not different from procedural abortions in any meaningful constitutional way to justify protection for one and not the other. It is irrelevant that the Supreme Court in 1975 may not have contemplated the exact contours of how most abortions would occur today because, at their cores, medication and procedural abortions accomplish the same objective, just by different means.¹⁷⁴

B. *Alternatives to Bigelow*

At best, *Bigelow* instructs, even if in dicta, there is a fundamental right to travel that protects the right to travel for medication abortion. However, if *Bigelow* is either (1) overruled; (2) interpreted as only pertaining to the First Amendment, and thus irrelevant to the right to travel; or (3) interpreted as not applicable to medication abortion, interstate abortion bans are nevertheless unconstitutional under the Privileges and Immunities Clause and the Commerce Clause.

1. Privileges and Immunities Clause

The Privileges and Immunities Clause of Article IV (also referred to as the Comity Clause) states that “[t]he citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”¹⁷⁵ The text suggests, and the Supreme Court has confirmed, “that when American citizens travel outside of the territory of their home state—and thus ‘in the several states’—they are ‘entitled’ to partake of the ‘privileges and immunities’ of local

lawful in that state would amount to nothing more than the right to have the physical environment of the states of one's choosing pass before one's eyes in a kind of virtual reality arcade while one remained strapped at all times in a legally fixed and closed environment. Surely, however, more than that is involved in the right of interstate mobility that follows from the basic structure of our federal Union.”).

¹⁷⁴ The first clinical trial for mifepristone, then named RU-486, began in 1982 in Geneva, just seven years after *Bigelow* was decided. See Donley, *supra* note 61, at 636.

¹⁷⁵ U.S. CONST. art. IV, § 2, cl. 1.

citizens.”¹⁷⁶ *Roe*’s companion case, *Bolton*,¹⁷⁷ used the Privileges and Immunities Clause to strike down Georgia’s attempt to deny out-of-state residents abortions available to Georgians. Kreimer argues the inverse is also true: “If Georgia cannot prevent residents of Florida from making use of Georgia’s abortion services by prosecuting the Georgia doctors who perform the abortions, Florida cannot make those same services unavailable by prosecuting the Florida residents for using those services upon their return home.”¹⁷⁸ However, in contrast, Rosen argues that the conduct protected under this Clause is limited, defined only as “such basic and essential activities, interference with which would frustrate the purposes of the formation of the Union,” and does not include interstate abortion travel.¹⁷⁹ But Rosen overlooks a myriad of other cases that found certain conduct within the scope of the Privileges and Immunities Clause for much less.¹⁸⁰ Taking this line of cases together, at the very least the Privileges and Immunities Clause can be said to encompass “important cases of moral dissensus,” which would certainly include interstate abortion travel.¹⁸¹

Additionally, it might be argued that the Privileges and Immunities Clause only limits a state’s treatment of foreign citizens, imposing no obligations on how a state treats its own citizens, and thus allows a state to punish its citizens for out-of-state conduct upon their return home.¹⁸² But that inference departs from the text, which does seem to guarantee the state citizen’s “entitlement” against interference from any state.¹⁸³ Moreover, “[a]llowing a home state to

¹⁷⁶ Kreimer, *Choice of Law*, *supra* note 6, at 497; see *Saenz v. Roe*, 526 U.S. 489, 501-02 (1999) (quoting *Paul v. Virginia*, 75 U.S. 168, 180 (1869)) (finding Privileges and Immunities Clause “removes ‘from the citizens of each State the disabilities of alienage in the other states’” and gives them “‘equality of privilege with citizens of those States’”).

¹⁷⁷ *Doe v. Bolton*, 410 U.S. 179, 200 (1973) (“Just as the Privileges and Immunities Clause . . . protects persons who enter other States to ply their trade . . . so must it protect persons who enter Georgia seeking the medical services that are available there.”).

¹⁷⁸ Kreimer, *Borders in American Federalism*, *supra* note 160, at 1000.

¹⁷⁹ Rosen, *Extraterritoriality*, *supra* note 105, at 898-99 (quoting *Baldwin v. Fish & Game Comm’n*, 436 U.S. 371, 387 (1978)). This includes the pursuit of common callings, the ability to transfer property, access to the courts, and the right of nonresidents to settle in a new state. See, e.g., *Baldwin*, 436 U.S. at 387 (holding access to Montana elk not basic to maintenance or well-being of Union); *Zobel v. Williams*, 457 U.S. 55, 76 (1982) (O’Connor, J., concurring) (finding Alaska’s uneven dividend distribution program violated Equal Protection Clause, but Privileges and Immunities Clause did not apply).

¹⁸⁰ See Kreimer, *Borders in American Federalism*, *supra* note 160, at 1001 (citing *Lunding v. N.Y. Tax Appeals Tribunal*, 522 U.S. 287 (1998) (alimony deduction). See generally *Supreme Court of Va. v. Friedman*, 487 U.S. 59 (1988) (practice of law); *Supreme Court of N.H. v. Piper*, 470 U.S. 274 (1985) (practice of law); *Hicklin v. Orbeck*, 437 U.S. 518 (1978) (employment on public works project); *Toomer v. Witsell*, 334 U.S. 385 (1948) (fishing for shrimp).

¹⁸¹ Kreimer, *Borders in American Federalism*, *supra* note 160, at 1002 (citing *Corfield v. Coryell*, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 3230), quoted with approval in *Baldwin*, 436 U.S. at 385, 387 (1978)).

¹⁸² Rosen, *Extraterritoriality*, *supra* note 105, at 900.

¹⁸³ Kreimer, *Borders in American Federalism*, *supra* note 160, at 1003.

destroy what a host state is required to give seems an odd way of assuring citizens the ‘same freedom possessed by citizens’ of the states they visit.”¹⁸⁴

Finally, it might also be argued that the Privileges and Immunities Clause is not absolute, permitting states to prevent their own citizens from evading the law of their home state.¹⁸⁵ But this eviscerates the purpose of the Clause in the first place. “[T]he Comity Clause was designed to give the people of the United States the benefits of national unity even if particular sets of states would prefer mutual insularity.”¹⁸⁶

2. Commerce Clause

Alternatively, the Commerce Clause prohibits interstate abortion bans. The seminal Supreme Court case on the Commerce Clause, *Gibbons v. Ogden*,¹⁸⁷ and cases since, “have found the interstate movement of persons to be a form of interstate commerce that is protected against state obstruction.”¹⁸⁸ And even Rosen agrees that the Commerce Clause largely precludes states from regulating conduct extraterritorially.¹⁸⁹ The Supreme Court’s latest Commerce Clause jurisprudence has, however, emphasized that some activities are not inherently commercial and therefore fall outside the ambit of the Commerce Clause, such as guns near school zones in *United States v. Lopez*,¹⁹⁰ or violence against women in *United States v. Morrison*.¹⁹¹ Nevertheless, interstate abortion bans necessarily implicate interstate commerce, and “[t]o prohibit citizens beyond a state’s borders from participating in commerce is precisely the sort of barrier to internal commercial union that the Commerce Clause was designed to prevent.”¹⁹² Thus, extraterritorial interventions like interstate abortion bans likely violate the Commerce Clause and are unconstitutional.

A related argument under the Commerce Clause can be made using *Edwards v. California*.¹⁹³ In 1941, the Supreme Court struck down a California law “which barred persons from bringing ‘any indigent person who is not a resident’ to California,” as an unconstitutional burden on interstate commerce.¹⁹⁴ But Professor Anthony Kreis points out that although the Court focused on travel

¹⁸⁴ *Id.*

¹⁸⁵ See Rosen, *Extraterritoriality*, *supra* note 105, at 907-08.

¹⁸⁶ Kreimer, *Borders in American Federalism*, *supra* note 160, at 1005.

¹⁸⁷ 22 U.S. (9 Wheat.) 1 (1824).

¹⁸⁸ Kreimer, *Choice of Law*, *supra* note 6, at 488.

¹⁸⁹ Kreimer, *Borders in American Federalism*, *supra* note 160, at 994 (citing Rosen, *Extraterritoriality*, *supra* note 105, at 919-20); see also *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989) (holding Commerce Clause “precludes the application of a state statute to commerce that takes place wholly outside of the State’s borders, whether or not the commerce has effects within the State”).

¹⁹⁰ 514 U.S. 549 (1995).

¹⁹¹ 529 U.S. 598 (2000).

¹⁹² Kreimer, *Borders in American Federalism*, *supra* note 160, at 998.

¹⁹³ 314 U.S. 160 (1941).

¹⁹⁴ Kreis, *supra* note 32.

from another state to California as a form of commerce, it also spoke about constraining movement as it relates to the criminalization of poverty—a similar kind of *Bigelow*-esque, dicta-versus-holding conundrum.¹⁹⁵ As a result of the tangled analysis in *Edwards*, it could also be argued that “what the Court protected in *Edwards*—even without explicitly stating—was an associative freedom to move across state lines that is part and parcel of the very meaning of national citizenship.”¹⁹⁶

C. Counterarguments

This Note has argued that *Bigelow* protects a constitutional right to travel for medication abortion, and in the alternative, other constitutional provisions do the same. However, Justice Thomas’s *Dobbs* concurrence asserted the Due Process Clause provides no substantive protections.¹⁹⁷ Under this view, there are no protections for many rights not explicitly mentioned in the Constitution, including a right to travel or family formation, rendering interstate abortion bans constitutional. But notably, Justice Kavanaugh explicitly recognized the right to travel in his *Dobbs* concurrence and expressed doubt over the constitutionality of interstate abortion bans.¹⁹⁸ Given that he also indicated prior to his confirmation that he would not overturn *Roe*, to say that this assurance should be taken with a grain of salt is an understatement.¹⁹⁹ Nevertheless, the sheer fact that Justice Kavanaugh was willing to say as much in a written concurrence potentially indicates overturning *Roe* and *Casey* is as far as he, and likely other Justices, are willing to go for the time being. Further, no other Justices joined Justice Thomas’s concurrence.²⁰⁰ Perhaps, admittedly with a fair amount of optimism, this indicates the other eight Justices do not agree with his interpretation of substantive due process protections and would not find interstate abortion bans constitutional.

Second, much like an abortion seeker in an anti-abortion state approaching their tenth week of pregnancy while waiting weeks for abortion pills from abroad, invoking *Bigelow* at this hour may be too little, too late. Fetal personhood, while once a far-right pipe dream, is now the mainstream anti-abortion movement’s objective, and some jurists are outright embracing it.²⁰¹ Maybe *Bigelow* is dead

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2302 (2022) (Thomas, J., concurring).

¹⁹⁸ *Id.* at 2309 (Kavanaugh, J., concurring) (“[M]ay a State bar a resident of that State from traveling to another State to obtain an abortion? In my view, the answer is no based on the constitutional right to interstate travel.”).

¹⁹⁹ See Carl Hulse, *Kavanaugh Gave Private Assurances. Collins Says He ‘Misled’ Her.*, N.Y. TIMES (June 24, 2022), <https://www.nytimes.com/2022/06/24/us/roe-kavanaugh-collins-notes.html>.

²⁰⁰ *Dobbs*, 142 S. Ct. at 2300 (Thomas, J., concurring).

²⁰¹ See *id.* at 2258 (“What sharply distinguishes the abortion right from the rights recognized in the cases on which *Roe* and *Casey* rely is something that both those decisions

because *Roe* is dead, and *Dobbs* is the beginning of the end for substantive due process. Maybe all this talk of rights untethered from the explicit constitutional text is a game already lost, and time would be better spent preventing fetal personhood from becoming a legal reality.²⁰² But maybe there is a different way to look at things. Because advocacy demands optimism, maybe there is a hope that even with *Roe* and *Casey* gone, some substantive due process protections remain. Kreimer argued as much in 1992, a similarly dark time for reproductive rights when many thought *Casey* would be the end of *Roe*:

[T]he extent of *Bigelow*'s continued vitality . . . turn[s] on the level of "significance" the Court is willing to accord to the state 'interest' offered as justification for the efforts to prevent or punish extraterritorial abortions The interests must be such that the application of home-state law is "neither arbitrary nor fundamentally unfair". . . . If the interest the Court recognizes in regulating abortion is primarily the interest in preventing the woman from engaging in what is regarded by her home state as an immoral act, then the "unfairness" of punishing an act approved by the jurisdiction in which it occurs might well raise sufficient due process concerns to invalidate prosecutorial efforts.²⁰³

In other words, maybe there is something so deeply, fundamentally unfair about punishing an abortion seeker for conduct their home state proscribes but their host state permits that raises its own constitutional concerns, regardless of a formally recognized right to travel. Perhaps that fundamental unfairness is what keeps some kind of right to travel alive.

CONCLUSION

The right to interstate travel is a fundamental cornerstone of federalism. In the absence of *Roe*, that federalism includes states promoting or restricting

acknowledged: Abortion destroys what those decisions call 'potential life' and what the law at issue in this case regards as the life of an 'unborn human being.'"); Pam Belluck, *Judge Invalidates F.D.A. Approval of the Abortion Pill Mifepristone*, N.Y. TIMES (Apr. 18, 2023), <https://www.nytimes.com/2023/04/07/health/abortion-pills-ruling-texas.html> (describing judge repeatedly using anti-abortion language, "calling medication abortion 'chemical abortion' and referring to a fetus as an 'unborn human' or 'unborn child'"); All. for Hippocratic Med. v. FDA, No. 2:22-CV-223-Z, 2023 WL 2825871, at *1 n.1 (N.D. Tex. Apr. 7, 2023) ("Jurists often use the word 'fetus' to inaccurately identify unborn humans in unscientific ways. The word 'fetus' refers to a specific gestational stage of development, as opposed to the zygote, blastocyst, or embryo stages. . . . Because other jurists use the terms 'unborn human' or 'unborn child' interchangeably, and because both terms are inclusive of the multiple gestational stages relevant to the FDA Approval, 2016 Changes, and 2021 Changes, this Court uses 'unborn human' or 'unborn child' terminology throughout this Order, as appropriate." (citation omitted)).

²⁰² Wendy Davis, *The Next Big Battle in America's Abortion Fight Will Be Over Fetal Personhood*, NBC NEWS (Oct. 23, 2022, 7:00 AM), <https://www.nbcnews.com/think/opinion/americas-abortion-law-fight-will-fetal-personhood-rcna53477> [<https://perma.cc/MVX4-L6QL>].

²⁰³ Kreimer, *Choice of Law*, *supra* note 6, at 478.

abortion care as they see fit. However, “the moral sovereignty of each state ends at its borders. . . . The effort to prosecute a citizen at home for taking advantage of the options permitted by a sister state is at odds with this understanding of federalism.”²⁰⁴ *Bigelow* precludes interstate abortion laws. Even if the relevant language about extraterritoriality is dictum, it remains persuasive, and suggests states cannot punish their citizens for obtaining medication abortion in another state. This not only comports with the fundamental right to interstate travel, but also the bedrock principles of American federalism. Alternatively, interstate abortion bans violate the Privileges and Immunities Clause when a state punishes its own citizens for taking advantage of services that are legal in another state. Finally, the Commerce Clause renders interstate abortion bans unconstitutional because it prohibits states from regulating interstate commerce, which unequivocally includes the interstate movement of persons.

States are entitled to be laboratories for democracy and should experiment with their values, morals, and ideals as they see fit. The wide variety of services and opportunities across the several states allows citizens of each state to sample the liberties of another, forcing the home state to justify its decision to deny those liberties to its residents. We have never lived, and do not currently live, in a world where states can punish their own citizens for conduct entirely occurring in and affecting another state. The very reality that states have, until very recently, largely respected the sovereignty of other states within their respective borders, and have not attempted to apply their laws extraterritorially, reflects an implicit understanding of our constitutional culture and acceptance of a right to travel. What some scholars characterize as evading the laws of one’s home state is merely the promise of federalism. When citizens can pick and choose among the values and virtues available in each state, “we are likely to have a society that is morally richer, practically freer, and personally more fulfilling than if a single inflexible code governed the nation.”²⁰⁵

²⁰⁴ *Id.* at 519.

²⁰⁵ Kreimer, *Borders in American Federalism*, *supra* note 160, at 974.